



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E180 OF 2020

MOSES KARIUKI KIBATHI & JAMES MUCHUGIA KIBATHI

(Suing as Administrators of the Estate of the late

MILKA WANGUI WAMBURA).....PLAINTIFFS

VERSUS

DANIEL KIBATHI KIARIE.....1ST DEFENDANT

DENNIS KARIUKI WAWERU.....2ND DEFENDANT

JAMES KAHUGU MWANGI.....3RD DEFENDANT

CHIEF LAND REGISTRAR NAIROBI.....4TH DEFENDANT

RULING

1. This is the Notice of Motion dated 12th October 2020 brought under provisions of section 73(1) of the Land Registration Act, order 40 rule 1, order 51 rule 1 of the Civil Procedure Rules, and Section 1A and 3A of the Civil Procedure Act and any other enabling provisions of the law.

2. It seeks orders:-

1. Spent.

2. Spent.

3. Spent.

4. That this honourable court do issue an order directing that Title Deed emanating from Plot No. 1597 excised from Titl No. Dagoretti/309 belonging to the 1st defendant to be deposited in court upon subdivision and processing of Title Deeds pending determination of his dispute with the 2nd and 3rd defendant and determination of this suit.

5. That pending the hearing and determination of this application, this honourable do issue an allowing Mr. Reuben Ng'ang'a Wambura and Mr. Benson Muchugia Wambura beneficiaries of the Estate of the Late Milkah Wangui Wambura to sell their land parcels No.1598 and 1595 both excised from Dagoretti/Mutuini/309 as per annexed mutation map dated 7th January 2019 so as to seek urgent medical attention.

6. That pending hearing and determination of this suit, a temporary injunction to issue restraining the defendants, by themselves, agents, servants and/or any other persons claiming through them from interfering with the plaintiff's ownership and or usage of Land Title Number Plot No.s 1595, 1596, 1599 and 1600 excised from Dagoretti/Mutuini/309.

7. That the cost of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 14.

4. Upon being served with the pleadings and the application the 1st defendant/respondent entered appearance through the firm of Kanyi Ndurumo & Co. Advocates. He also filed a replying affidavit sworn on the 10th December 2020.

5. The 1st defendant also filed a notice of preliminary objection dated 10th December 2020. The grounds are:-

1. That under the Succession Act and under the Law Reform Act, the plaintiffs as the Administrators of the Estate of Milkah Wangui Wambura (Deceased) ought to bring the suit for the benefit of the Estate and for their own benefit and that of all the beneficiaries of the Estate including for the benefit of the 1st defendant who is one of the beneficiaries of Milkah Wangui Wambura (Deceased).

2. That the 1st defendant has been misjoined in these proceedings and that the name of the 1st defendant should be struck out from the proceedings.

3. That the plaintiffs' suit discloses no reasonable triable issues/cause of action against the 1st defendant and accordingly the plaintiffs' suit against the 1st defendant is scandalous, frivolous and vexatious.

4. That is both the application and the main suit, the plaintiffs have not made any claim against the 1st defendant and are not seeking any prayers against the 1st defendant.

5. That the 1st defendant as one of the beneficiaries of the Estate of Milkah Wangui Wambura (Deceased) is entitled to a portion of Title No Dagoretti/Mutuini/309 and supports prayer 3 of the Notice of Motion dated 12th October, 2020 and also supports prayer No. A & B of the main suit.

6. The 1st defendant shall seek to participate in these proceedings either as a plaintiff or as an interested party.

6. On the 14th December 2020, the court directed that the preliminary objection be heard first in priority to the notice of motion dated 12th October 2020. The court also directed that parties do file and exchange written submissions.

The 1st Defendant's Submissions

7. The role of the plaintiffs as administrators of the Estate of Milkah Wangui Wambura (Deceased) in relation to law suits for the benefit of the Estate. Under Section 2 of the Land Reform Act, the Administrators of the Estate of a deceased person have powers to file suits or causes of action that survive the deceased but these actions must be for the benefit of the Estate together with beneficiaries of the Estate by virtue of section (2) of the Law Reform Act. The plaintiffs should maintain the suit for the benefit of all the beneficiaries of the Estate of Milkah Wangui Wambura including the 1st defendant who is a beneficiary.

8. It has not been alleged that the 1st defendant has lodged a caution against Title No Dagoretti/Mutuini/309. The 1st defendant is as interested as the plaintiffs in the matter of finalizing the distribution of the Estate of Milkah Wangui Wambura. The plaintiffs ought not to sue the 1st defendant who is a beneficiary of the Estate who is yet to get his share of the Estate.

9. The 1st defendant has been misjoined in these proceedings and his name should be struck out from the proceedings. Under order 1 rule 10 and 14 of the Civil Procedure Rules. The 1st defendant has not lodged any caution against the suit property. The prayers as sought in the plaint are against the 2nd and 3rd defendants. The plaintiffs' suit discloses no reasonable cause of action against the 1st defendant. That further in view of the ruling in Nairobi CMCC No 9005 of 2019 and 8694 of 2019 that the 2nd and 3rd defendants have no legitimate interest in the share of the 1st defendant in relation to Dagoretti/Mutuini 309. He prays that the preliminary objection be upheld and the notice of motion dated 12th October 2020 be dismissed with costs to the 1st defendant. In the alternative the name of the 1st defendant be struck out from these proceedings.

The 2nd and 3rd Respondents Submissions

10. The 1st defendant has not raised any points of law in his preliminary objection and as such the same should be struck out. The 1st defendant has been rightfully enjoined in these proceedings as he sold a portion of his property to the 2nd and 3rd defendants with the knowledge of the plaintiffs. The 1st defendant is a crucial party in these proceedings. The plaintiffs in paragraph 10 and 11 of the plaint acknowledge that the 1st defendant sold his portion of land to the 2nd and 3rd defendants. They urge that the preliminary objection be dismissed.

The Plaintiff's Submissions

11. The plaintiffs are challenging the registration of caveats in Land Parcel No Dagoretti/Mutuini/309 from a dispute emanating from an alleged sale of a portion of land by the 1st defendant to the 2nd and 3rd defendants. The plaintiffs are administrators of the Estate of the late Milkah Wangui Wambura and the succession cause No 825 of 2012 was finalized and grant confirmed on 26th November 2018. This court has jurisdiction under Article 162 (2) (b) of the Constitution and The Environment and Land Court Act to deal with this matter. They have put forward the cases of **In re Estate of Njuguna Igwima [2017] eKLR; In re Estate of Prisca Ong'aya Nande (Deceased) [2020] eKLR.**

12. The plaintiffs have a duty under Section 83 (f) of the Law of Succession Act to complete the administration of the estate of the deceased by distributing the Estate as per the confirmed grant. They are however unable to do so since the 2nd and 3rd defendants have placed a caution in the suit property allegedly as beneficial owners of a portion thereto having purchase the same from the 1st defendant.

13. The core of this dispute emanates from the 1st defendant's actions of allegedly selling part of Plot No 1178 excised from Dagoretti/Mutuini/309 to the 2nd and 3rd defendants' without the knowledge of the legal administrators of the Estate who are the plaintiffs herein. It is on the basis of the alleged sale that the 2nd and 3rd defendants have lodge a caution. They have relied on order 1 and 6, rule 3 of the Civil Procedure Rules and the case of **Zephir Holdings Limited vs Mimosa Plantations Limited & 2 Others [2014] eKLR; Andy Forwarders Services Ltd & Another vs Price Water House Coopers Ltd & Another [2012] eKLR; William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Others [2016] eKLR.**

14. The subdivision, registration and distribution of the Estate of the late Milkah Wangui Wambura has stalled as a result of the impasse created by the 1st, 2nd and 3rd defendants to the detriment of the plaintiffs and the other administrators who are sickly, elderly and need urgent medical attention. The 1st defendant has been properly joined in this suit since his presence is necessary for the determination of the dispute herein as he is the alleged seller and the recipient of the purchase price from the 2nd and 3rd defendants.

15. The plaintiffs' suit and the application dated 12th October 2020 disclose a reasonable cause of action against the 1st defendant as the dispute herein was created by him resulting into the cautions being registered. The suit should be heard on merit to allow each party to access justice. They have put forward the case of **Crescent Construction Co. Ltd vs Delphis Bank Ltd [2017] eKLR.**

16. The grounds of opposition raised by the 1st defendant are matters whose veracity can only be determined upon production of evidence in the ordinary way. The plaintiffs were not part of Civil Suit Nos CMCC 9005 of 2019 and 8684 of 2019 between the 1st, 2nd and 3rd defendants. The plaintiffs' claim herein has not been adjudicated by a court of law and ought to be heard in the interest of justice. They pray that the preliminary objection be found to be unmerited and the same to be dismissed with costs to the plaintiffs.

17. I have considered the preliminary objection and the grounds. I have also considered the written submissions filed on behalf of the respective parties and the authorities. The issue for determination is whether the preliminary objection herein is merited.

18. The term preliminary objection was defined in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA** as follows:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which is argued as a preliminary point may dispose of the suit. 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 raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any act had to be ascertained or if what is sought is the exercise of discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuses the issue. The improper practice should stop.....”.

19. Similarly in **Oraro vs Mbaja [2005] eKLR** the court discussed what amounts to a preliminary objection as follows:-

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to the contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and 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 shall allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point”. This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message”.

20. The plaintiffs herein are Administrators of the Estate of the late Milkah Wangui Wambura. This is not in dispute. It is also not in dispute that the 1st defendant is a beneficiary of the said Estate. This dispute emanates from the 1st defendant's actions of selling part of alleged plot number 1178 excised from Dagoretti/Mutuini/309 being his portion of inheritance as per the grant confirmed on 26th October 2018.

21. The plaintiffs have brought this suit since they need to conclude the distribution of the Estate of the deceased. I find that the preliminary objection herein does not raise pure points of law. There is need to interrogate the part played by the 1st defendant (though one of the beneficiaries) in creating the dispute herein. The cautions registered against the title by the 2nd and 3rd defendants are preventing the final distribution of the deceased Estate.

22. **Order 1 rule 3** of the Civil Procedure Rules provides that:-

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

It is the 2nd and 3rd defendants' case that they bought portions of land from the 1st defendant. The 1st defendant has not registered the caution against the title Dagoretti/Mutuini/309 but he is the creator of this dispute. This dispute cannot be solved without him being a party. In the case of **Zephir Holdings Ltd vs Mimosa Plantations Ltd & 2 Others [2014] eKLR**, the court defined a proper party to a suit as follows:-

A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicated upon and settle all questions involved in the suit. The court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties”.

23. The 1st defendant is necessary party in this suit and without him the issues will not be solved to finality. I find that he is properly joined to these proceedings. I find that the plaint herein discloses a reasonable cause of action against the 1st defendant whose actions resulted in the cautions being registered against the title Dagoretti/Mutuine/309. In conclusion, I find no merit in the preliminary objection herein and the same is dismissed with costs to the plaintiffs and the 2nd and 3rd defendants

It is so ordered.

Dated, signed and delivered in Nairobi on this 15th day of April 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Munyasya for the Plaintiffs

Mr. Ndurumo for the 1st Defendant

Ms Onsembe for the 2nd and 3rd Defendants

Mr. Menge for the 4th Defendant

Phyllis - Court Assistant