



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO.329 OF 2017**

**JOHNSON GATHANGA MWANIKI.....PLAINTIFF/RESPONDENT**

**VS**

**ESTHER WATHERI MWANIKI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**SAMUEL GATHIMA MWANIKI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**ESTHER WATHERI MWANIKI (sued as the Administrator**

**or Legal Representative of the estate of**

**CHARLES MBUTHIA MWANIKI).....3<sup>RD</sup> DEFENDANT /APPLICANT**

**STEPHEN GITHAIGA MWANIKI.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

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

- a) An order for cancellation of the new titles in the names of the Defendants in respect of land parcel No. Loc 19/Kiawambogo/352, 360, 366 and T. 189 and the restoration of the old titles in the name of the deceased Mwaniki Gathanga as per the certificate of confirmation of grant dated the 26/6/90.
- b) And order for the dissolution of the existing trust in the name of the 1<sup>st</sup> Defendant on the suit lands and the transfer of each respective positions to the beneficiaries of the said trust as per the Court dated the 23/3/94
- c) Punitive costs by the Defendants as punishment for perpetuating and abetting in fraud.

2. The Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup> (deceased) and 4<sup>th</sup> Defendants are children of the 1<sup>st</sup> Defendant. Their father Mwaniki Gathanga died on 18/2/78. Prior to his demise, the deceased owned suit properties aforesated. Vide a succ cause No 148 of 1988 the estate (suit lands) were registered in the name of the 1<sup>st</sup> Defendant to hold in trust for herself and that of her 7 children pursuant to the grant issued on the 26/6/1990. According to the plaintiff vide a Court order issued on the 23/3/1994, the Court ordered that the estate of the deceased shall be shared equally between the beneficiaries with the 1<sup>st</sup> Defendant retaining a life interest in the estate. The trust was also dissolved.

3. It is the plaintiff's averment that the 1st Defendant unlawfully and illegally transferred the suit lands contrary to the certificate of confirmed grant and the orders of the Court aforesated and dissolved the grant unlawfully with the consequence that some of the beneficiaries to the estate, the plaintiff included, he argued, were disinherited. He alleges that the same was done secretly and without due regard to the trust existing then. That the alleged transfers were fraudulent and has particularised fraud. Further he alleges that the 1st Defendant in collusion with the 2nd and 4th Defendants filed a succession cause in respect to the estate of the 3rd Defendant Charles Mbuthia Mwaniki Succ Cause No 108 of 2007 wherein the 1st and 4th Defendants inherited the suit land Loc 19/Kiawambogo/352 and T.189 disinheriting the Plaintiff of his share of the inheritance.

4. The Defendants denied the plaintiffs claim in their statement of defence filed on 13/6/14 and sought to put the plaintiff to strict proof. Further it raised the lack of jurisdiction of this Court to determine the matter and undertook to raise a preliminary objection. True to their word the Defendants filed a Preliminary objection dated the 10/4/18 and urged the Court on the following points;

- a. That the Court lacks jurisdiction to hear the matter.

b. If the suit is heard in this Court it will offend mandatory provisions of the law.

c. That the suit is improper before the Honourable Court.

5. Parties elected to prosecute the preliminary objection by way of written submissions which I have read and considered.

6. In brief the Defendants/Applicants held that the preliminary objection is a pure point of law which has the potential of determining the suit with finality without the need for further evidence. Relying on Article 162(2)(b) and the Environment and Land Court Act 2012, they argued that the mandate of this Court does not include intestate and testamentary succession and administration of the estates of a deceased person. That it is in the province of the succession Court, which is the High Court. The Applicant also pointed me to the practice directions dated the 9/11/12 and contained in the Kenya Gazette Notice No 16268 which provided that all cases under the law of succession Act were to continue to be filed and heard by the High Court and the Magistrates Courts as the case may be. Be that as it may, they urged the Court to determine that the dispute can and could be adjudicated in the Magistrates Court to wit Murang'a Succ cause No. 148 of 1998 for determination. The Defendants relied on the cases of **Telkom Kenya Limited Vs John Ochanda CA NO 60 of 2013** and **Peter Ndukuthyo & 2 Others Vs Lydia Wangonde & Anor ELC No. 419 of 2013** to support their application.

7. The Plaintiff/Respondent argued that once the succession cause confirmed the grant on the 26/6/90 the Court became functus officio and the 1<sup>st</sup> Defendant became registered as owner of the 4 parcels of land comprising the estate of the deceased in trust for herself and her children. That the 1<sup>st</sup> Defendant acted contrary to the Court orders and in so acting committed fraud on the estate of the deceased in respect to the trust properties. The plaintiff submitted that the orders sought are within the mandate of the ELC Court as provided for under the constitution, 2010 read together with section 13 of the ELC Act, 2012. He urged the Court to dismiss the preliminary objection.

8. Having considered the application, the rival submissions there are two questions for determination; whether the Court has jurisdiction over the matter and secondly whether the Preliminary Objection as raised is a pure of point of law.

9. On the issue of Jurisdiction, Article 162(2) (b) of the Constitution read together with section 13 of the ELC Act, section 101 of Land Registration Act and Section 150 of the Land Act gives the ELC Court jurisdiction to determine cases in respect to land. For purposes of emphasis and clarity, section 13 of the ELC Act provides as follows;

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land”.

10. I understand the case of the Plaintiff to be based on alleged illegality and fraud as pleaded in the plaint. The plaintiff is alleging that his father's estate has been shared contrary to a Court order that among other things directed the 1<sup>st</sup> Defendant to be registered as a trustee of the suit land in trust for herself and her children, the plaintiff, included. That in 1994 the said Court determined the trust and ordered that the estate be shared equally among the beneficiaries, the plaintiff included. The 1<sup>st</sup> Defendant was to retain a life interest in the said properties. The plaintiff's claim is that title was obtained by some of the beneficiaries in contravention of the said orders. The Defendants have adverted that the plaintiff has been provided for in accordance to the wishes of the deceased Mwaniki Gathanga by being given two other lands to wit Mutitu/Ngori/Block 2(Rwathia) and Ruiru East/Juja East/Block 2/1805.

11. The prayers being sought in the plaint are mainly in respect to cancellation of title and the suit lands be reversed to the position in 1990 and 1994. 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 vis a vis the certificate of confirmation of grant aforementioned. I shall therefore proceed to determine the Preliminary objection.

12. What then 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...”

13. 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 point .....Anything 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 .....”

14. 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.

15. 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.

16. From the pleadings it is not discernible that there is a point of law that has been pleaded by one party and admitted by the other. It is on record that the estate of the deceased devolved to the 1<sup>st</sup> Defendant to hold in trust for herself and her children. At that point the asset of the deceased estate has been identified and the beneficiaries are known. The Court further proceeded to order for equal sharing of the estate amongst the known beneficiaries. One would assume that to be a succession matter. However, the dispute relates to how the estate was administered or not administered post the confirmation of grant. The plaintiff has alleged that the estate was dealt with contrary to the grant and Court order. Indeed, he has pleaded and particularised fraud on the part of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant on the other hand maintains that the plaintiff was provided for in accordance with the wishes of the deceased Mwaniki Gathanga. This state of affairs calls for the Court to inquire into the two parcels of land as they do not appear to have been disclosed to the succession Court and made part of the order for equal distribution of the deceased estate to the beneficiaries. To that extent the Preliminary Objection is fatally flawed and falls short of the definition provided by case law cited above.

17. The Court, for the reasons stated above, finds that the Preliminary Objection is devoid of merit and is dismissed with costs to the Plaintiff/Respondent.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff – Absent.

Wachira for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants.

Irene and Njeri, Court Assistants.