



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 43 OF 2018

NYOKABI KINYANJUI1ST PLAINTIFF

EUNICE MUMBI THIONG'O.....2ND PLAINTIFF

VERSUS

JOHN NJENGA KINYANJUI.....DEFENDANT

RULING

1. The Plaintiffs by a Plaint dated 24th July 2018 and filed in Court on the same date, instituted the instant suit against the Defendant whereby they sought for declaratory orders that the Defendant herein holds parcel No. Nyandarua/Mkungu/45 and or the subdivisions thereof being Nyandarua/Mkungu/5022- 5024 both numbers inclusive in trust for himself and the Plaintiffs. The Plaintiffs also sought for an order of cancellation of these subdivisions so that the suit land reverts to its original mother title to allow equal sub-division of the same.

2. There was also an application seeking injunctive orders against the Defendant wherein the Court directed that the parties maintain the status quo prevailing at the time pending the hearing and determination of the suit. Parties were directed to comply with the provisions of Order 11 of the Civil Procedure Rules so that the matter could be set down for hearing.

3. It was while the matter was pending confirmation of compliance with the said provisions of the law that Counsel for the Defendant sought leave to file a formal application on a preliminary point of Objection pursuant to the sentiments made at paragraph 16 of their statement of defence in which they had attacked the jurisdiction of the Court to try the suit.

4. There was no objection from the Plaintiffs' Counsel wherein leave was granted and the Defendant filed their Notice of Preliminary Objection dated the 5th March 2019 on the 7th March 2019.

5. By consent, the parties agreed to have the said application disposed of in the first instance by way of written submissions wherein they submitted their highlights on the 15th July 2019 which highlights follow;

Defendant/Applicant's Submission.

6. It was the Defendant's submission that the application dated the 5th March 2019 raised the legal issue of jurisdiction to the effect that Court had no jurisdiction to hear and determine the present dispute which was purely a succession dispute. That the jurisdiction of the Court is determined under Article 162 (2) (b) and Section 13 (2) of the Environment and Land Court Act.

7. That the question that begged was whether the nature of the dispute before the Court could be determined by this Court and that if the Court found that the dispute was not within its jurisdiction, then it should down its pen and strike out the suit and/or refer it to the proper Court.

8. That the nature and the subject matter of the suit derived directly from the pleadings and nothing else. The primary pleading being in the Plaint filed on the 24th July 2018 and provided by the Plaintiffs thereby detailing the subject matter of the suit in paragraphs 4 – 6.

9. That two things that arose from the Plaint, was that firstly there was an admission that both the Plaintiffs were siblings to the Defendant and that their father died intestate. That thereafter the Defendant had moved to the District Magistrate's Court where he had filed a Succession Cause and he had been appointed as Administrator thereby being issued with a certificate of succession which then caused the subject property to be registered in the his name as the only heir to their father's estate.

10. That having pleaded their case in that manner, it was clear from the prayers herein, that they were challenging the registration of the Defendant as the sole proprietor of the suit property which issues arose from a judicial process from another Court.

11. That from the above situation, the issue that came out was whether the Court had jurisdiction to set aside a certificate of succession issued in another Court when that prayer had not been raised? They submitted that the Court has no jurisdiction because the order could be issued by that Court as provided for under Section 70 of the Law of Succession Act. That the grounds pleaded in the Plaintiff's Pleint would be properly litigated in a probate Court. That the effect of the present suit was to circumvent the other judicial process that was pleaded and admitted. They relied on the case of **Re Estate of John Nthiwa Nzioka (deceased) [2018] eKLR** to submit that the objection was merited, the suit was misplaced, as it flowed directly from a succession process and it was therefore unsustainable in law.

Plaintiffs/ Respondents' Submission

12. The Preliminary Objection was opposed for reasons that the Court had been invited to look at issues in particular being paragraphs 4 – 6 of the Plaintiffs' Pleint and to avoid looking at the other paragraphs of the Pleint.

13. The Court's attention was drawn to paragraph 8 and 12 of the Pleint and the prayers in the Pleint in which the Plaintiffs' issues had been that after the Defendant had the subject suit registered in his name, he embarked on seeking to evict the Plaintiffs from the suit land so that he could keep the whole portion to himself but had offered the Plaintiffs the rocky part of the suit land which was unfit for farming. This had been the basis of the filing of the suit herein.

14. That the Court had the power to hear the Plaintiff and grant the prayers as sought by the Plaintiff as they had raised issues for resolution. That the Court in a bid to hear and determine land matters could not close its ears to other matters touching on any other jurisdiction apart from its own. That an example of a case on fraud, the Court could not close its ears on allegations of fraud because fraud lay to the criminal jurisdiction. That the Court could not pay attention to the factual background and history of a suit and declare its jurisdiction based on those only.

15. The Plaintiff's submission was that the history in a land matter may touch on various jurisdictions coming from contract to succession to criminal and fraud but the Court ought to look at the ultimate objective of a litigant which is deciphered from the prayers the litigant seeks.

16. That in their case, the Plaintiff had narrated the process of the Defendant's registration, which narration was what resolved into the Plaintiffs' actual pleadings as contained in paragraph 8 and 12 of the Pleint where the Plaintiff sought that that registration of the Defendant, however, it may have been obtained, was subject of their customary interest of that land.

17. That the Plaintiffs had not called upon the Court to query the process but was calling upon the Court to determine as to whether or not the registration was subject to their customary Act. The registration was under the repealed Registration of Land Act. That the Plaintiffs sought to demonstrate that the registration by the Defendant was subject to their customary rights. The prayers sought a declaration of trust.

18. That the deceased died in the year 1975 wherein the certificate of succession was obtained in the year 1979. The Law of Succession came into operation in 1981. In this case, the succession had been concluded and the certificate of succession lay beyond the ambit of the Succession Act. That the law did not act retrospectively.

19. It was the Plaintiff's submission that what they sought was for the Court to find that the dispute before it was not one challenging the process of obtaining the certificate, rather the dispute sought was one of the said customarily rights as per the provisions of Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act, it was a dispute relating to the use, occupation, and title to land. That the dispute was properly before the jurisdiction of this Court.

20. That the Court was being asked to dismiss the suit in limine which was draconian and would not meet the best interest of justice. They sought for the Plaintiffs to be allowed to demonstrate the customary rights in the matter so that the Court could determine that the Defendant's registration was subject to a trust however obtained.

Determination

21. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd-v- West End**

Distributors Limited (1969) EA. 696 was stated to be thus:-

“So far as I am 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.”

22. In this proceedings, it is the Defendant/Applicant's case inter alia that this suit should be dismissed with costs as the Court had no jurisdiction to hear and determine the present dispute which was purely a succession dispute. That it had been clear from the Plaintiffs pleadings and prayers herein, that they were challenging the registration of the Defendant as the sole proprietor of the suit property which issues arose from a judicial process from another Court whose decision was still in force and had not been set aside..

23. The Plaintiffs having raised the issue of trust in their Pleint, I find the issues for determination as follows;

i. Whether the issue of trust is triable by the Environment and Land Court and not the Succession Court.

ii. Whether the Defendant's Preliminary Objection is sustainable.

24. In the decided case of **James Aggrey Nyapola Michael & Another vs Rosemary Irene Wanga [2014] eKLR** the Environment and Land Court held that, intestate and testamentary succession to, and the administration of the estates of the deceased persons were governed by the **Law of Succession Act**, which under **Section 47** gave the High Court (read ELC) jurisdiction to deal with any matter arising under the Act. The Land and Environment Court in this regard, therefore, had concurrent jurisdiction to hear and determine disputes of succession relating to land.

25. In the case of **Henry Njung'e Kirika & Another v Kezia Njango Kirika (Being The Administrator Of The Estate Of Stephen Kirika Njunge (Deceased) [2014] eKLR**, Nyamwea J held that,

'...if the Plaintiffs are aggrieved as beneficiaries of the deceased's estate, and arising from the acts of the defendant as an administrator of the estate, then the right forum to ventilate their grievances is in the succession cause in the High Court of Kenya, and not in this Court.'

26. Further, the **Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts** issued by the Chief Justice dated 25th July 2014 and published in Gazette Notice 5178 of 2014, Practice Direction No. 6 directed that all cases touching on inheritance, succession, and distribution of land under the Law of Succession Act shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.

27. In the case of **Julius Wachira Maina & 2 others v Christopher Murathe Muraguri [2017] eKLR** the Court held that :

"Given the fact that the succession Court was not asked to determine whether the interest being succeeded was subject of any trust in favour of the Plaintiffs or any other person, I am unable to agree with the defendant's counsel that by asking this Court to determine whether the registration of the defendant as the absolute proprietor of the suit property is subject to their interest in the suit properties as beneficiaries pursuant to the alleged trust relationship amounts to challenging the orders obtained in the succession proceedings... In my view, this Court would lack jurisdiction, only and only if, the question of the Plaintiffs' interest had been made subject of consideration in the succession proceedings and found to be none existent. There being no evidence that the question of trust or the question of the Plaintiffs interest in the suit property was subject of consideration in the succession cause, I find and hold that this Court has jurisdiction to hear and determine whether the registration of the defendant is subject of the alleged trust in favour of the Plaintiffs.

28. Given the foregoing, I find and hold that the Plaintiffs cannot be reasonably blamed for moving the Court for the determination of the question as to whether the defendant's registration as the absolute proprietor of the suit property is subject to their pleaded trust. The preliminary Objection, therefore, lacks merit and is hereby dismissed with cost to the Plaintiffs.

Dated and delivered at Nyahururu this 26th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE