



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

CIVIL SUIT NO. 25 OF 2012

PETER KAMAU KIMANIPLAINTIFF

VERSUS

GRACE GAITAU KIMANI 1ST DEFENDANT

DANIEL MUIRURI KIMANI 2ND DEFENDANT

KENNEDY MAINA KIMANI 3RD DEFENDANT

KIMANI NJUGUNA (Deceased) 4TH DEFENDANT

Represented by HANNAH NYAMBURA KIMANI

RULING

The issue for my determination in this application is whether this Court is seized of the requisite jurisdiction to determine the 1st and 3rd defendant's Notice of Motion dated 27th October 2015 seeking the following orders:-

- 1. That a temporary injunction do issue restraining the plaintiff, his agents, servants and/or employees from collecting rent, leasing, entering, trespassing, undertaking acts of waste and/or in any other way interfering with the suit premises known as L.R MAKUYU/KIMORORI/BLOCK 111/89 pending the hearing and determination of the suit herein.***
- 2. That the rental proceeds of the rental houses existing upon the parcel or piece of land known as L.R MAKUYU/KIMORORI/BLOCK 111/89 to the tune of approximately Ksh. 150,000 or thereabout be deposited in an interest earning account to be opened by the advocates for the parties herein pending the hearing and determination of this suit or until further directions of the Court.***
- 3. That the costs of this application be in the cause.***

As I am not determining the application at this stage due to the objection raised by the plaintiff regarding this Court's jurisdiction to handle the same, I need not go into the basis of the application itself. Suffice it to state that the land parcel No. MAKUYU/KIMORORI/111/89 (the suit property) is currently registered in the names of the plaintiff who is a son to the 1st defendant who is the 2nd wife of the 4th defendant **KIMANI NJUGUNA** (deceased) and has been substituted by his 1st wife **HANNAH NYAMBURA**. It is the case of the 1st and 3rd defendants that although the suit property is registered in the names of the plaintiff, he only holds it in trust for the house of the deceased's 2nd wife who is the 1st defendant.

The plaintiff's case, as per his replying affidavit, is that the suit property was registered in his names in 1988 and developed by his late father. That there is nothing in the title deed to the suit property indicating that it is registered in the plaintiff's names in trust for any person.

On her part, the 4th defendant who is the 1st wife to the deceased filed ground of opposition to the application and raised a Preliminary Objection that the suit herein seeks reliefs whose jurisdiction lies in the High Court Civil Division and not the Environment and Land Court because the dispute relates to property belonging to a deceased person before probate has been done. That is the gist of this ruling.

Submissions have been filed by counsel for the plaintiff Mr. Gathirwa, counsel for the 1st and 3rd defendants Mr. Kanyi and counsel for the 4th defendant Mr. Mugo.

I have considered the Preliminary Objection and the Submissions by counsel.

A Preliminary Objection, as was held in the case of **MUKISA BISCUIT COMPANY LIMITED VS WEST END DISTRIBUTORS (1969) E.A 696**

“... consists of a point of law which has been pleaded, or which arises by clear implications 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”

The Preliminary Objection raised herein is that this suit involves the property of a deceased person and therefore, the jurisdiction lies in the High Court and not the Environment and Land Court. Any issue challenging a Court or Tribunal's jurisdiction to handle a matter before it is a matter of law and therefore is a proper Preliminary Objection as defined in the **MUKISA** case (supra). An objection on jurisdiction must ordinarily be determined at the earliest opportunity because where a Court or Tribunal determines that it has no jurisdiction, it must down its tools – **OWNERS OF THE MOTOR VESSEL 'LILLIAN S' VS CALTEX OIL KENYA LTD 1989 K.L.R 1**. In that case, NYARANGI J.A stated as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter, is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

Clearly therefore, if this Court lacks jurisdiction to handle this matter, it must come to an end by the downing of my tools and taking no further action.

Looking at the pleadings herein however, it is obvious to this Court that the Preliminary Objection raised by the 4th defendant questioning this Court's jurisdiction is without merits. From the amended plaint filed herein on 14th December 2012, the plaintiff seeks the following orders against the defendants:-

- 1. The registration of the 1st defendant as proprietor of the land parcel MAKUYU/KIMORORI/BLOCK 111/89 entered on 9th November 2012 and the title deed issued on the same day be cancelled and the registration thereof and title do revert and remain in the same names of the plaintiff.***
- 2. A permanent injunction do issue restraining the defendants, their agents, servants and/or employees or people working under them from collecting rent, entering, undertaking acts of waste upon, or in any other way interfering with the plaintiff's proprietorship, ownership, possession and use of land parcel MAKUYU/KIMORORI/BLOCK 111/89.***
- 3. Costs of the suit and interest thereon.***

Section 13 (1) and (2) of the Environment and Land Court Act provides for the jurisdiction of this Court as follows:-

13 (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 written law 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 relating to environment and land including disputes -

(a) relating to environmental planning and protection, trade, 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, chases in action or other instruments granting any enforceable interests in land; and

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

Under **Section 13 (7)** of the same Act, among the orders that the Court can grant are interim or permanent preservation orders including injunctions.

From the pleading in this case, there can be no doubt that both the remedies sought in the main suit and those sought in the Notice of Motion dated 27th October 2015 are well within the jurisdiction of this Court and the Preliminary Objection challenging such jurisdiction can only be described as mischievous. Indeed it is not lost on this Court that on 6th November 2013, this Court heard and dismissed a similar application filed by the plaintiff herein. This Court’s jurisdiction to handle this dispute was never raised.

In his submissions on behalf of the 4th defendant, Mr. Mugo advocates states as follows:-

“This Honourable Court has not been seized of power to determine ownership of the property of a deceased person”

Counsel is of the view that this Court is being asked to sit as a Probate Court, apply the Probate and Administration Rules and issue a grant under the law of Succession Act. However, that is not the case. It is common knowledge that by an application dated 21st May 2015, the 4th defendant filed an application to be substituted in place of the deceased **KIMANI NJUGUNA** having obtained a limited Grant ad Litem in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 812 of 2015** for purposes of defending this suit. That application was not opposed by the plaintiff and was allowed on 13th July 2015. That order clothed the 4th defendant with the powers to defend this suit on behalf of the Estate of her deceased husband **KIMANI NJUGUNA**. This suit, as is now clear from the pleadings, seeks to determine the ownership of the suit property and in the meantime, the application subject of this Preliminary Objection seeks to have the suit property preserved and the income accruing therefrom channeled in a particular account pending the hearing and determination of the main suit. The suit does not seek the distribution of the deceased’s Estate as suggested by the 4th defendant.

In the circumstances therefore, this Court has the requisite jurisdiction to determine both the suit and the Notice of Motion dated 27th October 2015. The Preliminary Objection questioning this Court’s jurisdiction is wholly un-meritorious and as was held in the **MUKISA** case (supra), its raising was **“improper”** and did –

“..... nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”

This Court was minded to penalize the 4th defendant with an order to pay costs for raising this improper Preliminary Objection. However, in view of the fact that the parties are family, I will not take that route. I must express my displeasure to both the parties and tier advocates about the numerous interlocutory applications being filed in this suit many of which are not really aiding the parties in expeditiously resolving the main dispute before this Court which should be their overriding objective. I would recommend to them to explore ways of withdrawing all such applications that are still pending and arriving at some status quo agreeable to them in relation to the suit land, comply with pre-trial directions and set down the main suit for hearing and determination. I think that is in the best interest of all the parties herein and will certainly save judicial time.

Having said so, however, I find that the Preliminary Objection on this Court's jurisdiction is mis-placed. It is hereby dismissed with no order as to costs.

B.N. OLAO

JUDGE

3RD JUNE, 2016

Judgment delivered, dated and signed in open Court this 3rd day of June 2016.

Mr. Gathirwa for Plaintiff present

Mr. Waithaka for Mugo for 4th Defendant present

Mr. Kanyi for 1st and 3rd Defendants absent

2nd Defendant present in person.

B.N. OLAO

JUDGE

3RD JUNE, 2016