



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 255 OF 2018

IRENE WANGUI KURIA.....1ST PLAINTIFF

JOYCE KANYI NJAU.....2ND PLAINTIFF

-VERSUS-

GEORGE NJOROGE NJAU.....1ST DEFENDANT/OBJECTOR

JOHN NJOROGE NJAU.....2ND DEFENDANT/OBJECTOR

CHARLES NJOROGE NJAU.....3RD DEFENDANT/OBJECTOR

BEATRICE WAMBUI CHEGE.....4TH DEFENDANT/OBJECTOR

RULING

The matter for determination is the Notice of Preliminary Objection brought by the 1st, 2nd, 3rd and 4th Defendants/Objectors dated **1st July 2020**, pursuant to the Plaintiffs' Complaint dated **23rd October 2018**, on the following grounds:-

- 1. That the Court lacks jurisdiction to hear and determine the matter as pleaded in the Complaint as the substance and/or gravamen of the claim is a Succession claim.***
- 2. That the matter is Res judicata.***
- 3. That the Complaint is an abuse of the Court process, irritatingly vexatious and frivolous.***
- 4. That the orders sought in the Complaint are untenable.***

The Notice of Preliminary Objection was canvassed by way of written submissions and the Defendants/Objectors through the **Law Firm of Abdullahi, Gitari & Odhiambo LLP Advocates**, filed their written submissions on **24th December 2020**, and submitted that the entire suit as filed by the Plaintiffs' is that of inheritance in nature as evidenced in Paragraph 12 of the Complaint. Further, that the prayers in the Complaint are largely for beneficial interests, which amounts to seeking distribution of the estate. They relied on the case of ***Peter Ndambu Nzikali v Onesmus Ndambu Musau(2015) eKLR*** and in the case of ***Re Estate of John Maraga Gwako (2007)eKLR***.

It was further submitted that the suit has entirely been determined in ***Kiambu Succession Cause No. 210 of 1990***, wherein a Ruling was delivered on **11th November 1992**. Subsequently, Plaintiffs' filed an Originating Summons ***In Nairobi ELC No.110 of 2015***.

It was their further submissions that the Plaintiffs' are disingenuously litigating on matters previously adjudicated as fresh claim and relied on the case of ***ETV v Attorney General & Another (2002) eKLR*** and in ***Pangaea Holdings LLC & Another v Hacienda Development Ltd & 2 Others (2002) eKLR***.

The Plaintiffs/Respondents upon being duly served did not file any pleadings with regard to the Defendants Preliminary Objection.

The Court has now carefully read and considered the Notice of Preliminary Objection, the written submissions and the Pleadings in general and finds that the issue for determination is whether the Notice of Preliminary Objection is merited.

Whether the suit is Res Judicata

Do the Grounds of Objections raised by the Defendants/ Objectors herein qualify to be a **Preliminary Objection** as was described in the case of Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696, where Law J A stated that;

“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 the pleadings and which objection point may dispose the suit.”

Further the Court stated;

“A preliminary objection 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 or if what is sought is the exercise of judicial discretion.”

The Court has considered the four grounds raised by the Defendants/Objectors. The Objectors have raised various issues amongst them that the suit is **Res Judicata** since issues herein were determined in Kiambu Succession Cause No. 210 of 1990 and in Nairobi Elc No.110 of 2015.

It is not in doubt that for the Court to ascertain whether the instant suit is **Res Judicata** or abuse of court process or irritatingly vexatious and frivolous, the Court will have to ascertain and probe evidence more so as the parties are disputing various issues.

Though **Section 7** of the **Civil Procedure Act** deal with the issue of *Resjudicata*, it is evident that the said issue of *Resjudicata* cannot be raised in a Preliminary Objection. As was held in the case of George Kamau Kimani & 4 Others ...Vs...County Government of Trans-Nzoia (supra), the best way to raise the issue of *res judicata* is by way of **Notice of Motion**, where pleadings would be annexed to allow the Court consider whether the issues in the previous suit are similar to the issues in the suit being in issue.

Whether the Court has jurisdiction to determine the dispute:

The Plaintiff's case as framed in their prayers amongst others are;

a) A declaration that the combination and/or consolidation of the land parcels Kiambaa/Kanunga/ 434 into Kiambaa/Kanunga/538 and the subsequent subdivision of the combined parcel Kiambaa/ Kanunga/538 into Kiambaa/Kanunga/1041, Kiambaa/ Kanunga/1042 and Kiambaa/Kanunga/1043 is declared illegal, null and void.

b) An order directing the Land Registrar to cancel all Titles derived from Kiambaa/Kanunga/434 and Kiambaa/ Kanunga/538 or the combined Kiambaa /Kanunga/ 538.

Under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011**, this Court has jurisdiction to determine all disputes relating to the environment and the use and occupation of, and title to land. **Section 13(1)** and **(2)** of the **Environment and Land Act** provides as follows:

“13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

There is no doubt from the foregoing that this Court has jurisdiction to determine the dispute before it which revolves around title to land. On whether the Court can determine a dispute over entitlement to equal shares of the property, so long as the dispute is over the use, occupation or title to land, this Court has jurisdiction to determine it.

In the present case, the objection is that the orders sought can only be granted by the Probate and Administration Court. However, prayer **(a)** and **(c)** as sought by the Plaintiffs on their Plaint dated **23rd October 2018**, are prayers that can be entertained by the Environment & Land

Court. For the above reasons, the Court finds that this Environment & Land Court has Jurisdiction to deal with the present allegations as raised. The Court finds support for this view in the case of *Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru, ELC (2013) eKLR* where it was held;

“In matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of the Constitution and the High Court as the Succession Court under Section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.” (Emphasis added).

Taking all the foregoing matters into consideration, the Court is of the firm view that it has jurisdiction to deal with the present suit before it, as the suit is inextricably intertwined with the succession issues relating to land.

The upshot of the foregoing is that the **Preliminary Objection** dated **1st July 2020** is **not merited** and the same is dismissed entirely with no orders as to the Costs as it was undefended.

Let the matter be set down for hearing and be determined on merit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 15TH DAY OF JULY 2021.

L. GACHERU

JUDGE

15/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the 1st Plaintiff

No appearance for the 2nd Plaintiff

Mr. Wachira for the 1st, 2nd, 3rd, and 4th Defendants/ Objectors

L. GACHERU

JUDGE

15/7/2021