



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC NO. 701 OF 2013 (OS)**

**FREDRICK MUIGAI GIKUHI.....1<sup>ST</sup> PLAINTIFF**

**DAVID KIMANI GIKUHI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NAOMI WANJIRU KIONGO (Sued as Legal Representative of the  
Estate of Kiongo Gikuhi).....DEFENDANT**

**RULING**

Coming up for determination is the Plaintiff's application dated **29<sup>th</sup> October 2013** and the Defendant's Preliminary Objection dated **8<sup>th</sup> December 2014**. The Plaintiff seeks orders as follows:

- 1. *The proceedings continue as if the cause had commenced by way of Plaint.***
- 2. *The Replying Affidavit filed be deemed as the Defendant's Defence.***
- 3. *The parties be at liberty to add to and/or to apply for particulars of the affidavits.***
- 4. *Costs of the application be in the cause.***

The application is premised on the ground that the matter cannot be adequately and conclusively be determined by way of affidavit evidence only. It is supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff who deposed that the suit was instituted by way of Originating Summons and the Defendant entered appearance and filed a Replying Affidavit. However, the deponent stated that they had come to a realization that the facts in the matter are too contentious to be adequately and conclusively be determined by way of affidavit evidence. Consequently, that there is need for viva voce evidence to be adduced for purposes of determining the real question in controversy between the parties herein.

The Defendant filed a Notice of Preliminary Objection to oppose the Plaintiffs' application as well as the Originating Summons, on the following grounds:

- 1. *Land Title No. Kiambaa/Waguthu/865, having been transferred by Gikuhi Kiongo (deceased as at 1998) to Kiongo Gikuhi (deceased as at 1997) as absolute legal owner on 23<sup>rd</sup> May 1996 at a***

*consideration of Ksh. 10,000/- with the knowledge of the Plaintiffs cannot be subject of a trust.*

2. *Land Title No. Kiambaa/Waguthu/865, is currently subject of Nairobi HC Succession Cause No. 699 of 2003 where the same or similar issues relating to this land are being dealt with, hence the suit is an abuse of the court process and should be stayed, struck out or dismissed with costs.*
3. *The issue as to whether or not there is a trust in respect of the said title was presented to the Court by the Plaintiffs in Nairobi HC Succession Cause No. 699 of 2003 and was determined by the Court against the Plaintiffs which they have neither appealed not applied for review, hence the present proceedings are res judicata.*
4. *The present suit is time barred under the Limitation of Actions Act.*
5. *The Applicants are mere trespassers who have forcibly entered the suit land, fraudulently filed in the Kiambu Magistrate's Court Succession Cause No. 239 of 2000 and Nairobi HC Succession Cause No. 699 of 2003 which is still pending in the High Court.*
6. *The 1<sup>st</sup> Plaintiff having himself petitioned the Court to be, and being an administrator of the Estate of Kiongo Gikuhi the registered owner of the suit property, is not competent to sue his co-administrator of the said estate hence the proceedings are bad in law/incompetent.*

The application and objection were canvassed by way of written submissions. On behalf of the Defendant, counsel submitted that the property, subject matter of the suit herein is the subject between the same parties in **H.C. Succession Cause No. 699 of 2003** where similar issues relating to the suit property are pending determination. Consequently, that the suit herein is an abuse of the court process and should be stayed, struck out or dismissed with costs. Further, that there is another suit pending in **Kiambu Chief Magistrate's Court Succession Cause No. 239 of 2000**, further demonstrating that the suit herein is an abuse of the court process. Counsel also submitted that the 1<sup>st</sup> Plaintiff was a co-administrator of the estate of the registered owner of the suit property and could not sue his co-administrator, thus the proceedings are bad in law.

For the Plaintiffs, it was submitted that the Court pursuant to **Order 37 Rule 19 of the Civil Procedure Rules** had the powers to convert the proceedings commenced by way of Originating Summons to proceed as if they were commenced by Plaintiff. Counsel submitted that the issues raised in the matter are highly disputed and would require calling of evidence, and therefore, the ends of justice would be met if leave was granted to proceed with the matter as initiated by Plaintiff.

With respect to the objection raised by the Defendant, Counsel for the Plaintiffs submitted that the objections raised does not meet the nature and scope of preliminary issues since certain facts have to be ascertained before the plea can lie. Counsel relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** in that regard. The claim that the issues herein are *res judicata* having been determined by the Probate Court in **H.C. Succession Cause No. 699 of 2003** was refuted with counsel submitting that the present suit is distinguishable from the Succession Cause primarily because the issues of trusts and adverse possession was not determined neither was it an issue in the Succession Cause. It was further submitted that the issues of acquisition of title to the suit property and trespass on the part of the Plaintiffs are factual issues that can only be addressed by viva voce evidence.

