



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 86 OF 2020

JEREMIAH MWANGI KIHARA..... 1ST PLAINTIFF

JAMES KIHARA..... 2ND PLAINTIFF

LUCY NJERI KIHARA.....3RD PLAINTIFF

LYDIA WAMBUI WANGARI..... 4TH PLAINTIFF

=VERSUS=

JOSHUA NJOROGE KIHARA..... 1ST DEFENDANT

JESSEE NJUGUNA KIHARA.....2ND DEFENDANT

RULING

1. The plaintiff initiated this suit through a plaint dated 28/9/2020. They contended that the 1st, 2nd and 3rd plaintiffs were children of the late **Lydia Wambui Waweru** [hereinafter referred to as “**the late Lydia**”]. The late Lydia had a brother by the name **Kihara Waweru** [hereinafter referred to as the “**late Kihara**”]. The late Lydia and the late Kihara were children of the late **Waweru Kihara** [hereinafter referred to as “**the deceased**”]. The deceased owned the following parcels of land: **(i) Githunguri\ Githiga\9; (ii) Githunguri\Githangari\ T.324; (iii) Githunguri\ Githangari\100 (iv) Githunguri\ Kiairia\385; and (v)Githunguri\ Kiairia\T343** [hereinafter referred to as the “**suit properties**”].

2. The deceased died in 1962. The plaintiff contended that in 1981, the deceased’s son, the late Kihara, obtained registration as proprietor of the suit properties pursuant to “Succession of the estate of Waweru Kihara (the deceased) who died in 1962”. They further contended that the suit properties were family land and that the registration of the late Kihara as proprietor was subject to customary trust in favour of the estate of the late Lydia, hence they [the plaintiffs] were entitled to determination of the said customary trust prior to distribution of the estate of the late Kihara [the registered proprietor of the suit properties].

3. The plaintiffs contended that in 2019, the defendant petitioned the court for letters of administration in respect of the estate of the late Kihara and had subsequently moved the court to confirm the Grant in **Githunguri Senior Principal Magistrate Succession Cause No. 98 of 2019**. They added that the defendant intended to procure distribution of the estate of the late Kihara in disregard of the entitlement of the estate of the late Lydia.

4. Consequently, the plaintiffs sought the following orders against the defendants:

a) A declaration that the registration of Kihara Waweru as proprietor of the suit premises namely: LR Nos (i) Githunguri\ Githiga\9; (ii) Githunguri\Githangari\T.324; (iii) Githunguri\Githangari\100 (iv)Githunguri\ Kiairia\385; and (v) Githunguri\ Kiairia\T343 is subject to customary trust in favour of the estate of Lydia Wambui Waweru and the plaintiffs as her heirs and beneficiaries.

b) An order to determine the trust and allocate half share to the estate of Lydia Wambui Waweru and the plaintiffs as her heirs in the suit premises that is LR Nos (i) Githunguri\ Githiga\9; (ii)Githunguri\Githangari\T.324; (iii) Githunguri\ Githangari\100 (iv) Githunguri\Kiairia\385; and (v) Githunguri\Kiairia\T.343.

c) Any further or other relief this honourable court may consider just and appropriate for the ends of justice.

d) Costs of the suit.

5. The defendants filed a statement of defence dated 28/10/2020. They admitted that the late Lydia was a sister to the late Kihara and added

that there were two other sisters. Their case was that the late Lydia was married to one Githuku Mwangi and under Gikuyu Customary Law and they lived in Tatu Estate. They contended that their grandfather, Waweru Kihara [the deceased], died way back in 1962 and the registration of their father [the late Kihara] as proprietor of the suit properties was by way of succession court proceedings, to wit, **Succession Cause Number 5 of 1967**, a cause in which the late Lydia did not raise any objection. It was their case that if the late Lydia or the plaintiffs had any objection relating to the distribution of the estate of their late grandfather (the deceased – the late Waweru), they should have petitioned the relevant court for cancellation of the titles. They added that the plaintiffs and their late mother [the late Lydia], had all along occupied the suit properties as licencees.

6. The defendants contended that this court lacked jurisdiction to adjudicate a dispute relating to distribution of the estate of a deceased person who died intestate and in respect of which registration to land was obtained through succession. Further, the defendants averred that the plaintiff's suit herein was statute-barred under the Limitation of Actions Act.

7. Subsequent to filing their statement of defence, the defendants brought a notice of preliminary objection dated 28/1/2021, through which they urged this court to strike out this suit on the following grounds:

1) The plaintiffs' suit herein is time-barred pursuant to Section 7, 9(1), (2) and (3) of the Limitation of Actions Act (CAP 22 Law of Kenya).

2) The registration as the proprietor of the parcels of land known as LR Nos Githunguri\Githiga\9, Githunguri\ Githangari T.324, Githunguri\Githangari\100, Githunguri\ Kiairia/385 and Githunguri Kiairia\T.343 were obtained by the deceased Kihara Waweru on 30/11/1981 was through Succession Cause No. 5 of 1967 and hence this court has no jurisdiction to determine a matter involving distribution of an estate of the deceased person.

3) In light of the provisions of Article 162 of the Constitution of Kenya 2010 as read with Section 13 of the Environment & Land Court Act, this court has absolutely no jurisdiction to handle this matter.

4) The main issue relates to succession of the deceased estate and not customary trust as alleged and the court herein as a land court has no jurisdiction whatsoever to determine the beneficial interest of the plaintiffs.

5) The prayers sought in the plaint dated 28/9/2020 lack foundation and the suit herein should be dismissed with costs to the defendants.

8. The said preliminary objection dated 28/1/2021 is the subject of this ruling. The preliminary objection was orally argued by Mr Kihara of *Kihara Ndiba & Co Advocates*. On limitation, counsel submitted that the plaintiffs' suit was anchored on customary trust. He contended that **Section 7** of the Limitation of Actions Act provided for a limitation period of 12 years. He added that the plaintiffs' grandfather [the late Waweru Kihara – the deceased] having died in 1962, the 12 year limitation period lapsed in 1974. Counsel added that the defendants' father obtained registration relating to the suit properties in 1981 pursuant to succession orders issued in **Succession Cause No. 5 of 1967**.

9. On jurisdiction, counsel for the defendants submitted that the jurisdiction of this court was conferred by Article 162(2) (b) of the Constitution. Counsel added that titles to the suit properties were obtained through succession hence this court did not have jurisdiction to entertain the present dispute. Counsel urged the court to strike out the suit.

10. In response, Mr. Baiya, counsel for the plaintiffs, submitted that the plaintiffs' claim was anchored on customary trust and raised the question of occupation and possession of land which fell within the jurisdiction of this court. Counsel added that a customary trust was a continuing cause of action. Counsel urged the court to dismiss the preliminary objection.

11. I have considered the preliminary objection dated 28/1/2021. I have also considered the parties' rival submissions. Further, I have considered the relevant legal frameworks and jurisprudence. The preliminary objection raises the following two key issues: (i) *Whether, registration of the suit properties in the name of the defendants' deceased father having been obtained pursuant to court orders made in Succession Cause No. 5 of 1967, this court has jurisdiction to determine the dispute in this suit; and (ii) Whether the plaintiffs' claim, as pleaded in the present suit, is statute-barred.* I will make brief sequential pronouncements on the two issues in the above order:

12. An examination of the plaintiffs' pleadings reveals that the plaintiffs are, through this suit, contesting the succession orders that culminated in the registration of the defendants' father, Kihara Waweru, as the absolute proprietor of the suit properties. It does emerge from the parties' pleadings that **Kihara Waweru** was the only son of **Waweru Kihara**. Besides the said son, Waweru Kihara had three daughters. He died in 1962 and succession relating to his estate was carried out through what is said to be **Succession Cause No. 5 of 1967**. The exact date when the succession orders were made is not clear but it is clear that registration of the suit properties in the name of the defendants' father took place in 1981 pursuant to succession orders made in relation to the estate of Waweru Kihara.

13. Given the above circumstances, this suit is clearly an attempt to review the succession court orders that gave the defendants' father the suit properties absolutely. In my view, the platform on which to contest the succession orders is the succession cause in which the succession court orders were made. A fresh suit filed in the Environment & Land Court is not the arena for waging a contestation against the succession court orders. Mr Baiya, counsel for the plaintiffs argued that the plaintiffs' claim is anchored on customary trust and that this is the proper court where the claim should be ventilated. While I agree with Mr Baiya that this court is vested with jurisdiction to adjudicate disputes relating to customary trusts, I do not think what is before court is a claim under customary trust. The plaintiffs are basically contending that provision ought to have been made for the late Lydia. That, in my view, may well be a legitimate claim calling for adjudication by the

relevant court. Regrettably, the Environment & Land Court is not the proper forum for adjudication.

14. The Law of Succession Act received presidential assent on 13/11/1972 and came into operation on 11/7/1981. The Act was enacted to “amend, define and consolidate the law relating to intestate and testate succession and the administration of estates of deceased persons.” The transitional framework which is contained in **Section 98** of the Act provides as follows:

“98. All proceedings commenced under any written law or part thereof repealed by this Act shall, so far as practicable, be continued under this Act.”

15. At Paragraph 5 of their plaint, the plaintiffs pleaded thus:

“5. The registration of Kihara Waweru as proprietor of the aforesaid suit premises was pursuant to succession of the estate of Waweru Kihara (deceased), who died intestate in 1962.”

16. What is intriguing is that, despite being aware that registration of Kihara Waweru as the absolute proprietor of the suit properties was procured through court orders issued in a succession cause relating to the estate of Waweru Kihara, the plaintiffs have ignored the succession cause and want this court to review the succession court orders and infer a customary trust in the succession court orders. I do not think this court is vested with jurisdiction to entertain a suit of that nature. I think I have said enough to demonstrate that the proper court to adjudicate the plaintiffs’ claim is the succession court which distributed the estate of the late Waweru Kihara.

17. Having come to the conclusion that this is a succession dispute and this

court does not have jurisdiction to adjudicate succession disputes, I will down my tools in tandem with the principle in **Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Ltd (1989) 1 KLR in which Nyarangi JA stated thus:**

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”

18. Because the plaintiffs and the defendants are grandchildren and great-grandchildren of the late Waweru Kihara, fighting over the estate of their grandfather/great grandfather, I will not make any order relating to costs of this suit.

19. In the end, I make the following disposal orders:

a) The suit herein is struck out on the ground that it is a succession dispute relating to the estate of Waweru Kihara who died in 1962 and the dispute should be adjudicated in the succession cause in which the said estate was distributed.

b) Parties shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON

THIS 30TH DAY OF NOVEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Kihara for the Defendants

Court Assistant: Lucy Muthoni