



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 98 OF 2017

MARGARET OMOROJE.....1ST PLAINTIFF

BONIFACE KATHENGE.....2ND PLAINTIFF

PHILLIP KIOKO KATHENGE.....3RD PLAINTIFF

BENSON MBUVI KATHENGE.....4TH PLAINTIFF

NELSON KIEMA KATHENGE.....5TH PLAINTIFF

FRED MBITHI KATHENGE.....6TH PLAINTIFF

ABDALLAH JUMA KATHENGE.....7TH PLAINTIFF

RACHEL SYONTHI MWATU.....8TH PLAINTIFF

VERSUS

JOHNSON KITHEKA KATHENGE.....1ST DEFENDANT

JACKSON WAMBUA KITHEKA.....2ND DEFENDANT

JAMES KATHENGE KITHEKA.....3RD DEFENDANT

MARGARET MUSUKI KITHEKA.....4TH DEFENDANT

MARTHA KITHEKA.....5TH DEFENDANT

KITHOI MUKUU.....6TH DEFENDANT

CLEOPUS MASILA KINDUI.....7TH DEFENDANT

RULING

1. In the Notice of Motion dated 18th December, 2015, the Plaintiffs are seeking for the following reliefs:

a. That a temporary injunction do issue restraining the 1st Defendant whether by himself, his servants, agents or anybody claiming under him from charging, disposing, alienating, selling or

otherwise parting with possession of Land Reference Numbers Kisasi/Nguuni Plot Numbers 1266 and 1269 pending the hearing and determination of this suit.

b. That a temporary injunction do issue restraining the 2nd Defendant whether by himself, his servants, agents or anybody claiming under him from charging, disposing, alienating, selling or otherwise parting with possession of Land Reference Numbers Kisasi/Nguuni/342 pending the hearing and determination of this suit.

c. That a temporary injunction do issue restraining the 3rd Defendant whether by himself, his servants, agents or anybody claiming under him from charging, disposing, alienating, selling or otherwise parting with possession of Land Reference Kisasi/Nguuni Plot Number 1265 pending the hearing and determination of this suit.

d. That a temporary injunction do issue restraining the 4th Defendant whether by herself, her servants, agents, or anybody claiming under her from charging, disposing, alienating, selling or otherwise parting with possession of Land Reference Kisasi/Nguuni/81 pending the hearing and determination of this suit.

e. That a temporary injunction do issue restraining the 2nd, 4th and 5th Defendants whether by themselves, their servants, agents or anybody claiming under them from charging, disposing, alienating, selling or otherwise parting with possession of Land Reference Block Kisasi/Plot 17 pending the hearing and determination of this suit.

f. That a temporary injunction do issue restraining the 6th Defendant whether by himself, his servants, agents or anybody claiming under him from charging, disposing, alienating, selling or otherwise parting with possession of Land Reference Kisasi/Nguuni Plot Number 1267 pending the hearing and determination of this suit.

g. That a temporary injunction do issue restraining the 7th Defendant whether by himself, his servants, agents, or anybody claiming under him from charging, disposing, alienating, selling or otherwise parting with possession of Land Reference Kisasi/Nguuni/347 pending the hearing and determination of this suit.

h. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 3rd Plaintiff who has deponed that the Plaintiffs are the sons and daughters of the late Paul Kathenge Kisithe while the 1st Defendant is their eldest brother and that the 2nd and 3rd Defendants are the sons of the 1st Defendant while the 4th and 5th Defendants are his wives.

3. According to the Plaintiffs, the suit properties belong to all of them through their parents.

4. It is the Plaintiffs' case that adjudication in Kitui County commenced in late 1980's; that their father died in 1971 and that it is the 1st Defendant who assumed the leadership of their family after the death of their father. Accordingly, it is the 1st Defendant who was registered as the proprietor of the family's land.

5. The 3rd Plaintiff deponed that after registering all the suit properties in his name, the 1st Defendant caused parcel of land known as Kisasi/Nguuni/342 to be registered in the name of the 2nd Defendant while Plot No. Kisasi/Nguuni/81 was registered in the name of the 4th Defendant.

6. It is the Plaintiffs' case that the 1st Defendant again caused another land belonging to the family being Plot No. 1267 to be registered in the name of the 5th Defendant and that in the year 2010, the 2nd Defendant transferred Plot No. 347 to the 7th Defendant.

7. The Defendants filed a Notice of Preliminary Objection dated 15th January, 2016 in which they averred that the suit and the Application are a nullity because the Defendants have not obtained the letters of administration for the Estate of their late father and that the suit is time barred.
8. In the Replying Affidavit, the 1st Defendant deponed that all plots, except Plot No. 1266, are developed and occupied; that there is no trust relationship between himself and the Plaintiffs and that the suit properties are not family property but his properties.
9. According to the 1st Defendant, he purchased unsurveyed plot numbers 1265, 1266, 1267, 1269, 1262 and 1268 from Wambua Mulu in 1970; that the plots were sub-divided in 1984 and that on 10th February, 1973, the court was categorical that the land belonged to him and not to his late father.
10. In respect to plot numbers 342 and 81, the 1st Defendant deponed that the same were bequeathed to him by his late grandmother and that he bought plot number 17 from his uncle Muthoki Kisithe.
11. As for plot number 347, it is the 1st Defendant's deposition that the same was given to him by his late mother as part of his inheritance and she also distributed other parcels of land to her siblings.
12. In his submissions, the Plaintiffs' advocate submitted that this court has jurisdiction to hear this matter; that the Plaintiffs have not filed this claim on behalf of the Estate of their late father or mother and that this suit is founded on trust and is expressly excluded by Section 20(1) of the Limitation of Actions Act from the Act.
13. Counsel submitted that the suit that the 1st Defendant filed in PMCC No. 157 of 1972 was to recover his and their father's land but proceeded to claim that the land belongs to him.
14. Counsel submitted that the Plaintiffs have shown that they have a *prima facie* case with chances of success.
15. The Defendants' advocate submitted that the Plaintiffs have not filed this suit as independent litigants; that a party suing on behalf of a deceased person must first obtain Grant of Letters of Administration and that having failed to obtain Letters of Administration, the suit is a nullity.
16. The Defendants' counsel submitted that Section 20 of the Limitation of Actions Act only applies to beneficiaries under a trust and not to transactions involving land and that the Defendants are the lawful registered proprietors of the suit land.
17. The Plaintiffs' suit was filed in the Environment and Land Court in Nairobi on 14th December, 2015. By the time the suit was being filed, there was no Environment and Land Court either in Kitui or Machakos County.
18. Consequently the Plaintiffs filed the matter in a court which had the requisite jurisdiction.
19. The Defendants have submitted that the Plaintiffs do not have the *locus standi* to bring this claim because they do not have the letters of Administration in respect to the Estate of their late father.
20. A perusal of the Complaint shows that the Plaintiffs' complaint is that the 1st Defendant had the suit properties registered in his name as the head of the Kisithe family who died in 1971.
21. Consequently, it is the Plaintiffs' claim that the 1st Defendant holds the suit property in trust for the entire family.
22. It is trite that section 28 of the Land Registration Act recognizes customary trusts as one of the overriding interests which the registered land may be subject to.

23. The issue of whether the claim by the Plaintiffs that the 1st Defendant was registered as the proprietor of the suit land as a trustee for the entire family cannot therefore be wished away at this stage.

24. If indeed the Plaintiffs prove at trial that the 1st Defendant was registered as the proprietor of the land on behalf of the Plaintiffs, then the issue of the Plaintiffs not having acquired the Letters of Administration in respect to their father's estate will not arise.

25. Considering that the main prayer in the Plaint is for a declaration that the Defendants holds the suit land in trust for the Plaintiffs, then the suit cannot be said to be time barred in view of the provisions of Section 20 of the Limitation of Actions Act.

26. Section 20 of the Limitation of Actions Act expressly excludes the periods of limitation prescribed by the Act to an action by a beneficiary under a trust, which is an action "*to recover from the trustee trust property in the possession of the trustee.*"

27. Until the Defendants show at trial that the concept of trust does not arise in this case, the provisions of Section 20 saves the current suit.

28. The issue of whether the Defendants who are related to the Plaintiffs hold the suit land as trustees can only be ascertained at trial.

29. Considering that the 1st Defendant has admitted that some of the properties were bequeathed to him by his mother and grandmother, and in the absence of written agreements to show that he purchased the other suit properties, an order of injunction should issue so as to preserve the suit properties pending the hearing and determination of the suit.

30. My observation above is based on the Judgment of the court in Kitui PMCC No. 159 of 1972 which was exhibited by the 1st Defendant. In the said Judgment, the court started off by stating as follows:

"The Plaintiff's (the 1st Defendant herein) case is that the land in dispute was acquired by his father by living on it.."

31. The above Judgment shows that the 1st Defendant's claim over the suit land in Kitui PMCC No. 159 of 1972 was in respect to land which was acquired by his late father.

32. Consequently, the Plaintiffs' claim that some of the suit properties were registered in the name of the 1st Defendant in trust for the entire family is not frivolous.

33. For those reasons, I find that the Plaintiffs have established that they have a *prima facie* case with chances of success. I therefore allow the Application dated 18th December, 2015 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE