



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO.135 OF 2014

PETER NDAMBU NZIKALI PLAINTIFF

ARON NTHUKU NGULA PLAINTIFF

VERSUS

ONESMUS NDAMBU MUSAU..... RESPONDENTS

R U L I N G

1. By a Plaint dated 21.10.2014 the Plaintiffs/Applicants filed instant suit on 22.10.2014. Along with Plaint the Applicants filed Notice of Motion dated 21.10.2014 seeking injunctive reliefs against the Defendant/Respondent. The reliefs in the Plaint were principally a declaration that the Plaintiff/Respondent are beneficial owners of NDITHINI/MANYANJA /BLOCK 4/4 and NDITHINI/MANYANJA/ BLOCK 4/8. The suit lands and also injunctive relief.
2. The Defendant filed defence on 10.11.2014 dated 10.11.2014 upon service of summons the Defendant/Respondent also filed an Affidavit on 10.11.2014 which he swore on 10.11.2014. On 3.12.2014 the Defendant filed a preliminary point of law. The point of law raised is that:
 - The court is divested of jurisdiction to entertain the suit as the suit lands are owned and registered in the name of Musau Mulinge deceased whose estate is yet to be succeeded in accordance with the Law of Succession Act.
 - Secondly, the Defendant lacks the requisite *locus standi* to be sued and thus suit is null and void *ab initio*.
 - On paragraph 6 of the Plaint, the Plaintiffs plead that on 3.4.1964 they with Musau Mulinge jointly bought shares in Green Hill Farm in Ithanga and agreed the share to be registered in the name of Musau Mulinge.
 - Paragraph 7 of the same Plaint state that, upon the purchase of the said share, they were allocated the suit lands measuring 124 acres which according to paragraph 8 of the Plaint, they have been in possession, used and occupied since then and even at the life time of Musau Mulinge.
 - In a statement of Peter Ndambu Nzikali dated 21.10.2014 filed together with Plaint on paragraph 5, he states that on or about 29.7.2010 during the life time of Musau Mulinge he (Musau Mulinge) sold a portion of suit land to third parties and so is the Plaintiffs who sold part of suit lands to third parties.
 - According to the 6th paragraph of the 1st Plaintiff statement, it is upon the demise of Musau Mulinge that the Defendant started perpetrating the acts complained of by the Plaintiffs. This implies that the said Musau Mulinge died after 29.7.2010.
3. In his submission on the Preliminary Objection the Defendant Advocate argued that the issues

raised in the Plaintiff can only be canvassed in succession matter. This is because the owner of suit land is deceased. There is no administrator of the estate of the said deceased to date appointed under the provisions of Cap.160. The Claim pleaded vide prayer No.1 in the Plaintiff is beneficial interest. The same amounts to seeking distribution of estate which can only be undertaken under the provisions of Cap.160.

A beneficiary is supposed to invoke the provisions of Cap.160 to ventilate his claim under the procedure set in Rule 40 (6) of Probate and Administration Rules.

4. Mr. Ngolya advocate for the Defendant submitted that, it was wrong for the Plaintiffs to institute suit in ELC court whose jurisdiction is not mandated to handle such cases by dint of the provisions of Cap 160. The ELC court's jurisdiction is limited to occupation, use, and title to land and environmental issues vide provisions of ELC 2012 and Article 162 of Constitution of Kenya.

Further, Ngolya submitted that the Defendant lacked capacity to be sued as he is not the administrator of the estate of his deceased father. He concluded by submitting that jurisdiction is everything and anything done without it is a nullity. He thus prayed for the striking out of the suit.

5. Mr. Kamwendwa Advocate for the Plaintiffs submitted that the claim is against the Defendant as an individual. The suit is not against the estate. There are specific complaints against the Defendant. The Plaintiffs are seeking protection of the property. One has to file suit to safeguard the property. The Defendant is not the administrator of the estate in issue. The Plaintiff only objective is to protect the property. Mr. Kamwendwa submitted that the Plaintiffs are not seeking to transfer suit lands only that they claim against wastage against the Defendant as a person. He submitted that the court has jurisdiction to entertain the suit.
6. In a rejoinder to Mr. Kamwendwa's submissions, Mr. Ngolya submitted that the Plaintiff's case can only be ventilated via Rule 40(b) of Probate and Administration Rules. In protest proceedings under above cited provisions viva voce evidence is entertained and the beneficiaries have a window of stating their claim. Mr. Ngolya submits that by seeking declaration that the applicants own the suit lands, it is tantamount to asking the court to act outside jurisdiction. It is the jurisdiction of the probate and administration court to determine shares ownership of property of a deceased person estate not ELC court.
7. Mr. Ngolya submits that citation procedure would have been employed to enable lodgement of the Succession Matter. There is already citation No.30/2014 Machakos over the deceased estate in issue. In Succession matter under Section 47 of Cap.160, the court can issue injunctions for protection of deceased person's properties as provided in the provisions of Section 45 of Cap.160 via what is called intermeddling with estate provisions.
8. After going through the pleadings, affidavits and the submissions by the parties advocates, the court makes the following findings:

The Plaintiffs claim to have acquired the suit lands jointly with the deceased way back in 1964. They have not explained why since 1964 to after 2010 and especially before the deceased died, they never claimed their shares of the suit land. They claim to have been in possession, used and occupation of the suit lands. The court has seen a document stating to be agreement between wives and children of deceased on one side and the Plaintiffs on the other side dated 28.5.2013 acknowledging that the Plaintiffs jointly purchased land with the deceased.

9. There is also on record an affidavit sworn on 20.1.2014 by Rosebelle Nzilani Musau, wife of the deceased indicating that the Plaintiffs acquired the suit lands, and were owned equally by Plaintiffs and the deceased. However, that notwithstanding, the suit land remains in the names of the deceased as part of the estate and in the eyes of the law property of the deceased. The Plaintiff claim beneficial interest and thus claim for declaration of the suit lands which are part of the estate of the deceased estate. They are trying to protect their shares presumably 2/3 of the suit land as they plead they acquired suit land equally and were entitled to share equally 3 of them, though registered in the name of the deceased person.
10. The declaration of ownership of suit land sought in Plaintiff amounts to seeking distribution of the

estate contrary to Section 55 of Cap.160. The section prohibits distribution of estate until the grant are confirmed under section 82 of Cap 160 the personal representative is vested with power to specific shares of estate upon confirmation of grant. A beneficiary of the estate is entitled under Section 45 and 47 of Cap 160 to seek protection of the properties of the deceased which he claims to have beneficial interest. The claimants of shares of estate as creditors under section 66 of Cap 160 are listed as persons entitled to administer the estate of the deceased person.

- 11.The act complained of against the Defendants as concerns the suit land which is a part of the estate of the deceased person, can be addressed via the provisions of Section 45 and 47 of Cap 160. They also amount to criminal acts which can be addressed via the criminal jurisdiction regime. The ELC court jurisdiction under ELC Act and Article 162 Constitution of Kenya is limited to occupation, use and title to land and environmental issues.
- 12.The issue at hand in the instant suit concerns an estate of a deceased person sharing and intermeddling. The same issues lie within the mandate of the High Court Family Division. In the **CASE OF LILLIAN –VS- CALTEX**, the court held:

“... a question of jurisdiction ought to be raised at the earliest opportunity and the court seized with the matter is then obliged to decide the issue right away on the material before it. Without it, a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence court of law downs the tools in respect of matter before it the moment it holds the opinion that it is without jurisdiction.”

- 13.In our instant suit, the court has found that it has no jurisdiction to entertain the suit as the same claim lies in the Probate and Administration Court. The court thus lays down tools in respect of the instant suit. The court thus make the following orders:

1. The suit is struck out.
2. Costs to the Respondent.

Dated and Delivered at Machakos, this 6th day of March, 2015.

CHARLES KARIUKI

JUDGE