



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO 356 OF 2017**

**JOSEPH GICHERU KARANJA (suing as the legal representative of the**

**Estate of the late FRANCIS GICHERU KARANJA).....PLAINTIFF**

**VERSUS**

**MBURU KARANJA KABUCHIA.....1<sup>ST</sup> DEFENDANT**

**KAMAU KARIUKI.....2<sup>ND</sup> DEFENDANT**

**PETER KAMANDE (Defending the suit on his behalf and on the behalf of the**

**legal representative of the Estate of the 1<sup>st</sup> Defendant).....3<sup>rd</sup> DEFENDANT**

**DAVID KANGETHE KIMANI.....4<sup>th</sup> DEFENDANT**

**RULING**

1. The Plaintiff, by a Plaint dated the 5<sup>th</sup> April 2017 instituted the instant suit against the Defendants wherein he sought for the rectification of the register to have titles No. Nyandarua/Njabini/4081-4089 cancelled and reverted to No. Nyandarua/Njabini/288 as earlier decreed by the Court. The Plaintiff also sought that there be excision of 10 acres of land out of land parcel No. Nyandarua/Njabini/288 and that the registration of the same be in his name as the legal representative of the Estate of the Original Plaintiff namely Francis Karanja, Gicheru. He had also sought for costs of the suit and any other relief that the Court would deem fit to grant.

2. Initially, the Defendants had appeared in person, wherein whilst the matter was still pending, on the 2<sup>nd</sup> October 2018, the Court had been informed that the 1<sup>st</sup> Defendant had passed away.

3. The Defendants subsequently instructed Counsel who filed both their joint statement of defence dated the 18<sup>th</sup> December 2018, on the 19<sup>th</sup> December 2018, and an Application for the substitution of the 1<sup>st</sup> Defendant with the 3<sup>rd</sup> Defendant, filed on the 13<sup>th</sup> May 2019 on which day where parties recorded a consent to the effect;

i. That the Application dated 11<sup>th</sup> May 2019 be allowed summarily in respect of prayer (a).

ii. That the suit against the 1<sup>st</sup> Defendant which abated on the 2<sup>nd</sup> February 2019 be revived.

4. The said consent was adopted as the Order of the Court wherein the matter was fixed for hearing, Parties having complied with the provisions of Order 11 of the Civil Procedure Rule.

5. Pending the hearing of the matter, the Defendants filed a Notice of Preliminary Objection on the 11<sup>th</sup> November 2019 in which they sought for the Plaintiff's suit to be dismissed with costs for reasons that the original proprietor of land parcel No. Nyandarua/Njabini/288, which was later sub-divided giving rise to Nyandarua/Njabini/4081-4089 had died on the 2<sup>nd</sup> February 2018 before the Plaintiff's Decree had been implemented. That all the land against which the Plaintiff's decree would affect, was now vested in the Estate of the deceased Mburu Karanja Kaguchia and therefore the proper forum to canvas the Plaintiff's right was in a Succession Court and not against the Defendants who were not party to decree in PMCC 307 of 1997.

6. This is the Application that the Court seeks to determine in the first instance, as the same seeks to have the Plaintiff's suit dismissed with costs. The same There having been a consent to have the Application disposed of by way of written submissions, parties filed their respective submissions which I shall address as herein under;

7. The Defendants' submission was that the registered owner of land parcel No. Nyandarua/Njabini/288 which was later subdivided into land parcels No. Nyandarua/Njabini/4081-4089, died on 2<sup>nd</sup> February 2018 before the Plaintiff's Decree was implemented. That all the lands parcels against which the Plaintiff's Decree would affect were now vested in the estate of the deceased and therefore the right forum for the Plaintiff to canvas this rights as vested in the Decree should be in a Succession Cause over the estate of the deceased Mburu Karanja Kaguchia and not in the suit against the Defendants or parties who were not parties to Nyahururu PMCC 307 of 1997, hence the suit filed cannot stand against the Defendants.

8. That further, the Plaintiff's case was premised on Nyahururu PMCC 307 of 1997 in which the Plaintiff's father was the Plaintiff whilst the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's father, Mburu Karanja Kaguchia and who was the registered owner of land parcel No. Nyandarua/Njabini/288, was the Defendant.

9. That before Mburu Karanja Kaguchia passed away, he had subdivided No. Nyandarua/Njabini/288 which resulted to No. Nyandarua/Njabini/4081-4089 the subject matter in this case and which parcels of land had been registered in his name.

10. That the Plaintiff's claim in the present case had been to have the green cards to the suit lands cancelled and the land reverts to No. Nyandarua/Njabini/288, from which the plaintiff could get his share of 10 acres as decreed in Nyahururu PMCC 307 of 1997.

11. The Defendants' submission was that the Decree in Nyahururu PMCC 307 of 1997 was dated 7<sup>th</sup> November 2006 and had been obtained while the Defendant in that case was still alive, but that before the Decree could be implemented, the Defendant had passed away.

12. That it was trite law that when a person died, all his property became part of his estate and therefore parcels of land No. Nyandarua/Njabini/4081-4089, which are the subject matters of this case became the properties in the estate of the deceased Mburu Karanja Kaguchia upon his death pursuant to the provisions of Section 3 of the Law of Succession Act.

13. That it was therefore incumbent of the Plaintiff to move the appropriate Succession Court to establish his right or rights over the estate of the deceased in respect of the lands he lay claim to either as a beneficiary, buyer, or in any other way that his right exists. That it was only after the establishment of his right in a Succession Cause, could he then move the appropriate Court for implementation of the determined right.

14. That the Environment and Land Court or any Civil Court could not adjudicate the Plaintiff's' claim before such right was properly and appropriately determined in a Succession Court.

15. The Defendants' submission was further, that they had raised the issues on their Preliminary Objection at paragraphs 20, 21 and 22 of their defence dated the 18<sup>th</sup> of December 2018 and therefore the Plaintiff was aware of the same.

16. That further as the matter stood, the Defendants had not been adjudicated as administrators of the estate of the deceased Mburu Karanja Kaguchia. They sought for the preliminary objection to be upheld and the Plaintiff's' case dismissed with costs.

17. The Plaintiff's submission in opposition of the Preliminary Objection and without going into the gist of the main suit is that, vide a retrial in Nyahururu PMCC 307, judgment had been entered in favour of the his mother one Veronica Njeri Karanja, on behalf of her deceased husband's estate, where the Court had decreed that she be given 10 acres of land to be excised out of the suit land No. Nyandarua/Njabini/288.

18. That the Decree could not be executed for reason that the Green Card to the suit land could not be traced at the Nyandarua/ Samburu District Land Registry and by the time it was traced in the year 2000, the 1<sup>st</sup> Defendant (deceased) had already subdivided the suit land resulting in parcels No. Nyandarua/Njabini/4081-4089.

19. That vide a Notice of Motion dated 23<sup>rd</sup> August 2005, Veronica Njeri Karanja had sought for the rectification of the register to have title No. Nyandarua/Njabini/4081-4089 cancelled and reverted to parcel No. Nyandarua/Njabini/288 for ease of implementation of the Court's judgment.

20. That the trial Magistrate, via a ruling dated 22<sup>nd</sup> March 2006 found that she had no jurisdiction to order for the rectification of a Register and directed that the matter be presented before the Environment and Land Court for determination by which time the 1<sup>st</sup> Defendant had already fraudulently transferred 3 out of the 9 subdivisions to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively, which portions of land formed part of the 10 acres decreed to the initial Plaintiff.

21. The Plaintiff submitted that the jurisdiction of the Court, which is set out under Article 162 (2)(b) of the Constitution and Section 4 as read together with Section 13 the Land Court Act, is to determine disputes relating to title to land, occupation of land and all related and incidental claims and rights.

22. That the Plaintiff filed herein was one where the 1<sup>st</sup> Defendant's title to the suit land was disputed and where ownership of the parcel of the said land was the subject in issue.

23. That the jurisdiction of the Probate and Administration Court was limited to administration and distribution of the free estate of a deceased person and therefore, it had no jurisdiction to decide disputes of ownership of land and/or property in general. Reliance was placed in the decided cases of **Re Estate of Salome Mwangi Waweru (deceased) [2018] eKLR**, **Alexander Mbaka vs Royford Muriuki Rauni & 7 Others [2016 eKLR]** and **Re Estate of Njuguna Igwima [2017] eKLR**.

24. That the 1<sup>st</sup> Defendant died before the final determination of this suit which was filed to challenge his title to the original suit land and which title he had purported to transfer to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

25. That the 1<sup>st</sup> Defendant's estate was now enjoined in the suit on his behalf through the 2<sup>nd</sup> Defendant as his personal representative. The preliminary objection therefore lacked merit and the same ought to be dismissed with costs to the plaintiff, to be paid by the defendants jointly and severally.

#### **Determination.**

26. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd-v- West End**

**Distributors Limited (1969) EA. 696** was stated to be 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 point 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.”

27. In this Application, the Defendants/Applicants' seek inter alia that the Plaintiff's suit be dismissed with costs as the Court had no jurisdiction to hear and determine the present dispute which was purely a succession dispute in the first instance. That it had been clear from the Plaintiff's pleadings and prayers herein, that they were challenging the registration of the 1<sup>st</sup> Defendant as the sole proprietor of the suit property which was vested in the Estate of the deceased Mburu Karanja Kaguchia from a judicial process from another Court in PMCC 307 of 1997.

28. I find the issues for determination as follows;

i. Whether the suit land against which the Plaintiff's decree would affect is vested in the Estate of the deceased 1st Defendant and therefore the matter should be tried in a Succession Court

ii. Whether the Defendant's Preliminary Objection is sustainable

29. Order 24 Rule 4 of the Civil Procedure Rules provides as follows:

Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

30. The deceased 1<sup>st</sup> Defendant in this matter was substituted by the 3<sup>rd</sup> Defendant on the 13<sup>th</sup> May 2019 as his legal representative as the cause of action survived and/or continued and therefore the 3<sup>rd</sup> Defendant by law was made a party to the present suit to proceed with the same henceforth.

31. In the decided case of **James Aggrey Nyapola Michael & Another vs Rosemary Irene Wanga [2014] eKLR** the Environment and Land Court held that, intestate and testamentary succession to, and the administration of the estates of the deceased persons were governed by the Law of Succession Act, which under Section 47 gave the High Court (read ELC) jurisdiction to deal with any matter arising under the Act. The Land and Environment Court in this regard, therefore, had concurrent jurisdiction to hear and determine disputes of succession relating to land.

32. **A Preliminary Objection** therefore is an Application that raises pure points of law, which are argued on the assumption that all facts pleaded by the other side are correct. The same cannot therefore be raised if any facts have to be ascertained from elsewhere or the Court is called upon to exercise judicial discretion.

33. In the case of **Quick Enterprises Ltd. vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

34. In the case of **Oraro vs Mbaja(2005) 1KLR 141**, the Court held that:-

**“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.**

35. In the present matter, all the three grounds contained in the Notice of Preliminary Objection as well as the Defendants/Applicants’ written submissions did not clearly spell out the actual point of law or the defect that was being canvassed. It was the Defendant’s submission in support of their Preliminary Objection that upon the death of the 1<sup>st</sup> Defendant, all his property became part of his estate and therefore parcels of land No. Nyandarua/Njabini/4081-4089, which are the subject matters of this case became the properties in his estate pursuant to the provisions of Section 3 of the Law of Succession Act. That it was therefore incumbent of the Plaintiff to move the Succession Court and not the Land and Environment Court, to establish his right or rights over the estate of the deceased in respect of the lands he lay claim.

36. It only became clear in the Plaintiff/ Respondent’s response to the Preliminary Objection, that the Applicants/Defendants had not cited the fact that 1<sup>st</sup> Defendant (deceased) had subdivided the suit parcel of land No. Nyandarua/Njabini/288 which resulted into No. Nyandarua/Njabini/4081-4089, during the pendency of the matter before Court.

37. A party coming to court seeking a remedy or to have a claim by the other side struck out ought to make full disclosure of material facts or the specific law that has been breached. In my view, I find that the dispute herein is not on the intestate and testamentary succession to, and the administration of the estate of the deceased person keeping in mind the Provisions of Order 24 Rule 4 of the Civil Procedure Rules, but rather on the legality of the ownership of title that the 1<sup>st</sup> Defendant (Deceased) held to the suit land being No. Nyandarua/Njabini/288 which title has been attacked by the Plaintiff herein and which in order to ascertain whether or not it was legally held by the 1<sup>st</sup> Defendant, the Court would be required to **ascertain factual information which stands to be tested by rules of evidence.**

38. **In the case in Richard Ncharpi Leiyagu –vs- Independent Electoral and Boundaries Commission & 2 Others CA No. 18 of 2013**, the Court of Appeal sitting in Nyeri held that;

**“The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there would be proportionality.”**

39. *In the case in Omondi vs. National Bank of Kenya Ltd & Others {2001} eKLR 579; [2001] 1 EA 177*, the Court held that:

“..... A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.’

40. I find that the Defendants’ preliminary objection was not based on a pure question of law but on facts that were contested and could only be answered by reference to facts and [evidence](#) as well as inferences arising from those facts. To this effect thereof the Preliminary objection lacks merit and is herein dismissed with costs to the Plaintiff.

**Dated and delivered at Nyahururu this 3<sup>rd</sup> day of June 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**