



**Njoroge v Mburu & another (Environment & Land Case 134 of 2021)
[2022] KEELC 13281 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 134 OF 2021**

JG KEMEI, J

SEPTEMBER 29, 2022

BETWEEN

PATRICK MBUGUA NJOROGE PLAINTIFF

AND

MARY WAITHERA MBURU 1ST DEFENDANT

DAVID MWANGI MBURU 2ND DEFENDANT

RULING

1. The plaintiff filed this suit against the defendants seeking orders of permanent injunction restraining the defendants from trespassing on the suit land being Ndeiya/Ndeiya/2154 (suit land). It is the plaintiffs claim that he is the registered owner of the suit land as shown in the copy of title issued in his name on the August 26, 2020. That the defendants resided on the land with the permission of the undisclosed previous owner whom he acquired the land from and upon acquisition the defendants undertook to vacate the suit land upon harvesting their crops on the land but have since changed heart and refused to vacate.
2. Simultaneously he filed a notice of motion on the November 16, 2021 seeking orders *inter alia* that the defendants be restrained from trespassing, farming or harassing in any way the plaintiff, his associates or farm workers in the suit land pending the hearing and determination of the application / suit.
3. In answer to the said application the defendant filed a preliminary objection on the December 3, 2021 on the following grounds;
 - a. The subject matter of the suit is also directly and substantially in issue between the same parties in Succession Cause No 38 of 2020 in the estate of Kiando Kiongo at Kiambu High Court and thus this suit should be stayed.



- b. That the court lacks jurisdiction to hear and determine the matter as the estimated pecuniary value is well within the lower court's jurisdiction.
 - c. That there can never be an eviction or declaration of a trespasser to a 55 years occupier of land at the interlocutory stage.
 - d. The suit be dismissed with costs.
4. The preliminary objection is opposed. The plaintiff filed a replying affidavit on the January 11, 2022 and contended that the Succession Cause No 38 of 2020 is an illegality *resjudicata* and void *ab initio* as the estate of Kiando Kiongo was successfully succeeded in the Succession Cause No 40 of 2001 wherein a grant of letters of administration was issued to Njoroge Kiando and Mburu Kiando as joint administrators. He refuted claims that the suit land forms part of the estate of the said Kiando Kiongo and contended that the said suit land has no connection with the subject land in Succession No 40 of 2001 as it is private property. He averred that the value of the suit land is in the region of Kshs 30 Million and hence the court is seized with jurisdiction to determine the matter. Further he contended that the objection is an abuse of the process of the court and is aimed at delaying justice and urged the court to dismiss the same.

The submissions by the 1st and 2nd Defendants

5. On whether the suit is *subjudice* they submitted that according to the pleadings in Succ Cause No 38 of 2020 and ELC SPMCC No 29 of 2019 Limuru, the suit land is a subject of two pending suits in court. That by way of background the plaintiff is the son of Njoroge Kiando, deceased who was the son of Nyamiri, the 2nd wife of the late Kiando Kiongo. The plaintiff attested to this in his affidavit dated the November 14, 2021 in Succession Cause No 38 of 2021. The 1st defendant is the surviving spouse of Harun Mburu Kiando deceased, the son of Nyamiri, the 2nd wife of Kiando Kiongo. The 2nd defendant is the son of the 1st defendant.
6. Further that the parties in ELC 29 of 2019 are Samuel Chege Gachie and the 1st defendant herein. Samuel Chege Gachie is the son of Wambuku Gachie deceased who was the daughter of Dorcas Waithera alias Ndati, the 3rd wife of Kiando Kiongo. In this suit Samuel Chege Gachie claimed ownership of the suit land and sought eviction of the 1st defendant. That the ELC 29 of 2019 has been stayed pending the conclusion of the Succession Cause No 38 of 2020.
7. They averred that the suit land emanates from the subdivision of parcel 594 which was subdivided into two parcels; 869 and 870. Parcel 869 was further subdivided into parcels 1833 and 1834; and finally parcel 1834 was subdivided into parcels 2154 (suit land) and 2155. That on the August 12, 2020 the High Court in Kiambu ordered *status quo* be maintained with respect of the assets of the estate of Kiando Kiongo pending the final determination of the Succession Cause. That the plaintiff is the 7th respondent in the said succession cause where he has filed a preliminary objection on the grounds that the said cause is *resjudicata*.
8. The defendants have argued that the subject matter in this suit is directly and substantially in issue in the Succession Cause No 38 of 2020 and relying on section 6 of the *Civil Procedure Act*, and the decision of the court in *Republic v Registrar of Societies & 2 others* (2017), urged the court to dismiss the suit given that the subject matter of the Succession Cause No 38 of 2020 is the ownership and distribution of the estate of Kiando Kiongo, deceased. That the defendants contend that the suit lands being resultant subdivisions of the mother title parcel 594 which was unlawfully subdivided and that the said suit lands trace their root to parcel 594 which was owned by Kianda Kiongo, deceased.



