



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC APPEAL NO. 23 OF 2017

JOSEPH KAMAU MWANGI.....APPELLANT

VS

ESTHER NJERI NGUGI.....1ST RESPONDENT

PETER NDUATI.....2ND RESPONDENT

JOHN MAINA NGUGI.....3RD RESPONDENT

SAMUEL KARUGA.....4TH RESPONDENT

ISAAC GITAU.....5TH RESPONDENT

JUDGMENT

1. This appeal relates to the decision of Hon. B J Ndeda, Principal Magistrate Thika in Civil Case No. 1165 of 2010 delivered on 25.5.2012. In the Lower Court, the Appellant's (then the Plaintiff) suit was struck out on a Preliminary Objection on grounds *inter alia* that the suit was res judicata, lacked the necessary locus and was defective beyond cure.

2. The Appellant's case at the Lower Court was that the suit land Loc 3/Mukuria/26 registered in the name of the late Ngugi Gikuma, the father of the Respondents was held under customary trust for himself and the father of the Plaintiff -Mwangi Gikuma, deceased. That during the lifetime of the customary trustee the family of the late Mwangi Gikuma cultivated 3.7 acres out of the total 10.1 acres whereas the Respondents father cultivated 6.4 acres. That the Respondents have succeeded the suit land in equal shares and now want the Court to declare the existence of a customary trust over 3.7 acres of the suit land and order that the said trust be dissolved and the portion of 3.7 acres of the suit land be registered in the Appellant's name as administrator of the estate of the late Mwangi Gikuma.

3. In opposing the Appellant's claim the Respondents filed a defense denying the existence of any customary trust on the land and subsequently filed a Preliminary Objection on the grounds that;

“ the Plaintiff's claim is resjudicata.

The 2nd 3rd, 4th & 5th Defendants have no locus to be sued.

The Plaintiff's suit is incurably defective and not proper before the Court.

The registered owner of the suit land is deceased and the mode of distribution of the estate including the suit land has been determined by this honorable Court in a succession cause and the order made therein have never been challenged and remain valid orders of a Court of law hence the orders sought herein by the Plaintiff in his suit are untenable.”

4. Upon considering the issues raised before her in the Preliminary Objection the Learned Principal Magistrate in her considered ruling delivered on 21.5.2012 upheld the Preliminary Objection and accordingly struck out the Appellant's suit.

5. Aggrieved by the above decision the Appellant filed this appeal and set forth the following grounds:-

a) The Learned Principal Magistrate erred in law in upholding the Preliminary Objection on a point of law raised by the Respondents

whereas the objection did not qualify to be a Preliminary Objection on point of law but was based on facts thereby rendering a wrong decision.

b) The Learned Principal Magistrate erred in law in holding that a previous succession cause filed by the Respondent in respect of the subject property was a suit which had been determined on merit thereby allowing the objection by the Respondents whereas the Appellant suit is based on Kikuyu Customary Trust an issue that could only be determined in the said suit thereby rendering a wrong decision.

6. With tremendous respect to the Learned Principal Magistrate I have strained to understand the basis of her decision in allowing the Preliminary Objection. What I deciphered with unmerited difficulty is that the issue of customary trust was determined in the succession cause and therefore determining the issues in the plaint would be tantamount to reopening the succession cause, which the lower Court had no jurisdiction. Further that Appellant did not disclose the capacity in which he had sued the defendants.

7. I have considered the findings of the Lower Court, the submissions of counsel and the authorities cited before me. Guided by various authorities, I am aware that this is a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions in the matter. In the Court of Appeal case of **Selle v Associated Motor Boat Co. [1968] EA 123**, it was put thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

The Issues for determination.

8. In line with the above principles, and having regard to the grounds of appeal, the evidence, everything that transpired before the Lower Court; the impugned Ruling and the submissions made before me, the issues I discern are four-fold, namely: -

- a) Whether the Preliminary Objection is a point of law
- b) Whether the suit is resjudicata.
- c) Whether the suit is defective on account of non-disclosure of the defendant’s locus to be sued.
- d) Who pays the cost of the Appeal?

The Court shall answer the issues in turn.

9. What is a Preliminary Objection? In the case of **Mukisa Biscuit Company Vs Westend Distributors Limited (1969) EA 696** a Preliminary Objection is defined as;

“a matter raised by a party in a lawsuit that objects to or challenges a pleading filed by an opposing party. It consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a Preliminary Objection, may dispose of the suit”.

10. Examples are an objection to the jurisdiction of the Court, or a plea of (time) limitation, or a submission that the parties are bound by the contract giving parties to the suit to refer the dispute to arbitration etc. 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 has to be ascertained before determining the merits of the objection or what is sought is the exercise of judicial discretion.

11. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

“.....a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, 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 should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

12. The aim of a Preliminary Objection is to save the time of the Court and of the parties by not going into the merits of a matter in dispute because there is a point of law that will dispose of the matter summarily.

13. In the instant case the Preliminary Objection has been raised majorly on three issues; resjudicata, locus standi and that the suit is defective and beyond cure.

14. Section 7 of the Civil Procedure Act states as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.

15. It is on record that the parties filed a case at LDT Kandara No 28 of 2002 which decision was appealed in HCA No. 105 of 2003 wherein the Learned Judge Justice O.K Mutungi (as he then was) allowed the appeal on the sound legal ground that neither the Provincial Appeals Committee nor its predecessor, the land Dispute Tribunal had no jurisdiction to determine title in land. It is also on record that the matter was subjected to Succession Cause No. 58 of 2008 wherein the suit property was distributed *interalia* to the beneficiaries being the Respondents in this Appeal in equal shares.

16. Guided by section 7 of the Civil Procedure Act above, it is clear that the Succession Cause determined the beneficiaries of the estate and distributed the suit land accordingly. This suit is for the determination of a question of customary trust. It therefore follows that the issues in this suit are not similar to the issues that were determined in the Succession Cause. With respect this Court does not agree with the Respondents learned Counsel that the matter is *resjudicata*. It is not.

17. On the issue of whether or not the Respondents are clothe with the relevant locus to be sued in the suit, it is trite law that the determination of that question would call for evidence which will remove the matter out of the purview of being a pure point of law.

18. It is the finding of this Court is that the Learned Principal erred in upholding the Preliminary Objection.

19. Consequently, the decision of the Lower Court is set aside and the appeal is allowed. The costs of this appeal and that of the application in the Lower Court shall be met by the Respondents. The suit in the lower Court is reinstated accordingly.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 2ND DAY OF JULY 2018.

J G KEMEI

JUDGE.