



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MILIMANI**

**ELC CASE NO. 778 OF 2017**

**JONATHAN NJUGUNA MWANGI ..... PLAINTIFF**

**=VERSUS=**

**JOHN GITATA MWANGI & 3 OTHERS ..... DEFENDANTS**

**RULING**

1. This is a ruling in respect of two separate applications and a preliminary objection by the defendants. The first application is dated 22<sup>nd</sup> December 2017. It is brought by the plaintiff and it seeks the following orders.

**1. Spent**

**2. Spent**

**3. Spent**

**4. That the defendants be restrained by themselves, their agents or servants from entering into the half of LR No.6909/7 on which stands the plaintiffs home pending the hearing and determination of this suit.**

**5. Spent**

**6. That the defendants be restrained by themselves, their agents or servants from evicting the plaintiff from the half of LR No.6909/7 on which stands the plaintiff's home pending the hearing and determination of this suit.**

**7. Spent**

**8. That the defendants be restrained by themselves, their agents or servants from cutting down/harvesting trees and/or uprooting coffee standing in the plaintiff's half of LR No.6909/7 on which stands the plaintiff's home pending hearing and determination of this suit.**

**9. That the costs of this application be provided for.**

2. The second application is dated 31<sup>st</sup> January 2018. It is brought by the defendants and it seeks stay of these proceedings pending the hearing and determination of the summons for distribution of the estate of Mwangi Mbothu dated 12<sup>th</sup> October 2017 filed by the plaintiff in Nairobi HC Succession cause No.494 of 1994 in the matter of the Estate of Mwangi Mbothu (Deceased). The preliminary objection relates to the issue of jurisdiction of this court to handle this suit.

3. I will first deal with the preliminary objection, the second application and finally the first application.

**The Preliminary Objection.**

4. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants contend that this court has no jurisdiction to entertain this suit. They argue that the issue in contention relates to the distribution of the estate of the late Mwangi Mbothu and that therefore the court with Jurisdiction to deal with the case is the Family Division of the High Court.

5. The plaintiff on the other hand argues that this is the court which has jurisdiction because the plaintiff's claim relates to occupation, use and title to land which is within the jurisdiction of the court.

6. In determining whether this court has jurisdiction to hear this suit or not, a look at the prayers in the plaint is necessary. I wish to reproduce the same herein:-

*i. A declaration that he is entitled to the exclusive occupation and possession of half of LR No.6909/7.*

*ii. A declaration that the defendants have breached their fiduciary duties in relation to LR No.6909/7.*

*iii. A declaration that the defendants have committed the tort of trespass to land on the portion of LR No.6909/7.*

*iv. An order that the defendants do account to the plaintiff all the money fetched by sale of all trees and coffee bushes uprooted/removed from the suit property and sold.*

*v. A permanent injunction restraining the defendants from interfering with the plaintiff's quiet possession with the half of LR No.6909/7.*

*vi. General damages*

*vii. A declaration that the defendants are in breach of their duties under section 83 of the Law of Succession Act.*

*viii. A declaration that the purported division of the property in 2003 was illegal.*

*ix. Costs of the suit.*

*x. Interest on (Vi) and (ix) above*

*xi. Any further order which this Honourable Court deems fit to grant.*

7. The plaintiff and the defendants are sons of the late Mwangi Mbothu (deceased). The plaintiff is from the deceased's second house whereas the defendants are the deceased's sons from the first house. The deceased bequeathed LR No.6909/7 in equal shares to the Plaintiff and the 3<sup>rd</sup> defendant. This property is 80.68 acres. The plaintiff and the 3<sup>rd</sup> defendant were therefore entitled to 40.34 acres each. The other defendants are executors of the will of the deceased.

8. The plaintiff's contention is that the defendants have sub-divided the property into two unequal parts contrary to what he is entitled to as per the confirmed grant in Nairobi HC Succession Cause No.494 of 1994. The plaintiff's contention is that the defendants have trespassed into the plaintiff's half portion of the property and have cut down the coffee on it as well as the trees on it and have threatened to evict him from his portion.

9. It is clear that the plaintiff's claim squarely falls within the jurisdiction of this court. There is no dispute as to what share was bequeathed to the plaintiff and the 3<sup>rd</sup> defendant. This is a matter which has already been settled by the Family Division of the High Court. I therefore find no merit in the preliminary objection which is hereby dismissed with costs to the plaintiff.

### **The Second application**

10. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants contend that the plaintiff has filed an application in Nairobi HC Succession Cause No.494 of 1994 in the matter of the Estate of Mwangi Mbothu (Deceased) where he has obtained interim orders. They contend that the orders which the plaintiff has sought are similar to what he is seeking herein; that the issues herein relate to distribution of the estate of the deceased which should not be entertained by this court.

11. The plaintiff has opposed the application by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants based on a replying affidavit sworn on 17<sup>th</sup> February 2018 as well as a further affidavit sworn on the same date. The plaintiff contends that the defendants application is an abuse of the process of the court; that this court has the requisite jurisdiction to deal with the issues herein and that among the prayers which the plaintiff has sought in the succession cause is removal of the executors from office, appointment of the public trustee to execute the estate of the deceased and for the public trustee to subdivide the property in issue in terms of the orders made on 21<sup>st</sup> September 1999.

12. I have considered the application by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and the opposition thereto by the plaintiff. As clearly seen from the affidavit in support of this application, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are seeking stay of this suit mainly on grounds of jurisdiction. As I have said hereinabove, this court has jurisdiction to handle the complaints made by the plaintiff. What is before the Family Division as can be seen from the further affidavit of the plaintiff in opposition to the application is a matter within the jurisdiction of the Family Division court. Among other prayers is removal of the executors from office and appointment of the public trustee.

13. The plaintiff herein is claiming that he has been deprived part of his entitlement. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are cutting down the coffee growing on his portion and are selling trees growing thereon. Already his entitlement is known. He is entitled to half of the property bequeathed to him by his father. When rights to the enjoyment of his half portion of that property is threatened, the proper court to hear his grievances is this court. There is therefore no point of staying proceedings in this suit. I therefore find no merit in this application which is

hereby dismissed with costs to the plaintiff.

**The first application.**

14. The first application is seeking injunctive reliefs against the defendants. There is no contention that the plaintiff was given one half of a property then known as LR No.6909/7. What the court has to consider is whether the plaintiff has demonstrated that he has a prima facie with probability of success.

15. I have considered the affidavits filed by the respective sides. What is not in contention is that the plaintiff and the third defendant were to share LR No.6909/7 in equal shares. There were attempts to share out the said land in a manner agreeable to the parties. Professionals in various fields were appointed by each of the parties concerned to try to reach an acceptable mode of sub-division. It is clear that there was no agreement reached. Despite the fact that no agreement was reached, the defendants later purported to subdivide the land into unequal portions. The plaintiff was given a portion which was less by about 9 acres. This is what he is disputing.

16. The person who was said to have represented the interests of the plaintiff resulting in the subdivision of the land as currently is has denounced his alleged role. He has in fact sworn an affidavit stating that the defendants tried to persuade him to support their case but he declined to do so. The defendants are now arguing that equal share does not mean 50:50 sharing. In trying to justify this; they have even brought in the history of how the deceased came to hold the land which he finally bequeathed to the plaintiff and the 3<sup>rd</sup> defendant. Though the deceased and his partners were tenants in common in equal shares, the distribution was not equal. This may have been the case but it cannot be applied here.

17. The plaintiff has even offered to take what the defendants are giving the 3<sup>rd</sup> defendant if their contention is that that is what is equivalent to half of what he was bequeathed. I find that plaintiff has a prima facie case with probability of success. He is entitled to injunctive reliefs. I therefore allow the application dated 22<sup>nd</sup> December 2017 in terms of prayers (4), (6), (8), and (9).

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 26<sup>th</sup> day of July 2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of :

M/s Kinuthia for Dr.Kuria for Plaintiff

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**