



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 60 OF 2018

JOSPHAT MBOGO KAGUONGO.....1ST PLAINTIFF

PETER KARANI KAGUONGO.....2ND PLAINTIFF

VERSUS

GEOFFREY MURIUKI KIMONDO.....1ST DEFENDANT

JANE MUTHONI KARANI.....2ND DEFENDANT

FREDRICK MIANO MURIUKI.....3RD DEFENDANT

JOSEPH KINYUA MURIUKI.....4TH DEFENDANT

RULING

Background

The Applicants who are also the plaintiffs have moved this Court vide the Notice of Motion dated 27th December 2018 under *Order 40 Rule 1 and 2 Civil Procedure Rules* seeking the following orders:-

(1) Spent.

(2) That this Honourable Court be pleased to grant temporary injunction against the defendants/respondents herein restraining them from transferring, selling, leasing, disposing, alienating and/or charging land parcels Nos. MWERUA/KANYOKORA/937, 938, 939 and 940 pending the hearing and determination of this application.

(3) That this Honourable Court be pleased to grant temporary injunction against the defendants/respondents restraining them from transferring, selling, leasing, disposing, alienating and/or charging land parcel Nos. MWERUA/KANYOKORA/937, 938, 939 and 940 pending the hearing and determination of this suit.

(4) That the costs of the application be provided for.

Grounds in support of the Application

(1) The plaintiffs have sued for a declaration that the defendants hold land parcels No. MWERUA/KANYOKORA/937, 938, 939 and 940 in trust for them.

(2) That it is in the interest of justice that injunction orders do issue against the said parcels of land to prevent them from being sold or encumbered pending the hearing of the main suit.

(3) If such orders are not granted, the defendants may dispose or charge the parcels of land to the detriment of the plaintiff's suit.

Applicants Statements of Facts

The Applicants filed an affidavit in support of the said application and deposed as follows:-

- (1) That they are biological brothers and sons of the late Kaguongo and the late Mary Njeri Kaguongo.
- (2) That the defendants are nephews and nieces to one Monicah Njoki Ndegwa.
- (3) That land parcel No. MWERUA/KANYOKORA/117 was originally registered in the names of Johana Ndegwa who was husband of the late Monica Njoki Ndegwa.
- (4) That the late Johana Ndegwa, Nyaga and the plaintiffs late father Kaguongo Nyaga were step brothers and land parcel No. MWERUA/KANYOKORA/117 which was clan and ancestral was registered in the name of the eldest son Johana Ndegwa Nyaga to hold in trust for the step brother Kaguongo Nyaga.
- (5) That oblivious of the existence of this customary trust the late Johana Ndegwa Nyaga transferred land parcel No. MWERUA/KANYOKORA/117 to his wife who later subdivided the land into land parcel Nos. MWERUA/KANYOKORA/937, 938, 939 and 940 and thereafter transferred the same to the defendants who were her nieces and nephew – they attached copies of green card and certificate of official search as “**JMK 1**”.
- (6) That this was during the pendency of High Court Case No. 14 of 1991 between Monica Njoki Ndegwa Versus Mary Njoki Kaguongo & 2 Others which case was ruled on 6th July 2007 to the effect that the land be shared between the 2 step brothers’ families. They also attached a copy of the said High Court ruling as “**JMK 2**”.
- (7) That if the orders sought herein are not granted, they stand to suffer irreparable loss as they may be evicted and denied their rightful share in the suit land being clan land where they were both born and brought up and have nowhere else to call home.