9. On the issue of jurisdiction, the defendants argued that the estimated value of the suit land is Kshs 7 Million and thus within the purview of the jurisdiction of the lower court.
10. In addition, the defendants argued that the orders of mandatory injunction sought in the notice of motion dated the November 16, 2021 cannot be issued at the interlocutory stage as *interalia* there are no exceptional circumstances that warrant the issuance of the same. *Interalia* that the 1st defendant has lived on the suit land for a period in excess of 50 years, a fact that is well known to the plaintiff who, as disclosed, is one of the family members.
11. The plaintiff submitted that the Succession Cause No 38 of 2020 is an illegality given that a similar Succession Cause No 40 of 2001 in the Estate of Kiando Kiongo was initiated and concluded. On the issue of the value of the suit land he was adamant that the ELC Court has jurisdiction to entertain it.
12. Having considered the preliminary objection, the written submissions and the list of authorities supplied by the parties the issue for determination is whether the preliminary objection raises a pure point of law.
13. What then is a preliminary objection? As to whether the preliminary objection as raised is a pure point of law, the court in the case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Limited*, 91969) EA 696, defined a preliminary objection as follows;

“... A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

14. In this case the defendants have raised 3 grounds of objection; that the suit is *subjudice* and hence the court should stay it pending the hearing and determination of the Succession Cause No 38 of 2020; that the courts jurisdiction is ousted given that the pecuniary value of the suit land should be determined in the lower court; the 1st defendant has been in occupation for over 50 years and hence not a trespasser.
15. On the issue of *subjudice*, I rely on the definition given under section 6 of the [Civil Procedure Act](#) as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

16. I have carefully read the pleadings in the Succession Cause No 38 of 2020 and my observation is that the plaintiff is the 7th respondent in that cause. Additionally the subject matter in the Succession Cause is the mother title parcel 594 belonging to the estate of the late Kiando Kiongo. It is not denied that the parties are related and trace their ancestry to the estate of the late Kiando Kiongo. The root of the title is traceable to the mother title parcel No 594 from whence parcel No 2154 which is the subject matter



of this suit as well as in ELC 29 of 2019 emanate. The plaintiff has not disputed the Succession Cause except to argue that the same is *resjudicata* in view of the previous succession of the estate of the late Kiando Kiongo. I have also examined the record and it is not disputed that the suit land at some point was registered in the name of Samuel Chege Gachie who happens to be the cousin of the plaintiff and a relative of the defendants. It is clear that the suit in ELC 29 Of 2019 was stayed pending the hearing and determination of the Succession Cause No 38 of 2020. Of great concern to this court are the orders of the court in Succession Cause No 38 of 2020 where the court ordered *status quo* with respect to the assets of the estate of the deceased Kiando Kiongo. It is also instructive that the plaintiff has elected to stay mum on these orders a position which is tantamount to concealing material information to the court for reasons only known to him.

17. From the analysis above this court therefore has no difficulty in making a finding that the subject matter is the same between the same parties and before a court of competent jurisdiction. The issues in the succession court however touch on the identification and distribution of the estate of the deceased while in this case a claim of ownership is being adverted.
18. Is this suit an abuse of the process of the court? The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. In the case of *Republic v Paul Kibara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya* [2020] eKLR the court defined abuse to include the following situations: -
 - a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
 - c. Where two similar processes are used in respect of the exercise of the same right.
 - d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
 - e. Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
 - f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
 - g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first.
19. Given the circumstances of this case, it is clear that the plaintiff is a party to the existing succession cause; the subject matter of the succession cause is the same suit land , having emanated from the original mother title in the estate of the late Kiando Kiongo; undisputed existence of *status quo* orders issued by a court of concurrent jurisdiction; the suit property is subject of an existing suit in Limuru ELC 29 of 2019 where there are orders staying the proceedings pending the conclusion of the succession cause; the parties are related and are litigating under the- same umbilical cord being the assets of the estate of their deceased family patriarch.



20. The act of filing this suit by the plaintiff knowing too well of the existence of the succession cause in my view amounts to filing a multiplicity of suits, a position that is frowned on by the court as an abuse of the process of the court.
21. In the end I find that the justice of this matter is to stay the current suit pending the hearing and conclusion of the Succession Cause No 38 of 2020.
22. With respect to the issue of the pecuniary valuation of the suit land, the court finds that the objector failed to table a valuation of the suit land. The fact of calling for evidence to determine the valuation of the suit land clearly ousts the objection from being a pure point of law.
23. The issue of occupation of the suit land by the 1st defendant for the period of over 50 years is a question of fact and law that is best resolved after a hearing is held to enable the court determine the controversy to its logical end.
24. In conclusion, I find that the objection partially succeeds to the extent that the suit be is hereby stayed pending the conclusion of the Succession Cause No 38 of 2020 at Kiambu High Court.
25. Parties being related each to bear the costs of the application.
26. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 29TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Applicant in person

Respondent 1 - Absent

Respondent 2 – present in person

Court Assistant – Phyllis Mwangi

