



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 61 OF 2017

ZACHARIA KARIUKI KABITHI.....PLAINTIFF/ RESPONDENT

VS

JOSEPH NDUNGU MUMBURA.....1ST DEFENDANT

HELLEN WANJIRU.....2ND DEFENDANT

RULING

1. The Plaintiff sued the Defendants as joint registered trustees on their own behalf and on behalf of their siblings and children of Mumbura Kabithi (deceased) and as proprietors of the suit land Ref LOC 19/RWATHIA/366 measuring 7.08 ha. The Plaintiff is claiming, *inter-alia*, a declaration that the suit land registered in the names of the Defendants was held by one Mumbura Kabithi in trust for Mumbura Kabithi, the Plaintiff and his late brother Willy Ndugi Waithaka.

2. In denying the Plaintiff's claim the 1st Defendant averred that the suit land devolved to the Defendants by way of succession vide High Court Succession Cause No 41 of 1988 Nyeri where the Defendants became registered as joint owners in trust for themselves and other family members. He denied that they held the suit land in trust for anyone least of all the Plaintiff. The 1st Defendant further contended that the suit as filed is fatally defective for reasons that the 2nd Defendant died in 1992 many years before the suit was filed and thus such a suit is not sustainable in law. Under para 12 of the Statement of Defence, the 1st Defendant undertook to raise a preliminary objection prior to the commencement of the hearing of the suit.

3. True to his word, the 1st Defendant through his counsel on record filed a preliminary objection on the 12/2/18, which objection is the subject of this ruling. The grounds, *inter-alia*, are as follows;

- a. The Plaintiffs suit and claim as filed is fatally defective grossly incompetent and an abuse of the due process of the law and Court.
- b. The suit remains incurably defective the Plaintiff having sued an already dead person Hellen Wanjiru who died on 17/7/92, the defect is incurable and the suit is for striking out.
- c. The Plaintiff has no locus standi.
- d. The estate having been administered in Nyeri High Court Succession cause No 36 of 1990 the trust as alleged has nothing to stand on.
- e. The Court has no power or jurisdiction to revoke the grant issued by the probate Court in the succession cause aforesaid.
- f. The claim is time barred having been filed 52 years after the registration of the subject land in the name of the deceased.

4. It would appear that the Plaintiff did not file any response to the preliminary objection. It is on record that the Plaintiff on the 17/4/18 filed a Notice of Motion seeking leave to amend the Plaintiff. The 1st Defendant while responding to the said application dated 17/4/18 filed grounds of objection on the 28/5/18. There seems to be a confusion in the manner the counsels on record are proceeding with the two applications. I say so because what is coming up for determination before this Court is the Preliminary Objection filed on the 12/2/18. The Plaintiff s' counsel has filed submissions on the application for leave to amend and failed to file submissions in respect to the Preliminary Objection whilst the 1st Defendant's counsel has filed submissions on both applications. When Counsels appeared before me in Court on the 12/7/18 Mr. Kirubi for the 1st Defendant in his address to the Court stated as follows;

“Both parties have filed their written submissions in respect to the application dated the 12/2/18.”

Equally, Mr. Wambugu holding brief for Mr. Mathenge for the Plaintiff said this in response;

“That is the position”

No directions were given by this Court that both applications would be heard simultaneously. What is before me for determination is the Preliminary Objection filed on the 12/2/18. Failure by the Plaintiff’s counsel to respond to the Preliminary Objection means that the same is uncontroverted. The Court will nonetheless look at the merits of the Preliminary Objection in arriving at the ruling.

5. The 1st Defendant submitted that the 2nd Defendant died on 17/7/92 and the suit has been filed 16 years later against a dead person. He stated that no orders bind any dead person or the deceased estate. He opined that the Plaintiff should have obtained letters of administration in respect to the state of the said Hellen Wanjiru, deceased. He relied on the cases of; **Peter Kimani Kabachi & Anor Vs Jeremiah Kiruga ELC 101 OF 2017, Muranga** and **Judith Gathoni Willie Vs George Kihara Muchuki & 2 others (2000) ECLR** to support his case.

6. Maintaining that the suit property was a subject of a succession cause in HCCC No. 36 of 1990 (Public Trustee administration cause No.41 of 1988), Nyeri where the estate was distributed and devolved to the Defendants, the 1st Defendant submitted that the Court lacks the jurisdiction to handle the matter. He contends that the suit therefore is rendered incompetent on that account.

7. The 1st Defendant further argued that the Plaintiff’s claim being a claim on land is statutory barred under section 7 of the Limitations of Actions Act as the land was transmitted to the joint names of the Defendants in 1991. Further that the suit seeks to vary the judgement of the Probate Court issued in 1991. He contends that the Plaintiff is not seized with a valid and sustainable cause of action.

8. That since the Plaintiff is pursuing a claim on behalf of the estate of the late Ndugi Waithaka, he ought to have sought and obtained letters of grant of administration to clothe him with the necessary legal standing to bring the suit. It is his view that he has not and therefore the suit must fail for the reason that it is incurably defective and incompetent.

Determination

9. Having analyzed the Pleadings, Notice of Preliminary Objection, the 1st Defendant’s submissions, there are three key issues for determination; firstly whether the Court has jurisdiction to determine this suit; secondly whether the suit is statute barred by dint of section 7 of the Limitations of Actions Act; thirdly whether the suit is incompetent in law for want of letters of administration in the estate of the late Ndugi Waithaka (locus standi); fourthly whether the suit is incompetent on grounds that it was filed against a deceased person, Hellen Wanjiru;

10. 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...”

11. 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 of the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

12. Does this Court have jurisdiction to determine this suit?. The 1st Defendant contends that the suit land was transmitted through a succession cause in High Court Succ cause in HCCC No. 36 of 1990 (Public Trustee administration cause No.41 of 1988) to the Defendants to hold in trust for themselves and the other members of their family. That the claim being based on trust seeks to challenge the decision of the probate Court which is a Court of concurrent jurisdiction with the current Court seized of this matter. That the Plaintiff ought to have appealed against the decision of the probate Court but not file a fresh suit. It is the understanding of this Court that the mandate of the succession Court is to determine the beneficiaries and the assets due for distribution in an estate. The mandate of this Court is encapsulated in section 13 of the Land Registration Act; to, *inter-alia*, determine title in land. The instant suit is based on establishing title by way of customary trust. I hold and find the claim, being a claim in title in land is competently before the ELC Court. The jurisdiction of this Court is not ousted at all. With that I now proceed to determine the preliminary objection. The objection fails on this ground.

13. Whether the suit is statute barred by dint of section 7 of the Limitations of Actions Act? This claim being a claim in customary trust, I have held before in the case cited by the 1st Defendant in his submissions; **Peter Kimani Kabachi & Anor Vs Jeremiah Kiruga ELC 101 OF 2017 , Muranga** that limitations does not apply to a claim in customary trust. In that case I relied on the Court of Appeal decision in **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”.

The preliminary objection fails on this limb.

14. Is the Plaintiff clothed with locus to file this suit? It is the 1st Defendants contention that the Plaintiff is suing on behalf of the estate of his late father Ndugi Waithaka. As such he ought to have sought letters of administration to mount a successful claim against the Defendants. That in the circumstances it is bereft of locus and therefore the suit cannot be sustained. The Plaintiff's claim is that the father of the 1st Defendant Samuel Mumbura held the suit land as the family's' Muramati in trust for himself and the family of their late brother Willy Ndugi Kabithi. Although the Plaintiff appears to have brought the claim on his own behalf on the basis of trust, he traces his alleged entitlement to his father Ndugi Waithaka. Secondly the totality of the claim includes a claim for the estate of his late brother Willy Ndugi Kabithi. In the plaint he has indicated that the wife of his late brother Esther Njeri resides on the land. The Plaintiff has sought prayers for himself and the estate of the said Willy Ndugi Kabithi. He has not showed the Court that he is clothe with the requisite authority to bring this claim on their behalf. In the case of **Troustik Union International & Anor Vs Jane Mbeyu & Anor CA 145 OF 1990** the Court held that where a party seeks to file a suit on behalf of the estate of a deceased person he must of necessity obtain letters of administration before filing the suit. The Preliminary Objection succeeds on this limb.

15. Whether the suit is incompetent on grounds that it was filed against a deceased person; Hellen Wanjiru. It is on record that the said Hellen Wanjiru died in 1992. A copy of the death certificate was enclosed. In the case of **Babubhai Dhanji Puthak Vs Zainab Mrekwe (1964) EA 24**, the Court held that a suit instituted in the name of a dead person is a nullity. The general rule is that suits and actions must be prosecuted by and against living persons or parties. The institution of a suit in such a case therefore is void and is of no effect. The claim against the 2nd Defendant is not valid. The Preliminary Objection succeeds on this point.

16. The upshot is that the Preliminary Objection has merit and is accordingly upheld. Consequently, the Plaintiff's case is dismissed with costs to the 1st Defendant.

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:

Mbugua HB for Mathenge for the Plaintiff

1st and 2nd Defendants – Absent. Parties are absent.

Irene and Njeri, Court Assistants