



Wanderi v Mwangi (Administrator of the Estate of Mwangi Njuguna) (Environmental and Land Originating Summons E001 of 2023) [2024] KEELC 4904 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4904 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023
LN GACHERU, J
JUNE 13, 2024

BETWEEN

GRACE NJOKI WANDERI APPLICANT

AND

TERESIA NJERI MWANGI (ADMINISTRATOR OF THE ESTATE OF MWANGI NJUGUNA) RESPONDENT

RULING

1. The Respondent, through a Preliminary Objection dated 25th October, 2023, and filed before the Court on 26th October, 2023, has urged the court to strike out the Applicant’s entire suit with costs on the following grounds:
 1. The Applicant in HCSUCC No. 769 of 2010, made a claim as a beneficiary of the estate of Mwangi Njuguna, and the Court found that her claim was based on trust.
 2. The said Succession Court directed the applicant to lodge a claim based on trust and gave timelines.
 3. The said order and direction above are in rem and binds the applicant not to lodge another claim not based on trust, and a claim that is otherwise based is incompetent and an abuse of the process of the court and needs to be struck out.
 4. The applicant claims for title under that of her late husband one Josphat Wanderi Njuguna. The grant annexed as D in the Supporting affidavit is clear on its face that it is “Limited only to purposes of filing and prosecuting the ELC suit to establish Trust”. The applicant is therefore not a legal representative of her deceased husband for any other purpose since the grant is limited. The suit is thus further incompetent for that reason.”



2. In the proceedings before the Succession Court, the Applicant (then Protestor), claimed that she was the widow of Josphat Wanderi Njuguna, a brother to Mwangi Njuguna, the registered proprietor of the suit property and husband to the Respondent herein. The Applicant's suit which the Respondent opposes through the current Notice of Preliminary Objection is dated 11th July 2023, and is premised on Section 17 and 3B of the [Limitation of Actions Act](#) and Order 37 Rule 7 of the Civil Procedure Rules.
3. In her suit, the Applicant claims that the title of Mwangi Njuguna (deceased), over land parcel No. LOC.12/SUB-LOC.1/471, (the suit land) has been extinguished by way of adverse possession in her favour. The Respondent is the Administrator of the estate of MWANGI NJUGUNA (deceased).
4. Further, the Applicant has sought for an order from this Court directing the Land Registrar to delete the name of MWANGI NJUGUNA (deceased), in respect of the suit land, to substitute the same with her own name and a fresh title to be issued in her name.
5. The Applicant filed her reply to the Notice of Preliminary Objection on 21st November, 2023, wherein, she set out ten (10) grounds of opposition as summarized below;-
6. The Applicant contended that the Respondent's Preliminary Objection was entirely misplaced as it raises issues that require an in-depth examination of the evidence. She further argued that a Preliminary Objection must raise a pure point of law, and the same cannot be raised in instances such as the subject suit where facts have to be ascertained. It was her further contention that facts cannot form the basis of a Preliminary Objection.
7. The Applicant claimed to have been in occupation of the suit property for a period exceeding 50 years. She contended that her claim over the suit land is premised on the doctrine of adverse possession, and requires interrogation through the medium of a full hearing and the same does not fall to be dismissed on a Preliminary Objection.
8. In response to ground 3 of Respondent's Preliminary Objection that the directions issued by the Court in HC SUCC No.769 of 2010, precluded the Applicant from filing any other claim not founded on trust, the Applicant contended that as a litigant she is at liberty to lodge any cause of action which she figures that she may get justice from.
9. The Applicant further argued that she opted to premise her suit on the doctrine of Adverse Possession rather than customary trust, for the reason that upon accessing the Green Card in respect of the suit property, she discovered that the Respondent's husband claimed to have commenced a Succession Cause in respect of the suit land and the foregoing is a factual issue that needs to be proved through evidence and demonstrates that the Respondent's husband does not hold the suit property in trust.
10. The Applicant refuted the Respondent's contention that she is laying claim over the suit property through her husband. She contended that she has lodged her claim in her personal capacity, and that the Grant ad litem annexed to her Affidavit was to support her claim that she is the lawful wife of Josphat Wanderi Njuguna (deceased).
11. Further, that she has not filed any suit founded on trust with respect to the suit property, and out of her own choice opted to base her claim on the doctrine of Adverse Possession, relying on the Valuation Report undertaken by Up Country Valuers in respect of the suit land.
12. It was her contention that the current Preliminary Objection is based on a misapprehension of the law and urged the Court to dismiss the same with costs and allow her suit to go to full hearing.
13. This Notice of Preliminary Objection was canvassed by way of written submissions.



Applicant's Submissions

14. The Applicant filed her written submissions on 21st October 2023, through the Law Firm of Murira Winnie & Company Advocates. She relied on the holding of the Court in the cases of Oraro Vs Mbaja [2005] 1 KLR 141, and Jamii Bora Kenya Limited Vs Esther Wairimu Mbugua & Another [2019] eKLR, to anchor her submission that in case a Preliminary Objection diverts to issues of fact which require evidence to be proven, then, it cannot qualify as a Preliminary Objection.
15. She relied on the definition of a Preliminary Objection set out by the Court in the case of Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] E.A. 696.
16. It was the Applicant's further submissions that the Court's directive that her claim over the suit property be based on trust reflects only the discretion of the Court and cannot constitute the basis for a Preliminary Objection. She cited the provisions of Article 159 (2) (a) (d) and (e) of *the Constitution* of Kenya to anchor the preceding submission. She reiterated the averments contained in her Reply to the Notice of Preliminary Objection.

Respondent's Submissions

17. The Respondent filed written submissions on 15th March 2024, through the Law Firm of J.N. Mbuthia & Co. Advocates.
18. It was the Respondent's submission that the Applicant was directed by the Court in HCSCUCC 769 of 2010, to file a suit to establish a trust in respect of the suit property, and the Applicant obliged to the preceding directive by obtaining a Limited Grant ad Litem to file suit on behalf of her deceased husband.
19. However, he submitted that the Applicant by founding her suit on the doctrine of Adverse Possession, has flouted the directive issued by the Court in HCSCUCC 769 of 2010. He added that the Applicant's suit likewise runs afoul of the terms stated in the Limited Grant ad Litem, which require her to premise her suit before this Court on trust.
20. It was his further submissions that the preceding directive by the Succession Court is not reflective of mere judicial discretion, but was based on the Court's analysis of the submissions tendered by the Applicant who was the protestor in the proceedings before the Succession Court.
21. The Respondent relied on the holding of the Court in the cases of Gabriel Macharia Njoroge Vs Absa Bank Ltd [2021]e KLR and in RE Estate of Henry Kithia Mwitari (Deceased) [2021]e KLR in support of the foregoing submissions.
22. The court having considered the instant Notice of Preliminary Objection and the rival written submissions and the cited authorities, frames the issues for determination as follows:
 - I. Does the Respondent's Notice of Preliminary Objection meets the threshold of what amount to a Preliminary Objection?
 - II. Is the Respondent entitled to the Orders sought?

I. Does the Respondent's Notice of Preliminary Objection meet the threshold of what amount to a Preliminary objection?

23. A Preliminary Objection was defined in the case of Mukisa Biscuit Manufacturing Co. Ltd Vs Westend



Distributors Ltd [1969] E.A. 696 as follows: `

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

24. The Supreme Court in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR held that a Preliminary Objection should be founded upon a settled and crisp point of law.

25. In the case of Oraro v Mbaja [2005] eKLR, the Court found that if facts must be proved using the rules of evidence, then this is not a true Preliminary Objection based on a point of law:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed...”

26. In the current proceedings, the Respondent argued and submitted that the directive issued by Succession Court directing the Applicant to lodge a claim based on trust had the following implication: that any claim by the Applicant not founded on trust is incompetent.

27. It is trite that Limited Grants can be limited with regard to: purpose; property; or, time. Section 54 of the [Law of Succession Act](#) authorizes a Court to issue Limited Grant for various purposes, as follows:

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the fifth schedule to this act.”

28. The Fifth Schedule of the [Law of Succession Act](#) sets out the various limited grants and the correct format to use in petitioning the Court. Limited Grants Ad Litem fall under paragraph 14 of the Fifth Schedule of the [Law of Succession Act](#) which paragraph is specific that the grant of administration ad litem is limited to filing suit. Paragraph 14 states that:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

29. In Re Estate of Henry Kithia Mwitari (Deceased) [2021] eKLR, the Court held that a “Grant Ad Litem is issued for a specific, limited and finite purpose.”



30. In the case of Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva [2016] eKLR, the Court declared as follows:

“The law further provides for various forms of limited or special grants. They include, but not limited to, Limited Grant of Letters of Administration Ad Litem. Limited Grant of Letters of Administration Ad Colligenda bona, Limited Grant of Letters of Administration Ad de bonis non, Limited Grant of Letters of Administration durante minore aestate, Limited Grant of Letters of Administration durante absentia, Limited Grant of Letters of Administration pendente lite, Limited Grant of Letters of Administration purpose and due to their limited nature each such grant ought to be used for that specific purpose only. Given that more than one limited grant or a combination of grants can be issued depending on the circumstances of a case, there is every reason to deal with a limited grant as it specifically provides. That will undoubtedly bring order and decorum in dealing with an estate of a deceased person noting that there may be need to obtain a full grant in future.”

31. The Court set out the scope of a Grant Ad litem In Re Estate Of Helena Wangechi Njoroge (Deceased) [2015] eKLR as follows:

“It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad Litem. The suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defend the estate against third parties.”

32. The Succession Court specifically directed the Protestor (now Applicant) “to take out proceedings to determine the claim based on trust under Order 37 Rule 1 of the Civil Procedure Rules”.

33. The Respondent contended that she has raised a point of law by arguing that the Applicant has commenced an incompetent suit as the same is expressed to be founded on Adverse Possession rather than on trust.

34. The Applicant, on her part, subscribes to the position that the Ruling of the Court dated 2nd August, 2012, in respect of HCSUCC 769 of 2010, did not have the effect of limiting her range of choice with regard to the nature or character of the suit she would commence in respect of her claim over the suit property.

35. Further, she argues that the Court exercised its discretion when directing her to initiate a suit based on trust; she added that she was not bound by the Court’s directive as to the character of her prospective suit. The applicant further contends that she lodged the present suit in exercise of her rights as a litigant and cannot be denied the right to foreground her suit on the doctrine of Adverse Possession rather than on trust.

36. Taking into account the description of a Preliminary objection, which is a pure point of law, which does not require ascertainment of facts, and considering the grounds raised by the Respondent/ objector, it is clear that for the court to consider what the succession court held, it has to consider the holding of that court and thus ascertaining facts.



37. The grounds of objection as raised by the Respondent/Objector are not pure points of law, as facts have to be ascertained from elsewhere and thus the objection herein does not meet the threshold for a pure Preliminary Objection.
38. Be that as it may, the court will proceed to determine the merit of the Preliminary Objection, by determining the second issue.

II. Is the Respondent entitled to the Orders sought?

39. The main issue in contention in the current Notice of Preliminary Objection is whether the Applicant's suit is incompetent for laying claim over the suit property on the basis of Adverse Possession rather than on grounds of trust.
40. In the proceedings before the Succession Court, the Respondent herein was the Petitioner and was seeking for Confirmation of a Grant of Letters of Administration Intestate given to her on 17th June, 2008. The Applicant herein was the Protestor. It was the Protestor's submissions that the Respondent's husband was registered as the proprietor of the suit property to hold the same in trust for the Protestor's husband.
41. The Petitioner denied the Protestor's claim and further contended that the Josphat Wanderi died without a wife and children, hence the Protestor was a stranger to the estate. The Succession Court, in a Ruling delivered on 2nd August, 2012 held as follows:

“After critically examining the Protestor's claim, it is clear in my mind that her claim is based on trust. Such a claim can only be established in the manner specified under rule 41(3) of the Probate and Administration Rules. Consequently, I hereby postpone the confirmation of grant for 90 days and direct the Protestor to take out proceedings to determine the claim based on trust under Order 37 rule 1 of the civil Procedure Rules within the aforesaid period of 90 days. Costs to abide the outcome of the summons for Confirmation of Grant”.
42. Section 82 (a) of the *Law of Succession Act* provides for Powers of Personal Representatives of a deceased person as follows:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

 - a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative...”
43. In the subject proceedings, the Ruling of the Court dated 2nd August 2012, directed the Protestor (now Applicant) “to take out proceedings to determine the claim based on trust under Order 37 rule 1 of the Civil Procedure Rules...”. The Applicant has opted to foreground her suit on the doctrine Adverse Possession rather than on trust as directed by the Court.
44. Section 3 of the *Judicature Act* (CAP 8) provides that the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate Courts shall exercise their jurisdiction in conformity with *the Constitution* and all other written laws.
45. From the framing of Section 82 (a) of the *Law of Succession Act*, it is clear that Personal Representatives enjoy wide powers to enforce a cause of action by way of a suit. For the avoidance of doubt, the



foregoing provision of the law empowers personal representatives “to enforce all causes of action, by virtue of any law,” that survive, or, arise from the death of the deceased.

46. Upon a perusal of the pleadings and rival submissions of the parties herein, the Court finds and holds that a Succession Court exercising its jurisdiction pursuant to Section 3 of the *Judicature Act* (CAP 8) though directed the Applicant to file a suit based on trust, could not alter or vary the import of Section 82 (a) of the *Law of Succession Act* by confining the Personal Representative to the character of her prospective suit, as Section 82 above provides for “all causes of actions.”
47. The Applicant has chosen to file a claim under the doctrine of adverse possession, that is one of the many causes of action. Though she has limited grant, she has filed the instant suit in her own capacity, but not as administrator of the estate of her husband.
48. It the further holding of the Court that, while accepting that a Limited Grant Ad Litem can be limited by the Court as to its purpose, such a limitation must be in conformity with the law. The Applicant submitted that the Limited Grant herein was for the purpose of exhibiting that she is a wife of the deceased, but not for purposes of filing this suit. Indeed, this court has found that the Applicant has filed this suit in her own personal capacity, but not on behalf of the estate of her deceased husband.
49. Further, the Court in its Ruling delivered on 2nd August, 2012, noted the Protestor’s (now Applicant), claim that she had been residing on the suit property together with her three (3) children. Therefore, the Applicant’s choice to premise her suit on the doctrine of Adverse Possession, which pertains to occupation of the land in question coheres with the observations made by the Succession Court.
50. Having considered the instant Notice of Preliminary Objection, and the grounds in support and opposition of the same, the Court holds and finds that the said Preliminary Objection is not merited, and is thus dismissed entirely.
51. Costs to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 13TH DAY OF JUNE, 2024.

L. GACHERU

JUDGE

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Mbuthia for the Respondent/Objector

N/A for the Applicant.

13/06/2024

Court: Matter To Be Mentioned On 16Th July 2024, For Further Directions.

Mention Notice To Issue.

