



Joseph & another v Nyaga & 5 others (Environment & Land Case E020 of 2021) [2024] KEELC 4462 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4462 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E020 OF 2021**

A KANIARU, J

MAY 15, 2024

BETWEEN

SAMMY GICHOVI JOSEPH 1ST PLAINTIFF

ROSELILLIAN MBEERE JOSEPH 2ND PLAINTIFF

AND

MARTIN MURIITHI NYAGA 1ST DEFENDANT

STEPHEN NJUE NYAGA 2ND DEFENDANT

ZABRON MWANIKI NYAGA 3RD DEFENDANT

ANDERSON KARIUKI 4TH DEFENDANT

KENNETH NJERU NYAGA 5TH DEFENDANT

REGISTRAR OF TITLES 6TH DEFENDANT

RULING

1. Before me for determination is a preliminary objection dated October 12, 2022 and filed on October 13, 2022. The objection has been brought by the 1st – 5th Defendants on the following grounds;
 1. That the suit before the Honorable court herein offends the provisions of article 162(2)(b) of the Constitution as read with section 13 of the Environment and Land Court Act 2011.
 2. That the suit filed herein purports to seek to direct inter-vivos gifts and the person gifting is not even a party to the suit contrary to the provisions of the law of succession act and other attendant laws.



3. That the Honourable court lacks the jurisdiction to entertain, hear and determine the matter and thus the court is hereby called upon to down its tools as the matter is non-justiciable in its form.
 4. That the suit filed is fatally defective, a non-starter, bad in law and or otherwise and is not sustainable and ought to be dismissed with costs.
2. The plaintiffs in response to the objection filed grounds of opposition on December 9, 2022 as follows;
1. That the suit as filed does not offend provisions of article 162(2)(b) of the Constitution as read together with section 13 of the Environment and Land Court Act, 2011 as the suit relates to the fraudulent transfer of property. The court has jurisdiction to cancel a certificate of title issued by the registrar of land on the following 2 grounds;
 - i. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - ii. Where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme.
 2. That the subdivision and subsequent transfer of the suit property to the defendants is not gift inter vivos as the registered owner had already signed a consent on how his property shall be divided between his family members in ELC 30/2019. His intentions are documented in the court order adopting the consent and the court order has not been reviewed or set aside.
 3. That the initial registered owner of the suit property, the father to the plaintiffs and the defendants is senile and his health has since deteriorated and is not capable of giving the gift inter vivos. The court should issue summons for him to be produced in court.
 4. That the suit is not incompetent and is properly filed before this court.
 5. That the issues raised in the preliminary objection require evidence and are not on pure points of law.
3. The preliminary objection was canvassed of by way of written submissions. The defendants filed their submissions on September 25, 2023 whereas the Plaintiffs filed their own on January 30, 2024.
 4. The defendants started by giving a brief background to the case. They submitted that it is not within the jurisdiction of this court to dictate how the property of a person is to be dealt with or devised among his children during his lifetime. That this is a matter properly placed under the law of succession and this court is not a succession court. That the prayer by the plaintiff's that the court issues a declaration that they are entitled to half share of the property - Ngandori/kirigi/8476 - would be properly issued by a court under the law of succession. That the court ought to strike out the suit filed as it offends the provisions of article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act 2011 as well as the provisions of the Law of Succession Act.
 5. The cases of Re Estate of the late Gedion Mantbi Nzioka (deceased) 2015 eKLR, Re Estate of Chesimbili Sindani (deceased) (2021) eKLR, High Court Succession Cause no. 15 of 2015 in the *estate of the late Gichunge M'itwerandu alias Githungu M'Nthiiri*, Samuel Kamau Macharia & anor v Kenya Commercial Bank Ltd & others (2012) eKLR, Orange Democratic Movement v Yusuf Ali Mohammed & 5 others (2018) eKLR were cited in support of the submissions.
 6. The plaintiffs on the other hand submitted, without conceding that this court lacks jurisdiction, that decision made by a court of law without proper jurisdiction is a nullity *ab-initio*. The celebrated case



of *Owners of the Motor vessel "Lilian S" v Caltex Oil (Kenya) Ltd* (1989) KLR, the case of *In the matter of Interim Independent Electoral Commission* (2011) eKLR Constitutional Application No. 2 of 2011, *Samuel Kamau Macharia & anor v Kenya Commercial Bank Ltd & 2 others* (2012) eKLR, Application No 2 of 2011 were cited in support of this position.

7. It was further submitted that article 162(2)(b) establishes the Environment and Land Court with equal status as the High Court to hear and determine disputes relating to the environment and the use and occupation of and title to land. That the *Environment and Land Court Act* No. 19 of 2011 under section 4 and 13 breathes life to article 162(2)(b) of the *Constitution* and provides for the jurisdiction of the court. That further, the reliefs sought in the substantive suit filed before this court reveal a land dispute as envisaged under the above laws. That it follows that this court is clothed with jurisdiction to hear and determine the matter before it. That a preliminary objection can only be raised on a pure point of law and must not be blurred with factual details that can be subjected to contest in any way or that can only be proved by way of evidence.
8. That further, the subject matter of the instant suit is not about succession or any kind of gifts but the fraudulent transfer of titles through corrupt and un procedural means. That the preliminary objection on this ground must fail for it raises a point of fact more than of law as the plaintiffs did not raise any issue relating to succession. It was urged that the preliminary objection be dismissed with costs on the higher side to discourage such frivolous and time wasting escapades. The cases of *Joseph Wachira Mbiti v George Muhobo Wanjiru & anor* (2020), *Zipporah Njoki Kangara v Rock and Pure Ltd & 3 others* (2021) eKLR, *Cecilia Karuru Ngayu v Barclays Bank of Kenya & anor* (2016) eKLR, among others, were proffered for guidance.
9. I have taken into consideration the preliminary objection, the party's rival submissions and the plaintiff's grounds filed in response to the objection. I find that the issue for determination is whether the preliminary objection has merit.
10. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, 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”. Emphasis mine.
11. From the above, it is clear that for a preliminary objection to succeed, it ought to satisfy the following requirements: Firstly, it should raise a pure point of law; secondly, it should be argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
12. The defendants in this suit have raised a preliminary objection on four grounds. I will first deal with ground 1 and 3 together. The first ground is whether the suit herein offends the provisions of article 162(2)(b) of the *Constitution* as read with section 13 of the *Environment and Land Court Act* 2011; whereas the 3rd ground is whether this Honourable court lacks the jurisdiction to entertain the suit. On whether that is true, the court has to examine the impugned provisions of law. Article 162(2)(b) of the *Constitution* provides as follows:
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—



- (a)
- (b) The environment and the use and occupation of, and title to, land.

13. Section 13 of the *Environment & Land Court Act* on the other hand provides as follows;

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes——
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the *Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012, Sch.
- (6) Deleted by Act No. 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including——
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs.



14. It is clear from the above that section 13 of the [Environment & Land Court Act](#) gives effect to article 162 (2)(b) of the [Constitution](#) which confers the [Environment and Land Court Act](#) with the jurisdiction to hear and determine environment and land related disputes.
15. The plaintiff's in this case filed the instant suit seeking a permanent injunction restraining the defendants from dealing in any manner with the suit land herein previously known as Ngandori/kirigi/8476. They also seek for a declaration that the subdivision and subsequent transfer of the suit land from the name of Joseph Nyaga M'Mbui to the names of the 1st - 5th defendants was fraudulent, illegal and void; that the title deeds of the subsequent sub divisions be revoked and revert back to Joseph M'Mbui, and also for a declaration that they, the plaintiffs, are entitled to half share of all the suit property.
16. The said Joseph M'Mbui is said to be the father of all the parties with the plaintiffs being the children of his first wife while the defendants are the children of his second wife. It is said that the defendants fraudulently caused the suit land to be sub divided and the resultant subdivisions transferred to their names. That all that was done to the exclusion of the plaintiffs who are also beneficiaries of the suit land and contrary to a consent signed by the registered owner of the suit land on how his property was to be divided among his family members.
17. From the defendant's perspective, the plaintiff's prayer for a declaration that they are entitled to half share of the suit property falls under the law of succession which this court does not have jurisdiction to determine on. That it is not within the jurisdiction of this court to dictate how the property of a person is to be dealt with or devised among his children during his lifetime. I do not agree with the defendants in that regard as I do not see how that automatically becomes a succession issue. This is because, whether or not the plaintiffs are entitled to the share that they are claiming is an issue that they have to prove first through evidence as the defendants have denied the claim. This can only be done during trial. That is the only time that this court can be in a position to determine whether the matters in issue are in the domain of succession. It would be wrong for this court to start examining evidence and facts at this point would go beyond the purpose of a preliminary objection. That purpose is essentially to determine a suit on a preliminary basis without having to ascertain facts from elsewhere apart from the pleadings.
18. Again this court is empowered under section 80 of the [Land Registration Act](#) to order for rectification of the register of land if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. This is the basis of the plaintiff's suit. For these reasons this court finds that the issues for determination fall squarely within the jurisdiction of the court and therefore do not offend the provisions of Article 162(2)(b) of the [Constitution](#) and/ or section 13 of the [Environment and Land Court Act](#). The preliminary objection must fail on these two grounds.
19. The defendants have also raised an objection that the suit herein purports to direct inter vivos gifts and the person gifting is not even a party to the suit contrary to the provisions of the [Law of succession Act](#). The term gift *inter vivos* has been defined as "gifts made between living persons." The defendants seem to be implying that the suit herein seeks to enforce gifts inter vivos whereas the grantor of the said gifts is still alive and not a party to this suit. In my view, that is also an issue that can only be determined during trial by way of evidence. This goes beyond the purpose of a preliminary objection. To sum it all, there is no proper preliminary objection before this court.
20. Therefore, this court finds that the preliminary objection dated October 12, 2022 lacks merit and the same is dismissed with costs to the plaintiffs.



RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15TH DAY OF MAY, 2024.

In the presence of Ithiga Githinji for Njoroge for 1st and 5th defendants.

Court Assistant – Leadys.

A. KANIARU

JUDGE – ELC, EMBU

15. 5.2024

