



REPUBLIC OF KENYA



Ngure & 5 others v Mugo (Sued in her Capacity as the Personal Representative of the Estate of Jeremiah Ngiri (Deceased) & 2 others (Environment & Land Case 002B of 2023) [2024] KEELC 5949 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 5949 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 002B OF 2023
A KANIARU, J
APRIL 30, 2024**

BETWEEN

**KIRANGI NGURE 1ST PLAINTIFF
PETER MURIUKI NJERU 2ND PLAINTIFF
ELIUD NYAGA NGARI 3RD PLAINTIFF
JUSTUS MWANIKI NYAKI 4TH PLAINTIFF
JESSICA CHUKA NJIRU 5TH PLAINTIFF
JOHN MURIUKI NJERU KAMUNGE 6TH PLAINTIFF**

AND

**EFUREITH IRIMA MUGO (SUED IN HER CAPACITY AS THE
PERSONAL REPRESENTATIVE OF THE ESTATE OF JEREMIAH NGIRI
(DECEASED) 1ST DEFENDANT
MERCY MUTHONI NYAGA 2ND DEFENDANT
ROSE WARUE NJERU 3RD DEFENDANT**

RULING

1. This is a ruling on a Preliminary objection dated 20.09.2023 and filed on 21.09.2023. The objection has been brought by the defendants and is based on the following six (6) points;
 1. That the suit and notice of motion application offend the provisions of section 29 of the [Land Adjudication Act](#) Cap 284 laws of Kenya.



2. That the suit and notice of motion application offend the provisions of section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya.
 3. That the suit is res judicata in view of EMBU H.C J.R No. 40 of 2011 and ELC J.R App *no. 1 of 2021*.
 4. The 2nd, 3rd, 4th, 5th and 6th plaintiffs do not have the locus standi to bring the present suit and notice of motion application.
 5. The suit and notice of motion application is incompetent and an abuse of the court process.
 6. That the suit and notice of motion application ought to be struck out with costs to the defendants.
2. The plaintiffs responded to the preliminary objection by way of a replying affidavit sworn by Kirangi Nguire on 13.10.2023. He deposed that the suit did not offend the provisions of section 29 of the *land adjudication act* as it was not an appeal against the decision rendered on 30.12.2010. That the suit does not offend the provisions on section 7 of the *limitation of actions act* as the claim is not of adverse possession but on constructive trust, which is not subject to limitation. That the suit is not res judicata for the reasons that: ELC JR 1 of 2021 and ELC H.C JR 40 of 2011 had been instituted by the 1st plaintiff and another party who is not a party in this suit and that JR 40 of 2011 was dismissed vide a ruling delivered on 07.11.2012. He deposed that the matter was not determined on merit but on a technicality.
 3. That JR 1 of 2021 was indeed res judicata owing to the existence of JR 40 of 2011 and the same was dismissed vide a ruling delivered on 30.06.2022. That in respect to this present suit, the claim herein is that of constructive trust yet JR 40 of 2011 and JR 1 of 2021 were judicial review proceedings and therefore, the issues in the instant suit were not directly and substantially in issue in the previous suits. That the equitable doctrines of trust, and in this case constructive trust, is applicable and enforceable by the plaintiffs who are beneficiaries of the estates of the deceased previous proprietors.
 4. That the preliminary objection cannot be sustained as the defendants have pleaded facts that have to be ascertained. That for a preliminary objection to succeed, the facts as alleged in the plaint are deemed to be correct but as per the defendants defence, the facts in the plaint have been disputed and on a prima facie basis. That the suit cannot be deemed to be incontestably hopeless to be summarily dismissed by way of a preliminary objection. It was urged that the preliminary objection be dismissed for want of merit.
 5. The preliminary objection was disposed of by way of written submissions. The defendants filed their submissions on 16.01.2024 and they submitted, inter alia, that it was clear from the plaintiff's pleadings, and in particular paragraphs 16,17,18 and 19 of the plaint, that the plaintiffs are challenging the decision of the minister in Ministers appeal case no 117 of 2000, which awarded the 1st defendant's late father the suit properties. That the plaintiffs in their prayers go ahead to seek to have the decision of the minister overturned and the suit properties registered in their favour. That the claim by the plaintiffs is contrary to section 29 of the *Land Adjudication Act* and that the decision of the minister was final. That the said decision could only have been challenged through the judicial review process on procedural grounds but not on merit. The cases of Watuku Mutsiemi Watuku & Anor v Republic & 5 Others (2018) Eklr, Joseph Muriuki Kithinji v Peterson Ireri Mwaniki & 3 others (2021) Eklr were cited for persuasion and/ or effect.
 6. That the original parties in Ministers appeal case no. 117 of 2000 did challenge the decision of the minister in this court vide EMBU H.C Judicial Review no. 40 of 2011, which application was



