



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 101 OF 2014 (O.S)

NEPHANT KIGUTA KING'ORI

NEWTON IGOKO KINGO'RI

WANJOHI KIGUTA APPLICANTS

VERSUS

JANE GATHONI KING'ORI

GRACE WARUGURU MATHENGERESPONDENTS

RULING

1. The applicants took up the summons dated **6th May, 2014** for determination of various questions concerning various titles arising out of L.R NO. Othaya/Ihuririo/698 (hereinafter referred to as the suit property), originally owned by Habel Kiguta Kingori (deceased).
2. It is the applicants' case that the deceased caused the suit property to be divided into seven portions to wit, Othaya/Ihuririo 1386 to 1392. The applicants contend that the deceased working in cahoots with the respondents caused the suit property to be sub-divided and the subtitles in respect of the sub-divisions thereof to issue at a time when they had lodged a caution to prevent dealings with the suit property. Further that the deceased and the respondents caused the caution to be fraudulently removed in order to facilitate the impugned sub-divisions. As a result, they filed Nyeri HCCC No.11 of 2009 in which they obtained a order restraining dealings on the resultant parcels of land.
3. Contending that the act of the deceased and the respondents of transferring L.R Othaya/Ihuririo/1391 and 1392 (some of the parcels arising from the original suit property) to the respondents when the prohibitory order issued in Nyeri HCCC No.11 of 2009 was subsisting was fraudulently done by the deceased person in connivance with the respondents, the applicants seek a declaration that the suit property was alienated and/or subdivided fraudulently and prays for cancellation of the resultant titles so that the suit property reverts to its original state. The applicants also seek costs of the suit.
4. Upon being served with the suit papers, the 1st respondent Jane Gathoni King'ori, filed the notice of preliminary objection dated 30th October, 2014 challenging the suit on the grounds that:-
 - a) the court has not been properly moved hence the suit is incompetent;

b) the suit is *res judicata* Nyeri HCCC No.11 of 2009 which has been concluded and that

c) the Applicants have no capacity to bring the suit.

5. The notice of preliminary objection was disposed of by way of written submissions but at the time of writing this ruling the applicants had not filed their submissions.

Submissions

6. In the submissions filed on behalf of the 1st respondent, it is explained that from the affidavit sworn in support of the originating summons, the applicant's grievances stem from the allegations that the deceased (Habel King'ori Kiguta) who was the original proprietor of the suit property caused the suit property to be sub-divided and some portions thereof to be transferred to the respondents when dealings in respect thereof were restrained.

7. Pointing out that the affidavit discloses that the said original proprietor of the suit property passed on in 2009 after effecting the impugned dispositions and that the applicants had sued the deceased vide Nyeri HCCC No. 11 of 2009, the 1st respondent submits that the current suit is *res judicata* Nyeri HCCC No. 11 of 2009. The 1st respondent also contends that the applicants' claim is unmaintainable for want of capacity to pursue the suit.

8. On the issue of the applicants' capacity to litigate the claim, reference is made to **Section 82** of the Law of Succession Act, Cap 160 Laws of Kenya, and the cases of **Rajesh Prajivan vs. Sailesh Prajivan (2014) e KLR; Robert Meleya Ole Letoluo & 5 Others vs. Synergy Industrial Credit Ltd & 2 others (2014) e KLR** and submitted that the suit ought to be struck out because the applicants are questioning and seeking declarations against the property and actions of a deceased person.

9. It is contended that granting the orders sought would alter and vary the estate of the deceased person when the power to do so lies in a duly appointed administrator of the estate as stated in the case of **Robert Meleya supra** that:-

“...The Court of Appeal in the decision of Troustik Union International & Ingrid Ursula Heinza vs. Jane Mbeyu & Alice Mbeyu CA 269/97 reiterated that only an administrator can sue on behalf of a deceased person under the Law of Succession Act.”

and in the case of **Rajesh Prajivan vs. Sailesh Prajivan (supra)**, that:-

“In our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession....It therefore matters not that the respondent had a cause of action. Indeed the issue was not whether he had a cause of action or not but that he lacked the requisite locus standi to seek relief from the Court without first obtaining letters of administration.”

10. Concerning the contention that the suit is *res judicata* Nyeri HCCC No.11 of 2009 reference is made to the affidavit sworn in support of the originating summons, the court order annexed thereto and the cases of **Nicholas Njeru vs. A.G & 8 Others (2013) e KLR; Njangu vs. Wambugu & Another Nairobi HCCC NO. 2340 of 1991; a passage in Mulla's Code of Civil Procedure, 16th Edition Volume 1 at page 61** and submitted that the applicants are trying to introduce a veiled new cause of action when in actual fact, the remedy sought is the same as that sought in Nyeri HCCC No.11 of 2009 *supra*.

11. In the aforesaid case of **Nicholas Njeru (supra)**, the Court of Appeal stated as follows concerning the doctrine of *res judicata*:-

“This doctrine has been applied in a number of cases including; reference No.1 of 2007, James

Katabasi and 21 others vs. Attorney General of the Republic of Uganda EACJ where the Court stated that for the doctrine to apply:

- 1. The matter must be directly and substantially in issue in the two suits;**
- 2. The parties must be the same or parties under whom any of them claim, litigating under the same title; and**
- 3. The matter must have been finally decided in the previous suit (See Uhuru Highway Development Ltd v. Central Bank & 2 others- Civil Appeal No. 36 of 1996)."**

Analysis and determination

12. From the affidavit sworn in support of the suit herein, it is not in dispute that the suit relates to land No. L.R Othaya/Ihuririo/698. That property before it was sub-divided and separate titles issued in respect thereof was registered in the name of Habel King'ori Kiguta (deceased).

13. The applicants who had lodged a caution to restrict dealings on the suit property moved to court vide Nyeri HCCC No.11 of 2009 and obtained an order restraining the deceased, his agents, servants, or anyone claiming right under him from selling, disposing of, alienating, transferring or in any way interfering with land parcel number Othaya/Ihuririo/1386 to 92 (that is to say the parcels of land arising from the sub-division of land No. L.R Othaya/Ihuririo/698. The order restraining dealing with the resultant parcels of land was issued on 26th March, 2009.

14. It appears that during the subsistence of the order referred to above, the deceased transferred to the 1st respondent land parcel No. Othaya/Ihuririo/1391 and he transferred land parcel No. Othaya/Ihuririo/1392 to himself, the 1st respondent and the 2nd respondent.

15. It is the applicant's case that the registration and transfer effected in favour of the respondents was effected fraudulently.

16. It is also not in dispute that the two parcels of land herein were registered in the name of the respondents during the subsistence of the court order prohibiting dealings therein and that the properties which are the subject matter of the current suit form part of the estate of the deceased (all flow from the suit property which was originally registered in the name of the deceased).

Is the current suit Res judicata Nyeri HCCC No. 11 of 2009?

17. From the court order annexed to the affidavit sworn in support of the originating summons herein, it is clear that the issues raised in this suit were subject of litigation in Nyeri HCCC No.11 of 2009; Nephant Kiguta King'ori & 2 others v. Habel King'ori Kiguta. It is noteworthy that apart from making reference to the order obtained in that suit, the applicants have not disclosed what other proceedings or orders were issued in that suit.

18. On her part, the 1st respondent through the notice of preliminary objection dated 30th October, 2014 contends that Nyeri HCCC No.11 of 2009 was concluded. However, there is nothing in the court file to prove that fact. Be that as it may, from the court order annexed to the affidavit sworn in support of the applicant's claim, I gather that the issues raised in this suit were substantially or directly in issue in the former suit, to wit whether registration of the respondents as proprietors of some of the sub-divisions of the suit property was effected fraudulently.

19. Whether or not the issues raised or which ought to have been raised in the former suit were raised or heard and determined, I am of the considered view that, presence of the former suit renders the current suit *sub judice*. In this regard see **Section 6** of the Civil Procedure Act which provides:-

"6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is

also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

20. It is noteworthy that the above determination is premised on the assumption that the applicants applied for substitution of the deceased with the respondents within one year from 19th October, 2009 (when the deceased died). If that was not done, the claim against the deceased and the order served on the deceased abated within one year of the deceased's death. See **Order 24 Rule 4** of the Civil Procedure Rules which provides as follows:-

Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]

1. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

21. If the suit against the deceased abated by operation of law, it means that the applicants can only revive the abated suit using the procedure contemplated under **Order 24 Rule 7** of the Civil Procedure Rules but not bring another suit against the deceased or his estate. In this regard See **Order 24 Rule 7** of the Civil Procedure Rules which provides:-

Effect of abatement or dismissal [Order 24, rule 7.]

1. Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

2. The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit."

22. Moreover, a suit for or against the estate of a deceased person can only be brought by an administrator of the estate or against an administrator of the estate. In the circumstances of this case, it is not clear in what capacity the applicants have brought the suit or the capacity in which the respondents are sued. In this regard, see the decision in the case of *Robert Meleya supra*.

23. Since the capacity in which the applicants have brought the suit or in which the respondents are sued is unknown and there being no evidence that the applicants and/or the respondents are administrators of the estate of the deceased, I find and hold that the suit is incompetent for lack of capacity to sue on the part of the applicants and capacity to be sued on the part of the respondents.

24. The upshot of the foregoing is that the notice of preliminary objection has merit and is allowed as

prayed.

Dated, signed and delivered at Nyeri this 6th day of July, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Ms Wambui h/b for Andrew Kariuki for the applicants

Mr. Kingeri for the respondents

Court assistant - Lydia