



REPUBLIC OF KENYA



KENYA LAW
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**Ndung'u & another v Njau & 12 others (Environment & Land Case
E003 of 2022) [2024] KEELC 1022 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E003 OF 2022
JO OLOLA, J
FEBRUARY 29, 2024**

BETWEEN

**PASQUELINA NYOKABI NDUNG'U 1ST PLAINTIFF
JOHN MWANGI NDUNG'U 2ND PLAINTIFF**

AND

**FAITH WAMBUI NJAU 1ST DEFENDANT
BONIFACE MURIITHI 2ND DEFENDANT
CATHERINE N. NDUNG'U 3RD DEFENDANT
CAROLINE WANJA MURIITHI 4TH DEFENDANT
MARTIN VINCENT NDIRANGU 5TH DEFENDANT
PAUL MUREITHI GITAHU 6TH DEFENDANT
ROSEMARY MWANGI 7TH DEFENDANT
PATRICK MWANGI 8TH DEFENDANT
JOSEPH GACHAGUA NYINGI 9TH DEFENDANT
TIMOTHY THUITA MWANGI 10TH DEFENDANT
GOE EXPLICIT SYSTEMS LIMITED 11TH DEFENDANT
COUNTY GOVERNMENT OF NYERI 12TH DEFENDANT
CHIEF LAND REGISTRAR NAIROBI 13TH DEFENDANT**



RULING

1. By a Plaint dated 22nd February, 2022 and filed herein on 24th February 2022, Pasquelina Nyokabi Ndung'u and John Mwangi Ndung'u (the Plaintiffs) pray for Judgment against the 13 Defendants jointly and severally for:
 - (a) A declaration that the agreements entered into by all the purchasers in respect of any parcel of land out of Mweiga Farm L.R No. 2274 is void *ab initio*;
 - (b) A declaration that the survey, approval and sub-division of the parcel of land Mweiga Farm L.R No. 2274 by the 11th, 12th and 13th Defendants are irregular and unlawful hence null and void;
 - (c) An order for cancellation of the titles, if any issued to the 1st to the 10th Defendants and all other purchasers not of now known by the Plaintiffs and their eviction from the portions allocated to them out of the parcel of land Mweiga Farm L.R No. 2274; and
 - (d) Costs of the suit and interest.
3. Those prayers arise from the Plaintiffs' contention that they are respectively the legal administrator and beneficiary of the estate of the late Festus George Ndung'u who was the registered proprietor of the said parcel of land known as Mweiga Farm L.R No. 2274 Nyeri. The Plaintiffs accused the 1st Defendant and her husband George Maina Ndung'u (now deceased) of entering into various sale agreements with the 2nd to 10th Defendants for the sale of various portions of the suit property without authority and during the pendency of Mombasa High Court Succession Case No. 247 of 2007 which distributed the estate of the said Festus George Ndung'u.
4. In her Statement of Defence dated 24th May 2022, Faith Wambui Njau (the 1st Defendant) denies that the 1st Plaintiff has the soundness of mind and legal capacity to institute this suit. It is the 1st Defendant's case that on 28th November 2016, the 2nd Plaintiff made a future promise or future commitment to sell his future interest in Mweiga Farm to his deceased brother and husband to the 1st Defendant, George Maina Ndung'u.
5. The 1st Defendant denies that the 2nd Plaintiff's said future promise to sell his future interest in the Farm amounted to intermeddling of the estate of his late father. She asserts that the Plaintiffs are delinquent sellers who made enforceable future promises on their future interest in the said Mweiga Farm and that they have now yoked this Court to aid them in breaching the same.
6. The 1st Defendant further asserts that this Court is a Court of equity and that as such it should declare the Plaintiffs as constructive trustees of the subject properties which they are now wrongfully attempting to deprive the Estate of George Maina Ndung'u of.
7. Subsequent to her filing of the Statement of Defence and by a Notice of Preliminary Objection dated and filed herein on 4th May 2023, the 1st Defendant objected to this suit on the grounds that:
 1. The suit is bad in law as it untenably invites this Court to reconstitute itself as a Probate and Administration Court and arrogate itself with High Court Powers;
 2. The suit is incompetent as the issues it raised necessitate a revocation of the Grant;
 3. This Honourable Court has no jurisdiction to hear and determine the Plaintiffs' cause of action, which is founded on alleged intermeddling with the Estate of Festus George Ndung'u



(deceased) whose Grant of Representation was confirmed on 5th June 2017, in Mombasa High Court (Family Division) Succession Cause No. 247 of 2007; In the matter of the Estate of Festus George Ndung'u (hereinafter referred to as "Succession Cause");

4. This Court has no jurisdiction to hear and determine whether the above succession cause was concluded or not;
 5. This Court has no jurisdiction to hear and determine whether the estate comprised in the above succession cause was distributed or not;
 6. This Court has no jurisdiction to hear and determine whether the 1st Plaintiff is a legal administrator of the Estate of Festus George Ndung'u (deceased);
 7. This Court has no jurisdiction to hear and determine whether the 1st Plaintiff is a legal administrator of the Estate of Festus George Ndung'u;
 8. This Court has no jurisdiction to hear and determine whether the 2nd Plaintiff is a beneficiary of the Estate of Festus George Ndung'u;
 9. The suit violates Article 162(2) (b) and 165 of the Constitution;
 10. The suit offends Section 47 of the Law of Succession Act (Cap. 160); and
 11. The suit offends Section 13 of the Environment and Land Court Act No. 19 of 2011.
8. Following directions issued herein on 8th May 2023, the Preliminary Objection was canvassed by way of written submissions. I have accordingly carefully perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Plaintiffs as well as the 1st Defendant. The other Defendants supported the 1st Defendant on the objection.
9. By the Notice of Preliminary Objection dated 4th May 2023, the 1st Defendant objects to the suit herein on some 11 grounds said to be points of law. A perusal of the said grounds reveals that the 1st Defendant disputes the jurisdiction of the Court to hear the dispute on the basis that the issues raised in the Plaintiffs' claim arise from a Succession Cause and that therefore the issues raised can only be determined by the High Court as constituted under Article 165 of the Constitution and not the Environment and Land Court as established under Article 162(2)(b) of the Constitution.
10. The parameters for consideration of what constitutes a Preliminary Objection are now, I think, well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise were set out by the Court of Appeal in *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696. At Page 700 of that decision Law JA asserted as follows:
- “ A Preliminary Objection consists of a pure 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.
11. At Page 701 of the Mukisa Biscuit Case (*supra*), Sir Charles Newbold P. clarified as follows:
- “ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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 ...”

12. In the matter before me, the 1st Defendant by her Preliminary objection objects to the jurisdiction of this Court to hear the dispute on some 11 grounds. It is however notable that the said objection is raised without any amendments to her Statement of Defence dated 24th May 2022. At Paragraph 30 of the lengthy Statement of Defence, the 1st Defendant expressly admits the jurisdiction of this Court to hear the dispute.
13. While the 1st Defendant contends that the suit is bad in law as it invites this Court to reconstitute itself as a Probate and Administration Court and arrogate itself powers of the High Court, I am unable to find by a perusal of the Plaint and the 1st Defendant’s Statement of Defence where that conclusion arises from.
14. I have looked at the prayers in the Plaint and I am unable to find anywhere where the Plaintiffs have called upon this Court to hear and determine whether the Mombasa High Court Succession Cause No. 247 of 2007 was concluded and/or whether the estate comprised in the said succession cause was distributed or not.
15. In the end and from a perusal of the submissions made by the 1st Defendant, it was apparent to me that the issues raised as the Preliminary Objection herein were a mere presumption by the 1st Defendant as to what she understood the Plaintiffs’ case to be and not what the claim is about.
16. While the 1st Defendant asserts that this Court has no jurisdiction to hear and determine whether the 1st Plaintiff is a legal administrator of the Estate of Festus George Ndung’u, it was clear to me that that was not a matter in contention. At Paragraph 16 of her Statement of Defence, the 1st Defendant herself concedes that fact. Again there was no contention as to whether the 2nd Plaintiff is a beneficiary of Festus George Ndung’u. The 1st Defendant concedes that fact at Paragraphs 6 and 7 of her Statement of Defence.
17. In the premises, it was apparent to me that the so-called Preliminary objection herein was nothing but frivolous. The same is based on mere assumptions. It is not based on any proper point of law arising from the pleadings as the 1st Defendant therein concedes the jurisdiction of this Court.
18. Accordingly the objection dated 4th May, 2023 is dismissed with costs to the Plaintiffs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 29TH DAY OF FEBRUARY, 2024.

In the presence of:

Mr. Makura holding brief for Gori for the Plaintiff

No appearance for the Defendant

Court assistant – Kendi

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J. O. OLOLA

JUDGE

