



Muiyae & another v Muraya (As the Administrator of the Estate of the Late Samuel Ngugi Muraya) & another (Environmental and Land Originating Summons 2B of 2020) [2024] KEELC 1177 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 2B OF 2020
MN GICHERU, J
FEBRUARY 5, 2024**

BETWEEN

JOHN KIMUHU MUIYAE 1ST PLAINTIFF

PETER MURANI MUYAI 2ND PLAINTIFF

AND

RACHEL MUGURE MURAYA (AS THE ADMINISTRATOR OF THE ESTATE OF LATE SAMUEL NGUGI MURAYA) 1ST DEFENDANT

PURITY MUTHONI NGUGI 2ND DEFENDANT

RULING

1. This ruling is on the preliminary objection dated 22/2/2022 and filed by the 1st and the 2nd defendants. It raises three issues as follows.
 - i. The case is *res judicata* as against the 1st, 2nd and 3rd defendants.
 - ii. The case is a nullity *ab initio* as against the 1st and 3rd defendants as it was filed after their deaths.
 - iii. This is not an appropriate matter to be commenced by way of originating summons.
2. In support of the preliminary objection, the counsel for the 1st and 2nd defendants filed written submissions dated 17/4/2023 in which he states as follows.

Firstly, the subject matter of this case consists of two parcels of land which are Ngong/Ngong/4348 and 4354.

Secondly, these two parcels were the same parcels that the plaintiffs were claiming from the 1st, 2nd and 3rd defendants in High Court Probate and Administration Cause No. 412/2011 – The Estate of



Peter Murani Muyai where Musyoka J found that the two plots did not form part of the estate of the plaintiffs' father.

Thirdly, no appeal was preferred against the decision which means that the plaintiffs are litigating over the same issue that the court made a decision upon and this goes against the res judicata rule.

3. The plaintiffs' counsel filed written submissions dated 22/5/2023 in which he responds as follows.
Firstly, the issue for determination in the P and A Cause No.412/2011 concerned distribution of the estate and it was not a land dispute.
Secondly, the parties in the succession cause were different from the ones in this case.
Thirdly, then the High Court did not have jurisdiction to deal with land matters.
4. Regarding the second issue of filing the case against the 1st and 3rd defendants when they were deceased, the plaintiffs' counsel urges that it is proper to file the suit against a dead person so long as there living co-parties in the same suit.
5. Finally on commencing the suit by way of summons instead of by way of plaint, the plaintiffs' counsel is of the view that this is curable under Article 159 (2) (d) of the Constitution and Order 37 Rule 9 Civil Procedure Rules.
6. I have carefully considered the preliminary objection in its entirety including the pleadings, the issues raised by the learned counsel for both parties in the submissions and the law cited therein. I make the following findings.

On the first issue, I find that this suit is indeed res judicata. Succession Cause No. 412 of 2011 at Milimani Nairobi concerned LR Ngong/Ngong/4348 and 4354. The parties in the Nairobi Case were Peter Kimuhu Muiyae and Peter Murani Muiyae on the one hand and Samuel Ngugi Muraya, Henry Gichuru Njoroge and Purity Muthoni Ngugi on the other.

This suit is between the same parties and it relates to the same land. Since the High Court has already made a decision on the ownership of the land, the only way to challenge the decision of the High Court is through an appeal to the Court of Appeal but not through a fresh suit before this court.

It is not correct to say that this is a land matter. If it was a land matter, then the plaintiffs would not have filed succession no. 412 of 2011 at the High Court. They would have filed it in this court. Having filed it in the High Court and lost, the only option was to appeal to a higher court. It is not correct to say that the High Court does not deal with land cases. Under Article 165 (3) (a) of the Constitution the High Court has unlimited original jurisdiction in criminal and civil matters. The civil jurisdiction would, in my view, include the distribution of the estates of the deceased person. That is the jurisdiction that the High Court exercised.
7. Order 24 Civil Procedure Rules does not contemplate the filing of a suit against a dead person. It only contemplates the continuation of suits filed by parties who die before such suits are concluded. There is evidence in form of certificate of death No. 352881 dated 27/8/2013 showing that Samuel Ngugi Muraya died on 19/7/2013. The same Samuel Ngugi Muraya is the first defendant in this case which was filed on 30/1/2020 which was more than 6 ½ years since the death of the said Samuel Ngugi Muraya. It is improper to sue a dead person. Such a person cannot defend himself, or herself and it is an abuse of the court process to sue a dead person.
8. Order 37 Civil Procedure Rules provides the types of suits that may be commenced by way of originating summons. They include cases raising questions affecting the rights or interests of a person claiming to be a creditor etc of an estate, ascertainment of any class of creditors, heirs etc, furnishing of



any particular accounts by executors and other related cases where there is unlikely to be any substantial dispute of fact.

This case concerns disputed agreements for sale, disputed subdivision of LR Ngong/Ngong/4008, cancellation of title deeds issued many years ago, eviction of 23 parties from land that they occupy, reference to previous proceedings between some of the parties and some deceased persons whose particulars have not been pleaded. While the plaintiffs are right in saying that a suit should not be struck out unless it is irredeemable, this suit is bad in law for being commenced in a most inappropriate manner. It raises numerous facts which are all hotly contested. It should have been commenced by way of a plaint.

For the foregoing reasons, I uphold the preliminary objection dated 22/2/2022 on all the three grounds and I strike out the entire suit with costs to the 1st and 2nd defendants.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 5TH DAY OF FEBRUARY 2024.

M.N. GICHERU

JUDGE

