



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC CASE NO. 1663 OF 2007

MARY NYANGUGI KURIA (Suing as the personal representative of

The Estate of the Late ELIKANA KURIA).....PLAINTIFF

-VERSUS-

TOWN COUNCIL OF KIKUYU.....1ST DEFENDANT

SAMUEL KAMUNYU.....2ND DEFENDANT

DAVID NGUGI.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

THE COMMISSIONER OF LANDS.....5TH DEFENDANT

THE LANDS REGISTRAR, KIAMBU.....6TH DEFENDANT

RULING

1. The 1st Defendant has raised a preliminary objection to the suit on the basis that the Plaintiff lacks the locus standi to present and, presumably, continue with the instant suit as the suit property does not form part of the estate of the late Elikana Kuria and further that the late Elikana Kuria did not have any legal title and or enforceable claim to the parcel of land known as the title Number Dagoretti/Thogoto/1374. The preliminary objection is also premised on the point that the Plaintiff's claim is based on a contract to which the plaintiff and the late Elikana Kuria was not party to. The question in short is whether or not the plaintiff has the locus standi to bring the claim against the Defendants.

2. The preliminary objection was urged by way of written submissions filed by the Plaintiff and the 1st Defendant. The 2nd through 6th Defendants did not file any submissions either in support or opposition to the same.

3. Briefly, the law on preliminary objections is relatively clear. It is that a preliminary objection where raised should consist of a point or points of law which arise by clear implication out of the pleadings and which if argued successfully may dispose of the suit. The objection, which is in the nature of a demurrer,

should not invite the exercise of judicial discretion in its determination: see the case of **Mukisa Biscuits Manufacturing Co. Ltd –V- West End Distributors Ltd [1969] E.A. 696.**

4. I have read the submissions by both the 1st Defendant as well as the Plaintiff.

5. The three limbs of the preliminary objection can be easily disposed of. I will avoid however making any final determinations on issues of fact. Firstly, it was submitted by the 1st Defendant that the suit property does not form part of the estate of the deceased. The Plaintiff submits otherwise. This truly is a question of fact which ought only be determined at trial. The court then will be expected to address the question on how title the Number Dagoretti/Thogoto/20 became Dagoretti/Thogoto/21 or Dagoretti/Thogoto/1374. What formed what part and which part was surrendered to the Government as a road reserve and which part was retained or was to be acquired by the now deceased Elikana Kuria is a matter of fact to be determined at trial. In my view, the mere fact that the property Dagoretti/Thogoto/1374 is not listed as one of the assets in the Certificate of Confirmation should not be a bar to a claim by a personal representative or administrator of the estate of the deceased. Certificates of Confirmation are never cast in stone, as the saying goes. Under the Law of Succession Act (Cap 160) the Certificate can always be rectified. The rectification or alteration may entail an addition or removal of an asset or beneficiary. I am of the view that the simple question is whether the deceased Elikana Kuria was entitled to claim. If that be so then certainly the administrator by virtue of the provision of Section 16 of the Limitation of Auction Act (Cap 22) is also entitled to claim, subject only to the law of limitations. From the pleadings availed and the history of the parcel of land in question running from the Rev. William Njoroge (deceased) in 1973 through Elikana Kuria (deceased) in 1997 to the Plaintiff it is apparent on the face of the record that the said Rev. William Njoroge had a cause of action. As to whether the said cause of action survived and was inherited by the late Elikana Kuria and subsequently by the Plaintiff is however a matter of fact to be determined at trial.

6. The second limb of objection is based on the common law doctrine of privity of contract. That is the doctrine of contract law that prevents any person from seeking the enforcement of a contract or suing on its terms unless they are a party to that contract. This doctrine has proven problematic due to its implications on contracts which have been made for the benefit of third parties. Third parties may include not just legal representatives and successors in title but also independent beneficiaries. For all its problems, the doctrine has seen both the legislature as well as the courts develop various exceptions; see for example the U.K Contracts (Rights of Third Parties) Act 1999 of the United Kingdom and also various trust related cases. Closer to the Environment and Land Court one will come across restrictive covenants on land imposed on subsequent purchasers who are not parties to the original contract. In short, I do not for one moment hold the view that the doctrine cannot be interrogated. Far from it, where it is alleged or pleaded the court must investigate the circumstances and facts to come to a reasonable legal finding. Effectively, such an exercise can only be undertaken at trial. Further I did not see the Plaintiff as stating that it was a party to any contract but rather that the contract and any rights and obligations thereunder were succeedingly handed down to the Plaintiff by the Rev. William Njoroge (deceased) through Elikana Kuria (also deceased). As to whether that position holds can only be ascertained at trial after an interrogation of all the facts.

7. The final line of the Preliminary Objection is that the deceased Elikana Kuria and by extension his legal representative, the Plaintiff did not have any legal claim to the parcel of land known as Dagoretti/Thogoti/1374. A quick answer to this is found in a copy of the said parcels land register. As of 5th November, 2004 the proprietorship section of the said register reflected Elkana Kuria as the proprietor. Whether or not that registration should be vitiated due to the alleged posthumous registration will only be determined at trial. The question then will be whether the alleged posthumous registration was conscientiously effected.

8. I come to the rather obvious conclusion that the 1st Defendants objection's was not well founded. It was riddled with questions of fact which demand investigation at trial. That conclusion appears pretty common with most questions of locus standi. I would consequently disallow the Preliminary Objection as I hereby do with costs to plaintiff.

9. Orders accordingly.

Dated, signed and delivered at Nairobi this 6th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent