



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 101 OF 2017

PETER KIMANI KABACHI

1ST PLAINTIFF

WATSON KARANJA KIMUHU

(Suing in the capacity as legal representative of the estate of

KABACHI WAIHENYA AND KIMUHU WAIHENYA

2ND PLAINTIFF

VS

JEREMIAH KIMEMIA KARUGA

(Sued as the legal representative of the Estate of KIRUGA

DEFENDANT

JUDGMENT

1. The Plaintiffs sued the Defendant seeking dissolution of alleged trust in Loc.18/Gachocho/653 and subsequent transfer to them.
2. The land is registered in the name of Kiruga Waihenya who had 4 brothers to wit: Kabachi Waihenya, Gakio Waihenya, Kamau Waihenya and Kimuhu Waihenya. They are all deceased. The 1st Plaintiff is the son of Kabachi Waihenya and the 2nd Plaintiff is the son of Kimuhu Waihenya. The Plaintiffs are suing as legal representatives and administrators of respective estates.
3. The Defendant is the son of Kiruga Waihenya (deceased) the registered owner of the suit land. He has been sued as the legal representative of the estate of Kiruga Waihenya.
4. The Defendants denied trust on the suit land and put the Plaintiffs in strict proof.

Plaintiffs case

5. The 1st Plaintiff testified that he is the cousin of the 2nd Plaintiff and the Defendant, their fathers having been brothers. That his mother Rachel was inherited by the Defendant's father upon the demise of his own father Kabachi Waihenya. That the Defendants further died in 1957 and his mother Rachel, gathered the fragments and consolidated them under the name of the Defendant's father to hold in trust for himself and his brothers. That his grandfather, Waihenya had 5 sons and one daughter. That he had land in various places such as Gachocho and Gitumbi. That the suit land was allocated to Kabachi Waihenya, Kimuhu Waihenya and Kiruga Waihenya. That the suit land was family land. That though the title does not denote the land is held under trust, the same was registered in the name of the Defendant's father to hold subject to trust. He admitted that he has no letters of administration in respect to the estate of his father. That he got to know that the land is subject to trust in 1977. That he resides on the land since birth and cultivates coffee and subsistence crops. That the land at Gitumbi is registered in the name of Keziah Wangui (wife of Kamau Waihenya) is not family land.

6. PW 2 – The 2nd Plaintiff stated that he was born in 1980 and therefore does not know the history of the suit land. That his father was Kimuhu Waihenya and mother was Zipporah Njeri both died in 2012 and 1993 respectively. That though he has raised his claim on behalf of his deceased father he does not hold any letters of grant of administration over his estate. That he learnt about the trust on the suit land in 2009. That his father was buried on the suit land though under protest by the Defendant's family. That he lives on the suit land.

Defence case

7. DW 1 stated that his father Kiruga Waihenya bought the land from many people which he produced the list. That upon his death in 1957, the lands (fragments) were consolidated in 1963 or thereabouts and registered under his name in 1965 by his uncle Kamau Waihenya, deceased. That his mother Marion Nduta Kiruga died in 1957. That he has 2 siblings Waithira Mukura and Florence Wanjiku That his

grandfather Waihenya Kiruga died in 1963. That his family home was in Gitumbi scheme measuring 1.0 acres registered in the name of Keziah Wangui the wife of Kamau Waihenya. He denied that his father inherited the mother of the 1st Plaintiff. He admitted that the land is being cultivated by the 1st Plaintiffs and that the 2nd Plaintiff's father was buried therein. That the plaintiffs should claim the family land registered in the name of Keziah Wangui. That his father's land is registered in his name absolutely and is not subject to any trust.

Written Submissions

8. The parties elected to file written submissions which I do not wish to replicate. However I will refer to them in my analysis of the case.

9. The Defendant raised a Preliminary Objection in his defence which I wish to address before I deal with the substantive matter. If the Preliminary Objection succeeds then it will have disposed of the case, if it fails then I will handle the substantive claim in the suit.

10. The Defendant in Paras 3, 4, 5 of the defence have raised Preliminary Objection. I shall reproduce them for ease of reference.

“a) The Defendant does not refute and deny the contents of paragraph 3 of the plaint and does specifically aver that the Plaintiff remains non-suited against him and has no locus to lodge this claim and further that the purported claim is not sustainable in law.

b) Further to the above, the Defendant does aver that the Plaintiff's claim is fatally defective, incompetent, frivolous, vexatious and is an abuse of the due process of the law and Court.

c) In particular, the Defendant does aver that the claim herein is hopelessly time barred and in particular there is no trust subsisting and binding on land parcel number Loc.18/Gachocho/653 registered in the name of the Defendant's father, Kiruga Waihenya (deceased)

11. Both parties have addressed the issues raised in the Preliminary Objection as well as the substantive claim in their written submission.

12. On the issue of *locus standi*, the Defendant's position is that the Plaintiffs pleaded and testified that they are claiming their deceased's father's entitlement in the suit land. That the suit land belonged to their grandfather Waihenya Kiruga and was registered in the name of the Defendant's father to hold in trust for himself and siblings, their fathers included. That the two Plaintiffs have not obtained grants of representations to the respective estates of the father; thus have no locus and are therefore not suited.

13. The Plaintiffs in their submissions have stated that their claim rests on trust and therefore do not require letters of representation. That they are direct beneficiaries of the trust. That they are not claiming the estate of their respective fathers. That they are claiming as beneficial owners and therefore they are properly before the Court.

14. It is trite law that parties are bound by their own pleadings. In the case of **DAVID SIRONGA OLE TUKAI V. FRANCIS ARAP MUGE & OTHERS**, CA NO. 76 OF 2014, this Court expressed itself thus:

“..... And it is for the purpose of certainty and finality that each party is bound by its own pleadings.

15. Locus standi is defined in Black's Law Dictionary, 9th Edition (page 1026) as “the right to bring an action or to be heard in a given forum.”

16. In the case of **Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) (2016) eKLR A.C. MRIMA J.**

held that:-

“Further the issues of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

17. In the case of **Trolistik Union International & Anor. Vs. Mrs. Jane Mbeyu & Anor. CA 145 of 1990**. The Court of appeal held that where a party seeks to file a suit on behalf of the estate of a deceased person, he must as of necessity obtain letters of administration.

18. An excerpt of the Plaint is set out as follows;

In para 4 of the Plaint, the Plaintiffs state as follows;

“The deceased Kiruga Waihenya was a brother to Kabachi Waihenya, Gakio Waihenya, Kamau Waihenya and Kimuhu Waihenya the Plaintiffs are administrators of the respective estates”.

Para 1 of the Plaintiff's joint written statement states as follows;

“our names are Peter Kimani Kabochi and Watson Karanja Kimuhu. We are legal representatives of the estate of Kabachi Waihenya and Kimuhu Waihenya”.

The cause of action is under trust but they have presented themselves as persons with grant of representation. The plaint remains commingled as far as their claim is concerned. They have however not placed before the Court evidence of grant of representation to clothe them with legal capacity to so file the claims. It is clear from the Plaintiff’s pleadings that they have filed suit as representatives of the estates of their deceased fathers. This Court concurs with the Defendants counsel that in in the absence of a grant of representation, the plaintiffs have not disclosed a locus in the manner pleaded.

19. On the issue that the claim is statute bared, the Defendant stated that the matter was filed in Court in 2017, 20 years after it came to the knowledge of the 1st Plaintiff that the suit land was subject to a trust. That the 2nd Plaintiff filed suit 9 years from 2009 when he obtained knowledge of the trust.

20. Relying on the decision in the case of MACHARIA KIHARI VS NGIGI KIHARI C.A CIVIL APPEAL No. 170 of 1993, where the Court of Appeal held as follows:-

“Limitation period prescribed in Section 20 (2) of the Limitation of Actions Act will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law”.

This Court finds and holds that the claim is not one to be subject to Limitation of actions Act.

21. Having held that the Plaintiffs have no locus, the Court does not find it necessary to deal with the substantive claim. The Preliminary Objection is upheld to the extent of the issue of want of legal capacity to file suit.

22. The upshot is that the suit is incompetent and is struck out accordingly. Each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 19TH DAY OF APRIL, 2018.

J.G. KEMEI

JUDGE