Respondents Statements of Facts

In response to the application, the Respondents filed a further affidavit sworn by the 3rd respondent on 27th February 2019 and stated as follows:-

- (1) That the parcel of land known as MWERUA/KANYOKORA/117 from which land parcels No. MWERUA/KANYOKORA/937, 938, 939 and 940 were derived from is the subject matter of NYERI ELC No. 56 of 2016 (Formerly Nyeri HCCC No. 114 of 1991 – MONICA NJOKI NDEGWA (PLAINTIFF) VERSUS MARY NJERI KAGUONGO, PETER KARANI KAGUONGO AND BEN MARU MWENJE (DEFENDANTS) AND GEOFFREY MURIUKI KIMONDO, JANE MUTHONI KARANI AND FREDRICK MIANO MURIUKI (INTERESTED PARTIES), in which a final judgment was delivered by the Honourable Lady Justice M. Kasango on 6th July 2007.
- (2) That the effect of the said judgment was to grant the 1st defendant in the said suit, the late MARY NJERI KAGUONGO (and the plaintiffs mother), a half share of the land parcel No. MWERUA/KANYOKORA/117. This is the same parcel of land and the subdivisions there from that the plaintiffs are suing about in this case. The said case is still pending before the Nyeri land and Environment and Land Court due to numerous applications filed therein by the 2nd plaintiff herein, however, for reasons best known to the plaintiffs herein, the said judgment has never been executed. It has also not been set aside.
- (3) That by the averments contained in the affidavit sworn in support of the application dated 27th December 2018 by the 1st plaintiff/applicant on the same date, the plaintiffs claim herein is for a half share of land parcel No. MWERUA/KANYOKORA/117 pursuant to the judgment delivered in NYERI ELC No. 56 of 2016 (Formerly NYERI HCCC No. 114 of 1991) on 6th July 2007 therefore the suit herein seeks to enforce the said judgment and it is therefore misconceived as this Honourable Court cannot review, or sit on appeal on the decisions made in the Nyeri case or deal with the matter given that the Nyeri Court is already seized of the same.
- (4) That even the issue of the subdivisions arising from the land parcel No. MWERUA/KANYOKORA/117 that is land parcels No. MWERUA/KANYOKORA/937, 938, 939 and 940 which the plaintiffs claim to be entitled to is a matter for determination before the Nyeri Court as shown by various applications filed in the said case on behalf of the 2nd plaintiff as shown by the following:-
 - (I) N/M Appl. dated 23/5/2012
 - (II) N/M Appl. dated 8/1/2013
 - (III) N/M Appl. dated 1/7/2015
 - (IV) N/M Appl. dated 8/3/2016
 - (V) Replying affidavit sworn by the 3rd defendant on 31/3/2016 and
 - (VI) Supplementary affidavit sworn by the 2nd plaintiff on 26/5/2016.
- (5) That the 2nd plaintiff herein is the 2nd defendant in the Nyeri case while his late mother MARY NJERI KAGUONGO is the 1st defendant therefore he is aware of the existence of the said case. The 2nd plaintiff herein sought to have the 1st to 3rd defendants herein joined in the said case as interested parties amongst other prayers pursuant to which the Honourable Lady Justice L.N. Waithaka delivered a Ruling on 9th November 2017. The copy of the said Ruling was annexed and marked “**FM 3**”.

(6) That the 2nd plaintiff herein filed an appeal against the said Ruling delivered on 9th November 2017 vide a Notice of Appeal dated 22nd November 2017. The same is still pending and the intended appeal has not been prosecuted. A copy of the said Notice of Appeal was also annexed as “**FM 4**”.

(7) That from the matters stated herein above at paragraphs 1 – 6 and the pleadings produced as **FM 2**, the substantive prayers sought in this suit are the same prayers sought in the Nyeri case and in the various applications filed in the said case such that the issues for determination in this case are the same issues for determination in the Nyeri case. In the circumstances, this suit is sub-judice. He annexed copies of the plaint dated 11th June 1991, Defence and counter-claim dated 24th June 1991 and Authority to Act filed in the Nyeri case as “**FM 5**”.

(8) That the plaintiffs have wrongly failed to disclose to this Court the position of the Nyeri case or that the 2nd plaintiff and their mother, the late MARY NJERI KAGUONGO were parties in the same case and that the judgment delivered in the matter was in her favour. They have also lied on oath as to the truthfulness of the matters deponed to in this suit.

