



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

LAND CASE NO. 571 OF 2014

PETER NGURE KARIUKI.....1ST PLAINTIFF

GEORGE NJUGUNA KARIUKI.....2ND PLAINTIFF

MOSES NDUNGU KARIUKI.....3RD PLAINTIFF

JAMES KANYARI KARIUKI.....4TH DEFENDANT

VERSUS

LOICE WANJIRU MBURU.....1ST DEFENDANT

MOSES WAMBUGU MBURU.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 5/5/2014 the four plaintiffs in this suit claimed for the following orders against the two defendants:-

- a. A declaration that the defendants have no right over LR. No. Limuru/Kabuku/1324.**
- b. An order for eviction of the defendants from LR. No. Limuru/Kabuku/1324.**
- c. An order for injunction restraining the defendants either by themselves, agents or servants from entering and remaining on LR. No. Limuru/Kabuku/1324.**
- d. Costs of this suit.**
- e. Any other or further relief as this Honourable Court may deem fit to grant.**

THE PLAINTIFFS' CASE

2. The plaintiffs aver that they are the registered proprietors of all that piece of land known as **Limuru/Kabuku/1324** situate at Kabuku Village in Kiambu County on which they have allowed the defendants to live; that however on the 20th March, 2014 the defendants without the permission of the plaintiffs began building permanent buildings on the said land parcel with the intention of depriving the plaintiffs the use thereof; that despite demand vide a letter dated 24/3/2014 requiring the defendants to cease any further construction and also vacate the premises the defendants declined to comply hence this suit. The plaintiffs therefore claim is that the defendants have no interest in LR. No.

Limuru/Kabuku/1324, an order for their eviction and a permanent injunction restraining the defendants or their agents from entering, staying or putting up developments on the suit land.

THE DEFENDANTS' DEFENCE

3. The defendants filed a statement of defence dated 20/6/2014 on 23/6/2014. The 1st defendant clarified that she is **Loice Wanjiku Mburu** and not **Loise Wanjiru Mburu** as indicated in the plaint; I hereby order that the pleadings, which were not amended by the plaintiffs after the disclosure, shall be amended to reflect that name.

4. The defendants further averred that the suit property is known as **Limuru/Ngecha/1324** and not LR. No. **Limuru/Kabuku/1324**; it was the plaintiff's duty to amend the plaint to reflect this fact. However even though the court may order suomotu the name of a party to be amended it is proper that a disputed fact be left to the parties to amend if necessary and this was not done.

5. It is the defendant's case that the defendants have been living on the suit property as a matter of right of virtue of their entitlement under the share of one **Daniel Mburu Kariuki** the husband and father of the 1st and 2nd defendants respectively.

6. The first defendant is said to have lived on the suit premises since 1975 when she was married by the deceased Daniel Mburu Kariuki while the 2nd defendant has lived on the premises, since his birth; the 2nd defendant is said to have demolished an old semi permanent structure he had been living in and bought building materials to use for the putting up of a new home for himself, hence the complaint by the plaintiffs.

7. Further, the defendants plead that the plaintiffs deliberately failed to obtain the Consent of the deceased **Daniel Mburu Kariuki** in **Nairobi High Court Succession Cause No. 1311 of 1996** during his lifetime and obtained the title to the suit property in their names to his exclusion.

8. Subsequently, the defendants allege that during the summons for confirmation of grant in succession cause no **Nairobi High Court Succession Cause No. 1311 of 1996** the defendants were not summoned.

9. There was no reply to the defence.

10. The issues that arise from the pleadings are as follows:-

1. Whether the defendants have a right to share in the distribution of LR. No. Limuru/Kabuku/1324.

2. Whether the plaintiffs obtained the title LR. No. Limuru/Kabuku/1324 rightfully.

3. Who should bear the costs of this suit?

11. I state from the outset that the above issues can not be resolved in this suit for reasons that I will give in this judgement.

12. It is not in dispute that Daniel Mburu Kariuki, now deceased, was the 1st defendant's husband and the plaintiffs' brother. It is not disputed that he was alive as at the time the plaintiffs' mother obtained a Grant of Letters of Administration to their late father's Estate.

13. It is not in doubt that though he was listed as a beneficiary in the succession cause, the late Daniel Mburu Kariuki was not involved in the quest for a Grant of Letters of Administration to his late father's Estate.

14. There is also evidence to suggest that there was bad blood between the 1st defendants' husband and

his mother who became the administrator of the estate of the plaintiff's deceased father, Jeremiah Kariuki.

15. The plaintiffs produced a title deed to **Limuru/Ngecha/1324**. This differs with their plaint which reads **Limuru/Kabuku/1324**. They also produced a Grant of Letters, showing that the Letters of Administration to the Estate of their late father were granted to their mother **Isabellah Wanjiku Kariuki** and that the Grant was confirmed and Certificate of such Confirmation was issued on 2/10/1998. It shows that the four plaintiffs were to share the land comprised in Limuru/Ngecha/1324 equally to the exclusion of the 1st defendant's husband's family.

16. The defendants on the other hand produced the Certificate of Death of Daniel Mburu Kariuki showing that the 1st defendant's husband died on 29/11/1996 after the Petition for the Grant of Letters of Administration of the Estate of the plaintiffs' father was filed on 14/6/1996.

17. The Petition reads as follows in part:-

“Every person having an equal or prior right to a grant of representation herein has consented hereto or has renounced such right or has been issued a citation to renounce such right and apply for a grant of representation and has not done so”.

18. In the affidavit in support of Petition for the Letters of Administration the petitioner stated that the deceased died intestate. The plaintiffs and the late Daniel Mburu Kariuki were named as the survivors. However the Consent to the Grant dated 13/10/1995 was not signed by Daniel Mburu Kariuki.

19. It is the defendant's case that the plaintiffs deliberately failed to obtain the Consent of the deceased in **Nairobi High Court Succession Cause Number 1311 of 1996** during the deceased's lifetime and obtained the title to the suit property in their names to his exclusion.

20. However evidence shows that the burden was on their mother rather than on the plaintiffs to obtain Consent to her application from Daniel Mburu Kariuki. Besides Daniel Mburu Kariuki being named in those proceedings, his widow was apparently allocated shares in Limuru Pyrethrum Co-operative Society Limited (Share Certificate No. 918,) representing 6 acres of land while all the other parcels of land including Limuru/Ngecha/1324 owned by the plaintiff's father were to be divided among the plaintiffs in equal shares. Therefore, it may seem incorrect, as stated by the 1st defendant, that the Estate of the plaintiff's father was distributed among the plaintiffs to the exclusion of the deceased Daniel Mburu Kariuki.

21. However the 1st defendant contends that the six acres belonged to her deceased husband as he had bought them before his death and therefore disputes their inclusion as part of the estate of Jeremiah Kariuki hence they were improperly included in the distribution.

22. Evidence that the six acre piece of land in Subukia was paid for by the 1st defendant's husband or by Jeremiah Kariuki before they died is a matter to be dealt by the succession court and without any of the parties herein volunteering information toward that end, this court cannot tell if the same was brought up, considered or determined in those proceedings.

23. The inescapable fact remains that several pertinent issues have been raised in this suit by the defendants:

a. Whether the deceased Daniel Mburu Kariuki granted his mother consent to apply for the Grant

b. Whether the 1st defendant or her family, being the widow to Daniel Mburu Kariuki was summoned to court during the confirmation of the grant.

c. Whether the shares in Limuru Pyrethrum Co-operative Society Limited (Share Certificate

No. 918,) representing 6 acres of land formed part of the deceased Jeremiah Kariuki’s estate for them to be properly included in the succession proceedings relating to the said estate.

d. Whether the omissions in (a) and (b) above, if they occurred, were fatal to the propriety of the grant issued to the plaintiff’s mother.

24. From what is pleaded, one further issue that may arise is that of the 1st defendant’s matrimonial home which is said to have been on the suit land. The applicable law as regards matrimonial property is the Matrimonial Property Act of 2013, which at section 6 defines matrimonial property as follows:

(a) The matrimonial home or homes;

(b) Household goods and effects in the matrimonial home or homes; or

(c) Any other immovable and movable property jointly owned and acquired during the subsistence of a marriage.

25. Under **Section 2** of the said Act matrimonial home is taken to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property. Therefore, whether these provisions apply to the suit land or to the **Limuru Pyrethrum Co-operative Society Limited (Share Certificate No. 918,)** representing 6 acres of land is a matter falling squarely within the purview of the court seized of the succession proceedings.

26. **Article 162(2) (b)** of the Constitution states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

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

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes:—

(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) Relating to compulsory acquisition of land;

(c) Relating to land administration and management;

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) Any other dispute relating to environment and land.”

27. In the case of ***Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] eKLR*** where an objection was raised over the jurisdiction of this court to hear and determine a suit involving matrimonial property, it was observed as follows:

“It is however notable in this regard that this Court shares concurrent jurisdiction with the High Court in certain matters relating to land, and these matters have been described in the *Practice Directions On Proceedings In The Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts* dated 25th July 2014 and published in Gazette Notice No. 5178 as cases

touching on inheritance, succession and distribution of land under the Law of Succession Act. These cases shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.”

28. The court continued as follows:-

“It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land.”

29. This court therefore has wide jurisdiction over matters land. However, in respect of the instant case, other proceedings previously filed before a court that also had jurisdiction and vide which proceedings a grant of letters of administration was issued exist, and they have a direct relationship with this suit.

30. When loopholes through which irregularities *are alleged* have crept into the process of registration of the suitland in the plaintiffs’ names have been revealed, this being a court of justice, cannot shut its eyes to such loopholes and give the orders sought by either party as there is not sufficient material on the record to enable it do that.

31. Hearing of all parties in a succession cause is as vital as in any other proceedings. In the case of *Mpatinga Ole Kamuye v Meliyo Tipango & 2 others [2017] eKLR* the court observed as follows:

“...before distribution of the estate of the deceased under Section 71 of the Law of Succession act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution.

“The Court has to hear evidence where each claimant establishes their claim so as to enable the Court grant an informed decision. He who alleges must prove their claim so as to inform the Court whether there an asset belonging to the deceased's estate available for distribution. If so who holds proprietary interest, possessory interest and or beneficial interest to the said asset and how much of the asset is the relevant party entitled to.

“So whether, it is a beneficial interest, proprietary interest, or debt recovery from the estate, it is only after hearing all the parties laying claim in the asset that belonged to the deceased and is now subject to distribution that the Court can conclusively determine what interest takes priority.”

32. The grant, unless and until challenged successfully in the court that issued it, still remains in place. This court has not been asked to nullify that grant and even if it had been asked to do so, its jurisdiction would be brought into question.

33. It is possible for this court to foresee that this suit, if determined on the basis of the contents of the plaint, defence and the evidence in the record, may lead to great detriment to either party herein as rights of either party, if any, may be snuffed out with finality, yet what I understand the pleadings to say is that the issues listed above were not determined in the succession proceedings for reasons beyond control of the parties.

34. It is unfortunately that matters that were within the realm of the Succession Proceedings in *Nairobi High Court Succession No. 1311 of 1996 – in the matter of estate of Jeremiah Kariuki (deceased)* have overflowed into this suit.

35. **Section 47 of Law of Succession Act Cap 160** which provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as maybe expedient.

36. The Preamble in the *Law of Succession Act* stipulates that the Act is to;

“amend, define, and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased's persons; and for purposes connected therewith and incidental thereto”.

37. The High Court therefore has jurisdiction over issuance of grants in Succession matters where each party seeks to establish their, beneficial, proprietary and or possessory rights over the asset that comprised of a deceased's estate.

38. This court considers the issues listed above as sufficiently weighty to deserve the attention of the court seized of the matter. While those issues so sorely stick out, this court does not have jurisdiction to determine this suit. Those issues must be resolved first, and in the proper forum.

39. The consideration of the issues arising from the pleadings and the evidence in this suit leads to the finding that though this court would otherwise have jurisdiction in a matter such as this one, the presence of these other proceedings renders this court to be unable to determine the matter at hand.

40. In the face of the dearth of evidence in this matter and the revelations by both parties of material omissions in the succession process, this court is incapable of issuing a decision that would stand the test of time.

41. Furthermore, issues have been raised in this suit where a decision would of necessity in some way affect the status of the grant by either affirming it or denying its validity in proceedings other than the proceedings in which it was issued or an appeal therefrom. In this court's view, such a decision would be irregular and contrary to good practice in the administration of justice.

42. If any application regarding the decision of the court, either to annul or rectify the grant or otherwise - which could as well be the effect of an order of this court though not couched in that language - that application can only be made before and handled by the court that dealt with the succession cause.

43. For clarity, this court is not stating that there were irregularities. All it is saying is that there are several weighty issues that at present render themselves for determination, if presented in further proceedings before the Succession Court, as listed above. Whatever orders the Succession Court would make if these matters were brought up now before it, this court cannot tell.

44. For the reasons outlined above, I find that to hold that the defendants have a right to share in the distribution of the suit land would fly in the face of the order confirming the Grant and the resultant conflict would not be proper.

45. I find that in the circumstances, the plaintiffs' prayers cannot be granted. This suit must be dismissed so that the issues herein may, if the parties so wish, be laid before the court that has jurisdiction to entertain the succession proceedings for its decision relating to the integrity of the Grant and thereafter the propriety of the distribution of part of the suitland which hosted the 1st defendant's matrimonial home.

46. Consequently, this suit is hereby dismissed. The parties should explore other remedies in the matter in the court that issued the grant. As the parties are related by way of kinship, each party shall bear their own costs.

Signed at Kitale on this 9th day of October, 2017

MWANGI NJOROGE

JUDGE

Dated, signed and delivered at Nairobi on this 10th day of November, 2017

K. BOR

JUDGE

Judgement read in open court at Nairobi on this 10th day of November, 2017.

In the presence of:

No appearance for the Plaintiff.

No appearance for the Defendant.

Court Assistant: V. Owuor

K. BOR

JUDGE