



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C.A NO. 22 OF 2017

IRUNGU KIBE.....APPELLANT

VERSUS

JOHN MAINA KIBE (suing as the legal representative of

RUTH NJERI KIBE (deceased)..... **1ST RESPONDENT**

IRUNGU KIBE.....**2ND RESPONDENT**

(An appeal against the Ruling delivered by J J Masiga -RM on 5/2/2016 in CMCC No 32 of 2015, Muranga)

RULING

1. The Appellant herein being aggrieved with the ruling and order of the Honourable Resident Magistrate J.J Masiga sitting at Murang'a Chief Magistrate Court in Civil Case No. 32 of 2015 delivered on 5/02/2016 preferred the present appeal vide a memorandum of appeal dated 8/02/2016 on the following grounds;

- a. The learned Magistrate erred in law and in fact in not finding that the lower Court suit is time barred under the Limitation of Actions Act Chapter 22 laws of Kenya the cause of action having arose on 29/06/89.
- b. The learned Magistrate erred in law and fact in not finding that the 1st Respondent's mother now deceased had no property to pass to him at the time of her death as the suit land was not registered in her name.
- c. The learned Magistrate erred in law and fact in not finding that the suit as drawn and filed was scandalous and vexatious in that the 1st Respondent should have sought the orders in the suit in the lower Court Murang'a CMCC Succession Cause No. 59 of 1984 instead of filing the suit subject of this appeal.
- d. The learned Magistrate erred in law and fact in not finding that the suit in the lower Court is stale and no legal orders can issue there from.
- e. The learned Magistrate erred in law and facts in not sustaining / upholding the preliminary objection in the lower Court in that the judgment in the lower Court dated 29/6/1989 was unenforceable in law and that it has been caught up by limitation.

2. The Appellant then made the following prayers;

- a. The ruling of the lower Court dated 5/2/2016 be set aside.
- b. The preliminary objection dated 27/7/2015 be upheld and the suit in the lower Court be dismissed with costs to the Appellants.

3. The impugned ruling was in respect to the Preliminary Objection filed by the Defendant/ Appellant dated 02/07/2015 on grounds that;

- i. The Plaintiff's suit is statutorily time barred as the alleged trust arose more than 12 years before the date of filing the instant suit.
- ii. The 1st Plaintiff's mother Ruth Njeri Kibe was not registered at any one time or at all as the owner of land parcel no. LOC.10/MUKANGU/328 and therefore she had no title to pass.
- iii. There is no certificate of confirmation of grant in favour of Ruth Njeri Kibe now deceased in respect of Murang'a CMCC

succession cause No. 59 of 1984.

iv. If indeed the Plaintiffs have a right to land LOC.10/MUKANGU/328 by virtue of Murang'a CMCC succession cause no. 59 of 1984 then the proper course for them to take would have been to substitute the deceased Ruth Njeri Kibe and thereafter make the necessary application in that succession cause and not bring a fresh suit.

v. The Judgment in Murang'a CMCC succession cause no. 59 of 1984 was delivered on 29.06.1989 and a period of more than 12 years has elapsed making the judgment stale and unenforceable. It has been caught by limitation.

4. After considering the submissions by both parties, the Honorable trial magistrate overruled the preliminary objection on the basis that most grounds on the face of it raised points of facts as opposed to points of law. The Honourable magistrate went ahead to note that the only point of law raised was that of limitation of action for the cause of action based on trust in which the trial magistrate agreed with the Plaintiff's counsel that the cause of action arose when the Defendant became registered over the suit land on 29.9.2010 as opposed to when the ownership right was conferred on the Plaintiffs' deceased mother in the year 1989.

5. The facts of the case before the trial Court are that, the suit was instituted through a plaint dated 20.01.2015 by the Plaintiff / Respondents herein who claimed a beneficial interest of all that parcel of land known as LOC.10/MUKANGU/328. It was the Plaintiff's case that they had inherited the suit land from their deceased mother one Ruth Njeri Kibe (deceased).

6. That the said Ruth Njeri Kibe had been allocated the suit land as a beneficiary of the estate of Kibe Mbutia in Murang'a CMCC succession cause number 59 of 1984 but died in the year 1989 before the suit land was transferred to her.

7. That it was after the death of Ruth Njeri Kibe that the suit land was transferred and registered in the name of the Appellant/ Defendant herein.

8. The Plaintiffs/Respondents claim that the registration of the suit land in the Defendant/Appellant's name created a resulting trust in favour of the Respondents as the Appellant lacked legal right to own the suit land. The Plaintiffs then sought the following reliefs;

a. A declaration that the Defendant holds the land parcel number LOC.10/MUKANGU/328 as a resulting trustee for the Plaintiff.

b. An order that the said trust be dissolved and the Defendant's title to land parcel number, LOC.10/MUKANGU/328 be cancelled and the said land be registered in the names of the Plaintiffs in equal shares.

c. Costs of the suit.

