



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ORIGINATING SUMMONS NO. 34 OF 2020

GERALD MURIUKI.....PLAINTIFF

VERSUS

BENSON MBIBUA.....DEFENDANT

RULING

1. By a preliminary objection notice dated 12.4.2021 the defendant states the suit is bad in law on account of res-judicata, the orders sought are misplaced and that the originating summons is a legal nullity, incompetent, vexatious, frivolous and an abuse of the court process.
2. By oral submissions Miss Aketch Advocate for the respondent stressed that the issues raised in the originating summons are similar to the issues raised in succession cause No. 37 of 2000. The same were determined to finality on 26.9.2019.
3. Counsel submitted that since those issues, prayers and claims were determined by a competent court the plaintiff is now abusing the court process by bringing up the same matter over the same issue for the determination in an ELC court.
4. Asked by the court what prejudice her client would suffer if the matter is heard, counsel submitted there may be no prejudice save that judicial time and resources should not be utilized in an undeserving cases.
5. On his part the plaintiff relies on his answer to the preliminary objection dated 28.4.2021 and oral submissions made in court underlining that his matter should be heard on merits and not on mere technicalities.
6. The originating summons dated 13.7.2020 brought under **Order 37 rule 1** of the **Civil Procedure Rules** seeks 4 principal prayers:-
 - a. **If the two defendants parents were related hence sharing common property.**
 - b. **If the respondents father held the suit property in trust for the plaintiff.**
 - c. **If the plaintiff is entitled to a share of the ancestral land.**
 - d. **If there was any fraud committed.**
7. It is supported by an affidavit sworn on 13.7.2020. Basically the plaintiff pleads **L.R No. Ntima/Igoki/134** was held in trust for him by the defendant's deceased father in line with Kimeru customary law on inheritance. He pleads there were agreements to purchase the suit land.
8. By an affidavit sworn on 12.4.2021 and filed in court on 13.4.2021 the defendant states a similar application was made in court in 2018 and a ruling rendered. He admits the plaintiff is a relative though a distant one. He denies any trusts over the suit land as alleged or any purchase from his late father. Further he states the applicant lives in **Gathanka L.R No. Ntima/Igoki/1934** which is a property belonging to (their) late grandfather.
9. As can clearly be seen from the pleadings there are issues of facts which are contested by both parties. Further at this juncture the court has not been supplied with any pleadings from the succession case in order to make an assessment as to whether the claim is res judicata or not.
10. **Section 2** of the **Law of Succession Act** defines the jurisdiction of the court as limited to succession proceedings only and not the determination of ownership of land. See ***Priscilla Ndubi & Zipporah Mutiga –vs- Gerishon Gatobu [2013] eKLR.***

11. It is now common knowledge that ELC and family courts have cross setting issues as per **Rule 41 (3) Probate & Administration Rules**.

12. In **Speaker of National Assembly –vs- James Njenga Karume [1992] eKLR**, the Court of Appeal held that where there is a clear procedure for redress of any particular grievance prescribed by the **Constitution** or an **Act of Parliament** that procedure should be strictly followed.

13. Parliament enacted the **Environment and Land Court Act 2011**. In line with this the **Magistrates Court Act 2015** was enacted. Pursuant to **Sections 26 (3) and (4)** of the Environment and **Land Court Act**, several magistrates were gazetted to handle land disputes. The jurisdiction and powers of the ELC court are clearly defined under **Section 13** of the **Act**.

14. Article 165 (5) (b) of the **Constitution** provides the High Court shall not have jurisdiction in respect to matters falling within the jurisdiction of the courts contemplated in **Article 162 (2)**. The High Court cannot assume jurisdiction over ELC matters. See **Republic –vs- Chief Land Registrar & Another [2019] eKLR and In Re Estate of Late M’Ikuura Mukindia – Deceased [2021] eKLR, Elizabeth Akinyi Mokkonen v Annue Buore Oginga [2018] eKLR, Isaac Kinyua & 3 Others –vs- hellen Kaigongi [2018] eKLR**.

15. Given the foregoing analysis the preliminary objection herein requires ascertainment of facts to establish if the issues were ever determined in the family. The same does not raise a pure point of law as held in **George Oraro –vs- Barak Eston Mbaja [2005] eKLR and in John Musakali –vs- Speaker of County Assembly of Bungoma & 4 Others [2015] eKLR**.

16. The same is hereby dismissed with costs.

Parties are ordered to comply with case conference procedures within 45 days.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 15TH DAY OF DECEMBER, 2021

In presence of:

Gerald Muriuki in person

No appearance for defendant

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE