



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 357 OF 2015

JAMES MWANIKI MUNYI.....1ST PLAINTIFF/APPLICANT

JOHN MILTON NYAGAH.....2ND PLAINTIFF/APPLICANT

VERSUS

LUCY WANJIKU NYAGA Alias LUCY WANJIKU MAINA.....DEFENDANT/RESPONDENT

RULING

By consent of the parties herein, it was agreed that the plaintiffs' Notice of Motion dated 18th December 2015 and the defendant's Preliminary Objection dated 5th February 2016 be canvassed together. This ruling is therefore in respect to both the plaintiffs' Notice of Motion and the defendant's Preliminary Objection.

The plaintiffs suing both as the legal representatives of the Estate of **MUNYI NGIGE** Alias **MUNYI NGIGE NDIRANGU** (deceased) and **ITUMU MITAMBO** Alias **ITUMU MITAMBO NDIRANGU** (deceased) and also in their "*own capacity*" filed this suit seeking the following orders against the defendant:-

(a) A declaration that the defendant holds the following land parcels in trust for herself as well as for the Estate of the deceased i.e. land parcels No. MBEERE/KIRIMA/2910, 2912, 3516, 3518 3520, 3527, 3529, 3535, 3539, 3540, 4035, 4036, 4032, 4033, 4034, 4037, 4038, 4039, 4040 and 4041 (hereinafter the suit land and which are all resultant sub-divisions of land parcel No. MBEERE/KIRIMA/2056.

(b) An order that the trust held by the defendant be determined and parcels of land whose area is equal to a third of the area of the original land parcel No. MBEERE/KIRIMA/2056 be transferred to each of the Estates of the deceased.

(c) Costs of the suit.

The plaintiffs' case is premised on pleadings that the original land parcel No. MBEERE/KIRIMA/2056 was ancestral land belonging to the **NDIRANGU** family which comprised of the two deceased named above. **ESTON NYAGA NDIRANGU** who is the deceased husband of the defendant and **SAMUEL KARANI NGIGI** (also deceased) and who were cousins. That **ESTON NYAGA NDIRANGU** had the land parcel No. MBEERE/KIRIMA/2056 illegally and fraudulently transferred to himself while claiming to hold it in trust for himself and his two cousins **ITUMU MITAMBO** Alias **ITUMU MITAMBO NDIRANGU** and **MUNYI NGIGE** Alias **MUNYI NGIGE NDIRANGU** (both deceased) after which he fraudulently, secretly and without the knowledge of the members of the **NDIRANGU** family caused the

said land parcel sub-divided into 56 portions including the suit land which he then transferred to his wife the defendant herein.

Simultaneously with the plaint, the plaintiffs filed a Notice of Motion citing **Sections 1A 1B and 3A of the Civil Procedure Act** and **Section 68 of the Land Registration Act 2012** seeking an order inhibiting any dealings with the suit land pending the hearing and determination of this suit. The said application is supported by the affidavit of the plaintiffs in which they repeat the averments in their plaint and add that the land parcel No. MBEERE/KIRIMA/2056 was in fact subject of Siakago Principal Magistrate's Case No. 20 of 2011 in which a decree had been drawn directing that the said land be shared equally between **ITUMU MITAMBO NDIRANGU, MUNYI NGIGE NDIRANGU** and **ESTON NYAGA NDIRANGU**. However, **ESTON NYAGA NDIRANGU** moved swiftly and fraudulently caused the said land parcel to be sub-divided and secretly transferred to his wife the defendant herein. The plaintiffs are therefore apprehensive that the defendant will dispose of the suit land and thereby dis-inherit them.

In response to that application, the defendant filed a replying affidavit in which she deponed inter alia, that this suit is an abuse of the Court process as the same matter is the subject of Judicial Review Application No. 11 of 2014 (**KERUGOYA**) formerly Misc Application No. 58 of 2011 (**EMBU**) where the Court has pronounced itself on land parcel No. MBEERE/KIRIMA/2056. That the orders sought are likely to affect persons who are not parties to this suit. That this Court allowed the plaintiffs to formalize their appearance in Judicial Review Application No. 11 of 2014. That the plaintiffs obtained letters of Administration in Probate and Succession Cause No. 45 and 46 of 2015 for the purpose of pursuing Land Dispute Tribunal Case No. 20 of 2011 at Gachoka Court and therefore have no locus to use the same for this case.

In her Preliminary Objection, the defendant raised the following issues:-

- 1. That this application is res-judicata due to the existence of Judicial Review Application No. 11 of 2014 (KERUGOYA) formally Judicial Review Application No. 58 of 2011 (EMBU).***
- 2. That the orders sought in this application are in conflict with the orders dated 21st September 2011 and 13th November 2014 in the said Judicial Review Application.***
- 3. That the applicants lack locus standi in law to prod this matter for legal deficiency in their stated capacity.***
- 4. That the prayers sought are incapable of being granted for lack of inductiveness and non-pleading. The cause of action stated thereto is misconceived.***
- 5. That the entire suit fails the threshold of a claim for declaration of trust and therefore the application lacks a foundation to which it can hinge on reasons the application and plaint dated 18th December 2015 be struck out with costs.***

Submissions on the Notice of Motion and Preliminary Objection have been filed both by the firm of **ROSE W. NJERU** Advocate for the plaintiffs and **MUNGAI KIVUTI** Advocate for the defendant.

I have considered the plaintiffs' Notice of Motion, the rival affidavits, the defendant's Preliminary Objection and the submissions by counsel.

I shall first deal with the defendant's Preliminary Objection because if it is up-held, then there will be no need to go into the merits of the plaintiff's Notice of Motion.

Some of the issues raised by the defendant in her Preliminary Objection are not really matters of law and cannot therefore fall within what is a proper Preliminary Objection. It is settled law that a Preliminary Objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot therefore be raised if any facts have to be ascertained by evidence – **MUKISA BISCUITS CO. VS WEST END DISTRIBUTORS 1969 E.A 696**. In that case, **LAW J.A**

described a Preliminary Objection in the following terms:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

Some of the issues raised by the defendant in her Preliminary Objection include assertions such as that the prayers sought are incapable of being granted and that the claim for trust lacks any foundation. Those are not really issues of pure law. Whether or not a trust will be proved are matters of evidence and cannot be the basis of a Preliminary Objection as defined in the ***MUKISA*** case (supra).

In my view, the only two issues that warrant consideration as proper Preliminary Objection are:-

1. That this suit and the application are res-judicata in view of the existence of Judicial Review Application No. 11 of 2014 (KERUGOYA) formerly Judicial Review Application No. 58 of 2011 (EMBU).

2. That the plaintiffs lack the requisite locus standi to file this suit.

On the issue of the plaintiffs' locus standi, it has been submitted by the defendant's counsel that among the plaintiffs list of documents are letters of Administration ad litem issued by the High Court in Embu for purposes of pursuing Land Dispute Case No. 20 of 2011 at Gachoka Court. I have looked at the documents filed by the plaintiffs and it is true that the 1st plaintiff **JAMES MWANIKI MUNYI** was issued with a limited Grant of letters of Administration ad litem in **EMBU HIGH COURT SUCCESSION CAUSE No. 46 of 2015** ***“limited to the purposes of pursuing interests of the deceased's Estate in Land Dispute Tribunal Gachoka Case Number 20 of 2011”***. The 2nd plaintiff **JOHN MILTON NYAGAH** was on the other hand issued with a limited Grant of letters of Administration ad litem in **EMBU HIGH COURT SUCCESSION CAUSE No. 45 of 2015** ***“limited to the purposes of following up the Land Dispute Tribunal award number 438 of 2011 Siakago for the benefit of deceased's Estate”***. It is of course correct that a limited Grant of letters of Administration Ad Litem such as was issued to the plaintiffs in this case can only be used for the limited purpose for which it was issued. In that respect therefore, the submission that such limited letters cannot be used for filing this suit is well founded. However, as is clear from paragraphs 1 and 2 of the plaintiffs' plaint filed herein on 29th January 2016, they have filed this suit in both their capacities as the legal representatives of the Estate of their deceased fathers and also in their own capacity. While a party should choose in what capacity he is moving the Court, from the circumstances of this case, I am persuaded that the plaintiffs should be allowed to prosecute their claim for whatever it is worth. Whether or not, in their own capacities, they have any identifiable interest in the suit land is a matter to be left to the trial Court after hearing evidence from both sides. The Preliminary Objection with regard to the plaintiff's locus standi is not well founded and I dismiss it.

