



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 430 OF 2018

**THERESA WANJIRO (Suing as the administrator of the Estate of
JOSEPH GICHUKI RIUNGE.....PLAINTIFF**

=VERSUS=

ANDREW KIMATA GACHANGA.....1ST DEFENDANT

SOLOMON GACHANJA MUKOI.....2ND DEFENANT

GEORGE MWAI MBURU.....3RD PARTY

RULING

1. The Preliminary Objection is dated 27th May 2019.

The grounds are:-

- 1. That the entire suit offends the provisions of Section 82(a) of the Law of Succession Act (Cap 160 of the Laws of Kenya).*
- 2. That the entire suit offends the provisions of Section 7 and Section 9(2) of the Limitation of Actions Act (Cap 22 of the Laws of Kenya).*
- 3. That the entire suit offends the provisions of Section 7 of the Magistrate's Court Act No 26 of 2015.*
- 4. That the entire suit offends the provisions of Order 2 rule 10 of the Civil Procedure Rules 2010.*
- 5. That the entire suit offends the provisions of order 3 rule 2 of the Civil Procedure Rules.*
- 6. That the 3rd Party Notice offends the provisions of Order 1 rule 15(1) of the Civil Procedure Rules 2010.*

2. On the 13th October 2020 the court with the consent of the parties directed that the preliminary objection be canvassed by way of written submissions.

The 3rd Party's submissions

3. The plaintiff lacks capacity *locus standi* to file the present case. At paragraph 3 of the plaint, the plaintiff avers that she has filed the case on her capacity as the administrator of the estate of the late Joseph Gichuki Riunge. The suit offends the provisions of Section 82(a) of the Law of Succession Act which empowers personal representatives to enforce by suit or otherwise all causes of action which by virtue of any law survive the deceased. He has put forward the cases of **Simon Kamau Muhindi vs Monica Wambui Ngugi & Another [2014] eKLR; Hassan Iddi Malambu vs Bestel Agencies Co. Ltd & Another [2015] eKLR**, In her affidavit filed in court on 4th October 2018 the plaintiff attached a copy of a grant which shows that the same was issued to four administrators; Theresa Wanjiro Riunge, Francis Kimani Gichuki, Francis Mburu Riunge and David Muniu Riunge. This suit has been filed by the plaintiff without the participation or consent of her co-administrators.

4. The suit is statute barred and offends the provisions of Section 7 and 9(2) of the Limitation of Actions Act. At paragraph 3 of her plaint,

the plaintiff pleads that the late Joseph Gichuki was the registered owner of LR NO 57/163 prior to his death on 9th March 2001. The suit property is not a subject of the succession proceedings; meaning that the plaintiff was well aware that her father's interest in the said land had been alienated at the time when the process of administration started. This case was filed four (4) years after it became time barred. He has put forward the cases of **Muchiri Mikiara vs Mrinkanya Baikara [2019] eKLR**; **Beatrice Wambui Kiarie vs Beatrice Wambui Kiarie & 9 Others [2018] eKLR**. In the instant suit the 3rd party's interest on the land was registered between July – August 2006.

5. The documents show that the value of the land is Kshs.500,000/- and as such the current suit should have been filed before the Resident Magistrate's Court in line with the Chief Justice's directions dated 28th July 2014 and Section 7 of the magistrates' Court Act.

6. Order 2 rule 10 of the Civil Procedure provides that every pleading shall contain the necessary particulars of fraud where the same is pleaded. Further order 3 rule 2 provides that all suits shall be accompanied by copies of documents to be relied on at the trial including a demand letter before action. The plaint that was filed on 4th October 2018 falls short of the above mandatory requirements and should be struck out with costs.

The Plaintiff's Submissions

7. The co-administrators have been enjoined by the plaintiff's proposed amended plaint to ensure that the court has opportunity to hear them on alleged complicity in the matter and or as accessories to fraud in land transactions.

8. The principles provided in the cited case of **R vs Nairobi City Council Misc App No 103B of 2013** cannot apply where administrators by their commission or omissions are made defendants.

9. Section 26 of the Limitation of Actions Act, permit extension of time if mistake and fraud is involved and it is clear from the documents that the defendants are likely to have played part in the fraudulent transfer.

10. The High Court has unlimited jurisdiction to handle all matters. Section 1A, 1B, 3A, 17 and 18 of the Civil Procedure Act gives the High Court powers to transfer cases, terminate them *suo moto* or on application by a party.

11. The issues raised in respect of order 2 rule 10, order 3 rule 2 of the Civil Procedure Rules will be cured by amendment. The power to amend is provided for under section 99 and 100 of the Civil Procedure Act. She prays that the preliminary objection be dismissed with costs to the plaintiff.

12. I have considered the preliminary objection, the grounds, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the preliminary objection is merited.

13. As to whether this is a preliminary objection I am guided by the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** the Court of Appeal stated thus as per Sir Charles Newbold P:-

“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 facts pleaded by the other side are correct. It cannot be raised if any fact, has to be ascertained or if what is sought is exercise of judicial discretion”.

Lord J A proceeded to state thus:

“.....so far as I am aware 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 objection 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”.

I am satisfied that the issues raised herein are pure points of law.

14. The first issue for consideration is whether the plaintiff lacks capacity or *locus standi* to file this suit.

In paragraph 1 of the supporting affidavit sworn on the 2nd October 2018, the plaintiff states that she is one of the administrators of the Estate of Joseph Gichuki Riunge. She annexed a certificate of confirmation of grant which shows that the said grant was issued to Theresa Wanjiri Riunge (plaintiff), Francis Kimani Gichuki, Francis Mburu Riunge and David Muniu Riunge.

15. At paragraph 3 of the plaint, the plaintiff avers that she has filed the suit in her capacity as the administrator of the estate of the said Joseph Gichuki Riunge. **Section 82(a)** of the Law of Succession Act provides that:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;”

16. In the present suit the plaintiff has filed this suit without involving the other three administrators of the Estate of Joseph Gichuki Riunge.

No explanation has been given. There is no authority to sue on behalf of the other administrators. In the case of **Simon Kamau Muhindi (suing as the administrator of the estate of Esther Nyokabi Muhindi) vs Monica Wambui Ngugi & Another [2014] eKLR** the court stated thus:-

“The plaintiff was jointly appointed with his brother Richard Wainaina Muhindi as the administrators of the estate of the late Esther Nyokabi Muhindi. However, this suit has been brought by only the plaintiff and no authority to sue on behalf of Richard Wainaina Muhindi has been produced to this court. To that issue I wish to rely on the decision of Majanja J in Misc. Civil Application No 103B of 2013 Republic vs Nairobi City Council where he stated as follows:-

“The capacity to litigate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times.....one administrator out of the other lacks capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate”.

On that issue, I find that the plaintiff lacks capacity to file suit on behalf of the estate of the deceased in the absence of his co-administrator, Richard Wainaina Muhindi”.

17. In the instant scenario, I also hold that the plaintiff herein lacks capacity to institute this suit on behalf of the estate of the deceased without involving her co-administrators. I find that this is fatal mistake which cannot be cured by amendments.

18. The second issue for consideration is whether this suit is statute barred and offends the provisions of section 7 and 9(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya. **Section 7** of the Act provides that:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 9(2) of the Act provides that:-

“Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.”

19. I have gone through the pleadings and the documents filed by the plaintiff. I agree with the 3rd party’s counsel submissions that this suit is time barred having been filed four (4) years after it became time barred. In the case of **Muchiri M’ikiara vs M’Rinkanya Baikara [2019] eKLR**, the court stated thus:-

“Section 9(2) of the Limitation of Actions Act, provides that:

(2) where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of death in possession of the land, and was the last person entitled to the land to be in possession of the land; the right of action accrues on the date of death”.

Going by this proviso, the applicant ought to have brought his cause of action 12 years after the demise of his father bringing the same to the year 2009 (from 1997) thus there are two dates which can be taken as date of expiry of the claim; 27th May 2009 and 12th July 2009”.

I am guided by the above authority in finding that the instant suit is time barred.

20. As to the issue, that this matter ought to have been filed in the lower court given that the value of the subject matter is Kshs.500,000/- I am of the view that the court has power to transfer the suit under section 18 of the Civil Procedure Act. However, this option is not available to the plaintiff as this is not the only defect in the suit as filed.

21. I also find that the issue that the suit offends order 2 rule 10 order 3 rule 2 of the Civil Procedure Rules 2010 can be cured by amendments. Again I wish to state that this avenue would have been available to the plaintiff if this was the only defect in the suit herein.

22. The upshot of the matter is that given this court’s findings on the two grounds the preliminary objection is found to be merited. The same is upheld. The suit herein is hereby struck out with costs to the defendants and third party.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22ND DAY OF JULY 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendants

Mr. Kibiku for the Third Party

Phyllis - Court Assistant