



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 130 OF 2017

JOEL KAMAU ITHAGU.....1ST PLAINTIFF/ RESPONDENT

ISAAC NGANGA.....2ND PLAINTIFF/ RESPONDENT

HAMSON MUCHUGI.....3RD PLAINTIFF/ RESPONDENT

JANE WAMBUI4TH PLAINTIFF/ RESPONDENT

VERSUS

RABECA WAITHERA KAMAU.....1ST DEFENDANT/ APPLICANT

STEPHEN ITHAGU.....2ND DEFENDANT/ APPLICANT

JAMES GITAU KAMAU.....3RD DEFENDANT/ APPLICANT

RULING

1. Upon being served with the plaint and the Plaintiff's Notice of Motion application, the Defendant/Applicants gave notice of Preliminary Objection dated 23rd July 2014 to the Plaintiff's suit and application, seeking that both be struck out and/or dismissed with costs on the grounds that:

- i. The court lacked original jurisdiction to entertain the suit on the basis of pecuniary jurisdiction.
- ii. The Plaintiffs lacked the necessary locus standi to institute the instance suit as no letters of administration had been taken.
- iii. The 1st Plaintiff lacks the authority of the other Plaintiffs to swear /plead the affidavits verifying the facts of the suit herein.
- iv. The application is incompetent, premature, frivolous, and vexatious and an abuse of the court process.
- v. The suit does not disclose any cause of action.
- vi. The prayers sought are not available to the plaintiffs to be granted since this was not a succession cause.

2. On 20th September 2017, the court directed parties to first dispose of the application on the Preliminary

Objection through written submissions and thereafter highlight their submissions.

3. The Defendant/Applicants filed their submissions in support of the Preliminary Objection on 17th October 2017 whereas the Plaintiff/Respondents filed their submissions on the 22nd November 2017.

4. On the 22nd November 2017, Counsel briefly highlighted on their written submissions and relied entirely on their pleadings and submissions.

5. The gist of the Defendant/Applicant's submissions in support of the Preliminary Objection is that the Plaintiffs herein filed the present suit on the 10th October 2013 seeking inter alia that the parcel of land known as Nyandarua/Passenga/427 does revert to the names of Elishiba Nduta Ithagu(deceased)

6. The Applicants submission was to the effect that the 1st to 3rd Plaintiffs as well as the 1st Applicant were siblings. That their mother Elishiba Nduta Ithagu (deceased) left land parcel No. Nyandarua/Passenga/427 to the 1st Defendant/Applicant herein who then sub-divided the same into three resulting into parcel numbers Nyandarua/Passenga/787-789 which are the subject suits herein upon which the Plaintiff/Respondents sought orders of injunction.

7. The Applicant's submission is to the effect that the prayers sought by the Plaintiff/Respondent in their plaint could only be issued by the High Court in a Succession Cause and not in the Environment and Land Court which had no jurisdiction in the circumstance.

8. The Applicant further submitted that parcel No. Nyandarua/Passenga/427 was registered in the name of one Elishiba Nduta Ithagu, who is now deceased and for which the Plaintiff/Respondents had neither sought for letters of Administration in respect to her estate nor obtained a grant ad litem to give them the necessary locus standi to bring the instant suit. That they were therefore in contravention of the Law.

9. The Applicant then submitted that the 1st Plaintiff/Respondent had also contravened the provisions of Order 1 rule 8 and 13 of the Civil Procedure Rule by purporting to swear the verifying affidavit on behalf of the other plaintiffs.

10. In so submitting, the court was drawn to affidavits sworn on the 23rd October 2013 by the 3rd and 4th Plaintiffs vide their Notice of Motion dated the 23rd July 2014 wherein they had denied ever instructing the 1st Plaintiff/Respondent to file suit on their behalf.

11. Lastly the preliminary objection alluded to the fact that there was no Succession Cause filed by the Applicant as was deponed in paragraph No. 9 and 11 of the plaint.

12. In opposing the preliminary objection, the 1st and 2nd Plaintiff/Respondents submitted that vide their plaint dated the 9th October 2013 they had sought for orders of injunction against the Defendant/Applicants either by themselves, their agents, servants, and/or employees from further selling, alienating, transferring, registering any transfer, executing a transfer charging mortgaging to any third parties, entering, occupying or in any way interfering with No. Nyandarua/Passenga/787,788 and 789 pending the determination of this suit.

13. The Plaintiff/Respondent submitted that the present suit was competent before the court and should be heard on merit as the Defendant/Applicant without adhering to the due process had subdivided Nyandarua/Passenga/427 into three parcels of land being Nyandarua/Passenga/787,788 and 789 without there being a succession cause filed.

14. The Respondents submitted that under Article 162 (2) (b) of the Constitution and section 4(1) and section 13 (1) of the Environment and Land Court Act, the Environment and Land Court had jurisdiction to hear and determine all matters pertaining to occupation of and title to land and therefore this court had the jurisdiction to hear and determine the present suit.

15. The Defendant/Applicant having subdivided the deceased property without subjecting it to the proper succession cause and thereafter filing the present case seeking for orders of injunction against interference of the suit property by the Plaintiff/Respondents fell within the ambit of this court.

16. The Respondents further submitted that the suit land belonged to their mother and that the same had already been sub-divided and had titles which had been illegally acquired, and that the dismissal of the same would only promote chaos between the parties who are siblings.

17. The Plaintiff/Respondent thus urged the court, if it was is convinced that the letters of Administration ought to have been obtained, to treat the omission as a technicality and not to strike out the suit. They relied on Article 159(2) (d) of the Constitution, to submit that the court was obligated to dispense justice without due regard to technicalities.

18. The plaintiff submitted that whether or not they had authority to swear the affidavits verifying the facts of the suit were issues that ought to be proven by evidence and could not be raised at a preliminary stage.

19. That the suit disclosed a cause of action on paragraph 9 of their plaint and that this was also a factual issue. They submitted that their suit was not incompetent, premature, frivolous, and vexatious and an abuse of the court process and relied on the case of **DT Dobie and Company (K) LTD vs Muchina (1982) KLR** which enunciated the principles applicable in considering whether or not to strike out pleadings.

20. Lastly the Plaintiff/Respondents submitted that this was a matter that relating to the suit property which the defendants had fraudulently obtained titles without subjection the same to succession cause and as such the prayers sought by the plaintiffs were available in this court.

21. The plaintiff/Respondent prayed for the dismissal of the Preliminary objection as it did not fit the criteria set out in the case of Mukisa **Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696.**

22. After having analyzed the submissions by both parties as well as having paid regard to the authorities herein cited by both parties on the Preliminary objection, I find the matters for determination being:

i. Whether the court has jurisdiction

ii. Whether the Preliminary Objection raised is sustainable.

iii. Whether the said Preliminary Objection has merit and should be upheld.

23. In the present case, the 1st Defendant/Applicant raised the question of the court's jurisdiction to entertain the Plaintiff/Respondent's case as a preliminary point of law. Her argument, as I understand it, is that on the pleadings presently before the court, the court has no jurisdiction to determine the matter before it because the prayers sought by the Plaintiff/Respondent in their plaint could only be issued by the High Court in a Succession Cause thus the Environment and Land court had no jurisdiction in the circumstance.

24. That parcel No. Nyandarua/Passenga/427 was registered in the name of one Elishiba Nduta Ithagu, who is now deceased where after the Defendant/Applicants subdivided it into three parcels of land being Nyandarua/Passenga/787,788 and 789 which parcels of and the Plaintiff/Respondent sought injunctive orders as against the Defendant/Applicants, a matter which the Applicant herein has strong conviction that the same does not fall for consideration by this court, as the matter is a succession matter and therefor is a preserve of the High Court.

25. The Court of Appeal articulated the importance of jurisdiction in the case of the **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and**

“**Steve B**” [2008] 1 EA 367 in which it expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....As soon as that is done, the court should hear and dispose of that issue without further ado.”

26. The question before me is whether this court has jurisdiction to entertain proceedings of injunction brought pursuant to order 40 of the Civil Procedure Rules.

27. It is not in dispute that the suit property in his case being parcel No. Nyandarua/Passenga/427 was registered in the name of one Elishiba Nduta Ithagu, who upon her death, the Defendant/Applicant subdivided her parcel of land into three thus resulting into land parcels being Nyandarua/Passenga/787,788 and 789. It is also not in dispute that this subdivision was caused without the filing of a succession cause. That it was pursuant to the Defendant/Applicant’s illegal action that the Plaintiff/Respondent filed that present suit seeking for injunctive orders against the Defendant/Applicants either by themselves, their agents, servants, and/or employees from further selling, alienating, transferring, registering any transfer, executing a transfer charging mortgaging to any third parties, entering, occupying or in any way interfering with No. Nyandarua/Passenga/787,788 and 789 pending the determination of this suit.

28. After having laid down the foundation of the suit before court, the question then is whether the parties are properly before court. The approach to the court for orders of injunction under order 40 of the Civil procedure Rules, in my view, is proper. The Plaintiff/Respondent is correct when she submits that under Article 162 (2) (b) of the Constitution and section 4(1) and Section 13 (1) of the Environment and Land Court Act, the Environment and Land Court has jurisdiction to hear and determine all matters pertaining to occupation of and title to land and therefore this court had the jurisdiction to hear and determine the present suit.

29. On the second issue raised, I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A preliminary objection per Law J.A. 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.”

In the same case Sir Charles Newbold, P. stated:

‘.....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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

30. The summation of the 1st Defendant/Applicant’s submission is that the Plaintiffs lacked the necessary locus standi to bring the application and institute the instance suit in its entirety as he had not obtained a grant and/or the letters of administration to do so.

31. In the case of **Trouistik Union International vs. Mbeyu & Another [1993] eKLR** the Court of

Appeal emphasized that that personal representatives are people who have obtained grant and not blood relations. That if an administrator brought an action before obtaining Grant, the same would be incompetent from inception. That a suit commenced by a party who has not obtained letters of Administration was therefore incompetent as the party filing it lacks the locus standi to present and prosecute the suit. The court had relied on their own decision in the case of **Otieno v Joash Ochieng Ougo & another (1987) eKLR** to hold that;

“The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception”.

32. There having been consensus by parties that the Plaintiff/Respondent herein instituted the present suit without having obtained letters of Administration, I find that that the Preliminary Objection raising the issue of locus standi as not being a technicality but the law and that the same does not offend the provisions of Article 22 and 159 of the Constitution to the effect that a party needs to have capacity or locus standi before bringing a claim in court.

33. In the circumstance thereof, I find that the Preliminary Objection has merit and I uphold the same with the effect that the suit filed herein is incompetent and bad in law. The Plaintiff’s suit commenced through a plaint dated 9th October 2013 and filed in court on the 9th October 2013 is unenforceable and is hereby struck out with costs to the Respondents/Applicants.

Dated and delivered at Nyahururu this 15th day of February 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE