



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 88 OF 2017

NELSON RURIRA KANG'ETHE - 1ST APPLICANT

JULIA MUTHONI KANG'ETHE - 2ND APPLICANT

VS

JOYCE WAMBUI KAMANJA - 1ST RESPONDENT

BETHA NJERI KAMANJA - 2ND RESPONDENT

DAVID KAMAU KAMANJA - 3RD RESPONDENT

RULING

1. The Applicants in this suit filed an amended Originating Summons dated 9/12/16 expressed to be brought under order 37 of the Civil Procedure Rules and section 38 of Limitations of Actions Act (Cap 22) seeking the following orders:-

a) **THAT** the Plaintiffs have by adverse possession acquired 2 ½ acres out of Land Title Number Loc. 11/Gaitega/100 and or Land Reference Numbers Loc.11/Gaitega/793, Land Reference Number Loc.11/Gaitega/794, Land Reference Number Loc. 11/Gaitega/795 and Land Reference Number Loc. 11/Gaitega/796 measuring 5.5 acres registered in the name of the 1st Defendant.

b) **THAT** the caution lodged by the 3rd Defendants be removed.

c) **THAT** the Land Registrar Murang'a be ordered to transfer the 2.5 acres of Land Title Number Loc.11/Gaitega/100 and or Land Reference Numbers Loc 11/Gaitega/793, Land Reference Number Loc. 11/Gaitega/794, Land Reference Number Loc. 11/Gaitega/795 and Land Reference Number Loc. 11/Gaitega/796 into the names of Nelson Rurira Kang'ethe and Julia Muthoni Kang'ethe without requiring them to produce original title, copies of identify cards, PIN Certificate and Photographs.

d) **THAT** Land Reference Number Loc. 11/Gaitega/100 was sub-divided and registered illegally as Land Reference Number Loc. 11/Gaitega/793, Land Reference Number Loc. 11/Gaitega/794, Land Reference Number Loc. 11/Gaitega/795 and Land Reference Number Loc. 11/Gaitega/796 while this suit was pending and after pleadings were served upon the Defendants and the titles resultant from the subdivisions be revoked.

e) **THAT** the Deputy Registrar, High Court do sign application for land Control Board, Transfer and any other necessary applications to facilitate transfer into the Plaintiff's names.

f) **THAT** the Defendants be ordered to pay the costs of this suit.

2. The Respondents in response have filed a notice of Preliminary objection dated 4.4.2017 in which it raised the following issues;-

a) **The Summons do not lie in law in that the Respondents got the Suitland through a Succession Cause and the proper cause available to the applicant is revocation of grant.**

b) **The Court is being moved by the applicants to sit on appeal of the said Succession Cause No. MURANG'A SRM. C.C. NO. 147 OF 1994.**

3. By consent both counsels agreed to present the Preliminary Objection by way of written submission which I have considered.

4. The Respondents contended that the orders sought by the Applicants are vexatious and scandalous in nature. That the Applicants are asking the Honourable Court to act as Puisne Judge and revoke the grant and subsequent confirmation of the grant issued by the lower Court in CMCC No. Succ . Cause No. 147 of 1990. That the applicants should have filed an application for revocation of grant before a Judge. That the originating summons is untenable in law and cannot see the light of the day. That the facts and the law available cannot sustain a sound application for adverse possession.

5. The Applicants opposed the Preliminary Objection and urged the court to dismiss it. They based their rationale on the fact that the issue whether the Plaintiffs had a right to inherit is partly facts and partly law. That a Preliminary Objection cannot be issued where the court need to ascertain facts. They cited the case of **Mukisa Biscuits Manufacturing Limited Vs West End Distributors Limited (No. 390 of 2012)** and **John Mugo Gachuki Vs New Nyamakima Co Limited (2012) eKLR** to underscore the point that a Preliminary Objection should not deal with facts particularly which are disputed and have to be proved by evidence.

6. The issue before this court is whether the Preliminary Objection is merited.

7. It is trite law that a Preliminary Objection can only be entertained in the circumstances assessed in **Mukisa Biscuits Manufacturing Limited Vs West End Distributors Limited (No. 390 of 2012 as follows;-**

“ so far as I am aware, a preliminary objection consists of a point of law which has been pledged or which has arose by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. ...”

8. In the case of **Oraro vs Mbaja 2005] 1 KLR 141** Ojwang J said;

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are on 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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop..... The Principle is abundantly clear. 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 need 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. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a Preliminary Objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the Respondent's very detailed "affidavit in reply to an affidavit in support of Preliminary Objection", which replying affidavit was expressed to be "under protest".....The Applicant's "Notice of Preliminary Objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means it's evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said Preliminary Objections are matters of great controversy, as their factual foundations are the subject of dispute".

9. I have read the Originating Summons and the Responses and it appears that the Applicants were not the wife and the child of the deceased as stated in the submissions of the Applicants. The Respondents have contended that the proper case for the Applicants was to revoke the grant issued on 21st June, 2002 which granted the 2nd Respondent the properties. It is contested that the deceased was survived by wives and children none of whom were the Applicant's and had no right to inherit the deceased.

10. The 1st Plaintiff in his affidavit claims that they have been occupying the 2.5 acres of land Loc. 11/Gaitega/100 which now is LR Loc. 793,794,795 & 796 in conjunction Kangethe Rurira now deceased who was their father and husband of the 1st Plaintiff and 2nd Plaintiff respectively from 1983 to date.

11. Whether or not the Plaintiffs/Applicants are heirs or not is question of fact which immediately removes the Preliminary Objection from being a question of law. It would mean that the court would have to call for evidence to verify this matter. A preliminary objection cannot be entertained where there is a dispute as to the facts, alleged by the Plaintiff and denied by the Respondents. In this case the Respondents are contending that the Applicants should have filed a revocation of grant which presupposes a fact that the Applicants are beneficiaries of the grant; a position that the applicants deny.

12. A Preliminary Objection may also not be entertained in a case where the court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a court may exercise discretion.

13. In conclusion the court finds that the Preliminary Objection is not merited and the same is dismissed with costs to the applicants.

DELIVERED DATED AND SIGNED THIS 20TH JULY 2017.

J G KEMEI

JUDGE