



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 66 OF 2016

CATHRINE KARIMI GICHOBİ.....1ST PLAINTIFF

DANIEL CHOMBA GICHOBİ.....2ND PLAINTIFF

RACHEL NYAMBURA GICHOBİ.....3RD PLAINTIFF

VERSUS

JOSPHAT GICHOBİ KIBİCHO.....DEFENDANT

RULING

When this case came up for hearing on 17th May 2017, counsel for the defendant **MR. MURAGURI** raised a Preliminary Objection, which had been pleaded in paragraph five (5) of the defence, to the effect that this suit does not disclose any cause of action.

That Preliminary Objection was canvassed orally with **MR. MURAGURI** submitting that the plaintiffs are children of the defendant and they cannot force him to share out his land during his life-time. Further, that they do not live on the suit land and are aged over eighteen (18) years with some of them being married and therefore they cannot force the defendant to give them land.

Counsel for the plaintiffs **MR. KAGIO** submitted that the Preliminary Objection is incompetent and does not qualify as one and referred the Court to the case of **MUKISA BISCUIT MANUFACTURING COMPANY LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696**. He added that no point of law has been cited by counsel for the defendant who has not appreciated that this claim is founded on trust and the age of the plaintiffs is immaterial and therefore this Preliminary Objection will only delay the disposal of this suit.

MR. MURAGURI insisted that he had case law to support his position and I allowed him to avail it and subsequently, he availed judgments in the following cases:

1. MURIUKI MARIGI & RICHARD MARIGI MURIUKI & OTHERS C.A CIVIL APPEAL No. 189 of 1996 (NYERI)

2. JACKSON RIUA VS ROBERT JAMES H.C. CIVIL APPEAL No. 29 of 1997 (EMBU).

To fully comprehend this Preliminary Objection, it is important to set out the plaintiffs claim against the defendant as per their plaint filed herein on 11th May 2016. The plaintiffs are children of the defendant and their case is that at all material times, he (defendant) was registered to hold land parcel No. BARAGWE/GUAMA/2730 (the suit land) in trust for himself and his entire family which include the

plaintiffs. That the suit land was a resultant sub-division of land parcel No. BARAGWE/GUAMA/286 which had been allocated to the defendant's grandfather one **KARUGA MWAMBIA** by the clan during the land adjudication period to hold in trust for himself and in trust for further generations. That the plaintiffs together with their mother have all along lived on the suit land but the defendant has now chased them away after starting a clandestine affair with another woman. The plaintiffs therefore seek orders that the defendant holds the suit land in trust for the entire family, a permanent injunction restraining him from selling, charging, alienating, transferring or disposing the suit land and an order that the plaintiffs are entitled to live on and cultivate on a portion thereof.

The defendants filed a defence denying all those averments and raising the Preliminary Objection subject of this ruling.

A Preliminary Objection was defined by **LAW J.A** in the **MUKISA** case (supra) in the following terms:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arise by clear implication out of pleadings and which if argued as a Preliminary Point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

In the same case, **NEWBOLD P.** stated that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion” Emphasis added

OJWANG J. (as he then was) defined it in **ORARO VS MBAJA 2005 1 K.L.R 141** 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 process of evidence. Any assertion which claims to be a Preliminary Objection, and 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”. Emphasis added

What runs through the above precedents is that a Preliminary Objection must be confined to pure points of law. What counsel for the defendant has submitted are not really pure points of law but are in fact ***“blurred with factual details”*** as observed by **OJWANG J.** (as he then was) in the case of **ORARO** (supra). For instance, **MR. MURAGURI** submits that the plaintiffs are over eighteen (18) years, that they don't live on the suit land and that they cannot force their father to give them land. Those are not pure points of law which is what a Preliminary Objection should confine itself to.

In buttressing his argument that the plaintiffs have no cause of action against the defendant, **MR. MURAGURI** referred me to the Court of Appeal decision in the case of **MURIUKI MARIGI VS RICHARD MARIGI MURIUKI C.A CIVIL APPEAL No. 189 of 1996 (NYERI) (1997 e K.L.R)** where the Court held as follows:

“The Appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his own will”

Counsel also referred me to the case of **JACKSON RIUA VS ROBERT JAMES EMBU HIGH COURT CIVIL APPEAL No. 29 of 1997** that followed the same path as the **MARIGI** case (supra). I think the misconception here is whether a good defence is necessary a proper Preliminary Objection. The answer

is “No”. The **MARIGI** case (supra) may come in aid as a complete defence in an appropriate case. However, a good defence to another party’s claim should not be equated to a Preliminary Objection. The two are very different in that while a good defence may include both matters of law and fact, a Preliminary Objection as is now clear, must confine itself to **pure points of law and nothing more**. Counsel for the defendant was therefore clearly jumping the gun. For his benefit, and since he is the one who has raised that issue by invoking the decision in the **MARIGI** case (supra), I should point out that that case, where the judgment was delivered on 16th May 1997, has since been distinguished by the Court of Appeal in the case of **MBUI MUKANGU VS GERALD MUTWIRI MBUI C.A CIVIL APPEAL No. 281 of 2000** where the Court said:

“It is significant, we think, that un-like the MURIUKI MARIGI case (supra), where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of MBUI was ancestral land that devolved to him on the death of his father. It was un-registered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations”.

Judgment in the **MBUI MUKANGU** case (supra) was delivered on 10th December 2004 and it is clear from it that ancestral land is held for the benefit of future generations which would not be the case where such land is private property as was the position in the **MARIGI** case (supra). Of course whether or not the suit land herein is ancestral land held by the defendant in trust for the plaintiffs is a matter to be determined at the trial through evidence. So too the issue of trust. However, this Court has been made to refer to the above cases by counsel for the defendant in addressing the Preliminary Objection.

The up-shot of the above is that the defendant’s Preliminary Objection is wholly un-meritorious. It is therefore dismissed with costs to the plaintiffs.

B.N. OLAO

JUDGE

31ST MAY, 2017

Ruling dated, delivered and signed in open Court this 31st May 2017

Mr. Kagio for Plaintiffs absent but Plaintiffs all present

Mr. Muraguri for the Defendant absent but Defendant present.

B.N. OLAO

JUDGE

31ST MAY, 2017