(9) That the failure by the plaintiffs to disclose the above material matters is mischievous, unconscionable and is intended to mislead this Court. Indeed, there was no urgency in this matter when the suit was filed, as the matters complained of have been the subject matter in the applications brought before the Nyeri case. The issue of subdivision of land parcel MWERUA/KANYOKORA/117 into land parcels No. MWERUA/KANYOKORA/937, 938, 939 and 940 and the subsequent transfer of the same by the previous owner, the late MONICA NJOKI NDEGWA in my favour and in favour of the other defendants is also an issue before the Nyeri case as seen by the documents marked as “**FM2**”.

(10) That I have further been advised by the said firm of Advocates which I verily believe to be true that the plaintiffs suit against me is bad in law and is time barred because my title to land parcel No. MWERUA/KANYOKORA/940 was registered in my name in September 2005 about 13 years ago. He produced a copy of an Extract of the green card for the said title as “**FM 6**”.

(11) That the plaintiffs ought not to have filed this suit in the first place and appear to be forum shopping.

(12) That I make this affidavit in support of my application seeking that the plaintiffs suit be struck out with costs.

In addition to the said affidavit in opposition to the plaintiffs/applicants application, the respondents also filed two Notices of Preliminary Objection dated 28th January 2019 and 22nd February 2019 respectively. The first Notice of Preliminary Objection raised the following grounds:-

*(1) **Take Notice** that the 1st, 2nd and 4th defendants shall at the first appearance of this matter raise a Preliminary Objection to the matter proceeding on a point of jurisdiction as the same is Res-judicata Nyeri ELC 56/2016 (Formerly Nyeri HCCC No. 114 of 1991).*

The second Notice of Preliminary Objection is framed as follows:-

***TAKE NOTICE** that the 3rd defendant herein shall, at the hearing of the plaintiffs/applicants Notice of Motion application herein dated 27th December 2018 and supported by the affidavit sworn by the 1st plaintiff, or at the earliest opportunity raise a Preliminary Objection to the said application and the entire suit that the same be struck out with costs on the grounds THAT:-*

1. The plaintiffs application and the entire suit is misconceived and bad in law because there is another suit pending in the ELC at Nyeri on the same issues as in this suit to wit Nyeri ELC No. 56 of 2016 (Formerly NYERI HCCC No. 114 of 1991) – MONICA NJOKI NDEGWA (PLAINTIFF) VERSUS MARY NJERI KAGUONGO, PETER KARANI KAGUONGO AND GEOFFREY MURIUKI KIMONDO, JANE MUTHONI KARANI AND FREDRICK MIANO MURIUKI (INTERESTED PARTIES), therefore this suit is sub-judice, it has no merit and the same amounts to an abuse of the process of this Honourable Court.

2. The plaintiff’s suit against the 3rd defendant is time barred under the Limitation of Actions Act, therefore it is misconceived and bad in law.

Legal Analysis and Decision

I have considered the Notice of Motion dated 27th December 2018, the supporting affidavit and the annexures thereto. I have also considered the response by the 3rd respondent by way of a further affidavit sworn on 27/2/2019. I have equally considered the two Notices of Preliminary Objection taken out by the 1st, 2nd and 4th defendants/respondents and the 3rd defendant/respondent dated 28th January 2019 and 22nd February 2019 respectively.

In the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Limited (1969) E.A. 696*, the principles of a Preliminary Objection were set out as follows:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit”.

It was further stated that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite

improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

In the present case, the point of law – the 1st, 2nd and 4th respondents seek to raise requires this Honourable Court to determine whether this case is Res-judicata. The guiding law on the issues of resjudicata is **Section 7 of the Civil Procedure Act Cap. 21 Laws of Kenya** which provides as follows:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.

