



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 493 OF 2017

JIMNA MINAI WANGONYA.....APPLICANT

VERSUS

JULIUS MACHARIA MWANGI (Sued as the

Legal representative of the estate of MWANGI

KIRINGU alias MWANGI KIRENGU).....RESPONDENT

RULING

1. Julius Macharia Mwangi filed a Preliminary Objection on 16/4/18 seeking the Originating Summons to be struck out on the following points law:-

(a) Applicant has no locus standi in law to sue on behalf of Karoki family without the requisite authority.

(b) That the Originating Summons is res-judicata in view of an earlier civil suit No. 31 of 2001 involving the same parties and litigating on the same subject matter, which abated by operation of law and under Order 24 Rule 7 of Civil Procedure Rules no fresh suit, can be filed on the same cause of action.

2. On the 17/4/2018, the parties through their Learned Counsels on record elected to prosecute the Preliminary Objection by way of written submission, which they have duly filed.

3. The Respondent submitted that the Applicant has filed an Originating Summons in a representative capacity as representing the family of Karoki, which he belongs. The Applicant however contrary to Order 1 Rule 8 (1) (2) & (3) of Civil Procedure Rules has flouted the mandatory requirements that obligate the Applicant to give notices to the members of Karoki family before suit and obtain authority in writing from such persons on whose behalf the suit is to be commenced. In the circumstances, he argues the Applicant has no locus standi to file the present suit.

4. In respect to the second point of law raised, the Respondent contends that there was a previous proceedings in Murang'a PMCC No. 31 of 2000 between the Applicant and the deceased Mwangi Kiringu which sought the following orders;

a) A declaration that title No. Loc. 13/Karung'e/2347 is registered in the name of the Defendant as a trustee for two clans.

b) An order that the Defendant cease to be registered as proprietor of the said title.

c) An order that the title be subdivided into two portions each to Mbari ya Karoki and the other to Mbari ya Ndwiga (Mbari is a Kikuyu word meaning clan).

5. The Respondent informed the Court that the case did not proceed to full hearing because the Defendant died. The application by the Applicant to substitute the Defendant dated 19/5/2006 was dismissed with costs on 3/11/2006. The Respondent annexed a copy of the said ruling to the Replying Affidavit. The Respondent argued that with the abatement, Rule 7 (i) bars the Applicant from filing a fresh suit on the same cause of action. He urged the Court to strike out the Originating Summons.

6. In opposing the Preliminary objection, the Applicant submitted rather briefly that the provisions of Order 8 (1) of Civil Procedure Act (I guess he meant Order 1 Rule 8 Civil Procedure Rules) does not apply to the circumstances of the case because the Applicant is the only person remaining in the Karoki family and there is nobody to give notice to.

7. The Applicant submitted that Murang'a PMCC 31 of 2000 was instituted by way of plaint unlike the current matter which is been brought

by way of Originating Summons whose proceedings are governed by Order 37. The Respondent contends that the matter is not Res-judicata.

8. Having considered the Preliminary Objection, the rival submissions and the legal authorities which were supplied the key questions for determination are:

- a) Whether the Applicant has locus standi to bring the suit.
- b) Whether the suit offends Order 24 Rule 7(1).

9. The Applicant in his Originating Summons filed on 3/4/2017 sought the following orders;

- a) That Mwangi Kiringu alias Mwangi Kirengu be declared to hold all that piece of land measuring 1.20 Ha. known as Land Parcel No. LOC.13/KARUNG'E/2347 in trust for his own behalf and on behalf of Karoki family to which the Applicant belongs to.
- b) That all that Land Parcel known as LOC.13/KARUNG'E/2347 be subdivided equally between the Karoki clan represented by the Applicant and Nduiga Clan represented by the Respondent.
- c) That such other questions as may be pertinent to the case be determined and appropriate directions and orders given.
- d) That the costs of this application be provided for.

It is clear that he is seeking declaratory orders that the Respondents holds the suit land in trust for his own behalf and that of Karoki family. He further wants the suit land be subdivided equally between the Karoki clan represented by the Applicant, and the Nduiga clan represented by the Respondent.

10. Under Para 4 he has deponed that the Respondent and the Applicant share a common ancestry; that of Kahete which comprised of Kiambutu house, Gaturi house, Njuru house and Nduiga house. Kahete owned LR No. LOC.13/KARUNG'E/1833 which was held under trusteeship by a nominee of each house as follows; Muriu Macharia- Njuru house; Mwangi Kiringu: Nduiga house; Ezekiel Kariuki – Kiambu house and James Mwangi representing Gathuri house. He further deposed that LOC.13/KARUNG'E/1833 was subdivided into 4 parcels for each house and LOC.13/KARUNG'E/2347 was registered in the name of the Respondent as trustee for Nduiga clan, which he belong to under the Karoki family. According to Para 10 of his supporting affidavit. It is clear that the Applicant is pursuing a share of LOC.13/KARUNG'E/2347 allegedly on behalf of Karoki family which he represents. Further in Para 10 he deposed that he is entitled to ½ share of the suit land on behalf of Karoki family.

11. Having laid the background of the claim, what does the procedures provide in the circumstances. Order 1 rule 8 provides as follows;

- “(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as of all in same representing all or as representing all except one or more of them.
- (2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.
- (3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the Court to be made a party to such suit”

According to **Black's Law Dictionary 10th edition**, a clan is defined as;

“ a group of people having a common descent and sharing a strong interest and heritage in a particular geographical area”.

12. In Kenya, the Plaintiff need not obtain leave of Court in order to bring a suit. What he requires to do is to issue a notice to all interested parties of his intention to sue on their behalf. The reason for the notice is so that the interested parties are bound by the eventual decree of the Court.

The members of Karoki family for whom the Applicant claims to represent them must be ascertained as suit cannot be brought on behalf of a general populace. If there is a community of interest among the members of Karoki family then the rule obligates the Applicant to bring on representative suit.

13. The Applicant has responded in the written submissions that the members of Karoki family have all died. There is no evidence tendered by way of affidavit to support averment that Karoki family members have died; who died and when? Evidence of death. Even if they have died there could be representatives who ordinary would succeed them. This reasoning is unfounded and is accepted. In any event evidence cannot be tendered in submissions.

14. The Plaintiff/Applicant has not complied with the provisions of Order 1 rule 8. No evidence of authority to represent the members of Karoki family has been given. The Preliminary objection is upheld in that regard.

15. The Second question for determination is whether the suit as filed offends Order 24 rule 7(1). In the suit the Applicants is claiming title

by customary trust. The Respondent has disclosed the Court that there was a previous suit PMCC No. 31 of 2000 Murang'a which abated. The ruling of Hon. Court delivered on 3/11/2006 was presented to the Court. The claim of the Applicant together with 2 others was a declaration that the suit land was held by the Respondent in trust for the Karoki clan. This cause of action is similar to the current cause of action in the Originating Summons. The parties are the same and the subject matter is the same.

It is true that the previous suit No. PMCC No. 31 of 2009 was not heard and determined as the Defendant in the suit under whom the current Respondent is sued under was the same. In my considered view the suit cannot be said to be Resjudica on that ground. However Order 24 rule 7(1) state as follows;-

“Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action”

It therefore follows that the Applicant in filing this suit is in contravention of the above rule. The rule is worded in mandatory terms.

16. With respect I do not agree with the Applicants submission that the rule does not apply to the Originating Summons as it is not a plaint but originating summon brought Order 37. The determining factor in my view is that the previous suit abated and no fresh suit shall be brought on the same cause of action.

17. In the end, the Preliminary Objection is upheld and the suit is struck out with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF OCTOBER, 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Chege HB for Kimani for the Plaintiff

Mbugua HB for Mwangi Ben for the Defendant.

Irene and Njeri, Court Assistants