



**Kamau v Kubai (Environment & Land Case 201 of 2018)
[2022] KEELC 15088 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15088 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 201 OF 2018
BM EBOSO, J
NOVEMBER 21, 2022**

BETWEEN

HERMAN NJOROGE KAMAU PLAINTIFF

AND

ANDREW KUBAI DEFENDANT

JUDGMENT

1. This suit was originally filed at Milimani Environment and Land Court as Milimani ELC Case No 1053 of 2015. The case was transferred to Thika Environment and Land Court and registered as Thika ELC Case No 201 of 2018. The dispute in the suit revolves around Land Parcel No Ndumberi/ Riabai/1911 which at all material times belonged to the late Fredrick Polwarth Kibuthu Kubai (hereinafter referred to as “the deceased”) who died on June 1, 1996. It is important to point out that, at the time the plaintiff initiated this suit, land parcel number Ndumberi/ Riabai/1911 had been subdivided into four parcels namely, Ndumberi/Riabai/2928, 2929, 2930 and 2931. There is common ground that the land formed part of the estate of the deceased. Evidential materials placed before this court indicate that the land had been the subject matter of two succession causes, namely Nairobi High Court Succession Cause No 1860 of 1996, and 1940 of 1996, both relating to the estate of the late Fredrick Polwarth Kibuthu Kubai. The land had also been the subject matter of criminal prosecution in Kiambu Chief Magistrate Court Criminal Case No 2102 of 2004 where the Chief Magistrate Court found that the subdivision of parcel number Ndumberi/ Riabai/1911 into parcel numbers Ndumberi/Riabai/2928, 2929, 2930 and 2931 was procured through forgery and fraud. One Gideon Blacklaw Kubai was convicted of the criminal offence. It further emerged during trial in this court that the subdivision exercise leading to the four titles and the processing of the four titles was procured during the subsistence of a preservatory order issued by the High Court [Aganyanya J] on July 31, 1998. The order preserved the estate of the deceased. The preservatory order lapsed on December 19, 2013 when Musyoka J rendered a Judgement relating to the estate of the deceased.



2. Through a plaint dated October 26, 2015, the plaintiff claims that he is the registered proprietor of Ndumberi/Riabai/2928, 2930 and 2931. He contends that on October 22, 2015, the defendant purported to forcefully take over from him the three subdivisions together with the developments thereon and appointed an estate agent to manage the rental premises thereon.
3. Aggrieved, he brought this suit seeking:
 - i. a permanent of order of injunction;
 - ii. a declaration that he is the absolute proprietor of the three parcels of land;
 - iii. damages for trespass;
 - iv. cost of this suit and interest.
4. The defendant contested the plaintiff's claim and brought a counterclaim through a defence and counterclaim dated November 29, 2019. He contends that he is a grandson of the deceased and that the three parcels of land are part of land parcel number Ndumberi/Riabai/1911 which forms part of the estate of the deceased. He adds that the titles held by the plaintiff were fraudulently procured and were procured in contempt of the preservatory order issued by the High Court and are therefore null and void. Through the counterclaim, he seeks: (i) a declaration that the four subdivisions out of parcel number Ndumberi /Riabai/1911 were null and void ab initio; (ii) a declaration that sale of the three subdivisions to the plaintiff were procured through fraud, were unlawful and are null and void; (iii) an order revoking the three titles held by the plaintiff; (iv) a declaration that parcel number Ndumberi/Riabai/1911 legally belongs to the late Fredrick Polwarth Kibuthu Kubai; (v) a permanent injunction against the plaintiff; (vi) general damages for trespass; (vii) mesne profits (viii) interest at court rate; and (ix) costs of the suit.

Case of the Plaintiff

5. The case of the plaintiff is contained in the plaint dated October 26, 2015; the reply to defence and defence to counterclaim dated March 4, 2020; the witness statement dated October 26, 2015; the oral evidence tendered at the hearing on November 30, 2021; the six exhibits produced at the hearing, among them, copies of titles and green cards in respect of the three subdivisions; and the written submissions dated April 8, 2022, filed by Njoroge Baiya & Co advocates.
6. In summary, the plaintiff's case is that at the time he purchased the three subdivisions, there existed lawful administrators of the estate of Fredrick K Kubai, namely Stephen Kubai, Samson Kubai, Gideon Blacklaw Kubai and Martin Kubai, a grant of letters of administration in their favour having been confirmed on March 4, 1998 in Nairobi High Court Succession Cause No 1940 of 1996 - In the matter of the Estate of Fredrick Polwarth Kibutha Kubai (deceased). He contends that he did not acquire the three parcels under the [Law of Succession Act](#). His case is that he purchased existing titles from duly registered owners. It is his case that he is an innocent purchaser for value. In answer to the counterclaim, he reiterates the foregoing and contends that the defendant lacks locus standi to bring the counterclaim because he is neither the administrator of the estate of the deceased nor the executor of the will of the deceased.