9. Before filling the lower Court suit subject matter of this appeal, the 1st Plaintiff had filed High Court Succession Cause No. 1045 of 2013 in respect to the estate of Ruth Njeri Kibe to which letters of administration were granted and confirmed to the 1st Plaintiff on 17/11/2014. In that, confirmation of grant the estate of the deceased Ruth Njeri Kibe only constituted of the parcel of land number LOC.10/MUKANGU/328, the subject matter of the suit herein.

10. The Appellant/Defendant in defence to the suit filed his statement of defence and counterclaim dated 09/02/2015 in which he claimed that he was the absolute owner of the suit land and denied that he held the land in trust for the Plaintiffs.

11. The Appellant/Defendant contended that the late Ruth Njeri Kibe had no property registered in her name at the time of her death therefore legally she had no estate to pass on to the Plaintiffs. He disputed that the said Ruth Njeri kibe was allocated the suit land vide succession cause number 59 of 1984 as there is no documentary evidence provided by the Plaintiffs to that effect. And avers that the succession cause was contested as a result of which the Plaintiffs' mother lost to his (the Defendant's) mother one Josephine Muthoni Kibe. He argued that succession Cause No. 1045 of 2013 contained misrepresented facts and the same should be revoked.

12. The Appellant/ Defendant challenged the jurisdiction of the trial Court to determine a claim based on trust.

13. Further, that the judgment that the Plaintiffs' sought to rely on having been allegedly delivered on 29/6/1989 had already lapsed in the meaning of cap 22 of the Limitation of Actions Act.

14. The Appellant/Defendant argued that the Plaintiffs had not properly invoked the jurisdiction of the trial Court for failing to substitute their deceased mother and or sue the administrator of the estate in succession cause number 59 of 1984 instead of filing the trial Court suit. He opined that the Plaintiffs had better chance had they accused him of fraudulent acquisition of title to the suit land, which they did not.

15. The Appellant / Defendant concluded that in totality the Plaintiffs' suit failed to disclose any reasonable cause of action against him and prayed for its dismissal.

16. By way of Counterclaim, the Defendant stated that the Plaintiffs had no legal interest over the suit land and sought eviction orders against the Plaintiffs.

17. The Plaintiffs filed their reply to the defence and defence to the counterclaim respectively.

18. The appeal was argued through written submissions.

The Appellant's case

19. In his submissions, the Appellant fouled the trial magistrate for considering that the cause of action in respect to the resulting trust arose in 2010 when he became the registered owner of the suit land and insists the cause of action arose on 29/06/1989 when the judgment and order in the succession cause number 54 of 1984 was issued. That it was specifically admitted in the plaint filed on 21/01/2015 that the cause of action arose on 29/06/1989. He argues at the time of instituting the trial suit the stipulated twelve (12) years after which any party is estopped from claiming a right to land had since elapsed.

20. As regards the Plaintiffs' mother's legal right over the suit land the Appellant argues that she had no property to pass to the Plaintiffs since at the time of death of the Plaintiffs' mother the suit land had not been transferred and registered in her name. The Appellant also dismisses the succession cause in respect to the Plaintiffs' mother's estate, as an academic exercise as there was no estate to administer.

21. The Appellant argues that the suit in the lower Court was resjudicata considering that the ownership rights over the suit land had already been litigated upon vide succession cause number 59 of 1984 which was between the same parties. He is convinced that the right forum for the Plaintiffs to have pursued their rights over the suit land, if any, was in the Succession Court. He opines that the trial magistrate ought to have found the Plaintiffs as being vexatious litigants for filing multiple suits over the same subject matter.

22. In respect to the judgment delivered on 29/06/1989 and relied upon by the Plaintiffs, the Appellants contended that the same had already expired within the meaning of the limitation of actions at the time of instituting of the lower Court suit after lapse of twelve years.

23. The Appellant concluded that the trial magistrate misdirected himself in law in dismissing the Preliminary Objection and has urged this Court to uphold the Preliminary objection and order for striking out of the lower Court suit with costs.

The Respondents' case

24. The Respondents argue that their claim in the lower Court is premised on a resulting trust which is a matter of fact which can only be determined after adducing evidence and cannot be argued as a preliminary point. The Respondents relied on the case of **Samuel Waweru vs. Geoffrey Muhoro Mwangi (2014) Eklr** where the Court referred to the case of **Mukisa Biscuit** case that;

“a preliminary point raises only points of law and cannot be raised if any facts have to be ascertained”

25. The Respondents also contend that their lower Court case was not statute barred since their cause of action as against the Appellant arose when he became registered over the suit land on 29.09.2010 and not when the order bestowing the land to the Plaintiff's mother was made on 29.06.1989 in succession cause no. 59 of 1984 in the matter of the estate of Kibe Mbuthia. That the suit was instituted before the lapse of the stipulated 12 years for a claim founded on trust.

