



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC. CASE NO. 199 OF 2018**

**CHARLES MUNGAI NYAGUTHIE**

**MERCY NJERI KIUNA** (Suing as legal representatives of the Estate of

**ESTHER NYAGUTHII NJURU.....PLAINTIFF**

**VERSUS**

**GEOFFREY GITAU NJURU** Alias **GEOFFREY G. NJURU WAWERU**

Alias **GEOFFREY NJURU WAWERU.....1<sup>ST</sup> DEFENDANT**

**ESTHER WANJA GITAU.....2<sup>ND</sup> DEFENDANT**

**JOSEPH NDEGWA GITAU.....3<sup>RD</sup> DEFENDANT**

**JOHN WAWERU.....4<sup>TH</sup> DEFENDANT**

**SIMON SYLVESTER GATHURA.....5<sup>TH</sup> DEFENDANT**

**JACKSON NJENGA GITAU.....6<sup>TH</sup> DEFENDANT**

**RULING**

**BACKGROUND**

1. The Plaintiffs are the administrators of the estate of the late Esther Nyaguthii Njuru (deceased) who was a sister to the 1<sup>st</sup> Defendant. Prior to the death of the deceased, she had filed Nairobi HCCC No. 590 of 2012 against her brother. This suit later became ELC 150 of 2012. In this suit, the deceased was claiming that her brother held LR No. Muguga/Gitaru/1394 (suit property) in trust for her and that she therefore wanted the suit property registered in her name.

2. The deceased died on 12<sup>th</sup> May, 2015. The suit which the deceased had filed abated and it was so marked by the Court as having abated and the file was ordered closed on 11<sup>th</sup> October, 2017.

3. On 19<sup>th</sup> February 2018, the administrators of the estate of the deceased obtained limited letters of administration in respect of her estate. The administrators then proceeded to file this suit claiming that the 1<sup>st</sup> defendant held half of the suit property in trust for themselves. The suit property has since been subdivided and has resulted into LR Muguga/Gitaru/2429 to 2436 which are now registered in the names of the defendants. The Plaintiffs now seek to have the subdivisions cancelled so that the title can revert to the suit property before they are given half of the suit property which they claim to be entitled to by virtue of being children of the deceased who was entitled to the same.

**The Preliminary Objection**

4. The Defendants raised a Preliminary Objection against the Plaintiffs' suit on the following grounds:-

**1. That this Honourable Court lacks jurisdiction to entertain this suit pursuant to its Orders of 12<sup>th</sup> October, 2017 in ELC No. 150 of 2012.**

2. That the suit contravenes the provisions of Order 24 Rule 3 (1), (2), Rule 4 (1) (3) (5), Rule 5 and the same is null and void.

3. The Suit is null and void as the same is premised on nullified proceeding and orders that were declared null and void by the Court in High Court on 17<sup>th</sup> February, 2012 in High Court Succession Cause No. 2573 of 1999.

4. That this Honourable Court is *functus officio* in respect of the issues raised in the Plaint.

5. The suit being an abuse of the Court Process, the Defendants prays that the Plaint be struck out and the suit dismissed with costs.

5. The Court directed parties to file written submissions in respect of the Preliminary Objection on 10<sup>th</sup> December, 2018. The Defendants filed their written submissions on 10<sup>th</sup> January, 2019. As at 13<sup>th</sup> March, 2019 when the date for ruling was reserved, the Plaintiffs had not filed their submissions. The Plaintiffs' Counsel was granted leave to file submissions in the course of 13<sup>th</sup> March, 2019 but as at the time of writing this ruling, no submissions are in the Court file.

6. In their submissions, the Defendants contend that the administrators of the estate of the deceased applied to be allowed to come into ELC 150 of 2012 in place of the deceased and that that application was dismissed. The administrators also brought an application seeking to revive the suit which application was also dismissed and the suit (ELC 150 of 2012) was finally marked as having abated.

7. The Defendants further argue that the present suit is premised on proceedings and award in Land Dispute No. 6 of 2008 before Kiambu West Land Districts Tribunal and subsequent orders of Kikuyu Resident Magistrate's Court issued on 30<sup>th</sup> May, 2008 confirming the award. The Defendants argue that the orders of the Tribunal and those of Kikuyu Resident Magistrate's Court were later set aside by the High Court on 9<sup>th</sup> February, 2012.

8. The Defendants further argue that the suit which the deceased filed having abated, no fresh suit can be brought based on the same cause of action and that as the Court had marked ELC 150 of 2012 as having abated, the Court became *functus officio* and cannot entertain the present suit.

#### **Analysis**

9. I have considered the Preliminary Objection by the Defendants as well as the submissions by the Defendants. The only issue for determination in this matter is whether the Defendants' Preliminary Objection should be allowed on the grounds raised herein. In the case of **Mukisa Biscuit Manufacturing Company Limited Vs West End Distributors Ltd [1969]EA 696** a Preliminary Objection was defined thus:-

***“... 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.”***

In the same case, Sir Charles Newbold said:-

***“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 had to be ascertained or if what is sought is the exercise of judicial discretion.”***

10. Though the Defendants have raised five grounds in their Preliminary Objection, the grounds can be collapsed into two grounds namely whether the suit is premised on proceedings which had been set aside by the High Court on 17<sup>th</sup> February, 2012 in High Court Succession Cause No. 2573 of 1999 and whether it was proper for the Plaintiffs to file this suit after the abatement of the one which had been filed by the deceased.

11. On the first ground, I have looked at the plaint filed by the Plaintiffs in this case. There is nowhere in the plaint where the Plaintiffs have referred to the proceedings before the Tribunal or adoption of the award by the Kikuyu Resident Magistrate's Court. The claim is purely based on trust and there is therefore no basis upon which the Defendants can argue that the claim is premised on the award of the Tribunal and the subsequent adoption of it by the Resident Magistrate's Court at Kikuyu. The Plaintiffs have only listed the proceedings of the Tribunal in their documents. There is no indication in the plaint that their claim is based on those proceedings. I therefore find no merit in this ground which is rejected.

12. On whether the Plaintiffs should have brought the present suit in the face of the abated one which had been filed by the deceased, it is important to note that it is not contested that the suit which had been filed by the deceased abated. The Plaintiffs themselves concede to this fact in their plaint. Order 24 Rule 7 (1) of the Civil Procedure Rules provides that where a suit has abated or has been dismissed, no fresh suit shall be brought on the same cause of action.

13. In paragraph 6 of the suit which abated, the deceased was seeking to be registered as owner of the suit property on the grounds that the 1<sup>st</sup> Defendant held it in trust for her. The Defendant in the abated suit is the 1<sup>st</sup> Defendant in this case. The cause of action is still the same. The only difference is that the deceased has died but the administrators of her estate are still pursuing the suit property on the ground that the 1<sup>st</sup> Defendant held it in trust for her. The suit property has been subdivided but the Plaintiffs are seeking to have those subdivisions cancelled so that the titles can revert to the suit property before they can be given half share of it based on customary trust.

14. It is the Plaintiffs' contention in their claim that the 1<sup>st</sup> Defendant was registered as owner of LR No. Muguga/Gitaru/904 by virtue of

him being the first born in their house. Their father Njuru Ndegwa Magitha was the registered owner of LR No. Muguga/Gitaru/195 which he subdivided and had the resultant subdivisions shared to his wives but the titles were registered in the names of the eldest sons from each house. This is how the 1<sup>st</sup> Defendant was registered as owner of LR Muguga/Gitaru/904. The 1<sup>st</sup> Defendant later subdivided LR No. Muguga/Gitaru/904 which resulted into Muguga/Gitaru/1393 and 1394. The 1<sup>st</sup> Defendant sold Muguga/Gitaru/1393. This is how the deceased filed ELC 150 of 2012 seeking to have LR Muguga/Gitaru/1394 (suit property) registered in her name.

15. Though the Plaintiffs are seeking half of what their deceased mother was seeking, the cause of action is still the same. A cause of action has been defined as an act on the part of the Defendant which gives the Plaintiff his cause of complaint. See the decision of Pearson J in *Drummond Jackson Vs Britain Medical Association [1970] 2 WLR 688* which was quoted by the Judges of our Court of Appeal in *William Muinde Kilundo Vs Peter K. Wambua & 3 Others [2018] eKLR*.

16. I have demonstrated hereinabove the source of complaint which the deceased had in the abated suit. This is still the same complaint which the Plaintiffs in this suit are advancing. The addition of the other Defendants is due to the fact that the suit property has already been subdivided. The mere fact that the Plaintiffs are now claiming half of the suit property does not change the cause of action. The cause of action still remains that they are claiming to be entitled to that half share based on the same reasoning advanced by their mother in the abated suit. The Plaintiffs are therefore acting contrary to the provisions of Order 24 Rule 7 (1) of the Civil Procedure Rules. I therefore find that the Preliminary Objection on this ground is well founded. I uphold it and proceed to strike out the entire suit with no order as to costs as the Plaintiffs and the Defendants are related.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 25<sup>th</sup> day of June, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of Mr. Mirie for Defendants

Court Assistant Hilda