Case of the Defendant

7. The case of the defendant is contained in his defence and counterclaim dated November 29, 2018; his witness statement dated November 29, 2019; his oral evidence tendered at the hearing on March 9, 2022; the twenty exhibits produced at the hearing. His case is that whereas the High Court issued to



Stephen Gideon Kubai, Samson Owen Kubai Kibutha, Gedion Blacklaw Kubai and Martin Gideon Kubai Kibutha a Grant of Letters of Administration relating to the deceased's estate and confirmed the Grant on March 4, 1998, the same High Court (Aganyanya J) on July 31, 1998, restrained the said administrators from acting on the Certificate of Confirmation of Grant. Consequently, the purported subdivision of parcel number Ndumberi/Riabai/1911 in 2002 and the purported acquisition of the subdivisions by the plaintiff in 2007 during the subsistence of the preservatory order of the High Court were illegal, null and void. He contends that he is entitled to the suit property by virtue of being a beneficiary of the estate of the deceased. He further contends that he is entitled to bring the counter claim by virtue of the power of attorney donated to him by his mother who is the administrator of the estate of Samson Owen Kibutha Kubai, a son to the late Fredrick Polwarth Kubai Kibutha.

Submissions

8. The plaintiff's claim was canvassed through written submissions dated April 8, 2022 and further submissions dated June 23, 2022, filed by M/s Njoroge Baiya & Co Advocates. The defendant's defence and counterclaim were canvassed through written submissions dated June 10, 2022, filed by M/s AGN Kamau Advocates. I have read the rival submissions. I would have summarized the submissions if I found it appropriate to answer the key question in this suit in the absence of the personal representatives of the late Fredrick Polwarth Kibuthu Kubai.

Analysis and Determination

9. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. It does emerge from the parties pleadings, evidence and submissions that the key question to be answered in the primary suit and in the counterclaim is the question relating to the validity of the subdivision exercise that took place in February 2002 and the titles that were issued in relation to land parcel number Ndumberi/Riabai/1911 during the subsistence of an order that had been issued by the High Court [Aganyanya J] preserving the estate of the late Fredrick Polwarth Kibuthu Kubai. The ideal court to answer the said question would be the Succession Court that is seized of the two consolidated causes that relate to the said estate. The Succession Court would ordinarily be expected to render itself on the question as to whether a valid subdivision exercise could be carried out and valid titles issued during the subsistence of the said preservatory order.
10. This Court would not have hesitated to answer the question, in so far as it relates to the titles held by the plaintiff, if the personal representative(s) of the deceased and the parties who procured the subdivision and the impugned titles were made parties to this suit. In their absence, this court cannot pronounce itself on the validity of the titles held by the plaintiff. The claim for trespass is anchored on the validity of the titles and cannot be effectually adjudicated without disposing the question relating to validity of the titles.
11. In the circumstances, the disposal order that commends itself to this court is an order striking out this suit and leaving the plaintiff with the liberty to initiate appropriate proceedings in the appropriate court against all the necessary parties, most important, the duly appointed personal representative of the late Fredrick Polwarth Kibuthu Kubai.
12. I have considered the defendant's counterclaim. While it is not disputed that the defendant may be a grandchild of the deceased, that alone does not give him the *locus standi* to ventilate a claim in a court of law on behalf of the estate of the deceased. Similarly, a power of attorney issued to him by his mother does not give him the *locus standi* to ventilate the counterclaim he purported to ventilate on behalf of the estate of the late Fredrick Polwarth Kibuthu Kubai. It is only the court-appointed



personal representative of the deceased who is vested with the locus standi to initiate and prosecute the counterclaim that the defendant purported to prosecute before this court.

13. The result is that the plaintiff's suit is struck out for failure to join the personal representative of the deceased and the persons who procured the impugned subdivisions and titles as parties to this suit. Similarly, the defendant's counterclaim is struck out on the ground that he lacks the *locus standi* to initiate and prosecute the counterclaim on behalf of the estate of the deceased. Parties shall bear their respective costs of the primary suit and the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF NOVEMBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Baiya for the Plaintiff

Ms Mbirwe for the Defendant

Court Assistant: Ms Osodo