On the issue of this suit being res-judicata due to the existence of Judicial Review Application No. 11 of 2014 (**KERUGOYA**) formerly Judicial Review Application No. 58 of 2011 (**EMBU**), what was availed, to this Court were only the proceedings in Judicial Review Application No. 58 of 2011 (**EMBU**). Attempts to trace Judicial Review Application No. 11 of 2014 (**KERUGOYA**) in this Court's registry proved futile. While our records show that that file was returned to the **HIGH COURT EMBU**, the Deputy Registrar of that Court vide his letter ref JUD/EMBJR 58/11 & JR 11/14 dated 10th October 2016 indicated that the file was forwarded to this Court on 14th May 2014. It is the duty of the party pleading res-judicata to place before the Court all the materials available to enable it make a decision in that regard. For now, all I have before me are the proceedings in Judicial Review Application No. 58 of 2011 in which the deceased husband of the defendant had sought leave to file Judicial Review Proceedings in the nature of certiorari to quash the decision of the Land Disputes Tribunal in its case No. 438 dated 4th October 2011 ordering the cancellation of the Title deed in respect to land parcel No. MBEERE/KIRIMA/2056. That leave was granted by **MUCHELULE J.** on 20th September 2011. It is safe therefore to presume that the substantive application was most probably filed in the missing Judicial

Review Application No. 11 of 2014. That being the case, res-judicata would not apply for the simple reason that the issue being canvassed in this case is that of trust which could not be canvassed in a Judicial Review Application. The Preliminary Objection that this suit is res-judicata is also not well founded and must be dismissed.

Having dismissed the Preliminary Objection, I shall now consider the plaintiffs Notice of Motion dated 18th December 2015 on its merits. That application seeks orders that this Court inhibits any dealings with the suit land pending the hearing and determination of this suit. **Section 68 (1) of the Land Registration Act 2012** grants the Court power to inhibit dealings with registered land. It provides that:-

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”.

An order of inhibition is similar to an injunction as it seeks to preserve the suit property pending the hearing and determination of the suit. In considering whether or not to grant an order of inhibition, the Court will take into account the following:-

- 1. Whether the applicant has good grounds for the grant of such remedy.***
- 2. Whether the property in dispute is at risk of being alienated or transferred to the detriment of the applicant.***
- 3. Whether failure to grant the order would render the suit nugatory.***
- 4. What prejudice, if any, will be caused to the other party.***
- 5. The conduct of the parties.***

Taking all the above into account, it is noted that the plaintiff's claim in trust is still pending determination by the Court yet the suit land continues to be in danger of further alienation. This may render the suit nugatory if the order of inhibition is not granted. There are therefore good grounds for granting the order of inhibition.

It is further noted that the suit land sought to be inhibited is currently registered in the defendant's names and so the only prejudice caused to her is that she cannot transfer it pending the hearing and determination of the suit. On the other hand, the plaintiffs will suffer great prejudice if the orders sought are not granted and they succeed at the trial. It is therefore in the interest of justice that the orders sought are granted.

Having considered all the above, I am of the view that the plaintiffs are deserving of the of the order of inhibition inhibiting any dealings with land parcels No. MBEERE/KIRIMA/2910, 2912, 3516, 3518 3520, 3527, 3529, 3535, 3539, 3540, 4032, 4033, 4034, 4035, 4036, 4037, 4038, 4039, 4040 and 4041 pending the hearing and determination of this suit.

Each party shall meet their own costs of both the Preliminary Objection dated 5th February 2016 and the Notice of Motion dated 18th December 2015.

The parties to expedite compliance with pre-trial directions to expedite the trial.

It is so ordered.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016

Ruling delivered, dated and signed in open Court this 4th day of November 2016.

Ms Ndorongo present for Ms Njeru and also holding brief for Mr. Guantai on request of the Court.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016