26. The Respondent also sought to distinguish the facts of the present case from those of the concluded succession cause in that the present case seeks to assert the ownership rights of the late Ruth Njeri Kibe over the suit land against the Appellant herein which was not the case in the succession cause. That the facts in the two causes are not directly and substantially in issue in both suit and the two cases were not between the same parties.

27. The Respondents also argue that the effect of the Court order issued on 29/06/1989 was to vest the suit land in the hands of the beneficiary stated there under being the Plaintiff's mother which would thereafter be adopted in the certificate of the confirmed grant. That the confirmation of the grant is uncontested. They relied on the case of in the **Estate of Tuaruchiu Marete (deceased) [2019]Eklr** where the Court quoting from the case of **Kambora Kamau vs. Esther Nyambura Kirima[2002]Eklr** referring to Succession Cause No. 1086 of 1995 in the matter of the estate of Ndung'u Kariuki(unreported) , on the issue of a deceased beneficiary that;

“As a certificate of confirmation of grant , also referred to as a certificate of confirmation, confers upon a beneficiary under it a beneficial interest in the estate of the deceased person, where such a beneficiary subsequently dies before the execution or administration of the estate for which the certificate of confirmation was issued transfers the resultant legal interest or title to the aforesaid beneficiary, it is not proper and lawful to proceed to replace the deceased beneficiary with a person other than a confirmed executor or administrator of the estate of the deceased beneficiary”

28. In opposition to the ground of expiry of the Judgment and order of the Court issued on 26/06/1989 in succession cause no. 59 of 1984 the Respondents contend that awards in succession causes do not become stale or unenforceable due to lapse of time and that the limitation of actions does not apply to distribution of property vide a succession cause.

29. The Respondents also argue that it is inconsequential that the certificate of grant was not obtained in respect to the estate of the deceased Kibe conferring the suit land to their mother, that the orders in itself suffices and the confirmed grant is an automatic follow up to the order.

30. The Respondents claim to have been in occupation of the suit land since time immemorial which occupation can only be proved by way of evidence and cannot be wished away as a preliminary point.

31. The primary role as a first appellate Court is namely, to re-evaluate, re-assess and re-analyze the evidence before the trial Court and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212** this Court held that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own

conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”.

32. The ruling that gave rise to this appeal was in respect to a preliminary objection raised by the Defendant/ Appellant which was dismissed for reasons that Defendant had raised issues of facts as opposed to points of law. The cardinal rule on the nature of issues to be addressed in a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd .v. West End Distributors Ltd [1969] EA 696**, a Preliminary Objection must only consist pure points of law and not fact. In that case, Sir Charles Newbold delivered himself thus:-

"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."

33. *I have looked at the grounds of the preliminary objection which appear to have been mapped into the grounds of this appeal it would appear the Appellant had raised both points of law and fact as here under;*

34. In regard to the issue of the claim under trust being statute barred, Limitation of Actions is inapplicable to the issue of trusts. The Court of Appeal case of **Stephens & 6 others v Stephens & another [1987] eKLR** the Court stated thus :

‘The philosophy underlying the English Limitation Act seems to be, that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar. So no plea of limitation is available to a fiduciary in such a case. (See section 19 (1) of the Limitation Act 1939). The Parliament of Kenya clearly shares that policy and in the Limitation of Actions Act (cap 22) enacted a similar provision in almost identical language. Section 20(1)(b) of the Limitation of Actions Act (cap 22) provides that:

"None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action:

"to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use."

That was precisely the reliefs which the Appellants sought in regard to the suit plot. In my opinion, no period of limitation applies in this case and I am in respectful disagreement with the learned judge's contrary holding on this point. If this is the right view to take, the same must hold good for the consequential relief of account.’

35. In regard to the claim being res-judicata the Appellant argued that the ownership rights over the suit land had already been litigated upon by the succession Court, save for the order of 1989 there was no more material presented before the trial Court of the proceedings and the findings of the succession Court in terms of a detailed judgment that would inform the Court the issues that were addressed and the parties that were involved. The trial Court would therefore have not made a finding without the relevant information.

36. *The Respondents have argued that their claim is premised on a resulting trust which is an issue of fact and can therefore not be argued as a preliminary point while I agree that trusts are issues of fact.*

37. I see no reason to fault the ruling of the learned Magistrate in disallowing the Preliminary Objection. The appeal has no merit it is disallowed. Let the suit in the lower Court be heard on its own merits.

38. The Appellant shall pay the costs of the appeal and the objection in the lower Court.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Appellant: Absent Advocate is absent.

Ms Maina HB for Mbutia for the 1st – 2nd Respondents

Irene and Njeri, Court Assistants