



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E148 OF 2021

**MARGARET NYAMBARA WAITHAKA (Suing as the Personal Representative
of the Estate of MARTIN FRANCIS THUKU WAITHAKA-Deceased)....PLAINTIFF**

=VERSUS=

ROSELYN DOLA OUKO.....1ST DEFENDANT

AARON TAFARI OUKO.....2ND DEFENDANT

ANDREW ATINDA OUKO.....3RD DEFENDANT

NASHON KEBWARO OMWENGA.....4TH DEFENDANT

RULING

1. This ruling relates to the notice of preliminary objection dated 18.10.2021 filed by the 4th Defendant as well as the application dated 30.9.2021 filed by the 1st 2nd and 3rd defendants.

Notice of Preliminary Objection.

2. The grounds set out in the preliminary objection dated 18.10.2021 are;

1. The Plaintiff's suit through the Plaint dated 4th May, 2021 as filed is fatally defective and an abuse of this Honourable Court's processes and procedures as it offends the provisions of the Civil Procedure Act (CAP 21) and the Limitation of Actions Act (CAP 22) of the laws of Kenya namely:

a) Under Section 7 of the Civil Procedure Act (Cap 21), this matter is res judicata as the issues in dispute in this matter were raised in HC ELC. no. 616 OF 2008, FILED BY THE Plaintiff's husband, Martin Thuku Waitthaka and which was dismissed for want of prosecution on 28/5/2015 during his lifetime.

b) That the Plaintiff herein therefore lacks the requisite locus standi to institute this suit raising similar issues which were abandoned by her late husband who died on 26/4/2018.

c) That under Section 4 of the Limitation of Actions Acts, actions founded on contract cannot be brought after the lapse of six (6) years and the cause of action in this matter arose from a contract/sale agreement executed on 30/3/1983 which is over thirty (30) years ago.

2. This honourable therefore lacks the requisite jurisdiction to entertain this suit for being res judicata and further for being statutory time barred as provided for under Section 7 of the Civil Procedure Act and Section 4 of the Limitation of Actions Act respectively.

The Application dated 30.9.2021

3. The orders sought in the aforementioned application are for the consolidation of the following cases;

-Nairobi ELC Civil Suit 416 of 2018 – Nahashon Kebwaro Omwenga and Another vs. the Estate of Jason Ouko & another

-Nairobi ELC 1028 of 2016 – Marcella Omwenga vs. Josph Kamau Ngiria & Estate of Jason Ouko, and

4. The Applicants contend that they are facing a plethora of suits involving the estate of one Jason Atindo Ouko and that consolidation will help in alleviating costs, that there will be harmony in the prosecution of the matter and that it is essential to avoid duplication of the matters.

Determination

5. In regard to the Notice of Preliminary objection, I make reference to the case of **Mukhisa Biscuits manufacturing Co. Ltd Vs. West End Distributors (1969) E. A 696** where it was stated that;

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit” .

6. In the instant case, I find that the suit referred to **HCCC 616 of 2008** was more or less a holding suit, where the then plaintiff Martine Thuku Waithaka had filed an originating summons seeking extension of a caveat to await the implementation of the Plaintiff’s interest in another **Suit HCCC No. 673/1985**. This court does not have the full details of the said suit **HCCC NO.673 OF 1985**.

7. At this juncture, this court cannot embark on an investigation exercise to determine how the rights and interests of the parties in the aforementioned suits were determined or concluded. The 4th Defendant shall be at liberty to bring all the full facts of these claims at an appropriate time during the trial. In the circumstance, I find that the preliminary objection is not merited and the same is dismissed with no orders as to costs.

8. In regard to the issue of consolidation, I make reference to the case of **Nyati Security Guards and Services Ltd vs. Municipal Council of Mombasa (2004)eKLR** where Maraga J as he then was stated that:

“ Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action” .

9. Though the Applicants have given plausible reasons as to why they desire consolidation to take place, this court is not seized of the nature of the other matters. The court does not know whether there are common questions of law and facts, or whether the claims arise out of the same transactions. Nevertheless, there is a common thread running in all the claims, that they do relate to the estate of one Jason Ouko.

10. In that regard, I decline to grant an order of consolidation. Instead, **I direct that the matters be heard alongside each other.** The application is hence dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kahura for the Plaintiff

Onyango for the 1st and 2nd Respondent

Karira for the Defendant

Court Assistant: Eddel Barasa