



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 50 OF 2020

EUNICE NJERI KIMANI..... 1ST PLAINTIFF

HANNAH NJOKI NJOROGE.....2ND PLAINTIFF

MARY WANJIRU KIBUI..... 3RD PLAINTIFF

=VERSUS=

WALLACE NJOROGE KIBUI *Alias*

KIBUI WALLACE NJOROGE.....DEFENDANT

RULING

1. The plaintiffs initiated this suit through a plaint dated 6/3/2020. Their case was that they were sisters of the defendant. All of them are children the late **Penninah Kibui Njoroge**, now deceased. Their deceased mother was a daughter to the late **Wollis Kimani Njoroge** (their grandfather). Their grandfather was the proprietor of Land Title Number **Dagoretti/Mutuini/243**. Upon the death of their grandfather, their grandmother, **Wanjiku Njoroge Kimani** and their mother, **Penninah Kibui Njoroge**, applied for a grant of letters of administration relating to the estate of their grandfather. Subsequent to that, the two administrators applied to the court to designate the defendant as a beneficiary in place of their mother, Penninah Kibui Njoroge. Consequently, Wanjiku Kibui Njoroge and the defendant were registered as co-proprietors of Land Parcel Number Dagoretti/Mutuini/243.

2. The Plaintiffs' further contended that the intention of their grandmother in replacing their mother's name with the defendant's name was to enable the defendant to hold their mother's share of the suit property in trust for himself and for his sisters (the plaintiffs). They added that subsequently, without their knowledge, the defendant together with their uncles and other beneficiaries to the estate of Wollis Njoroge Kimani ensured that the defendant became the sole registered owner of their family share of the suit property, a subdivision parceled out of Dagoretti/Mutuini/243 and registered as Number Dagoretti/ Mutuini/1119. They contended that the defendant held the above title as a trustee.

3. They sought the following reliefs against the defendant:

a) A declaration that the defendant holds LR No. Dagoretti/Mutuini/1119 in trust of himself and the plaintiffs herein and all the children of Peninah Kibui Njoroge alive or dead.

b) Parcel LR No. Dagoretti/Mutuini/1119 be shared equally between the plaintiffs and the defendant for avoidance of doubt the same be subdivided into five (5) equal portions for the benefits of all the parties herein and a son of the plaintiffs' deceased sister Gladys Wanjira Wallace Njoroge Wanjira.

c) In the alternative, LR No. Dagoretti/Mutuini/1119 be sold and the proceeds therein be shared equally between the plaintiffs, the defendant and Wallace Njoroge Wanjira son of Gladys Wanjira deceased.

d) The plaintiffs' advocate costs be deducted directly from the

e) plaintiffs' share or as it may be agreed and/or ordered by the court.

f) The defendant do produce the original title No. Dagoretti/Mutuini/1119 within a limited time for subdivision or sale or in the alternative the Deputy Registrar of this court to execute all courts documents or consent, transfer and registration relating to this suit on behalf of the defendant.

g) Costs be in the cause.

h) The court to issue any other fair, just and expedient order it may deem fit to meet the ends of justice in this suit.

4. Subsequent to filing the suit, the plaintiffs brought a notice of motion dated 23/11/2020, seeking an interlocutory injunctive order restraining the defendant against selling, transferring, or interfering with Parcel Number Dagoretti/Mutuini/1119, pending the hearing and determination of this suit. They also sought an order compelling the defendant to produce the original title deed for the said parcel. Further, they sought an order enjoining the Police Officer in charge of the local Police Station to enforce the above orders. The said application dated 23/11/2020 is one of the two items falling for determination in this ruling.

5. The second item falling for determination in this ruling is the defendant's

notice of preliminary objection dated 19/3/2021, in which the defendant urges the court to strike out this suit on the following grounds:

1) That the suit filed herein is time barred having been filed after the lapse of the statutory period as set out in section 7 of the Limitation of Actions Act (Cap 22) Laws of Kenya.

2) That the honourable court is devoid of jurisdiction to entrain and/or adjudicate upon the instant suit, the transfer and registration of LR No. Dagoretti/Mutuini/1119 and LR No. Dagoretti/Mutuini/243 in favour of the defendant having been carried out by way of transmission.

3) That the plaintiffs' pleading are based on an incurable illegality and out to be struck out.

4) The entire suit and all proceedings taken against the defendant are a nullity ab initio.

5) The plaintiffs' suit and application herein are therefore incompetent, incurable defective, bad in law and ought to be struck out.

6. Because the notice of preliminary objection raises the question of jurisdiction of this court and the competency of the plaintiffs' suit, the law requires me to dispose it first [see the decision in **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR**]. I will therefore dispose the preliminary objection and thereafter dispose the application.

7. The preliminary objection was canvassed through written submissions dated 20/4/2021, filed by the firm of **C N Kinyanjui & Co Advocates**. Counsel for the defendant/objector identified the following as the two issues falling for determination in the preliminary objection: (i) *Whether the plaintiffs' plaint dated 6th March 2020 and notice of motion application dated 23rd November 2020 are time barred? and; (ii) Whether this honourable court has the jurisdiction to entertain the plaintiff's application and suit.*

8. On the question as to whether this suit and application were time-barred, counsel for the defendant submitted that Section 7 of the Limitation of Actions Act barred the plaintiffs against bringing this suit after the lapse of twelve years. Counsel contended that the defendant acquired the suit property in 2006, hence the plaintiffs' claim was statute-barred after the lapse of 12 years in 2018. Counsel contended that the certificate of confirmation of grant was issued in the year 2006.

9. On whether this honourable court had jurisdiction to entertain the application and suit the herein, counsel submitted that the defendant was registered as proprietor of the suit property pursuant to a certificate of confirmation of grant issued in **Nyahururu Principal Magistrate's court Succession Cause No. 40 of 2002; Estate of the late Wollis Njoroge Kimani**. Counsel added that the plaintiff had not challenged the said certificate of confirmation of grant.. Counsel argued that this being a succession dispute relating to the estate of the late Wollis Njoroge Kimani, the court with jurisdiction to deal with the dispute was the succession court. Counsel urged the court to uphold the objection and strike out the suit.

10. The plaintiffs, through the firm of **Kahuthu & Kahuthu Advocates**, filed what they described as "*Reply to Notice of Preliminary Objection*," sworn by Eunice Njeri Kimani. They also filed written submissions dated 11/6/2021 through the said law firm..

11. It is trite law that a preliminary objection is urged and contested or challenged on the basis of the law and pleadings before court at the time of bringing the preliminary objection [see **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**]. No supporting affidavit is admissible to support a preliminary objection. Similarly, no replying affidavit, by whatever name, is admissible to challenge or oppose a preliminary objection. I will therefore ignore the document titled *Reply to Notice of Preliminary Objection*. I will only *focus on the plaintiffs' written submissions*.

12. Counsel for the plaintiff submitted that the suit herein was not time-barred "as alleged but filed within time as the defendant was only registered as owner as per the search annexed to the application and a copy of title on 8th December 2009 while this suit was filed on 6th March 2020."

13. Counsel for the plaintiffs added that the plaintiffs' case was that the defendant held the suit property in trust for himself and for them as per **Nyahururu Principal Magistrate Court Succession Cause No. 40 of 2002** and that the trust created will determine when parties to the trust will apply to be registered as joint owners of the subject matter or when the trust property will be passed to the beneficiaries. They contended that the limitation period of 12 years did not apply to this suit. Counsel added that **Section 30 (g)** of the Registered Land Act (repealed) created customary trusts. Counsel urged the court to reject the preliminary objection.

14. I have considered the tenor of the preliminary objection. I have also considered the parties' submissions, and the relevant constitutional and legal framework. Further, I have considered the prevailing jurisprudence on the key issues in the preliminary objection. The following two key issues fall for determination in the preliminary objection: (i) Whether, given the fact that the defendant was registered as proprietor in pursuance of a certificate of confirmation of grant, this court is the proper court to adjudicate the dispute in this suit; and (ii) Whether the plaintiffs' claim is statute-barred? I will dispose the two issues sequentially in the above order.

15. The plaintiffs' case is that the suit property is a subdivision out of Parcel Number **Dagoretti/Mutuini/243** which belonged to the late Wollis Njoroge Kimani. They further contend that succession in respect of the estate of Wollis Njoroge Kimani was concluded in **Nyahururu Principal Magistrate Court Succession Cause No. 40 of 2002** and a certificate of confirmation of grant was issued on 1/12/2008. The essence of a certificate of confirmation of grant is that it sets out how the estate of the deceased is to be shared. Where land belonging to the deceased is to be held in trust, the elements of trusteeship and the beneficiaries under the trust are supposed to be indicated in the certificate of confirmation of grant.

16. It is clear from the plaintiffs' pleadings that, through this suit, they are laying claim to the estate of their grandfather. They contend that they are entitled to the portion given to the defendant in the succession cause relating to their grandfather. A perusal of the certificate of confirmation of grant presented by the plaintiffs does not, however, disclose any element of trusteeship. The plaintiffs are therefore in essence challenging the certificate of confirmation of grant which gave the defendant the suit property absolutely. At this point, the suit property is still registered in the name of the defendant.

17. In the above circumstances, I entirely agree with the defendant that the question of succession to the estate of the late Wollis Njoroge Kimani was adjudicated in the above succession cause. If the plaintiffs are dissatisfied by the fact that the defendant was given part of the assets of their deceased grandfather and they (the plaintiffs) were given nothing, the proper forum where they should seek redress is the succession court. The forum for ventilating their grievance is the succession cause. The succession court has jurisdiction under the Law of Succession Act to vary the certificate of confirmation of grant to make provision for the plaintiffs if a proper case for variation/rectification is established.

18. I would add that, the tendency of litigants coming to the Environment and Land Court to contest certificates of confirmation of grants issued by succession courts should not be allowed to take root. If a litigant feels disinherited, the proper forum of redress, in a matter such as this one where the suit property has not changed hands, is the succession court. I will therefore uphold the objection of the defendant and strike out the plaintiffs' suit. The plaintiffs will be at liberty to seek redress in the succession court which issued the certificate of confirmation of grant giving the defendant the suit property absolutely.

19. The second issue in the preliminary objection focuses on limitation under the Limitation of Actions Act. Because I have made a finding to the effect that the present dispute is a succession dispute which ought to be adjudicated in the court seized of the succession cause, I will not pronounce myself on the question of limitation. I take this view because pronouncing myself on the issue of limitation might prejudice the parties in the event that the dispute is taken to the proper court.

20. Having found that this court is not the proper court to adjudicate the succession dispute in this suit, I will not make any pronouncement on the application dated 23/11/2020. I will instead lay down my tools [see **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR**].

21. In the end, the defendant's preliminary objection is upheld on the single ground that the proper court to adjudicate the dispute in this suit is the succession court seized of the succession cause relating to the estate of the late Wollis Njoroge Kimani. The plaintiffs shall bear costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF NOVEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

M/s Kamotho for the Defendant

Court Assistant: Lucy Muthoni

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE