



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC SUIT NO. 443 OF 2014

FRANCIS KAMAU MURAI , and

GIDEON MBUGUA MURAI Suing As Executors Of

The Estate of WILFRED MURAI GACHERU[Deceased].....PLAINTIFFS

VERSUS

GATUNDU & MANGU CO.LTD.....1ST DEFENDANT

CHARLES WAINAINA MUNGAI.....2ND DEFENDANT

RULING

The Plaintiffs/Applicants herein brought this amended Notice of Motion dated **10th December ,2014** brought **under Order 40 Rules 1,2,3,4 & 8, order 51, Rules 1,13 and 14 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya** and all other enabling provisions of the law. The applicants have sought for these Orders.

- a. That Status Quo in respect of LR No 8569/5 Kahawa West be maintained pending interpartes hearing.***
- b. That the 1st and 2nd Defendants, their servants, agents, assignees and anyone acting under their authority be restrained from selling, alienating, mortgaging, leasing and or transferring title from any part of LR No. 8569/5 Kahawa West and or doing anything which will or might have an adverse effects on the deceased's estate, share, title, rights and/or interests on the said land pending the hearing and final determination of this suit on merits.***
- c. That costs of this application be provided for***

The application is supported by the grounds set on the face of the application and on the Affidavit of **Francis Kamau Murai**, and **Gideon Mbugwa Murai** . These grounds are;-

- a. The Defendants have failed to give the deceased title or piece of land in LR No.8569/5 Kahawa West to the applicants.***
- b. Defendants have failed to subdivide the said land to genuine shareholders.***

c. The Defendants have refused to show the applicants a specific area on the ground where they are supposed to allocate the deceased estate.

In their supporting affidavit, the applicants averred that they are the executors of the Estate of their late father **Wilfred Murai Gacheru**, who was a shareholder and a director in the 1st Defendants Company. Further that their deceased father held 100 shares in shareholder certificate No.3 issued to him by the 1st Defendant which shares entitled him to a piece of land from the land owned by the 1st Defendant known as **LR No.8569/5 Kahawa West**, when the same is eventually subdivided. Further that the 1st Defendant had not subdivided the said land nor had it distributed to its shareholders when the deceased died. It was their contention that the deceased died in May 1995 leaving a will in which he named the two of them as his executors of the will.

They further contended that the 1st Defendant has failed to neither allocate to them the piece of land which belongs to the deceased nor subdivide the said land. They were therefore apprehensive that failure by the 1st Defendant to subdivide the land and give the applicants herein the deceased share would result in the loss of the said land and the deceased estate and lawful beneficiaries would suffer loss and damages unless the Defendants are restrained and thus this application.

The 2nd Defendant filed his Replying Affidavit and a Preliminary Objection dated 19th January 2015. In the Preliminary Objection, the 2nd Defendant averred that the instant Notice of Motion and the entire suit thereto was filed out of time and offends the provisions of the Limitation of Actions Act. Further that the Plaintiffs do not have the **locus standi**, to institute this suit against him as the suit property do not form part of the deceased Estate. Thirdly, that the instant Notice of Motion and the suit thereto is **non-suited** as against the 2nd Defendant was wrongly enjoined and the claim raises no reasonable cause of action.

In his Replying Affidavits, the 2nd Defendant averred that he purchased 4 acres of the suit property from the deceased in the year 1984, and has been in possession ever since, further that he subdivided the same into plots and sold to the other parties who have developed the same into plots and sold to other parties who have since developed the same and are in the process of acquiring titles and therefore the 2nd Defendant is a total stranger to any alleged non-subdivision of the suit property **LR No.8569/5, Kahawa West**. The 2nd Defendant crave leave to rely on the sale agreement dated **23rd August 1984**, and further sale agreements upon subdivision to other purchasers. Further that the said property was not included in the deceased person's will as the deceased was aware that the same had been sold to the 2nd Defendant and did not form part of his Estate. Further the 2nd Defendant contended that he was not privy to the allegations of non-sub division of the suit land by the 1st Defendant having purchased the suit property for value upon confirmation that the deceased had capacity to sell the suit premises. The 2nd Defendant prayed for dismissal of the Plaintiffs suit and instant application with costs.

The 1st Defendant filed its Statement of Defence on 10th July 2015, but did not file a Replying Affidavit to the instant Notice of Motion. Both the preliminary objection and the Notice of Motion were canvassed at the same time by way of written submissions.

Both the Plaintiff and the 2nd Defendant filed their written submissions on both the preliminary objection and instant Notice of Motion. I have now carefully considered the written submissions and the authorities relied on and the relevant laws and I make the following findings.

There is no doubt that the Plaintiffs/Applicants have filed the instant suit and application as executors of the will of their late father one **Wilfred Murai Gacheru**. There is no doubt that the said **Wilfred Murai Gacheru**, died in the year 1995. There is a letter dated **14th October 2013**, by the applicants advocates to the 1st Defendant in reference to **LR No. 8569/5, Kahawa west**. There are also other correspondences from the applicant's advocates to the 1st Defendant dated December 2012, demanding title deed for the piece of land belonging to the deceased herein for the suit property **LR No. 8569/5**. It is only from the reply dated **23/1/2013** by **F N Ngigi** that the name of **Mr Mungai**, the 2nd Defendant was brought in. It

also evident that from the last will and testament of the late **Wilfred Murai**, the suit property was not listed as part of his property to be shared out by his beneficiaries.

The 2nd Defendant has raised a preliminary objection. I will deal with the said preliminary objection first. So are the issues raised by the 2nd Defendant herein capable of being referred to as preliminary objection? In the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, a preliminary objection is described as:-

A preliminary objection is in nature of what used to be called a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the excuse of judicial discretion”.

Further in the case of **Nitin Properties Ltd Vs Jagjit Singh Kalsi & another, Civil Appeal No.132 of 1989**, the court held that:-

“ A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct .It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion ”.

The 2nd Defendant states that the Plaintiffs suit offends the provisions of the Limitations of Actions Act and that Plaintiffs have no locus standi to institute this suit. The issues raised by the 2nd Defendant are pure points of law which are capable of disposing this suit. The 2nd Defendant objection therefore fits the description of a preliminary objection as described in the **Mukisa Biscuits** case. As was held in the case of **Quick Enterprises Ltd Vs. Kenya Railways Corporation , Kisumu High Court Civil Case No.22 of 1999**, the court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleading alone”.

The 2nd Defendant submitted that the Plaintiffs suit offends the provision of Section 7 of the Limitation of Actions Act. The said Section reads as follows:-....

“ An action may not be brought by any person to recover land after the end of twelve years from the date which the right of action accrued to him. If it first accrued to some person through whom he claims to that person”.

It is evident that the late **Wilfred Murai Gacheru** died in 1995 . The grant was confirmed in 1998. The applicants never brought this suit until the year 2014. That was 16 years after the grant was confirmed. It is evident that the suit was brought more than 12 years after the applicants obtained confirmation of Grant. No leave of the court was obtained and the suit property was not among the property listed in the schedule. The suit herein therefore offends the provisions of section 7 of the Limitations of Actions Act as it was filed out of time without leave of the Court.

Again from the will and testament of **Wilfred Murai**, the suit property is not listed as one of the property left behind by the deceased to be shared among his beneficiaries. There is a sale agreement attached to the 2nd Defendant pleadings dated the year 1984 which shows that the said **Wilfred Murai** sold part of his share in 1st Defendant to the 2nd Defendant. No evidence that the suit property is part of the estate of the deceased. The Plaintiffs therefore have no **locus standi** to institute this suit against the 2nd Defendant. The suit therefore does not lie and the same cannot be tried by any Court of law.

From the available documents, the late **Wilfred Murai** sold his share to 2nd Defendant long before his death. **LR No 8569/5** is the mother title and 2nd Defendant owns only a portion from it. The 2nd

Defendant does not participate in the management of LR No. 8569/5 but only a portion of it, which is what he purchased from the late **Wilfred Murai** . The Plaintiffs therefore cannot enjoin the 2nd Defendant in this suit where they are claiming from 1st Defendant only. The 2nd Defendant is wrongly sued in this matter.

Having now carefully considered the pleadings in general, the written submissions and the relevant laws, the Court finds that the Plaintiffs suit herein offends the provisions of Section 7 of the Limitations of Action Act, as it was filed out of time without leave of court, the Plaintiffs lacks locus standi which signifies a right to be heard and also have no cause of action against the 2nd Defendant. The preliminary objection raised by the 2nd Defendant is capable of disposing this matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.

Consequently, the Court finds that the preliminary objection raised by the 2nd Defendant is merited and the same is sustained. The Court finds that the Plaintiffs suit and instant Notice of Motion are therefore incompetent and the same are dismissed accordingly with costs to the Defendants herein.

Having now upheld the 2nd Defendant's preliminary objection , I will not dwell on the amended Notice of Motion dated **10th December 2014**, as the same has been dismissed together with the whole suit herein, with costs to the Defendants.

It is so ordered.

Dated, Signed and Delivered this **5th** day of November, **2015**

L.GACHERU

JUDGE

In the presence of:-

Mr Nyaaga holding brief for Mr Nabutete for the Plaintiff/Applicant

M/s Gitau holding brief for Mr Kariuki for the 1st Defendant

M/s Jakeila holding brief for Mr Mandala for 2nd Defendant

Court:

Ruling read in open Court in the presence of the above counsels.

L.GACHERU

JUDGE