



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 351 OF 2013

SALOME WAMBUI NJAU..... PLAINTIFF

(Suing as an Administratrix of the

Estate of PETER KIGURU NJUGUNA(Deceased)

VERSUS

CAROLINE WANGUI KIGURU.....DEFENDANT

RULING

The application for determination is a Notice of Motion dated 13th March 2013, brought by the Plaintiff under Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The application is supported by the Plaintiff's affidavit sworn on the same date. The application seeks the following orders from this court:-

1. That a prohibitory order issues against the Defendant stopping and restraining her from dealing, transferring, alienating or in any way disposing off all that parcel of land known as NGONG/NGONG/23814 (hereinafter referred to as "the suit property"), until the main suit is heard and determined.
2. That a mandatory injunction issues reinstating the Plaintiff as the occupier of the suit property until the main suit is heard and determined.

The Plaintiff is the widow to one Peter Kiguru Njuguna (hereinafter referred to as "the Deceased"), and an administrator of the Deceased's estate together with the Defendant who is also her stepdaughter. The Plaintiff claims she acquired the suit property together with the Deceased on or about 29th November 2002 as their matrimonial home. She states that the suit property was transferred to the Defendant who was issued with a title deed on 20th February 2011, after she exercised undue influence on the Deceased who was at the time of ill health. Further, that the Defendant thereafter caused the Plaintiff to be evicted from the suit property on 1st October 2012.

The Defendant denied the Plaintiffs allegation in a replying affidavit she swore on 8th May 2013, and stated that suit property was bought by her father and mother in 1998, and that the Plaintiff never participated in its acquisition and joined them in the said property after getting married to the Deceased in 2001. Further, that the Plaintiff was also gifted another adjoining property which she holds jointly with the Defendant and the Defendant's sister, and that she has also applied in the pending succession cause to be absolute beneficiary of another of the Deceased's property in Dandora from which she collects rent.

The Defendant also stated that the Deceased never suffered from ill health and died peacefully at home on

7th October 2011. She admitted to instructing auctioneers to evict the Plaintiff after non-payment of rent for the suit property that had been agreed upon. She attached various documents on the transfer and registration of the suit property and of the adjoining property she had referred to including the resulting title deeds issued, and on the succession case.

The Defendant in addition filed a Notice of Preliminary objection dated 3rd June 2013 on the following grounds:

3. That this Court lacks jurisdiction to hear the suit herein by virtue of the express provisions of Section 6 of the Civil Procedure Act . Further there is a ruling pending before Honourable Musyoka in Succession Cause No. 166 of 2012 between the same parties touching on the same subject matter.
4. That this matter falls under the scope of the Family Division and not the ELC Division of the High Court, and thus the Plaintiff's application dated 13th March 2013 has no audience before this Court.
5. That the Plaintiff is guilty of material non-disclosure of crucial facts regarding this case and has not come to Court with clean hands, therefore this suit is frivolous, vexatious and abuse of the court process.
6. That the suit property was transferred to the Defendant by the Deceased as a gift in line with the provisions of section 31(c) of the Succession Act which falls under the scope of the Family Division and thus lacks audience in this Court.
7. That the annexed affidavits of the Plaintiff dated 13th March 2013 contravenes Section 6 and Rule 9 of the Oaths and Statutory Declarations Act (Cap 15) and the same should be expunged from the record.

The parties were directed to file written submissions on the said Preliminary Objection. The Defendant's counsel in submissions dated 21st June 2013 argued that the Plaintiff had an application for confirmation of grant on the same subject matter pending in Nairobi High Court Succession Cause No 166 of 2012, and that the present matter is therefore *sub-judice*. Further, that the suit property is the subject matter of a succession cause and such matters properly fall within the Family Division of the High Court and not the Environment and Land Court.

The counsel further argued that the Plaintiff is guilty of material non-disclosure as she failed to inform the court of the pending succession dispute and has not come to court with clean hands. It was also submitted that the Plaintiff had admitted that the suit property was a gift by the Deceased to the Defendant, and as gifts made in contemplation of death are provided for under section 31C of the Law of Succession Act the issue should be canvassed in the succession cause. Lastly, counsel argued that the affidavits annexed by the Plaintiff to her application are not sealed by the Commissioner and marked with serial letters of identification as required by section 6 Rule 9 of the Oaths and Statutory Declaration Act (Cap 15 of the Laws of Kenya), which requirement is mandatory.

The Plaintiff's counsel in submissions dated 23rd June 2013 on his part argued that the preliminary objection does not meet the threshold set in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, and relied on Article 162(1) of the Constitution, section 150 of the Land Act, Act No 6 of 2012 and section 13(1) and (2) to argue that this court is properly seized of the Plaintiff's case. Further, that the family division of the High Court does not have jurisdiction to determine matters involving ownership of land.

The Plaintiff's counsel further submitted that Nairobi High Court Succession Cause No. 166 of 2012 is not *sub-judice* as it is dealing with the division of the Estate of Peter Kiguru Njuguna (Deceased), and not the adjudication of the ownership of the suit property. Further, that the parties in the instant suit and in the succession cause are different as in the present suit the Defendant is sued in her personal capacity, while in the succession cause she is participating as an administrator of the Deceased's estate. The counsel also submitted that the remedy of dismissal of a suit is not available under section 6 of the Civil Procedure Act.

Lastly, the counsel submitted that the Plaintiff's Notice of Motion dated 13th March 2013 was already disposed of by a consent recorded in open court on 27th May 2013, and the impugned affidavit was a supporting affidavit of the said Notice of Motion. The counsel also submitted that all the other issues other than those of jurisdiction and *sub-judice* were issues of fact and not the subject of a preliminary objection.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties. The main issue before this court is whether the objections raised by the Defendant are points of law, and if so whether they have merit and should be upheld. In the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, it was held that a preliminary objection must be on a pure point of law and cannot be raised if any fact has to be ascertained. The issues of whether this court has jurisdiction and whether this matter is *sub-judice* are pure points of law as they have the potential of determining this matter with finality without the need of ascertaining any additional facts.

On the objection raised on this Court's jurisdiction, the Constitution in Article 162 (2) (b) provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts. The jurisdiction of the said courts is found in section 13 of the Environment and Land Court Act of 2012 which provides that the court shall hear disputes relating to :

(a) environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) compulsory acquisition of land;

(c) land administration and management;

(d) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

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

The jurisdiction given to the Environment and Land Court under the said section is very wide, and it cannot therefore be argued that this court has no jurisdiction to hear a dispute seeking to cancel a title to land as sought in the Plaint dated 13th March 2013 filed herein by the Plaintiff.

I however also note from the said Plaint that the Plaintiff is in addition seeking a declaratory order that the suit property forms part of the Estate of the Deceased. Intestate and testamentary succession to, and the administration of estates of deceased persons are governed by the Law of Succession Act, which under section 47 gives the High Court jurisdiction to deal with any matter arising under the Act. The High Court therefore has concurrent jurisdiction to hear and determine disputes of succession relating to land. I also refer to the **Practice Directions on Proceedings relating to the Environment and the use and Occupation of, and Title to Land** issued by the Chief Justice dated 9th November 2012 and published in Gazette Notice No. 16268, which direct in Practice Direction No. 5 that all cases under the Law of Succession Act shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.

While I therefore find no merit in the objection that this court has no jurisdiction, I appreciate that this is a matter where all the issues raised can only be effectively handled by the Family Division of the High Court. I also note that there is already a pending succession cause being Nairobi Succession Cause No 166 of 2012 and it has been admitted that both parties herein are administrators and beneficiaries therein. Further, the suit property is one of the properties listed as being part of the Deceased's estate in the said suit.

It is on this regard provided as follows under section 6 Of the Civil Procedure Act:

“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.”

The disposition of the suit property herein whether by gift or inheritance is a substantial issue in the present suit, as well as in Nairobi Succession Cause No 166 of 2012, and this court is obliged by the above-cited section to stay this suit pending the hearing and determination of the said succession cause.

Coming to the outstanding objections raised by the Defendant, I concur with the Plaintiff that the objections that the Plaintiff has not come to court with clean hands require certain facts to be established before it can lie, and is not therefore on a pure point of law. The preliminary objection as to whether the Plaintiff’s affidavit dated 13th March 2013 contravenes the Oaths and Statutory Declaration Act has also been overtaken by events, as it was sworn in support of a Notice of Motion that was dispensed with by this court in the orders given herein on 27th May 2013.

I accordingly allow the Defendant’s Preliminary Objection to the extent that I find the suit herein to be *sub-judice* as explained in the foregoing, and this suit is hereby stayed pending the hearing and determination of **Nairobi Succession Cause No 166 of 2012- In the Matter of the Estate of Peter Kiguru Njuguna (Deceased)** or until further orders. During this period of stay the *status quo* to be maintained by the parties herein shall be as ordered by this court on 27th May 2013 as follows:

1. The Plaintiff shall not interfere with the Defendant’s possession and activities on the property known as NGONG/NGONG/23814.
2. The Defendant shall not undertake any further developments on the said property, or transfer, sell or in any other manner dispose of the said property.
3. The costs of the Defendant’s Preliminary Objection dated 3rd June 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of ____October____, 2013.

P. NYAMWEYA

JUDGE