- dismissed on 07.11.2012. That the decision of the Minister in Ministers appeal case no. 117 of 2000 which awarded the suit properties to the 1st defendant's late father was delivered on 30.12.2010. That the plaintiffs ought to have brought any claim they had in respect of the suit properties within 12 years of the said decision, which was on or about 30.12.2022. That the instant suit was filed on 21.07.2023 which is long after expiry of the 12 years and therefore the plaintiffs claim is time barred. The case of *Gathoni v Kenya Cooperative Creameries Ltd (1982) Eklr* was cited to drive the 4 point home.
7. It was submitted further, that on the issue of *res judicata*, the decision of the minister in appeal case no. 117 of 2000 could only be challenged in court by way of judicial review and not on merit and that the decision was challenged in JR 40 of 2011 which application was dismissed. That the 1st plaintiff also attempted to challenge the minister's decision *vide Embu JR 1 of 2021* and the court dismissed the said application on the basis that it was *res judicata* in view of JR 40 of 2011. That the plaintiffs are at it again in the present suit where they have brought the defendants to court over issues that have been competently determined. That the provisions of section 7 of the *civil procedure act* is meant to curtail instances where parties want to litigate endlessly over matters that have been determined. The cases of *CK Bett Traders Ltd & 2 others v Kennedy Mwangi & Anor (2021) Eklr*, and *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (2017) Eklr*, were cited.
 8. It was also submitted that the plaintiffs in their plaint state that their respective deceased fathers were the registered proprietors of the parcels of land that were subject of ministers appeal case no. 117 of 2000. That the said fathers were also the respondents in the said appeal. That in the present suit, the plaintiffs are challenging the decision of the minister and claiming the suit properties whereas they have not demonstrated that they are the legal representatives of their respective deceased parents, hence they lack the *locus standi* to present the suit. The case of *Alfred Njau and Others vs City Council of Nairobi (1982) KAR 229* was cited in support of the submissions.
 9. The plaintiffs on the other hand filed their submissions on 17.01.2024. They submitted, that a claim of trust such as theirs is not subject to limitation and that as per section 2(1) of the *Law Reform Act* all causes of action subsisting in a dead person survive. The said provision provides "subject to the provisions of this section on the death of any person after commencement of this Act, all causes of action subsisting against or rested in him shall survive against, or as the case may be, for the benefit of his estate."
 10. That *Embu H.C JR No. 40 of 2011* and *ELC JR App 1 of 2021* were judicial review proceedings but the instant suit has been brought on a claim of constructive trust. That the judicial review matters were instituted by the 1st plaintiff herein and another party, Iman Muriuki, but this suit is in respect to quite a number of parties, thus it cannot be said that it has been instituted by parties litigating under the same title. That the preliminary objection herein dwells on facts and/or evidence that have to be proven at the hearing and not on points of law as set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A 696* and therefore should be dismissed with costs.
 11. I have considered the Preliminary Objection the affidavit in response to it by plaintiffs and the rival submissions. The issue for determination is whether the Preliminary Objection has merit.
 12. The brief facts of the case are that the plaintiff's filed a plaint accompanied by an application under certificate of urgency seeking prohibitory orders in respect of the suit parcels of land as set out thereunder. Their case according to the plaint is that their deceased fathers are said to have acquired suit land parcels Mbeere/Mbita/2027 to 2032 pursuant to MBITA ADJUDICATION SECTION OBJECTION No. 809, 810,811,812,813 and 815 of 1981 *vide* a judgement delivered on 19.03.1991. That the respondent in the said objections who was the 1st defendant's father did not lodge any appeal against the said judgement within 60 days of the judgment. That he later filed an appeal, being



Minister's appeal no. 117 of 2000, 9 years after of the determination of the objections which action was said to be un procedural and prejudicial to the rights of the objectors therein. That the minister entertained the appeal out of time and entered judgement against the plaintiffs deceased fathers, which action was said to be in violation of the rights of the then registered proprietors.

13. It is also said that the 1st defendant caused title to parcel 2027, 2028 and 2029 to be closed on combination and a new registration 5160 issued. That upon the registration of parcel 5160, the 1st defendant caused the said land to be subdivided into 18 resultant subdivisions and transferred two parcels to the 2nd and 3rd defendants and retained the rest of the subdivisions. The plaintiffs want the court to declare that the 1st defendant and his deceased father hold the suit parcels of land in trust for the plaintiffs and that the transfer of the two resultant subdivisions to the 2nd and 3rd defendants did not extinguish the trust. They also want a declaration that the said registration of the suit lands in favour of the defendants is encumbered by a constructive trust and that the same be cancelled and reinstated in favour of the plaintiffs.
14. The celebrated Court of Appeal case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, laid out the circumstances in which a preliminary objection may be raised as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It 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.”

15. The court in the case of Dickson Esho v Suyianka Mayune & 2 others [2022] eKLR observed as follows;

“Arising from the above, it is not in doubt that a preliminary objection ought to raise a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. Further, in the case of Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu HCCC 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 result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

16. The court went on further to say,

“It is this court's opinion that in determining a preliminary objection, the court will also take into account that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

Before the court embarks on determining the merit of the notice of preliminary objection, it has to first determine whether what has been raised herein satisfy the requisite threshold of a preliminary objection. As the Court determines whether what the 1st defendant pleads in his statement of defence



amounts to a preliminary objection or not, the Court will also be guided by the findings in the case of Oraro Vs Mbaja (2005) 1KLR 141, where the Court held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

17. I agree with the plaintiff's that the defendant's preliminary objection as presented has been mixed up with issues that require this court to comb through evidence to ascertain certain facts. As observed by the courts above, a preliminary objection ought to confine itself to facts that are not in dispute. It should also originate from the pleadings filed by the parties. That is not the case herein. It seems to me that in order to make a determination whether the preliminary objection as raised has merit or not, the court will have to probe all the evidence produced by the parties and this goes beyond the scope of a preliminary objection.
18. This court therefore finds that the preliminary objection dated 20.09.2023 as presented does not satisfy the requirements of a proper preliminary objection. I hereby dismiss the same.
19. Costs to be in the cause.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 30th day of APRIL, 2024.

In the presence of Njage for Ms Maina for plaintiff. Court Assistant – Leadys.

A. KANIARU

JUDGE – ELC, EMBU

30.4.2024