Order dictates that I commence with the objections raised by the Defendant. This Court was pointed out to the **Mukisa Biscuit Case**, a guiding authority on preliminary objections. Their lordships held that:

***A preliminary objection raises pure points of law which is argued on the assumption that all the facts pleaded are correct, and it cannot be raised if any facts have to be ascertained or what is sought is the exercise of judicial discretion.***

Guided by the above authority, it is my finding that objections 1 and 5 as captured herein are matters of

fact as they refer to acquisition of property and trespass. These are issues that cannot be determined unless ascertained by facts.

As regards objections 2 and 3 the Defendant avers that the issues raised herein are substantially in issue in the Succession Cause and that the Court pursuant to the provisions of **Section 6 and 7 of the Civil Procedure Rules** is barred from proceeding with a matter in issue which is directly and substantially in issue, between the same parties in a suit that is pending or has been heard and finally determined. On perusal, the said objects raise points of law as they are in respect to the doctrine of *res judicata*. However, I have carefully read a ruling by **Mugo J.** delivered on **29<sup>th</sup> June 2012** in **H.C. Succession Cause No. 699 of 2003**. The ruling is annexed to the Plaintiff's affidavit in support of the Originating Summons marked "**FMG-7**". Therein the Court observed as follows:

***".....the determination of the existence or non-existence of a trust in the case of the suit property herein does not fall within this Court's mandate under Section 71 of the Succession Act under which the two applications for confirmation of grant were filed. The applicant, who appears to be claiming the subject land as an heir ought to have taken out an Originating Summons under Order XXXVI of the Civil Procedure Rules. Only after obtaining a declaration to that effect would be then have entitled to claim a beneficiary's interest in the land herein, which, from the title documentation filed is clearly shown to have been owned absolutely."***

From the observation made by the Judge herein, it is evident that the issue of trust was not determined in the Succession Cause and the Court did in fact advise the parties to approach the proper Court and initiate proceedings through an originating summons (now under Order 37 of the CPR). This Court pursuant to **Section 13 of the Environment and Land Court Act** is the proper forum in which the existence or non-existence of trust over the suit property can be determined. The said section gives this Court the jurisdiction to hear and determine all disputes relating to environment and land. It is my finding, that the suit herein is not *res judicata*.

In respect to Objection No. 4, the Defendant made an averment that the suit is statute barred in terms of **Sections 7 and 20 of the Limitation of Actions Act**. **Section 7** bars any action of recovery of land after the lapse of 12 years from the date on which the right of action accrued whereas **Section 20(2)** bars an action by a beneficiary to recover trust property after the end of six years from the date on which the right of action accrued. The deceased herein died in 1997 and the 1<sup>st</sup> Plaintiff and Defendant obtained letters of administration in the year 2002 at the Chief Magistrate's Court in Kiambu. These letters were subsequently revoked by the High Court which issued fresh letters on 6<sup>th</sup> December 2004. From the date the letters of administration were issued to the date of instituting this suit is 9 years. Suffice to add, the ruling by the Court directing the parties to deal with the issue of trust over the suit property before confirmation of the grant of letters of administration was entered on 29<sup>th</sup> June 2012. It is also notable that from the date of the deceased's demise, the Plaintiffs have been pursuing their claim. I therefore find that the Plaintiffs have not been locked out by **Sections 7 and 20** of the Statute of Limitation.

As regards Objection 6, the Defendant is categorical that the 1<sup>st</sup> Plaintiff being a co-administrator of the estate, cannot sue another administrator over the property that has been vested in him. The Defendant pointed the Court to the provision of **Section 79 of the Law of Succession Act** which vests all the property of the deceased to an executor or administrator as the personal representative of the deceased. In acknowledging the Defendant's averment, I do note that the circumstances of this case are peculiar in the sense that one administrator claims to be an heir of the suit property. He seeks that a declaration be made that the deceased held the property in trust for his siblings following sub-division of the entire property by their deceased father. This can only be achieved through a Court Order upon trial and it would be an injustice to the 1<sup>st</sup> Plaintiff if he were to be barred from asserting his claim.

Moving on to the Plaintiffs' application, the same is brought under **Order 37 Rule 19 of the Civil Procedure Rules** which gives this Court the discretion to order the proceedings initiated by Originating Summons to continue as if the cause had been initiated by Plaintiff. The issues in dispute, according to the

Plaintiffs are contentious and best articulated by viva voce evidence than by affidavit evidence. On careful perusal of the pleadings, I am of the considered view that this is a case not fit to proceed by way of affidavit evidence. Further, I see no prejudice to be occasioned to the Defendant since the Replying Affidavit can be deemed as a Defence. Additionally, the rules allow for the parties to make additions to the pleadings already filed.

Having now considered the instant Notice of Motion , the Court finds it merited and Orders as follows:-

1. *The Defendant's Preliminary Objection is dismissed.*
2. *The suit be deemed to have been commenced by way of Plaintiff and be heard by way of viva voce evidence.*
3. *Parties be at liberty to amend their pleadings if need be within 60 days from the date hereof.*
4. *Costs of the application shall be in the cause.*

***It is so ordered.***

Dated, Signed and Delivered this **10<sup>th</sup>** day of **July** 2015

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent

Hilda: Court Clerk

**L.GACHERU**

**JUDGE**