



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 481 OF 2014**

**RAHAB NJIRIKU NGUGI.....PLAINTIFF**

**-VERSUS-**

**LUCY NYAGUTHII NDIRAGU.....DEFENDANT**

**RULING**

**Introduction**

1. The plaintiff herein, **Rahab Njiriku Ngugi**, filed the suit herein seeking inter alia a declaration that the defendant holds the parcel of land known as **Ruguru/Kiamariga/1143** (the suit property) in trust for herself to the extent of half share thereof.
2. It is the plaintiff's case that pursuant to the pleaded trust, she has been in use and occupation of the suit property, alongside her brother, Erastus Ndirangu Ngugi (deceased).
3. The plaintiff claims that after her brother passed on, the defendant, who is her deceased brother's wife, got the suit property transmitted to herself without involving her.
4. Vide her statement of defence filed on 19th August, 2011 the defendant denies all the allegations levelled against her and the pleaded trust. Besides denying the allegations levelled against her and the pleaded trust, the defendant contends that the plaintiff's suit discloses no reasonable cause of action against her; is misconceived, incompetent, bad in law and statute barred.
5. When the matter came up for hearing the defendant informed the court that she had raised a preliminary objection vide paragraphs 11 and 12 of her statement of defence which she wanted heard and determined first.
6. The court acceded to the defendant's plea and directed that the preliminary objection be disposed of by way of written submissions. Subsequently, parties filed submissions which I have read considered.

**Defendant/applicant's submissions**

7. On behalf of the defendant/applicant, reference is made to the defendant's list of documents dated 14th April, 2012 and filed in court on 16th April, 2012 which include the title deed in respect of the suit property and the certificate of confirmation of grant issued to the defendant in Nairobi Succession Cause No.2552 of 1997 and submitted that the applicant has not used the appropriate legal machinery for challenging the distribution of the estate of her brother.

8. Based on the case of George Wambugu Ngunjiri v. Eunice Nyaita Nyeri HCCC No. 120 of 1996 where **Okwengu J.** (as she then was) stated:

**“It is evident that the defendant is in effect challenging the distribution done in succession Cause Number 165 of 1983 and the right of the plaintiff to inherit the portion having her matrimonial home. The Defendant however has so far sat on her rights as she has taken no action since she came to learn of the distribution and the registration of the suit land in the name of the plaintiff. The defendant has failed to use the appropriate elaborate machinery provided for challenging the distribution or confirmation of the grant relating to the estate of her deceased husband. This means that as matters stand now the plaintiff is the registered owner of the suit land and is therefore entitled to the orders sought”,** it is submitted that the current suit is incompetent and bad in law as it seeks to set aside the orders of the Succession Court which is a court of concurrent jurisdiction.

9. It is further submitted that the suit is time barred. In that regard reference is made to **Section 20(2)** of the Limitation of Actions Act (LAA) Cap 22 Laws of Kenya which provides as follows:

**“Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act may not be brought after the end of six years from the date on which the right of action accrued.”**

10. Arguing that the current suit was filed way after the period of six years within which the plaintiff ought to have brought the claim, the defendant maintains that the suit is time barred and urges the court to strike out with costs to her.

#### **Plaintiff/respondent’s submissions**

11. On behalf of the plaintiff/respondent, it is submitted that the Succession Court had no jurisdiction to determine the issue of trust or title to land.

12. Arguing that there are issues concerning the plaintiffs interests and entitlement to the suit property that ought to be determined by this court based on the decision of the Court of Appeal in the case of **D.T Dobie & Company (K) Ltd vs Muchina** quoted with approval in the case of **Jamlick Mwangi & Another v. Charity Wacuka Michael & 5 Others (2014) e KLR** thus:

**“No suit ought to be summarily dismissed unless it appears to be so hopeless that it plainly and obviously discloses no reasonable cause of action”,** it is submitted that the plaintiff’s suit is not so hopeless to warrant issuance of the orders sought.

13. Counsel for the plaintiff accuses the defendant of having filed the Succession Cause in a court without territorial jurisdiction to conceal it from her illiterate sister-in-law and argues that even if the plaintiff knew about the Succession Cause, the best she could do was to pray for stay of proceedings to enable her file a claim in the Environment and Land Court.

14. Reference is made to the case of **Re estate of Mbai Wainaina (deceased) Nairobi Succession Cause No. 864 of 1996 (2015)eKLR** where it was observed:

**“Even if there was material establishing that there was such a trust I doubt that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such orders but rather that the provision of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court”,** and submitted that existence of a Probate cause whether

pending or determined is not a bar to filling a suit challenging title to land or ventilating a claim of trust or adverse possession.

15. On the contention that the suit is on account of **Section 20(2)** of Cap 22 Laws of Kenya time barred, it is contended that the plaintiff's claim is on account of continuous trust hence **Section 20(1)** of Cap 22 Laws of Kenya is applicable which provides as follows:

**“None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under trust, which is an action:-**

**(b) to recover from the trustee property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”**

16. In support of that contention, reference is made to the case of **Michael Gachoki Gicheru v. Joseph Karobia Gicheru Nairobi ELC No. 783 of 2013** where it was observed:

**“In my view having looked at S. 20(1) and (2) of the Limitation of Actions Act, as well as pleadings herein this suit falls under S. 20(1) of the Limitation of Actions Act for which there is no period of limitation...The case of Stephens and six others v. Stephens and another (1987) KLR 125 the Court of Appeal held that the period of limitations prescribed in the Limitation of Actions Act S. 20 (1)(b) does not apply to actions by a beneficiary under a trust which is an action to recover from the trustee property or proceeds thereof converted by the trustee for his own use.”**

17. In view of the foregoing, it is submitted that the preliminary objection has not been made in good faith and the court is urged to dismiss it with costs to the plaintiff/respondent.

### **Analysis and determination**

18. From the pleadings filed in this matter and the submissions filed in respect of the defendant's preliminary objection, I find the issues for determination to be:

**(i) Whether the succession cause pursuant to which the defendant obtained title to the suit property is a bar to the determination of the issues raised in the current suit?**

**(ii) Whether the current suit is time barred?**

**(iii) What is the order as to costs?**

19. With regard to the 1st issue, since the question of trust was not one of the issues raised and determined in the succession court, I do not think by asking this court to determine whether or not the plaintiff's registration as the registered proprietor of the suit property is subject to her pleaded trust, the plaintiff is, in effect to trying to set aside the orders issued in the Succession Cause. Being of the view that the facts in the case of **George Wambugu Ngunjiri v. Eunice Nyaita** (*supra*), are different from those in this case in that in the former the claim was not based on trust, I adopt the decision of this court in the case of **Julius Wachira Maina & 2 others v Christopher Murathe Muraguri [2017] e KLR** where I observed:

**“Given the fact that the succession court was not asked to determine whether the interest being succeeded was subject of any trust in favour of the plaintiffs or any other person, I am unable to agree with the defendant's counsel that by asking this court to determine whether the registration of the defendant as the absolute proprietor of the suit property is subject to their interest in the suit properties as beneficiaries pursuant to the alleged trust relationship amounts to challenging the orders obtained in the succession proceedings...In my view, this court would lack jurisdiction, only and only if, the question of the plaintiffs' interest had been made subject of consideration in the succession proceedings and found to be none existent.**

**There being no evidence that the question of trust or the question of the plaintiffs interest in the suit property was subject of consideration in the succession cause, I find and hold that this court has jurisdiction to hear and determine whether the registration of the defendant is subject of the alleged trust in favour of the plaintiffs.**

20. The case of **Re estate of Mbai Wainaina** cited by the plaintiff respondent and that of **Eunice Ngunyo Wahome v Joseph Kihara Theuri [2015] eKLR** where **Ombwayo J.**, stated, “**This court finds that it is not possible to determine the issue of Trust in a succession matter where reliance is placed on affidavits and therefore it cannot be said that there was finality in the decision of the High Court in the Succession cause**”, makes it clear that the succession cause was not the proper forum for determination of the alleged trust.

21. In view of the foregoing, I find and hold that the plaintiff cannot be reasonably blamed for moving the court for determination of the question as to whether the defendant’s registration as the absolute proprietor of the suit property is subject to her pleaded trust.

22. On whether the plaintiffs’ claim is statute barred, being of the view that the plaintiff’s claim is based on a continuous trust, I find and hold that the applicable law is **Section 20(1)(b)** of Cap 22 Laws of Kenya thereof which is not subject of limitation.

23. The upshot of the foregoing is that the preliminary objection is found to have no merit and the same is dismissed with costs to the plaintiff/respondent.

**Dated, signed and delivered in open court at Nyeri this 15th day of May, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Kebuka Wachira for the plaintiff

Mr. Kiminda h/b for Wahome Gikonyo for the defendant

Court assistant - Esther