



**REPUBLIC OF KENYA**

**IN ENVIRONMENT AND LAND COURT AT MERU**

**ELC PETITION NO. 12 OF 2018**

**IN THE MATTER OF:**

**ARTICLES 10, 22, 23, 35, 40, 60, 63, 69, 155, 232, 234, 236, 258 AND CHAPTER 6 OF THE CONSTITUTION OF KENYA, 2010.**

**BETWEEN**

**CECILIA KATHUNI RINTAUGU.....PETITIONER**

**VERSUS**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, MERU.....2<sup>ND</sup> RESPONDENT**

**M'ARIMI M'RINKANYA alias**

**FRANCIS M'ARIMI M'RINKANYA .....3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....INTERESTED PARTY**

**RULING**

**Background**

1. This matter was filed by way of a **petition on 21/11/2018**, where the petitioner is claiming entitlement to land parcel No.Abogeta/U-Kithangari/ 377 measuring 3.33 Ha. (the suit land). The petitioner avers that this land was owned by her father one Paul M'Rintangu who died in 1962, that she is the only child and beneficiary of her father's estate but through collusion, the suit land went into the hands of one Kagutu Mwiti and one M'Arimi M'Rinkanya (3<sup>rd</sup> Respondent). She is seeking orders inter alia that she be declared as the owner of the suit land and the said land be transferred to her.

2. The petitioner also filed a **Notice of Motion** contemporaneously with the petition where she is seeking inter alia, conservatory orders to prevent the respondent from entering the land and for 1<sup>st</sup> respondent to release the records appertaining to the suit land.

3. Before the hearing of the application and the petition, the 3<sup>rd</sup> respondent filed a **Preliminary Objection on 10/12/2018** along with grounds in support thereof, plus further grounds filed on 11.2.2019 of which, the Preliminary Objection is the subject of this ruling.

**The Preliminary Objection**

**Case for the 3<sup>rd</sup> Respondent**

4. The grounds raised by the 3<sup>rd</sup> respondent in the preliminary objection are:-

i) *"The 3<sup>rd</sup> respondent was issued with a certificate of title on 22<sup>nd</sup> April, 1974 confirming him as the registered absolute proprietor of L.R No. ABOGETA/U-KITHANGARI/377 and his certificate of registration and or title is indefeasible.*

ii) *Under the limitation of Actions Act Cap 22 laws of Kenya, an action to recover land must be brought within 12 years from the date in which the right of action accrued. The 3<sup>rd</sup> respondent having been registered as the absolute proprietor of L.R.NO.*

ABOGETA/U-KITHANGARI/377 44 years ago, the applicant has no cause of action against the 3<sup>rd</sup> respondent.

iii) The applicant's application is a fishing expedition for grounds of collusion or fraud to prove her case of collusion between the Registrar of land and the 3<sup>rd</sup> respondent.

iv) The 3<sup>rd</sup> respondent right to property is protected under article 40 of the constitution of Kenya 2010, the Land Registration Act No. 3 of 2012, the Registered Land Act cap 300 Laws of Kenya (now repealed) and other laws. The applicant has not pleaded, particularized and or specified any ground where the 3<sup>rd</sup> respondent and the Registrar of land colluded in registering the suit property in favour of the 3<sup>rd</sup> respondent.

v) In any event, the 3<sup>rd</sup> respondent having been continuously in possession and occupation of the suit land for 56 years since the death of Paul Rintaugu, he has acquired unchallengeable title to the property under the doctrine of adverse possession.

vi) The application is without merit, is baseless, malicious, vexatious and otherwise an abuse of the court process.

vii) The issue of inheritance of the suit property L.R No. ABOGETA/U-KITHANGARI/377 was determined by a competent court in succession case No.16 of 1966 at Nkubu and there has not been any appeal against that determination. The matter is res-judicata.

viii) The National Land Commission has no mandate and or jurisdiction over L.R No ABOGETA/U-KITHANGARI/377 which is and has always been private land. The National Land Commission should be struck out of the suit, in any event".

5. During the hearing of the P.O, it was argued for the 3<sup>rd</sup> respondent that the main grounds for consideration are *jurisdiction and limitation of actions*. On jurisdiction, it was argued that the petitioner wants to inherit land yet the issue of inheritance was dealt with in **Nkubu case No. 16 of 1966**. It is averred that the petitioner and her mother participated in the succession case of which they lost. The 3<sup>rd</sup> respondent has urged the court to consider the contents in his replying affidavit and the affidavits of Joseph M'Makatuimo and Mutea Mutuambugu both who were witnesses in the succession case. 6. The 3<sup>rd</sup> respondent has also urged the court to see the copy of search in respect of the suit land availed by the petitioners which confirms that there was a succession cause. On this point the 3<sup>rd</sup> respondent has relied on the case of **Kenya Ports Authority VS Modern Holdings (E.A) Limited (2017) Eklr.**

6. The 3<sup>rd</sup> respondent contends that the issue of inheritance was heard by a court of competent jurisdiction and that the petitioner has not rebutted the averments of the 3<sup>rd</sup> respondent to the effect that there was a succession cause.

7. On limitation it was argued by the 3<sup>rd</sup> respondent that a claim based on land should be brought within 12 years. In the present case, the 3<sup>rd</sup> respondent became the registered owner of the land in 1974 and nowhere in the petition has the petitioner stated the time of discovery of the alleged fraud. He also contends that no extension of time was sought.

#### **Case for the Petitioner**

8. In opposition to the preliminary objection, the petitioner filed grounds of opposition on 23/9/2019 (dated 20/9/2019) where he states as follows:-

i) This honourable court has jurisdiction and powers to hear and determine the issues on land matters within the meaning of article 162 (1) & (2) (b) of the constitution of Kenya.

ii) There is no legal time limitation to bar to a party from seeking enforcement of constitutional rights.

iii) The petition raises very serious constitutional issues that can only be determined through a hearing of the petition on merit hereof.

iv) It is trite law that a notice of Preliminary Objection must be based on points of law and Not facts. Therefore, this preliminary Objection must fail.

v) The notice of preliminary objection is an abuse of court process to delay the conclusion of the petition as ordered by the court and must be rejected.

vi) "By a letter dated 20<sup>th</sup> November 2017, the petitioner's advocates wrote to the **National Land Commission** the interested party seeking information and raising complaint in respect of the said premises. The petitioner avers that by a letter dated 9<sup>th</sup> January,2018, National Land Commission the interested party wrote to the 2<sup>nd</sup> respondent requesting for various documents to take action hereof.

vii) The petitioner avers that by a letter dated 18<sup>th</sup> January 2018, the interested party's Ag. County Coordinator (NLC) wrote to the chairman of the interested party giving details of how the said land - premises was transferred to the 3<sup>rd</sup> respondent in reference to land registry available records hereof. However, the petitioner avers that she was not the petitioner in succession cause no.16 of 1966 at Nkubu.

viii) The petitioner agrees with the conclusion of the interested party in its letter dated 9<sup>th</sup> January 2018 to the effect that she is entitled to a share of the said Land reference No.Abogeta/U-Kithangari/377 measuring 3.33 Ha in Imenti South Consistency in Meru county.

ix) The petitioner avers that the respondent must comply with Article 35 of the constitution of Kenya to release to court and the petitioner any available records, information, including green cards and copies of the relevant documents relating to land Reference No.Abogeta/U-Kithangari/377 measuring 3.33 Ha in Imenti South Constituency in Meru County.

x) The petitioner avers that the respondents must comply with Article 63 of the Constitution of Kenya and have the said land revert back to the petitioner hereof.

xi) The petitioner avers that the respondents will infringe and or are likely to infringe the petitioner's constitutional rights to property under Articles 40 and 63 of the constitution of Kenya unless the orders prayed for herein are granted.

xii) The respondents have failed to comply with Article 10 of the constitution of Kenya by failing to make decisions of the suit premises in a transparent, accountable, fair and equitable manner.

xiii) THAT this honourable court be pleased to grant conservatory orders to prevent the respondents from transferring, subdividing, charging, selling, bequeathing and or affecting the current status of Land Reference No.Abogeta/U-Kithangari/377 measuring 3.33 Ha in Imenti South Constituency in Meru County pending the hearing and determination of this petition.

xiv) THAT this honourable court has jurisdiction to order the 1<sup>st</sup> Respondent to release to court and the petitioner any available records, information, including green cards and copies of the relevant documents relating to land reference No.Abogeta/U-Kithangari/377 measuring 3.33 Ha in Imenti South Constituency in Meru county.

xv) THAT the notice of preliminary objection ought to be dismissed with costs".

9. During the hearing of the case, it was urged for the petitioners that the issue of succession is a question of fact and that the court does not even have proceedings of the said case and that the NLC document is a factual one to be relied during the hearing. It is further argued that the matter was coming up for the hearing of the P.O and hence the 3<sup>rd</sup> respondent should not refer to their affidavits.

10. On the issue of limitation, it was argued that when there are issues of fraud as in the instance case, then time runs from the date when the claimant discovered the fraud and not from date of transfer of the land.

11. The petitioner avers that the issues raised in the P.O cannot be dealt with as points of law and that the P.O here in is based on factual sources.

#### **Case for the 1<sup>st</sup> - 2<sup>nd</sup> Respondent**

12. The counsel for these respondents informed the court that they will leave the matter to the court, neither supporting nor opposing the P.O.

13. The Interested party (National Land Commission) has not appeared in the matter so far.

#### **Determination**

14. The main issues for determination are whether this court has jurisdiction to hear the matter and whether the claim is statute barred.

#### **Jurisdiction**

15. In **owners of the motor vessel "Lillians" VS Caltex Oil (Kenya) limited (1989) KLR 1, Nyarangi JA**, had expressed himself as follows:-

*"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics..... 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 the moment it holds the opinion that it is without jurisdiction..."*

16. In the Supreme Court of Kenya Case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the court expressed itself as follows on matters of jurisdiction:

*"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law".*

17. The question of jurisdiction is therefore important and can be raised at any stage of the proceedings as was clearly stated in the Court of Appeal case **Kenya Ports Authority v. Modern Holdings (E.A) Limited (2017) Eklr** while quoting their own earlier decision in **Adero and Anothers. Ulinzi Sacco Society Limited (2002)1 KLR.**

18. In the present matter the 3<sup>rd</sup> respondent argues that the issue of inheritance of the suit property L.R No. Abogeta/U-Kithunguri/377 was determined by a competent court in Nkubu succession cause NO.16 of 1966. The petitioner avers that this is a factual issue which ought to be subjected to trial.

19. A scrutiny of the petitioners pleadings reveals that the petitioner is claiming the property of her father in her capacity as a beneficiary of the estate of her father who is deceased:- See paragraph 6,7,8 and 9 in the petition of which I find it necessary to reproduce paragraph 9 where it is stated that:

***“The petitioner was entitled by law to inherit the entire premises known as land reference No.Abogeta/U-Kithunguri/377 measuring 3.33 Ha in Imenti South constituency in Meru county.”***

20. In Re-Estate of **Alice Mumbuo Mutea (deceased) (2017) EKLR** it was held thus;

***“The law of succession Act and the rules made there under are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased , the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested (emphasize added). The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the assets”.***

21. Even without delving into the issue as to whether there was a succession cause, it is crystal clear that petitioner is claiming the suit land as a beneficiary of the estate of her father. However, she has not demonstrated that she has the legal mandate to sue as she is not the legal representative of her father’s estate. What more, the issue of inheritance of the property of a deceased person is the domain of the probate court. Even if the dispute herein is touching on 3<sup>rd</sup> parties like 3<sup>rd</sup> respondent and a person known as Kaguti Mwiti, the fact remains that the estate of Paul Rintaugu can only be represented by the legal representative of the deceased pursuant to the relevant statute which is the law of succession Act.

22. In the case of **Edward Mwaniki Gaturu and another vs Hon. Attorney General and 3 others (2013) EKLR, Lenaola J** (as he then was) stated that:

***“It must be remembered that one of the principles of statutory interpretation is the presumption that statutes enacted by parliament are constitutional unless otherwise proved.....”***

What resonates from the above mentioned case law is that the written law has to be respected. It is therefore not enough for the petitioner to disregard the applicable law in respect of the property of a deceased person.

23. In the instant suit, a question arises as to whether the estate of Paul M’Rintaugu was distributed. This court has taken cognizance of the fact that the issue of succession is captured in the green card availed by the petitioner which shows that the suit land landed into the hands of Kagutu Mwiti via succession. The 3<sup>rd</sup> respondent has given a detailed account of how the succession case was conducted in the presence of petitioner and her mother at Nkubu court. The court has been urged by the petitioner to note that the issue at hand is in respect of the ruling on the P.O hence reference should not be made to the affidavits of the respondents. However, the 3<sup>rd</sup> respondent has contended that the application is unmerited which means that the affidavits in response thereof form points of reference.

24. In response to the issue of the succession case, all that the petitioner states is that she was not the petitioner in succession cause No.16 of 1966 at Nkubu. She doesn’t deny that she was aware of the cause and that she participated in those proceedings.

25. I am inclined to believe that the issue of jurisdiction raised by the 3<sup>rd</sup> respondent is a valid point of law. It is clear that the issue of distribution of the estate of deceased was canvassed in a succession cause. If the case didn’t go in favour of the petitioner’s family, recourse was in a review or appeal. I conclude that on this point of jurisdiction, the Preliminary Objection succeeds.

### **Limitation**

26. This court is called upon to determine whether petitioner’s claim is time barred by the statute of limitation. The green card availed by the petitioner indicates that the 3<sup>rd</sup> respondent became the registered owner of the suit land on 17/10/1973 and the land certificate was issued on 22/4/1974 which is 44 years ago up-to the time the suit was filed.

27. Section 7 of the limitations of action Act cap 22 laws of Kenya 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”.***

28. Section 26 thereof provides for the extension of the limitation period in cases of fraud or mistake, where by the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake.

29. Nowhere in her pleadings has the petitioner indicated the period of the discovery of the alleged collusion or fraud.

30. In the case of **Peter Kimani Njenga VS Mugo Kamabuni Mugo and 3 others (2015) eKLR** the court cited the case of **Bosire Ongero vs Royal media services (2-15) eKLR** where the court held that

*“The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same.....”*

31. In the case **Meru ELC No.15 of 2018 Joshua Ngatu vs Jane Mpinda and 3 others**, while dealing with the question of “*rationale of the statute of limitation*”, I stated that;

*“The rationale of the statute of limitation was aptly captured in the East African Court of Justice appeal case No. 2 of 2012, Attorney General of Uganda & Another Vs. Omar Awadh & 6 Others (2013)Eklr where it was stated as follows; Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future)”.*

32. This is a case where the petitioner admits that the father died decades ago in 1962, precisely 57 years ago! I have no doubts that petitioner was aware of the succession cause of 1966 but now 53 years down the line, she is claiming her father's property. In the like manner of my conclusion in the Joshua Ngatu case (supra), I find that the logical conclusion to make is that petitioner's claim is stale and is time barred by the statute of limitation.

33. One more point, the petitioner ought to ask for the specific documents he desires from the relevant offices. Only after there is a deliberate withholding of the said records can the petitioner seek redress in court.

34. All in all, I find that the preliminary objection is merited. Both this suit and the application filed on 21/11/2018 are hereby struck out with costs to the 3<sup>rd</sup> respondent.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 22<sup>ND</sup> JANUARY, 2020 IN THE PRESENCE OF:-**

C/A: Kananu

Ouma holding brief for Kurauka for petitioners

Kiugu for 3<sup>rd</sup> respondent petitioner

3<sup>rd</sup> respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**