



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 25 OF 2016

FLORENCE GACHERI MBAABU.....1ST PLAINTIFF

IRENE MWENDWA.....2ND PLAINTIFF

VERSUS

LYDIA MWITHIABI M'MUNYUA.....1ST DEFENDANT

MARY KARIMI M'MUNYUA.....2ND DEFENDANT

FRANCIS MURIUNGI.....3RD DEFENDANT

MUNGANIA MUTHOMI EDWARD.....4TH DEFENDANT

RULING

1. This ruling is in respect of the Preliminary Objection filed on 22.11.16 seeking to have plaintiff's suit dismissed on the following grounds:-

i) The plaintiffs have no locus standi to bring the suit.

ii) The suit is Res Judicata as the same was subject of the High Court Succession Cause No. 45 of 2000 in which NAFTALY MBAABU M'MUNYUA was a party.

iii) The suit raises no cause of action against the defendants.

2. Directions were taken to have the matter canvassed by way of written submissions which submissions have been duly filed.

DEFENDANTS' SUBMISSIONS

3. Defendants submit that plaintiffs have no *locus standi* to bring this suit as it is pleaded that the suit is brought on behalf of Naftaly Mbaabu M'Munyua who is dead. The case of *Teresia Wairimu Kirima Vs Father Romeo & Another* has been cited, where it was held that **"a party needs to have capacity or locus standi before bringing a claim in court"**. Also cited is the case of **Peter Makome Mutungu & Another vs. Mary Wangari Mutungu Succession cause no. 2426 of 2011.**

4. Defendants also aver that there was Succession Case No. 45 of 2000 whereby Naftaly Mbaabu became a joint owner with the 1ST defendant in respect of Parcel No. Nyaki /Mulathakari/1154. It is averred that if

a joint owner dies, the land is taken over absolutely by the surviving joint owner.

5. Finally, the defendants aver that the suit raises no cause of action against the defendants because Naftaly Mbaabu Munyua left no land upon his death.

With these submissions, the defendants pray for the dismissal of the suit.

PLAINTIFF'S SUBMISSIONS

6. On the issue of *locus standi*, it is submitted that the suit is not brought on behalf of the estate of Naftaly Mbaabu Munyua. Plaintiffs submit that they have sued in their own capacity. To this end the case of Isaac **Maina Kahwai & 2 Others Vs Ruth Kabura Kahwai & 2 Others (2016)eKLR** has been cited.

7. On the issue that the suit is *res judicata*, it is averred that the proceedings in Succession Case No. 45 of 2000 have not been availed and that the Court has not been told to whose estate the cause relates to. The plaintiffs therefore aver that the Preliminary Objection has not met the threshold in the **Mukisa Biscuit Case**.

8. On the issue of whether the suit raises a cause of action against the defendants, the plaintiffs aver that the doctrine of joint ownership does not extinguish or defeat their (plaintiffs) claims under Customary Law Trust.

9. The plaintiffs have also relied on the case of George Mbiti Kiebia & Another Vs Isaya Theuri M'Lintari & Another (2014)eKLR where it was held that:-

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument that is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interest which need not be noted on the register.”

Determination

10. The issues for determination are three -

- (i) Whether plaintiffs have *locus standi* to bring this suit.
- (ii) Whether the matter is Res judicata.
- (iii) Whether the suit raises a cause of action against the defendants.

Whether plaintiffs have locus standi to bring this suit.

11. I have scrutinized the plaint and nowhere is it pleaded that the plaintiffs are bringing the suit on behalf of the estate of Naftaly Mbaabu M'Munyua. I therefore find that the case cited by the plaintiffs **Isaac Maina Kahwai & 2 Others Vs Ruth Kabura Kahwai & 2 Others (2016)eKLR** is quite relevant. In that case, the Court held that:-

“If therefore the plaintiffs had approached this Court suing as legal representatives of the estate of the deceased, before obtaining the grant of letters of administration.....then their capacity to file this suit would successfully be challenged by way of a Preliminary Objection such as this one. However, as I have already found above, the plaintiffs have not approached this Court as legal representatives of the estate of the deceased...”

The Preliminary Objection fails on this point.

Whether the case is Res Judicata

12. It is contended by the defendants that this suit is res judicata, in view of the Succession Cause No. 45 of 2000.

13. Section 7 of the Civil Procedure Act provides that:-

“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 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”.

14. As rightly submitted by the plaintiffs in the present case, the proceedings and judgement in Succession Cause No. 45 of 2000 have not been availed. The Court has not been told whether the issues raised in the present suit were canvassed in the Succession Cause.

15. A matter is *res Judicata* if it seeks to canvas a subject which was also canvassed in another suit – *See Okiiya Omtata Vs Communication Authority of Kenya & 14 Others Petition No. 59 of 2015.*

16. From the arguments so far advanced, I am not persuaded that this matter is res judicata. The Preliminary Objection fails on this point.

Whether the suit raises a cause of action against defendant

17. For a plaint to disclose a cause of action, a claimant must establish that:-

- a) He / she enjoys a right.**
- b) That right has been or is in danger of being threatened**
- c) And that defendant is liable.**

18. The plaintiffs' claim of the land is anchored on Trust. They aver that this is a family land and this is where they stay. As to whether their claim of Customary Trust is extinguished by the Doctrine of joint ownership is a matter that calls for evidence. It is not a pure point of law.

I therefore find that the Preliminary Objection again fails.

Conclusion

The upshot of my finding is that the Preliminary Objection is not meritorious the same is dismissed with costs to plaintiff.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MERU THIS 15TH DAY OF NOVEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet/Haway

Munya for Defendant present

Kimathi E. for Plaintiff present

Hon. L. N. MBUGUA

ELC JUDGE