



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 34 OF 2016

NANCY WAKATHARE NGURI.....1ST PLAINTIFF

JANE NJERI NGURI.....2ND PLAINTIFF

CHARITY MUTHONI NGURI.....3RD PLAINTIFF

VERSUS

EDITH WAGATU NGURI.....1ST DEFENDANT

JAMES MBUTHIA NGURI.....2ND DEFENDANT

KELVIN WAWERU NGURI.....3RD DEFENDANT

RULING

Land parcels No. KABARE/MUTIGE/256, KABARE/NYANGATI/1869, KABARE/NYANGATI/215, KUTUS MJINI PLOTS NOS 612 and 27 (herein the suit properties) were at all material times registered in the names of **PETER NGURI MBUTHIA** (the deceased) who was the father to the plaintiffs as well as the 2nd and 3rd defendants and husband to the 1st defendant. Following the death of the deceased on 16th March 2006, his Estate became the subject of Succession proceedings in **KERUGOYA PRINCIPAL MAGISTRATE’S SUCCESSION CAUSE No. 3 of 2010** and the 1st defendant was appointed as the administratrix of the deceased’s Estate and the suit properties devolved to her following the confirmation of grant issued on 1st November 2010. It is however the plaintiffs case as per their amended plaint filed herein on 5th April 2016 that although the suit properties were transferred to the 1st defendant, she was to hold the same in trust for all her children including the plaintiffs but in breach of that agreement, the 1st defendant has colluded with the 2nd and 3rd defendants and, without the knowledge and/or consent of the plaintiffs, sub-divided land parcel No. KABARE/NYANGATI/215 into three portions being parcels No. KABARE/NYANGATI/3621, 5622 and 5623 which she has transferred to the 2nd and 3rd defendants as follows:

1. **KABARE/NYANGATI/5621 - to 3rd defendant**
2. **KABARE/NYANGATI/5622 - to 2nd defendant**
3. **KABARE/NYANGATI/5623 - to 3rd defendant**

and 1st defendant.

The 1st defendant has further and without the knowledge or consent of the plaintiffs transferred land

parcels No. KABARE/NYANGATI/1869 and KABARE/MUTIGE/286 to the 2nd defendant and KUTUS MJINI PLOTS NO. 612 and 27 to the 3rd defendant. It is the plaintiffs' case that they have a legal and beneficial interest in the suit properties which had been entrusted by their late father to the 1st defendant to hold in trust for them and therefore the transfer thereof to the defendants was unlawful.

The defendants filed a joint statement of defence in which they denied that the suit properties were held in trust for the plaintiffs adding that the transfers by the 1st defendant were carried out legally by her as the registered proprietor of the same and were above board. The defendants also gave notice that a Preliminary Objection would be raised against the jurisdiction of this Court to hear this case. That Preliminary Objection which is the subject of this ruling was duly filed on 23rd August 2016 and raises the following issues:

1. That the cause of action relates to Probate and Administration hence this Honourable Court lacks the requisite jurisdiction to hear and determine the same.

2. That the issues raised herein are res-judicata having already been addressed and determined in a Probate Court.

That Preliminary Objection has been canvassed by way of written submissions filed both by the firm of **J.K. KIBICHO & COMPANY** Advocates for the defendants and **RUGAITA & COMPANY** Advocates for the plaintiffs.

I have considered the Preliminary Objection together with the pleadings herein and the confirmation of grant in Kerugoya Principal Magistrate's Succession Cause No. 3 of 2010 and the submissions by counsel.

A Preliminary Objection must be considered in line with what **LAW J.A** stated in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) E.A 696** when he said:

“so far as I am aware, 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 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 the 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”

The issues raised in the Preliminary Objection are two fold:

1. That this Court lacks the jurisdiction to determine this suit.

2. That this suit is res-judicata.

Those are matters of law and therefore are proper issues to be canvassed as a Preliminary Objection. I will therefore consider each of them.

JURISDICTION:

As was held in the case of **OWNERS OF THE MOTOR VESSEL 'LILLIAN S' VS CALTEX OIL (KENYA) LTD 1989 K.L.R 1**, a question of jurisdiction ought to be raised at the earliest opportunity and

decided straight away because without jurisdiction, the Court must down its tools. That is what the defendant seeks to persuade the Court to do.

The plaintiffs claim is based on trust. It is their case that the 1st defendant holds the suit properties in trust for them but she has unlawfully transferred them to herself and the other defendants. **Article 162 (2) (b) of the Constitution** establishes this Court which has the jurisdiction to hear and determine disputes relating to:

“the environment and the use and occupation of, and title to land”

Section 13 (1) of the Environment and Land Court Act provides that:

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) of the Constitution and with the provisions of this Act or any other written law relating to environment and land”.

Some of those disputes are enumerated in **Section 13 (2) (a) to (e) of the Act** and paragraph (e) thereof states:

“any other dispute relating to environment and land”.

It cannot therefore be correct that this Court lacks the jurisdiction to handle this dispute which relates to trust over land. This Court certainly has the requisite jurisdiction to determine this dispute.

RES-JUDICATA

This is provided for under **Section 7 of the Civil Procedure Act** as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”. Emphasis added

There are four pre-requisites to be met before a matter is deemed to be res-judicata. These were defined in the case of **UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA & OTHERS 1996 e K.L.R** to be:

- 1. A previous suit in which the same matter was in issue.***
- 2. The parties are the same or litigating under the same title.***
- 3. A competent Court heard and determined the matter in issue.***
- 4. The same issue has once again been raised in a fresh suit.***

See also **THERESA COSTABIR VS ROSHANLAL H. SHARMA & ANOTHER C.A CIVIL APPEAL No. 44 of 2014 MALINDI (2015 e K.L.R).**

It is the submission of counsel for the defendants that the issue of the ownership of the suit properties was determined in **KERUGOYA PRINCIPAL MAGISTRATE’S SUCCESSION CASE No. 3 of 2010** when the whole of the suit properties were transferred to the 1st defendant as per the certificate of confirmation of grant and therefore this suit is res-judicata. Counsel for the plaintiffs has however submitted that issues of trust cannot be addressed in succession proceedings and in any case, the trust was created after the succession cause was finalized. In support of his submission that this suit is res-judicata in view of the proceedings in **KERUGOYA PRINCIPAL MAGISTRATE’S SUCCESSION CAUSE No.**

3 of 2010, counsel for the defendant has cited the case of LYDIA WATHANU MAINA & ANOTHER VS IRUNGU KARUKU (2015) e K.L.R where WAITHAKA J. stated that:

“Although the question of trust pleaded in the current suit was not raised in the Succession Cause, given the fact that the Court in the Succession Court made a determination as to the parties’ entitlement to the suit property, it would be an abuse of the Court process to allow the respondents to circumvent the said determination on the guise that the doctrine of res-judicata does not apply to succession proceedings”

The Judge then proceeds to cite MAJANJA J. in the case of SAMUEL NJAU WAINAINA VS COMMISSIONER OF LANDS & OTHERS 2012 e K.L.R where he said that Courts should be vigilant to guard against litigants evading the doctrine of res-judicata by introducing new causes of actions so as to seek the same remedy. I am not persuaded that this suit is res-judicata in view of the confirmation of grant issued in Kerugoya Principal Magistrate’s Court Succession Cause No. 3 of 2010. I say so because of the following reasons:

Firstly, this suit involves determination of a trust and that is not part of the mandate of a Probate Court under the law of Succession Act. A party claiming land in trust would be required to file a suit in this Court as provided under Order 37 of the Civil Procedure Rules. Trust was not directly and substantially in issue in KERUGOYA PRINCIPAL MAGISTRATE’S SUCCESSION CAUSE No. 3 of 2010 and in any case Rule 41 (3) of the Probate and Administration Rules provides that:

“Where a question arises as to the identity, share or Estate of any person claiming to be

beneficially interested in, or of any condition or qualification attaching to such share or Estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or Estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to Section 71 (2) of the Act, proceed to confirm the grant”.

Emphasis added

Secondly, it is clear from the plaintiff’s plaint that the alleged trust was created pursuant to the confirmation of grant in the Succession Cause. Among the documents that the plaintiffs will be relying on is the minutes of a family meeting held on 11th December 2015 and signed by the parties herein agreeing on how the suit properties would be shared. A perusal of those minutes shows, for example, that land parcel No. KABARE/NYANGATI/1869 was to be owned jointly by the plaintiffs (who appear to be the only sisters in the family) and their mother the 1st defendant herein. The certificate of search in respect to the land parcel No. KABARE/NYANGATI/1869 shows that it is currently registered in the names of the 2nd defendant which is contrary to that agreement. Of course the issue of trust will have to be determined at the trial by evidence. However, this suit is clearly not res-judicata and I must reject that submission.

The up-shot of the above is that the defendant’s Preliminary Objection questioning this Court’s jurisdiction and also pleading res-judicata is wholly without merit. It is accordingly dismissed and since the parties are family, each shall bear their own costs.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Ruling delivered, dated and signed in open Court this 16th day of June 2017

Ms Njiru for Mr. Rugaita for Plaintiffs present

Ms Kiragu for Mr. Karomo for Defendants present.

B.N. OLAO

JUDGE

16TH JUNE, 2017