



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 457 OF 2016

SALOME WANGARI MWAURA.....1ST PLAINTIFF

ESTHER MUMBI MWAURA.....2ND PLAINTIFF

VERSUS

JOHN KIAGE.....1ST DEFENDANT

DANIEL KAGAGI.....2ND DEFENDANT

HENRY MACHARIA.....3RD DEFENDANT

BONIFACE MULL.....4TH DEFENDANT

JUSTUS MASANKWA.....5TH DEFENDANT

RULING

1. This ruling is in respect of the defendants' Notice of Preliminary Objection dated 27th March 2017. Before I go into the points raised in the objection, I find it necessary to paint a backdrop of the suit herein.

2. Proceedings in this matter commenced through plaint dated 20th August 2016 and filed in court on 27th October 2016. The case concerns a parcel of land known as Njoro/Njoro Block 5/35 (Ngundu), hereinafter referred to as the "suit property". The plaintiff aver that they are the children of one John Mwaura Kibui (deceased) and the sole surviving beneficiaries of his estate. That the suit property is registered in the name of the deceased and that Kesiah Gathoni, their late mother, obtained letters of administration in respect of their late father's estate in High Court Succession Cause No. 270 of 2003. That their said mother also passed away but left a written will bequeathing the suit property exclusively to the plaintiffs. That they later learnt that their grandmother (name not stated) who is since deceased had fraudulently processed title deed for the suit property, subdivided it and sold it to the defendants despite the fact that the plaintiffs still hold the original title deed in their late father's name. The plaintiffs further state that they fear that they may lose their inheritance if an injunction is not granted.

3. In view of the foregoing, the plaintiffs sought judgment against the defendants for an order to safeguard their late father's estate; an injunction restraining the defendants from among others entering, cultivating or transferring the suit property; cancellation of the defendants' titles; and damages for trespass.

4. The defendants reacted to the suit by filing the preliminary objection referred to at the beginning of this ruling. The grounds of the objection are that the plaintiffs lack *locus standi* to institute and/or prosecute this suit; that since the suit concerns the parcel of land known as Njoro/Njoro Block 5/35 (Ngundu) whose registered owner is deceased and since the plaintiffs commenced the suit without first obtaining letters of administration, it should be struck out.

5. Parties agreed and the court ordered that the objection be heard by way of written submissions. The plaintiffs filed submissions but the defendants did not file any. The plaintiffs argued in the submissions that they are the beneficial owners of the suit property and that the said property is held in trust for them. Citing **Section 28(b)** of the **Land Registration Act** and the case of **George Mbiti Kiebia & another v Isaya Theuri M'lintari & another [2014] eKLR**, they urged the court to dismiss the preliminary objection with costs.

6. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

So far as I'm aware, 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.

7. For a preliminary objection to succeed the following tests ought to be satisfied: firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The plaintiffs herein purported to respond to the preliminary objection by filing a replying affidavit. There is no place for filing an affidavit as a response to a preliminary objection. I have therefore disregarded the affidavit.

8. I have carefully considered the preliminary objection herein, the plaint and the submissions filed. The plaintiffs' case is plainly pleaded in the plaint. They assert that they are the children of and the sole surviving beneficiaries of the estate John Mwaura Kibui (deceased). According to them, the suit property is registered in the name of the deceased and therefore their inheritance. They do not claim to hold any letters of administration in respect of the deceased's estate. On the contrary, they plead that letters of administration in respect of the estate were issued to Kesiah Gathoni, their late mother, in High Court Succession Cause No. 270 of 2003. They seek judgment against the defendants inter alia for "an order to safeguard" the deceased's estate. It is thus clear to me that the plaintiffs' claim is purportedly brought to preserve the deceased's estate. The other issues as to whether they are entitled to any part of the said estate are just but secondary. In any case, such issues would be litigated in the succession cause.

9. In **George Mbiti Kiebia & another v Isaya Theuri M'lintari & another [2014] eKLR** (supra), the Court of Appeal stated:

On the issue of letters of administration, it is the appellant's contention that the learned Judge erred in entertaining the respondents' suit when they had no letters of administration to the estate of their deceased father Musa M'Lintari. In Hintz – v- Mwakima, (1984) KLR 294, it was clearly stated that without a grant of letters of administration to the estate of the deceased, no person can bring action and represent that estate. Until grant is obtained by someone, the estate and the legal chose in action are vested in the court. The estate and the legal chose in action automatically pass to the administrator when the grant is obtained.

...

10. In view of the foregoing, since the plaintiffs do not hold letters of administration in respect of the deceased's estate, they clearly have no standing to bring this suit. I am aware that the plaintiffs have argued in their submissions that they are the beneficial owners of the suit property and that the said property is held in trust for them. Such submissions are however an afterthought. No case for a declaration of trust is pleaded in the plaint.

11. I am persuaded that the Preliminary Objection dated 27th March 2017 is well founded and I uphold it. The suit herein is struck out with costs to the defendants.

12. Delay in delivery of this ruling, which was occasioned by the fact that I proceeded on medical leave, is regretted.

Dated, signed and delivered in open court at Nakuru this 30th day of April 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs

Mr Karanja Mbugua for the defendants

Court Assistants: Beatrice & Lotkomo