



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 207 OF 2013

**SIMON KAMAU MUHINDI Suing as the administrator of the estate of
ESTHER NYOKABI MUHINDI.....PLAINTIFF**

VERSUS

MONICA WAMBUI NGUGI1ST DEFENDANT

LAWRENCE KINYANJUI NJOROGE2ND DEFENDANT

RULING

Coming up for determination is the Notice of Preliminary Objection dated 13th February 2014 raised by the Defendants requesting that the Plaint and Pending Application be struck off with costs on the following grounds:

1. That the ELC has no jurisdiction to entertain this matter as it relates to a parcel of land known as L.R. Nachu/Ndacha/259 registered in the name of the late Esther Nyokabi Muhindi thus falls in the Family Division;
2. That this matter is *sub judice* as there is a pending Succession Cause namely High Court Nairobi Probate and Succession Cause No. 1460 of 2004 in the matter of the Estate of Esther Nyokabi Muhindi
3. That the Defendants are bona fide purchasers for value who are in possession.
4. That the Plaintiff's suit is bad in law as it seeks to cancel agreements with himself and his brother whose identity is not disclosed neither was authority to sue on behalf given.
5. That no security for deposit or costs has been tendered.
6. Other grounds to be adduced.

Counsels for the two parties made their oral submissions before the court on 17th February 2014. Counsel for the Defendant submitted that this is a matter relating to the estate of Esther Nyokabi Muhindi and that there is pending Nairobi High Court P/A No. 1460 of 2004. She further contended that this being the Environment and Land Court, it has no jurisdiction to hear this suit. She further submitted that this suit is

bad in law as the Plaintiff brings this suit on his own behalf and on behalf of his brother yet the brother's identity is not disclosed. She pointed out that no authority to sue on his behalf has been given. In response thereto, Counsel for the Plaintiff submitted that Section 13 of the Environment and Land Court Act confers upon the Environment and Land Court jurisdiction to hear all matters touching on land and the environment and that therefore this suit fails squarely within the jurisdiction of this court. He further submitted that under the Succession Act, one of the many powers granted to an administrator is to sue on behalf of the estate with a view to facilitate distribution of property. He further stated that under the Civil Procedure Act, subjudice only applied where the dispute in the other court touches on the same parties and similar facts and same subject matter. He stated that Succession Cause No. 1460 of 2004 is a non-contested intestate succession cause before the Family Division where there is no dispute about the property. He submitted further that the dispute brought by the Plaintiff has not been presented before any other court.

One of the issues for determination is whether this Court has jurisdiction to hear and determine the suit bearing in mind that the dispute relates to land which is currently owned by the estate of a deceased person. The question of a court's jurisdiction or otherwise is the beginning and the end of any matter as stated by Nyarangi JA (as he then was) in **The Owners of Motor Vessel "Lillian S" versus Caltex Oil Kenya Limited (1989) KLR** as follows:

"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".

The argument brought forth by Counsel for the Defendants is that there is a pending succession cause before the Family Division relating to the estate of Esther Nyokabi Muhindi and that therefore this court should not entertain this suit as this would amount to *sub judice*. The applicable law is to be found in **section 6** of the **Civil Procedure Act** which provides as follows:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

Does the ELC have jurisdiction to hear and determine this suit? To my mind, a succession cause seeks to devolve the property of a deceased person in the duly appointed personal representatives and further stipulates how the estate of the deceased person may be distributed by such personal representatives in the beneficiaries of that estate. Hence, a succession cause is not the same as a suit filed in this court. The personal representative of a deceased person is entitled by law to sue on behalf of the estate to get in any such assets of the estate as may have been appropriated by some else who is not a beneficiary of that estate properly so called. This is the position with the suit before this court. The Plaintiff is one of the personal representatives of the estate of Esther Nyokabi Muhindi. He has produced to this court his Grant of Letters of Administration in which he is appointed jointly with Richard Wainaina Muhindi. Both of these representatives are entitled to sue on behalf of the estate of Esther Nyokabi Muhindi in order to recover assets belonging to that estate. The suit property is stated to have belonged to the late Esther Nyokabi Muhindi and the Defendants claim ownership over the same arguing that they bought it from the Plaintiff and his brother. Clearly, the suit before this court is properly before this court as this court has jurisdiction to determine whether the Defendants, who are not beneficiaries to the estate of Esther Nyokabi Muhindi, have any rights of ownership over the suit property. I thus find that this court has jurisdiction to hear this suit and further find that this matter is not *sub judice*.

The second issue I have to address is the question whether the Plaintiff had the authority of his co-administrator to file this suit. Under **section 82** of the **Law of Succession Act (Cap 160 Laws of Kenya)** provides that,

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers; (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

The extent of the powers of an administrator were described by Musyoka J., in **Re the Estate of Thiong'o Nginyayu Muthiora (Deceased) Succession Cause Number 2131 of 2011** as follows,

“..... He is the person to be sued by third parties over the estate or to sue such third parties to protect the estate. He is the person with power to enter into contracts on behalf of the estate and to enforce contracts that exist between the estate and third parties. He has the power to sell assets, to convert them into money, to invest estate funds, to compromise suits on behalf of the estate, among others. He has these powers, given to him by Section 79 and 82 of the Law of Succession Act, and by various provisions of the Trustee Act, Cap 167 Laws of Kenya.”
[Emphasis mine]

The Plaintiff was jointly appointed with his brother Richard Wainaina Muhindi as the administrators of the estate of the late Esther Nyokabi Muhindi. However, this suit has been brought by only the Plaintiff and no authority to sue on behalf of Richard Wainaina Muhindi has been produced to this court. To that issue, I wish to rely on the decision of Majanja, J in **Misc. Civil Application No. 103B of 2013 Republic versus Nairobi City Council** where he stated as follows:

“The capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times...One administrator out of the others lacks the capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate.”

On that issue, I find that the Plaintiff lacks capacity to file suit on behalf of the estate of the deceased in the absence of his co-administrator, Richard Wainaina Muhindi.

The other issues to be addressed as raised in the Preliminary Objection are whether this suit should be struck off because the Defendants are bona fide purchasers for value who are in possession, the Plaintiff's suit is bad in law as it seeks to cancel agreements with himself and his brother and that no security for deposit or costs has been tendered are issues which require to be proved through production of evidence. This was enunciated in the case of **Mukisa Biscuit Manufacturing Co Ltd –vs- West Ed Distributors (1969) EA 696** where the court held that:

“...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....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 the 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”.

In this suit, those other issues are not pure points of law but are issues of fact which require proof through the tendering of evidence. They cannot therefore form the basis of dismissal of this suit and I so find.

Arising from the foregoing, I uphold the Preliminary Objection on the ground that the Plaintiff lacks capacity to sue on behalf of the estate of Esther Nyokabi Muhindi in the absence of his co-administrator, Richard Wainaina Muhindi. Accordingly, I hereby dismiss this suit. Each party shall bear his own costs.

SIGNED AND DELIVERED AT NAIROBI THIS 14th DAY OF March 2014.

MARY M. GITUMBI

JUDGE