I have looked at the uncertified copy of the Ruling by Lady Justice Mary Kasango in HCCC No. 114 of 1991 (Nyeri) dated and delivered on 6th July 2007. The findings of the Court is captured at the introductions where the learned Judge observed as follows:-

“The background of this case has had its own twists and turns since it was filed. When the case was first filed in this Court it was referred to the Tribunal whose award was made judgment of this Court by an order of 23rd July 1992. The parties by consent set aside that judgment and consented to this matter being heard and determined by the Court. Again by consent on 23rd October 1996, the matter was referred to the Land Disputes Tribunal Kirinyaga District. Thereafter the Court record does not show what became of that tribunal hearing until the 2nd defendant made the application presently before Court, which is by way of Chamber Summons dated 4th June 2001. The applicant by that application seeks that the Court would enter judgment in this case in terms of the Tribunal Award. The Applicant also seeks that the plaintiff/respondent be ordered to transfer half share of the suit property which is MWERUA/KANYOKORA/117 to the applicant on his own behalf and on behalf of his two brothers who form the family of the first defendant who is now deceased.....”.

In her final decision, the learned Judge at page 5 ruled as follows:-

“Accordingly the ruling of this Court is that the judgment of the LDT at Baricho Tribunal Case No. 23 of 1997 annexed to the plaintiff’s Replying affidavit sworn on 15th October 2001 and filed in this Court on 29th October 2001 be and is hereby made the judgment of this Court..”

When that ruling which sought to adopt the award of the LDT at Baricho being Case No. 23 of 197 on 6th July 2007, the original land parcel No. MWERUA/KANYOKORA/117 had been subdivided and the orders/judgment was incapable of being enforced. That explains why no decree has been extracted.

I also note that the ruling by the learned Judge Lady Justice M. Kasango was making references to pleadings in the L.D.T Case No. 23 of 1997 which were annexed to the plaintiff’s Replying affidavit sworn on 15th October 2001 and filed in this Court on 29/10/2001. Those proceedings have not been availed to this Court.

I also note that all the prayers sought in the plaint were not determined. The second Notice of Preliminary Objection by the 3rd defendant/respondent is on whether the plaintiffs claim is time barred. On this point, **Section 26 of the Limitation of Actions Act** which is the applicable law provides as follows:-

“Where in the case of an action for which a period of limitation is prescribed, either :-

(a) The action is based upon the fraud of the defendant or his agent; or

(b) The right of action is concealed by the fraud of any such person as aforesaid; or

(c) The action is for relief from the consequence of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered...”.

A look at the plaint by the plaintiffs dated 27th December 2018, the plaintiffs are seeking orders inter alia for a declaration that the defendants hold the suit land parcels No. MWERUA/KANYOKORA/937, 938, 939 and 940 in trust for them and to be given half share of land in total. A claim for determination of trust in land is not subject to Limitation of Actions Act. That was the holding in decisions and precedents by the superior Court. In the case of **Macharia Kihari Vs Ngigi Kihari Civil Appeal No. 170 of 1993**, the Court of Appeal held as follows:-

“We are unable to accept Mr. Thiongo’s contention that the case was time barred. Limitation prescribed in Section 20 (2) of the Limitation of Actions Act, will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law. We reject this ground of Appeal.”.

Again in the case of **Stephens & 6 others Vs Stephens & Another Civil Appeal No. 18 of 1987**, the Court held as follows:-

“The period of limitation as prescribed in the Limitation of Actions Act Cap. 22) Section 20 (1) (b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use”.

The upshot of my analysis on the two Notices of Preliminary Objection is that they are not upheld as they lack merit. Consequently, I hereby dismiss the two objections with costs in the cause.

Now turning to the substantive Notice of Motion dated 27th December 2018 and having considered the affidavit evidence both in support and opposition thereto and having considered the applicable law, I find that the plaintiffs/applicants are entitled to the equitable reliefs sought pending the hearing and determination of this suit. In the result therefore I find the said application merited and do hereby grant orders in terms of prayers (2) and (3) thereof. Costs shall be in the cause. It is so ordered.

READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 24TH DAY OF MARCH, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Mwangi Maina holding brief for Wangechi Munene
2. Nderi for 1st, 2nd and 4th Defendants
3. M/S Kimata holding brief for Kibe for 3rd Defendant
4. Kabuta – Court clerk.