Yego (Suing in her Capacity as Administrator of the Estate of the Late Isaac Kipiego Kitur) v Kitur (Environment & Land Case 1 of 2023) [2023] KEELC 21409 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21409 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 1 OF 2023

FO NYAGAKA, J

NOVEMBER 7, 2023

BETWEEN

JANE YEGO (SUING IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF THE LATE ISAAC KIPIEGO KITUR) ..... PLAINTIFF

AND

SOLOMON KITUR ..... DEFENDANT

RULING

1. On 27/03/2023 the Plaintiff brought this suit which she classified as Fast Track vide a Plaint dated 24/03/2023. In it she pleaded that she was the daughter of the later Isaac Kipiego Kitur and been granted Letters of Administration Ad Litem vide and order of the Kitale Chief Magistrates Court given on 06/03/2023 in Kitale CMC No. 22 of 2023. She prayed for a declaration that the Defendant was a trespasser on land parcel No. Cherangani/Kachibora Block 1/(Osorongai) 48. She also prayed for a permanent injunction against the Defendant in regard to his occupation on the said parcel of land, and costs of the suit.

2. The Plaintiff pleaded further that following a decree passed on 15/07/2005 by the Land Disputes Tribunal and which was adopted in Kitale SPM Land Case No. 14 of 2005 which arose from a dispute filed by the 1st Wife acting on behalf of the 2nd and 3rd houses, the Court awarded the use and occupation of the land as follows, Zipporah Yego, the 1st House – 16 acres, Joseph Kimeli Kitur representing the 2nd House – 15 acres, Jane Yego of the 3rd House – 5 acres, and Isaac Kiptur Arap Yego – 45 acres. She averred that the parties had been using the respective portions of the ground until after the death of father to the parties on 06/12/2021 when the Defendant without any colour of right interfered with the use of the Plaintiff's portion.

3. The Defendant filed a Statement of Defence on 03/05/2023. In it he averred in Paragraph 4 that the suit disclosed a succession dispute in respect of the estate of the late Isaac Kipyego Kitur and that the

matter should have been filed in the High Court. He averred further that he would raise a preliminary objection over the same at the earliest instance in order for the suit to be struck out in limine. He also pleaded that the suit was incompetent in so far as it sought to implement a decree of the Court in Kitale Land Case No. 14 of 2005 in which a decree was issued on 17/07/2005.

4. As surely as day follows night, the Defendant raised a Preliminary objection dated 18/04/2023 but filed on 03/05/2023. He raised the following grounds, namely, that the pleadings disclosed a succession dispute between the siblings who were children or beneficiaries of the estate of the late Isaak Kibiego Kitur hence this Court did not have jurisdiction but a succession (sic) court does; the applicant had no lucs standi to institute the suit as framed on behalf of Flora Yego and/or any of her (Plaintiff's siblings) or dependants of the estate of Isaak Kibiego Kitur; the suit offended Section 4(4) of the *Limitation of Actions Act* in so far as it sought to enforce a decree issued on 15/07/2005 in Kitale Land Case No. 14 of 2005 which had never been implemented for over a period of 12 years.

5. The Court directed the parties to file submissions over the preliminary objection. The Defendant began by submitting on the meaning of a preliminary objection as Defined in *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* [1969] EA 696 and the case of *Oraro v Mbaja* [2005] 1 KLR 141. He then went on to submit the pleadings disclosed a succession dispute between the children on the estate of the late Isaak Kibiego Kitur. He isolated paragraphs 4, 5, 6, 8, 9, 10, 11, and 12 of the Plaint and the reliefs sought. He submitted that since the land belonged to the late Isaak K. Kitur then the Plaintiff did not intend to protect the estate but her use and occupation of the 5 acres of land. Further that the claim then lay within the jurisdiction of the High Court.

6. Regarding locus, he submitted that the suit was framed to be representation of Flora Yego and any of the Plaintiff's siblings as dependants of the estate of the late Isaak K. Kitur. He singled out annexture SK7 to the Replying Affidavit in which there was a Defence and Counterclaim in Kitale ELC No. 9 of 2021 which involved the Plaintiff, and Flora Yego and Leah Yego against late Isaak K. Kitur. He submitted that the Plaintiff did not file any authority on behalf of the 1st, 2nd and 3rd Houses as required by Order 4Rule 3 of the *Civil Procedure Rules*.

7. Lastly, he submitted that the suit offended Section 4(4) of the *Limitation of Actions Act* since it sought to implement a decree issued on 15/07/2005 in Kitale Land Case No. 14 of 2005. That the period from the date of the decree to the date if filing suit was over 12 years.

8. On her part the Plaintiff submitted that the Preliminary Objection did not meet the threshold of the Mukisa Biscuits case. She repeated that the Plaintiff brought the suit in her capacity as the administrator of the estate of the late Isaak K. Kitur. Further, that as to whether the suit is a succession matter or not it is a question of fact which then is not a pure point of law. She submitted that she was seeking the preservation of the estate of the late father or the status quo pending further action by the family. She relied on the case if *Nancy Chepkurui Tali v Oscar Sudi* [2020] eKLR and *Irene Chepngetich Rop v Samuel Kibowen Towett* [2017] eKLR and prayed for the dismissal of the Preliminary Objection.

Issue, Analysis and Determination

9. I have considered the preliminary objection, the arguments for and against the same, and the law regarding a preliminary objection. Only three issues arise herein. One, whether the preliminary objection is one properly so called, two, whether if it is a proper preliminary objection is it merited, and three, who to meet the costs of the objection and suit if it succeeds.

10. In regard to the first issue, I begin by discussing what it means by a party raising a Preliminary Objection. I will not invent the wheel. To understand what it means by a preliminary objection the

words of the learned judge in the seminal case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 lay the foundation. In it a preliminary objection was defined 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 if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

11. Also, the Court of Appeal held in *Grace Mwenda Munjuri v Trustees Of The Agricultural Society Of Kenya* [2017] eKLR that: "We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue....We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned." What their Lordships stated in their decision is that one must state with precision the point of law he or she is raising against another so that both the court and that other party are aware of the match before him or her.

12. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] eKLR, the same Court stated as follows:

> " We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush."

13. Similarly, in *Susan Wairimu Ndiangui v Pauline W. Thuo & another* [2005] eKLR where Musinga J as he then was held that "a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect."

14. This Court is of the view that it is now clear, from the four authorities above, that a preliminary objection is a point of law which is either pleaded or arises out of a necessary implication. It is not based on facts but flows from pleadings of the parties. Anything factual or a cocktail of facts and the law will not constitute one.

15. With that in mind, looking at the preliminary objection dated 18/04/2023, I am on the view that the objections are on points of law. The court is invited to consider whether or not it has jurisdiction, the Plaintiff has locus standi and if a decree which has never been executed for 12 years can be executed after the expiry of the period.

16. I now turn to the merits or demerits of the Objection. The Plaintiff pleaded that she brought the instant suit as an administrator (sic) [but if true that the Plaintiff is a woman it should be "an adminstratrix"] for and on behalf of the estate of the late Isaac Kipiego Kitur. First, I note that the name of the deceased father has been given as it is in the Plaint. But on the death certificate annexed to her Affidavit Kitur Kibiego Isack while on the Grant of Letters Ad Litem it is Kipyego Kitor, on the title deed it is Kituri Kibiego Isack, and elsewhere in reference to Kitale Land Case No. 14 of 2005 it is Isaac Arap Yego on the title of the decree annexed and in the body it is Isaac Kiptur Arap Yego.

17. Granted that all the above names refer to one and the same person who was the Plaintiff's deceased father who allegedly died on 06/12/2021, the Plaintiff pleaded she had a Limited Grant (a Grant of Letters Administration Ad Litem) to the estate of the late Isaac Kipiego Kitur which were issued on 06/03/2023 and that they were for the filing of the instant suit. Further, she pleaded that in 2005 the Court had issued a decree in Kitale Land Case No. 14 of 2005 for the four parties named in the decree that was issued then to use and occupy the respective portions as pleaded in paragraph 6 of the instant suit. She then prayed for a declaration that the Defendant whom she did not describe the relationship with him but she alleged had trespassed onto 5 acres of part of the land registered in the name of the late Kituri Kibiego Isack (perhaps the deceased father). The Defendant pleaded at paragraph 6 of the Statement of Defence that he was a son of the late father and the Plaintiff was his sister and that the family had never conducted succession proceedings in respect of the estate of the deceased father.

18. To the extent that the Plaintiff sought to preserve, if the instant suit would be taken to be one for such as submitted by her in respect of the preliminary objection, only part of the estate of the deceased, and clearly that part which belonged to the House of her deceased mother in accordance with the decree issued on 15/07/2005, she was not acting in her capacity as the administratrix of the estate in terms of the Grant of letters Ad Litem. In any event, for the reason that the dispute herein involved division (and use and occupation) of land between two siblings being children of their deceased father, one Kituri Kibiego Isack (as per the Certificate of Death), it was clearly a matter governed by the *Law of Succession Act*, Chapter 60 of the Laws of Kenya. In those circumstances, this Court cannot and does not have jurisdiction to determine the same.

19. As was held by the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR,

> "A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution}}. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

20. Also, in *Uganda General Trading Co. Ltd v N T Patel* Kampala HCCC NO. 351 of 1964 [1965] EA 149, Udoma J. expressed as follows:

> "The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law... The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity."

21. This Court cannot arrogate itself jurisdiction. A court's jurisdiction is a constitutionally and/ or statutory flowing power that must be respected and upheld at by the Court at all times. Once a court does not have it, it has no business to carry out any further in the matter.

22. Lastly, if the claim by the Plaintiff were anything to go by, the estate of the deceased father has not devolved (that is to say it has not been distributed) as by law established so that the share she claims to have been trespassed on is determined to be hers or for whoever she represents. That can only be a function of the court acting under the *Law of Succession Act*.

23. That notwithstanding, permit me to say that even if the Court could have had jurisdiction herein, the second limb of trespass and injunction could not have succeeded. The Defendant pleaded at paragraphs 6, 13 and 14 that he was a brother, among other siblings, to the Plaintiff and all had been utilizing the land to the exclusion of the Plaintiff and her sisters who were married and resided away from the land. This was not denied by way of a Reply to Defence. It is clear then that it was an admission on the part of the Plaintiff in terms of Order 2 Rule 11 of the *Civil Procedure Rules*, 2010 that it was the position as pleaded. Subrule 1 provides that

> "(1) Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under r. 10 operates as a denial of it."

24. The Plaintiff prays for the Court to find as trespasser and therefore issue an injunction against a brother who has been and lives on the deceased father's land. This goes against the law on trespass, which I need not elaborate here as of now.

25. With regard to the limb on the failure to execute the decree issued in Kitale Land Case No. 14 of 2005 issued on 15/07/2005, this Court notes that under Section 4 (4) of the *Limitation of Actions Act*,

> "(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

26. It is my humble view that to the extent that the Defendant prays for this Court to consider whether there was failure or otherwise to implement the decree for more than 12 years since its issuance yet the Plaintiff does not admit as much, the limb of the Preliminary objection cannot pass as one properly so called since this court will have to call for facts on the dates, status or failure to execute the decree. That would be a blurred areas or analysis requiring clarification. It does not flow from pleadings. The limb therefore fails.

27. The Upshot is that since two limbs of the Preliminary Objection have succeeded, the suit hereby is struck out for those reasons. Further, for reason that costs follow the event, and that at the discretion of the court or judge for reasons to be given they may not be awarded, herein I find it fit to award the Defendant the costs of the preliminary objection and the suit although the dispute was between siblings.

28. Order accordingly.

RULING DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL THE 7TH DAY OF NOVEMBER, 2023.

HON. DR. IUR NYAGAKA

JUDGE