



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO. 78 OF 2018

MUKEKU NGAIA.....1ST PLAINTIFF/RESPONDENT

ESTHER NZAMBI.....2ND PLAINTIFF/RESPONDENT

-VERSUS-

NTHAMBI MUSYOKA.....1ST DEFENDANT/APPLICANT

KYEVA MUSYOKA.....2ND DEFENDANT/APPLICANT

RULING

1. What is before this court for ruling is the Defendants' Notice of Preliminary Objection against the Plaintiff's entire suit on point of law dated 02nd October, 2018 and filed in Court on the 25th October, 2018.

2. The Preliminary Objection is based on the grounds that: -

1) It is bad in law.

2) An abuse of court process for being re-judicata High Court of Kenya at Makueni. H.C.P. & A 49 of 2017 In the matter of the estate of Musyoka Ngaia (Deceased). Which was decided on 10th day of April, 2018.

3. On the 21st February, 2019 the court issued directions to dispose off the Preliminary Objection by way of written submissions. The Defendant and the Plaintiff filed their submissions on 12th and 17th June, 2019 respectively.

4. In his submissions, the Counsel for the Defendants pointed out that in High Court Succession Cause No.49/17, the High Court decreed that Land Parcel Number Machakos/Kiu/110 be registered in the name of Musyoka as an absolute owner subject to no overriding interests. The Counsel added that it was also the finding of the High Court that the Plaintiffs herein who were the Objectors in High Court Succession Cause No.49/17 had failed to prove trust and as such, the High Court decision can only be overturned by the Court of Appeal.

5. Arising from the above, the Counsel submitted that the plaint herein is bad in law since the issue in dispute is still trusts based on a joint purchase of plot No.160 by family members.

6. It was also the Counsel's submissions that since the issue of trust was deliberated in the matter before the High Court, the plaint offends the law of res judicata as provided for by Section 6 of the Civil Procedure Act. That the suit is fatally defective and cannot be cured by an amendment and should be dismissed with costs.

7. The Counsel for the Plaintiffs submitted that the Preliminary Objection is misplaced and misconceived. The Counsel cited the case of ***In the matter of the estate of Julius Ndubi Javan (deceased) Priscilla Ndubi and Another vs. Gerishon Gatobu Mbui [2018] eKLR*** where it was held that:-

“the primary duty or jurisdiction of the Probate Court under the law is to distribute the Estate of deceased person to rightful beneficiaries.”

The Counsel submitted that Article 162(2) of the Constitution has provided for the establishment of Environment and Land Court to hear and determine disputes relating to –

“the environment and the use and occupation of, and title to, land.”

The Counsel went on to add ***that Section 13(2) of the Environment and Land Court Act*** has provided the jurisdiction of the Environment and Land Court Act to:-

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

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to 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.

8. The Counsel further submitted that the dispute herein is not a succession cause but a claim on land thus this court which is of equal status as the Probate court ought to exercise its jurisdiction without encroachment. The Counsel cited the case of ***Samuel Kamau Macharia vs. Kenya Commercial Bank Ltd. & 2 Others [2012] eKLR*** which was coincidentally cited by E. C. Muita J ***in the case of Mukenya vs. Ernest Mangala Ayuga [2016] eKLR***.

9. Flowing from the above, the Counsel added that the Probate Court directed the Plaintiffs to file their claim in the Environment and Land Court. The Counsel concluded by urging the court to dismiss the Preliminary Objection with costs to the Plaintiffs.

10. Having read the Preliminary Objection as well as the submissions that were filed my finding is as follows:-

11. Section 6 of the Civil Procedure Act ... that the Defendants rely on deals with stay of suit. The Defendants have not sought to stay the suit herein. I presume that by asserting that the issue herein is res judicata, the Defendants' Counsel had Section 7 of the Civil Procedure Act in mind.

12. The above Section provides as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been

heard and finally decided by such court.”

13. Although the Defendants have indicated in their list of documents dated 19th September, 2018 and filed in court on 27th September, 2018 that there was a ruling of the High Court, they did not file the same. They did not indicate the court file number of the said ruling but perhaps they meant ***Makueni High Court P&A No.49 of 2017 Mukeku Ngala & Another vs. Nthambi Musyoka & Another.***

14. I have had a chance to peruse the ruling in the aforementioned ***Makueni P&A 49 of 2017.*** While dismissing the Protestors’ objection, the High Court in Paragraph 45 of its ruling expressed itself thus: -

“The dispute is not per se revolving on distribution or administration of the deceased estate but ownership of the suitland.”

The High Court went on to hold in paragraph 49 of its ruling that;

“.....if they so choose, the Protestors can pursue their claim over it in an ordinary suit.”

15. The above being the case, the suit herein cannot be said to be res judicata within the meaning of Section 7 of the Civil Procedure Act since this court has to hear and determine the issue of ownership of Land Parcel Number Machakos/Ulu/260. In the circumstances, the Preliminary Objection has no merits and same is dismissed with costs to the Plaintiffs.

Signed, Dated and Delivered at Makueni this 30th day of September, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

No appearance for the Plaintiffs

No appearance for the Defendants

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

30/09/2019.