



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 7 OF 2018

LUCY WAIRIMU KIANDA.....1ST APPLICANT

JANE WAMBUI KIONGO.....2ND APPLICANT

NICHOLAS WAMAI NJUKI.....3RD APPLICANT

VS

ESTHER WANGARI JOSEPH.....1ST DEFENDANT/APPLICANT

PETER NGURE NJUKI.....2ND DEFENDANT/APPLICANT

HENRY KAHIGA MUCHOKI.....3RD DEFENDANT /APPLICANT

WILSON KURIA WAMAI.....4TH DEFENDANT/APPLICANT

JULIAH WANJERI NJOROGE.....5TH DEFENDANT/APPLICANT

RULING

1. The Applicants filed suit against the Defendants seeking *inter alia* the following orders;

a) A declaration that the transfer of the suit premises Fort Hall – Loc.12/Sub-Loc.1/Gakira/T.15 appearing at entry No. 2 in the green card on this property on the 21st June 2017 to Esther Wangari Joseph, Nicholas Wamai Njuki and Henry Kahiga Muchoki and the portions of the said property into Loc.12/Sub-Loc.1/Gakira/T. 551, T.552, T.553, T.554 and T.555 and the titles issued subsequent to such partition in the names of Esther Wangari Joseph (T.551), Henry Kahiga Muchoki (T.552), Wilson Kuria Wamai and Juliah Wanjeri Njoroje(T.553), Nicholas Wamai Njuki (T.554) and Wilson Kuria Wamai and Juliah Wanjeri Njoroje (T.555) are all null and void.

b) An order cancelling all the above mentioned transfers and partitions and directing that all the titles referred to above do revert to the name appearing in the register on the 6th December 1962 – and 2nd October 1980 – as entry No. 1 in their respective registers in the name of Joseph Njuki M. Kirigo in respect of Fort Hall Loc.12/Sub-Loc.1/Gakira/T. 15 and Joseph Njuki M. Kirigo in respect of Loc.12/Sub-Loc.1/Gakira/1501.

c) An order that the Defendants deposit the title deeds that they now hold to Court for onward transmission to the Land Registrar Murang'a for cancellation and to give effect to orders No. 1 and 2 above in default of which the Land Registrar Murang'a be authorized by this Court to rectify the register and give effect to the orders of this Court without reference to the Defendants.

d) Such other or further relief as this Court may deem fair and just to grant.

e) Costs of this suit.

2. The Applicants and the 1st and 2nd Defendants are children of the Joseph Njuki Michuki alias Joseph Njuki M Kirigo alias Michuki Joseph Njuki (deceased) who died intestate on the 20.6.2004. That the said Joseph Njuki Michuki was at the time of his death the registered proprietor of several assets to wit; Land Reference No.s Fort Hall/Loc 12/Gakira/T.15 measuring 0.13 acres and Fort Hall/Loc 12/Gakira/T.1501 measuring 0.465 Ha. That the Applicants aver that no letters of grant of administration have been obtained in respect to the estate of the said Joseph Njuki Michuki. That the 1st Defendant petitioned for grant of letters of administration vide SPMCC Succession Cause No 106 of 2017 without the consent of the other siblings, which petition is being objected to by the Applicants.

3. That unknown to the Applicants the 1st Defendant has illegally and fraudulently caused the subdivision of Fort Hall/Loc 12/Gakira/T.15 into plot No.s 551, 552 and 553 and caused transfers to be effected accordingly. That the Fort Hall/Loc 12/Gakira/T.1501 was equally transferred to some of the beneficiaries before the letters of grant of administration was issued to enable the estate be administered as per law required.

4. Contemporaneously the Applicants filed a Notice of Motion under certificate of urgency on the 30.1.2018 seeking the following orders;

a)spent

b) That the Defendants herein Esther Wangari Joseph, Peter Ngure Njuki, Henry Kahiga Muchoki, Wilson Kuria Wamai and Juliah Wanjeri Njoroge be restrained by injunction from either by themselves, their servants, agents, assignees or any persons claiming title through the Defendants or any of them from alienating, transferring, selling, disposing, using, charging, mortgaging, developing on or constructing on, trespassing on, entering upon, or in any manner whatsoever dealing with the suit property herein:-

?Loc.12/Sub-Loc 1/Gakira/T.551

?Loc.12/Sub-Loc 1/Gakira/T.552

?Loc.12/Sub-Loc 1/Gakira/T.553

?Loc.12/Sub-Loc 1/Gakira/T.554

?Loc.12/Sub-Loc 1/Gakira/T.555

?Loc.12/Sub-Loc 1/1501

pending the hearing and determination of this application or until further orders of this Honourable Court.

c) That the Defendants herein Esther Wangari Joseph, Peter Ngure Njuki, Henry Kahiga Muchoki, Wilson Kuria Wamai and Juliah Wanjeri Njoroge be restrained by injunction from either by themselves, their servants, agents, assignees or any persons claiming title through the Defendants or any of them from alienating, transferring, selling, disposing, using, charging, mortgaging, developing on or constructing on, trespassing on, entering upon, or in any manner whatsoever dealing with the suit property herein:-

?Loc.12/Sub-Loc 1/Gakira/T.551

?Loc.12/Sub-Loc 1/Gakira/T.552

?Loc.12/Sub-Loc 1/Gakira/T.553

?Loc.12/Sub-Loc 1/Gakira/T.554

?Loc.12/Sub-Loc 1/Gakira/T.555

?Loc.12/Sub-Loc 1/1501

pending the hearing and determination of this application or until further orders of this Honourable Court.

d) That the costs of this application be borne by the Defendants.

5. The application is premised on the grounds stated as below;

a) The Defendants have unlawfully and fraudulently transferred and partitioned the suit property from the name of a deceased person without letters of administration or certificate of confirmation of grant contrary to section 61 of the Land Registration Act – 2012.

b) The Defendants have fraudulently forged the signatures of the 1st and 2nd Applicant in transferring and partitioning some of the suit property.

c) The Defendants may dispose of the suit property to further perpetrate their illegal activities and it is therefore necessary to preserve the property pending the hearing of this application and the main suit.

d) Such further reasons to be given at the hearing of this application.

6. In opposing the application, the Defendants filed a preliminary objection on the grounds that;

“a. the Applicants have no locus standi and it offends the law of succession Cap 160 Laws of Kenya to institute this suit.

b. This honorable Court lacks jurisdiction to entertain the suit.

c. That the suit is a non starter”.

7. The 1st Defendant filed a replying affidavit on her own behalf and allegedly on authority of the rest Defendants (I did not sight the authority) in which she deponed that the suit properties being sought to be injuncted relate to the estate of the late Joseph Njuki Michuki who is deceased. She admitted that to date there are no letters of grant of administration that have been issued in respect of the said estate. That the Applicants have not applied for and obtained any letters of representation to enable them institute the current suit thus rendering the suit and consequently the application a non- starter in law and misconceived as the Applicants have no locus standi to move the Court. That this is the wrong forum as the ELC Court is not clothed with the requisite jurisdiction to so determine the matter. That the matter being a succession dispute belongs to the High Court. She urged the Court to strike out the application and the suit.

8. Parties elected to canvass the application by way of written submissions.

9. The Defendants have submitted that the Applicants have no locus to institute the suit on the basis of want of letters of representation to act for the estate of the late Joseph Njuki Michuki. That in so far as the suit is concerned they are strangers to the estate. That they are acting contrary to the provisions of the Law of Succession. That letters of administration are mandatory under the Law of Succession Cap 160.

10. On jurisdiction of the Court, quoting section 13 of the Environment and Land Act No. 19 of 2011 in extenso, they submitted that the Court has no jurisdiction to determine the suit as it is outside the jurisdiction of the ELC Court as donated by the Constitution of Kenya, 2010. That the dispute relates to succession of an intestate estate and therefore lies in the province of the High Court. They urged the Court to strike out the suit on that ground.

11. The Applicant opposed the preliminary objection in their submissions and stated that on the issue of locus, the Defendants have not cited the relevant provisions in the Law of Succession Act that have been offended by their suit. The Applicants pointed to the Court the fact that the suit lands as they stand are now registered in the names of the 3rd Applicants and the Defendants, all living persons. That there is not a single title in the name of the deceased Joseph Njuki Michuki.

12. Further that the cause of action in their plaint is the fraudulent and illegal transfers of the suit properties from the name of the deceased Joseph Njuki Michuki without any grant of letters of administration being issued. Quoting from the decision of **Stephen Waithaka Gatumbi Vs Frumence Murui Nai 1757 of 2001** where Nyamu J pronounced himself as follows;

“That the matters of fraud and illegality do not fall under the succession Court but with the ELC Court and therefore the suit is properly before the Court”

13. Opining on the issue of jurisdiction the Applicants submitted that the definition of land under section 2 of the ELC Act read together with Article 162(2)(b) of the Constitution, gives the ELC Court the jurisdiction to determine the issues raised in the claim/suit.

