



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 799 OF 2013**

**BENINA WAIRIMU KABUI.....PLAINTIFF**

**VERSUS**

**JOHN KINYUA KABUI.....1<sup>ST</sup> DEFENDANT**

**MURIITHI KABUI.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is in respect to the defendants' Preliminary Objection dated 2nd February 2016 raising the following point of law:-

***“The suit of the plaintiff is statute barred by the Limitation of Actions Act Section 7, 9 (1) (2) (3) and ought to be struck out and dismissed”***

That Preliminary Objection was filed by the firm of **BALI-SHARMA** Advocates who had come on record on behalf of the defendants on 16th September 2015 in place of **IGATI MWAI** Advocate.

The firm of **IGATI MWAI** Advocates had on 16th December 2013 filed their own Preliminary Objection on behalf of the defendants in which they stated that the plaintiff's suit is an abuse of the Court process as the issues raised were canvassed in the following cases:-

- 1. SENIOR RESIDENT MAGISTRATE KERUGOYA L.D.T CASE No. 6 of 2007.**
- 2. SENIOR RESIDENT MAGISTRATE KERUGOYA L.D.T CASE No. 29 of 2000.**
- 3. DISTRICT MAGISTRATE COURT BARICHO L.D.T CASE No. 2 of 2002.**
- 4. EMBU HIGH COURT MISC APPLICATION No. 29 of 2007.**

What is coming up for my determination however, as agreed between **Mr. NGIGI** advocate for the plaintiff and **Mr. MAHAN** advocate for the defendant on 31st May 2016 is the Preliminary Objection dated 2nd February 2016. I am of the view however, that since the earlier Preliminary Objection raised by **Mr. MWAI** advocate then acting for the defendants raises points of law and although I have not been addressed on the same, I will nonetheless address it. This is because the issue raised touches on this suit being res-judicata. That is a matter of law which the Court can even raise suo-motto if such issues are brought to its attention through the pleadings. Besides, that will pre-empt the raising of such issues later on in these proceedings.

To understand whether or not this suit is caught up by the **Limitation of Actions Act**, this Court must look at the pleadings.

By her plaint filed herein on 15th November 2013, the plaintiff sought judgment against the defendants in the following terms:-

**1. A declaration that land parcel numbers MUTIRA/KAGUYU/608 and MUTIRA/KAGUYU/609 are registered in the names of the defendants to hold in trust for themselves and all other family members as stipulated in paragraph 4 above.**

**2. An order compelling the defendants to sub-divide land parcel numbers MUTIRA/KAGUYU/608 and MUTIRA/KAGUYU/609 in equal portions and to register the subdivisions and transfers in favour of the plaintiffs and all the family members.**

**3. Costs.**

**4. Any other or further relief the Honourable Court may deem fit to grant.**

The basis of the plaintiff's claim as can be gleaned from the plaint is that she is in occupation of part of land parcel No. MUTIRA/KAGUYU/608 while the 1st defendant is in occupation of the other portion. The 2nd defendant is in occupation of the whole of land parcel No. MUTIRA/KAGUYU/609. However, the two defendants are registered as proprietors of land parcels No. MUTIRA/KAGUYU/608 and MUTIRA/KAGUYU/609 (the suit land) in trust for themselves and the other family members who have been listed in paragraph 4 of the plaint. The plaintiff is the mother to the defendants.

The defendants filed a joint defence in which they denied that they are registered as proprietors of the suit land in trust adding that their titles are absolute and some of the children named as part of the family were not born by the time their father died which was before land demarcation.

The defendants also raise other issues in the defence which are not necessary for purposes of this ruling and which will have to await the main trial. However, they also plead that the suit is res-judicata, an issue that I have already alluded to and which I will address although it is not the subject of the Preliminary Objection before me.

The application was canvassed by way of written submissions which have been filed by the firm of **NGIGI GICHOYA** Advocates for the plaintiff and **BALI-SHARMA** Advocates for the defendants.

I have considered the Preliminary Objection and the submissions by counsel.

The Preliminary Objection raises the issue of Limitation which is a pure point of law and is therefore a proper Preliminary Objection as defined in the case of **MUKISA BISCUIT COMPANY LTD VS WEST END DISTRIBUTORS 1969 E.A 896** where **LAW J.A** 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 a contract giving rise to the suit to refer the dispute to arbitration”.*** Emphasis added.

The issue for my determination is whether in fact this Preliminary Objection which is premised on limitation is well founded. It is the submission by counsel for the defendants that they were registered as the proprietors of the suit land on 21st November 1959 and since the suit was filed in 2013, some 54 years later, it is statute barred. **Section 7 of Limitation of Actions Act (CAP 22)** provides as follows:-

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first occurred to some person***

*through whom he claims, to that person”.*

It is however clear from the plaint herein that the plaintiff’s cause of action is premised on a claim of trust. **Section 20 (1) of the Limitation of Actions Act** provides that:-

***“None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action –***

***(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or***

***(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use”***

From the plaintiff’s pleadings and particularly paragraphs 3, 4, 5 and 6 thereof, her case is that the defendants are her children with the late **KABUI KABIRU** who also left other children named therein and who are also entitled to a share of the suit land as it was registered in the defendants’ names to hold in trust for the family. This is essentially a claim under customary trust. It is not defeated by the provisions of **Section 7 of the Limitation of Actions Act** as is clear from the provisions of **Section 20 (1)** of the same Act. Similarly, in the case of **MACHARIA KIHARI VS NGIGI KIHARI C.A CIVIL APPEAL No. 170 of 1993**, the Court of Appeal held as follows:-

***“Limitation period prescribed in Section 20 (2) of the Limitation of Actions Act will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law”.***

See also **STEPHENS VS STEPHENS 1987 K.L.R** where the Court held that in a case based on a claim of land held in trust, no plea of limitation is available to a fiduciary in possession of trust property who abuses such trust and converts such property to his own benefit.

Whether or not the defendants hold the suit land in trust for themselves, the plaintiff and the other family members listed in the plaint is a matter that will be determined on the evidence during the trial. It is not a matter that can be determined at this stage. What is clear at this stage, however, is that the plaintiff’s claim is based on trust and therefore, it is not defeated by **Section 7 of the Limitation of Actions Act**. The Preliminary Objection on limitation is therefore not well founded and must be dismissed which I hereby do.

As indicated above, the defendants had previously raised the issue that this suit is res-judicata in view of the other suits which I have also referred to elsewhere in this ruling. The Preliminary Objection was not prosecuted because counsel who filed it is no longer on record. However, the issue of res-judicata which was also pleaded in paragraph 13 of the defendant’s defence is an issue that goes to this Court’s jurisdiction and although I was not addressed on it, I am of the view that I must investigate it particularly because the previous pleadings are part of the record herein. This is because, if this Court lacks jurisdiction, then it must down its tools – **OWNERS OF THE MOTOR VESSEL LILLIAN S’ VS CALTEX OIL KENYA LTD 1989 K.L.R 1**.

The doctrine of res-judicata is provided for under **Section 7 of the Civil Procedure Act** in the following terms:-

***“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”.***

For res-judicata to apply it must be shown that:-

***(a) The matter in issue in both suits is substantially the same***

***(b) The parties in both suits are the same***

***(c) There is a concurrence of jurisdiction***

***(d) The matters in dispute have been heard and finally determined.***

Guided by the above principles, I have considered the other suits whose pleadings are part of the record herein and which I have already referred to above.

What is clear from all those cases is that whereas the parties were the same litigating over the suit land, the issues did not involve trust as is now the case before me. Indeed in **EMBU HIGH COURT MISC APPLICATION No. 29 of 2007** in which the plaintiff had filed Judicial Review proceedings to quash the decision of the Central Division Land Disputes Tribunal which had been adopted by the **SENIOR RESIDENT MAGISTRATE'S COURT KERUGOYA IN L.D.T CASE No. 6 of 2007, WANJIRU KARANJA J.** (as she then was) addressed herself as follows while dismissing the application:-

***“The Tribunal did not determine the Trust as it had been asked to do. If the applicants still feel that Trust should be determined, then they should go ahead and file the suit before a Court seized of jurisdiction to determine the matter”.***

That is what the plaintiff has now done. What the Judge was saying was that although the parties had litigated in other forums, the issue of trust was not determined and could not have been investigated in those other forums. This was really the position as regards all the other cases which were heard by the various Land Disputes Tribunals. It is clear therefore that res-judicata does not apply in the circumstances of this case.

Ultimately therefore, the defendants' Preliminary Objection dated 2nd February 2016 is dismissed with costs.

Before I leave this matter, there is pending herein the plaintiff's Notice of Motion filed on 15th November 2013 seeking temporary injunctive reliefs against the defendants with respect to the suit land. That application should have been determined before but counsel for the defendants urged the Court to first determine the Preliminary Objection which I have now done. I notice from the record that there was previously an attempt to have the status quo maintained on the suit land pending the hearing and determination of this suit. Indeed on 9th April 2015 the defendants denied a claim by **Mr. NGIGI** advocate that they were threatening to evict the plaintiff. If there is no longer any threat of the plaintiff being evicted, I advise the parties and their counsel to agree on a consent on the pending application so that they can expedite the pre-trial process and have this suit which has a history dating back to 2000 heard and finally determined.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> OCTOBER, 2016**

Ruling dated, delivered and signed in open Court this 14<sup>th</sup> day of October 2016.

Mr. Chomba for Mr. Ngigi for Plaintiff present

Mr. Bali-Sharma for Defendants absent

Both Defendants present

Mr. Gichia Court Clerk.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> OCTOBER, 2016**