



Ndirangu v Gitonga (Environmental and Land Originating Summons E027 of 2022) [2025] KEELC 2926 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E027 OF 2022**

JO OLOLA, J

MARCH 28, 2025

IN THE MATTER OF: LR. NOS. OTHAYA/IHURIRIO/133

AND

IN THE MATTER OF: DETERMINATION OF TRUST

BETWEEN

CECILIA WAMBUI NDIRANGU PLAINTIFF

AND

JOHN MACHARIA GITONGA DEFENDANT

RULING

1. By an Originating Summons dated 8th December, 2022 as filed herein on 14th December, 2022, Cecilia Wambui Ndirangu (the Plaintiff) sought for the determination of the following: -
 - a. Is the Defendant herein John Macharia Gitonga registered as proprietor of land (reference) number Othaya/Ihuririo/133 measuring approximately 3.4 acres in trust for himself and the Plaintiff?
 - b. If the (answer to the) above question is in the affirmative, is the Plaintiff herein entitled to 1 acre of land (reference) Number Othaya/Ihuririo/133?
 - c. If the (answer to the) above question is in the affirmative should the Honourable Court determine the trust and order the Defendant to sign all document(s) of transfer of 1 acre out of the suit land to the Plaintiff and if he defaults whether the Deputy Registrar of this Court should be directed to sign the said documents of transfer? and
 - d. Should the Defendant be ordered to pay the costs of this suit?



2. The Originating Summons is supported by an Affidavit sworn by the Plaintiff wherein she avers that the suit property is registered in the name of one Ruth Nyaguthii Gitonga who was the wife of the paternal uncle to the Plaintiff's husband. She avers that the said Ruth obtained registration of the suit land through transmission following the death of her husband.
3. The Plaintiff further avers that following the death of Ruth's husband one Ndirangu Karimu had petitioned the court to administer his estate so as to inherit a portion of the land that the Plaintiff's family was occupying and continues to occupy and cultivate to-date.
4. John Macharia Gitonga (the Defendant) is opposed to the grant of the orders sought. In his Replying Affidavit sworn on 23rd January, 2023, the Defendant avers that the whole suit is an abuse of the court process and that the claim is based on succession matters relating to the estate of his mother the late Ruth Nyaguthii Gitonga to which he is the sole administrator. The Defendant further avers that the Plaintiff ought to have pursued a protest as provided under the Law of Succession Act instead of filing the present action.
5. In addition and by a Notice of Preliminary Objection dated 18th June, 2024, the Defendant objects to the entire suit on grounds framed thereon as follows:-
 1. Paragraph 12 of the Supporting Affidavit to the Originating Summons.

There is mention of a Petition filed by her late husband in Court seeking to inherit the portion of land Othaya/Ihurio/133" while the Succession Cause No. 189 of 1985 at R.M Nyeri the Petitioner therein claimed to be the only beneficiary of the deceased estate and therefore entitled to the whole land, not a portion of it (sic).

See document J.M.G 1 by the Defendant. At Paragraph 4 of the Replying Affidavit by the Defendant (sic). The Plaintiff Intentionally omitted this as part of her documents having pleaded its existence.
 2. Paragraph 13 of Supporting Affidavit to the Originating Summons.

Ruth Nyaguthii Gitonga filed an objection to the Petition. The Objection was allowed by consent and the grant issued to the objector who proceeded to administer the estate to its conclusion.
 3. Plaintiff's List of Documents No 6 - "Award and Orders in Nyeri High Court Civil Case Number 146 of 1994". This "award and orders" have not been exhibited. For this reason the Defendant sent a request for particulars of pleadings on 11/7/2023 on the rationale that: IF there is an order by this Court on the subject matter as herein, Section 6 of (the) Civil Procedure Act would apply or if there is no order and the case is still pending section 7 of the Civil Procedure Act would apply. In either situations prosecution of this suit is an excise in futility.
 4. This suit was filed after the Succession Cause No. 138 of 2020 and as directed in accordance with the Succession Act Cap 160 Law of Kenya. Consequently, existence of this suit is causing delay of the completion of Succession Cause.
 5. Also see Document No. 1 in the Plaintiff's List of Documents especially paragraph 6, 10,11 and 13.
6. Following directions issued herein, it was agreed that the Objection be disposed of first. I have accordingly carefully perused and considered the five (5) grounds upon which the Defendant objects to the suit herein as well as the submissions filed in support thereof.



7. As was stated in *Mukisa Biscuits Manufacturing Co. Ltd. –vs- West End Distributors Ltd.* (1969) EA. 696

“..... a Preliminary Objection consists of a pure 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.”

8. I have read and re-read the grounds put forward by the Defendant to object to the Plaintiff’s suit. They are certainly points of facts and arguments upon which the Defendant intends to rely in his defence to the suit as filed. I am not persuaded that the same raise any pure point of law, that they arise out the pleadings filed by the parties and/or that the same are capable of disposing of this suit.

9. A Preliminary Objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are prima facie presented in the pleadings on record.

10. I was not persuaded that that is the case herein and I find no merit in the objection dated 18th June, 2024. The same is dismissed with costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 28TH DAY OF MARCH, 2025

.....

J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. No appearance for the Plaintiff
- c. No appearance for the Defendant