14. Relying on the case of **Mukhisa Biscuit Manufacturing Co Limited Vs West End Distributors limited 1969 EA 696**, they pointed to the Court the principles governing the successful raising of a preliminary objection. They argued that in their opinion the preliminary objection should fail as the Defendants have made reference to the list of documents which would require a Court to call for facts or other evidence to verify the same. That the preliminary objection is fatal as it did not raise pure points of law.

15. What is a preliminary objection? As to whether the Preliminary objection as raised is a pure point of law, the Court in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, defined a preliminary objection as follows;

“.....a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

16. In the case of **Oraro vs. Mbaja(2005) I KLR 141** Ojwang, J the Court held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a preliminary objection must not deal with disputed facts, and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence”

17. Further in the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint and defence are disputed and prima facie the claim in this suit cannot be deemed to be incontestably hopeless and be summarily dismissed by way of preliminary objection.

18. The effect of the case law cited above means for one to succeed in putting up a preliminary objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

19. On the issue of Jurisdiction, Article 162(2)(b) of the Constitution read together with section 13 of the ELC Act, section 105 of Land Registration Act and Section 150 of the Land Act gives the ELC Court jurisdiction to determine cases in respect to land.

20. I understand the case of the Applicant to be based on fraud and illegality. I have looked at the copies of documentary evidence supporting ownership of title that is to say copies of official searches and the suit properties as currently registered are as follows;

- a. Fort Hall/Loc 12/Gakira/T.1501 - Peter Ngure Njuki and Nicholas Wamai Njuki
- b. Fort Hall/Loc 12/Gakira/T.551 - Esther Wangari Joseph
- c. Fort Hall/Loc 12/Gakira/T.552 - Henry Kahiga Muchoki
- d. Fort Hall/Loc 12/Gakira/T.553 - Wilson Kuria Wamai, Julia Wanjeru Njoroge and Nicholas Wamai Njuki
- e. Fort Hall/Loc 12/Gakira/T.554 - Nicholas Wamai Njuki
- f. Fort Hall/Loc 12/Gakira/T.555 - Wilsomn Kuria Wamai and Julia Wanjeri Njoroge

21. The prayers being sought in the plaint are mainly declaratory that is to say to determine title, that titles issued pursuant to alleged illegalities and fraud be cancelled and the suit lands be reversed to the name of the deceased Joseph Njuki Michuki. This Court is empowered to hear and determine disputes interalia relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. To that extent I hold that this Court has the requisite jurisdiction pursuant to section 13 of the ELC Act read together with Article 162(2)(b) of the Constitution and all other enabling legislation quoted above to determine the dispute in respect to the allegations relating to the ownership of title. I shall therefore proceed to determine the Preliminary objection.

22. The Defendants have raised a point of law in respect of the locus or lack of it of the Applicants in instituting this suit. It is trite law that for one to file suit in respect to the estate of a deceased person, he must obtain letters of grant of administration which could be final or *ad litem*. Anything short of that amounts to intermeddling in the state of a deceased person contrary to section 45 of the Law of Succession Act. That is the law in this country.

23. The Applicants have stated that currently the properties are no longer in the name of the deceased. The cause of action as can be ascertained from the plaint is that the 1st Defendant became owner of the suit properties by way of a grant of letters of administration and proceeded to deal with the assets of the estate without making provisions for them albeit that they are entitled. The 1st Defendant therefore became a trustee occupying a fiduciary position for those who are beneficially entitled including herself. The 1st Defendant was therefore by law bound to account for the trust asset to the beneficiaries. It is alleged that she appropriated the asset as pleaded in Para 7 of the plaint.

24. The issue of locus is therefore not founded because the Applicants do not seek to administer the estate of the deceased. In any event the assets have been transferred to the Defendants and are no longer in the name of the deceased. The Applicants are suing the administrator and the Defendants for alleged fraudulent and appropriation of the titles in the land. The Court is being asked to determine title in the land. The Applicants are seeking to establish their interest in the said properties which properties are already in the hands of third parties; They ceased to be the property of the deceased and therefore the issue of intermeddling with the estate does not arise. They are questioning the validity or otherwise of the titles. The claim in my view relates to the alleged disposal of the estate.

25. Having reached the conclusions on grounds a and b above, it follows that ground c is unfounded.

26. The Court, for the reasons stated above, finds that the Preliminary Objection is devoid of merit and is dismissed with costs to the Applicants.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF MAY 2018.

J G KEMEI

JUDGE