



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 134 OF 2020

LUCY NJOKI GICHURU.....PLAINTIFF

=VERSUS=

HANNAH WANJIKU.....DEFENDANT

RULING

(In respect to the Preliminary Objection dated 28th September 2021)

Introduction

1. By a Plaint dated 21st May 2020, the Plaintiff brought this suit against the Defendant for prayers that;

a) A declaration that the Defendant's claim to have a portion of L.R No. DAGORETI/RUTHIMITU/589 before the conclusion of the succession process and issue of the confirmation of certificate of grant is null and void.

b) A declaration that HANNAH WANJIKU's claim of portion of L.R No. DAGORETI/RUTHIMITU/589 is a nullity.

c) A declaration that only bonafide beneficiaries of the Estate of TABITHA NYAMBURA KINUTHIA can get portions of L.R No. DAGORETI/RUTHIMITU/589.

d) Costs of this suit be provided for.

e) Any other or further orders that the court may deem fit to serve the course of justice.

2. The Defendant filed a memorandum of appearance under protest on 2nd June 2021, Statement of Defence dated 30th July 2021 and subsequently a Notice of Preliminary objection dated 28th September 2021. It delimited some two grounds, focusing on the suit. The grounds are reprised in this Ruling.

The Preliminary Objection

3. The Defendant's preliminary objection was raised on the following terms:

a) That the suit filed herein by the Plaintiff offends the provisions of Section 6 of the Civil Procedure Act Cap 21 of the laws of Kenya as the matter in issue is substantially in issue in Milimani High Court Succession Cause No. 2948 of 2013 (IN THE MATTER OF THE ESTATE OF TABITHA NYAMBURA KINUTHIA) which has been concluded and a substantive judgment

delivered by Court.

b) That the Plaintiff's suit offends the mandatory provisions of Section 7 of the Civil Procedure Act Cap 21 of the laws of Kenya as the matter in issue herein are same matters that were directly and substantially in issue in Milimani High Court Succession Cause Number 2948 of 2013 (IN THE MATTER OF THE ESTATE OF TABITHA NYAMBURA KINUTHIA) which has been concluded and substantial judgment delivered by Court and as such, the suit is Resjudicata.

4. Pursuant to the directions of this Court issued on 19th October 2021, the Court directed the preliminary objection be canvassed through written submissions. Both parties filed their respective submissions for consideration by the Court.

Objector/Defendant's Submissions

5. The gist of the Defendant's submission is that this Court lacks jurisdiction to entertain the Plaintiff's suit for being *res judicata*.

6. It was submitted that through a sale agreement dated 10th April 2014, the Plaintiff sold to the Defendant a portion of land measuring 0.25 acres that was to be allocated to her from the family land known as L.R number DAGORETTI/RUTHIMITU/ 589. The original parcel of that land was still registered in the names of the plaintiff's mother TABITHA NYAMBURA KINUTHIA now deceased.

7. It was further submitted that in fulfilment of the terms of the agreement the plaintiff initiated the succession process for the estate of her late mother in **Milimani Succession Cause Number 2948 Of 2013** and included the Defendant's name as a beneficiary upon which the letters of administration were issued.

8. It was stated that the grant of letter of administration was later confirmed on 1st of July 2014 wherein the Defendant was listed as a beneficiary in *L.R. NO. DAGORETTI/RUTHIMINUTU/1331(F)*, which is a subdivision of the original title *L.R NUMBER DAGORETTI/ RUTHIMINTU/ 589*.

9. It was further submitted that the Plaintiff did not finalise the said transaction. She declined to sign the subdivided title in favour of the Defendant. Consequences of which numerous applications were filed in the succession case seeking cancellation of the confirmed grant. All applications were declined.

10. In support of these averments, the Defendant made reference to the judgement delivered by **Muchelule J. on 28th of October 2019**, another ruling delivered by **Musyoka J. on 27th of July 2018** and a ruling also delivered by **Mutuku J. on 21st July 2021** in respect to the ***Milimani High Court Succession Cause Number 2948 of 2013 (IN THE MATTER OF THE ESTATE OF TABITHA NYAMBURA KINUTHIA)***.

11. In support of this position, the Defendant maintained that the instant suit was *resjudicata* pursuant to the provisions of **section 7 of the Civil Procedure Act**. The Defendant cited various authorities including the decision of ***Stephen Wanganga Njoroge vs Stanley Ngugi Njoroge & another (2017) EKLR, E.T.V. vs Attorney General & another (2012) EKLR and the Independent Electoral and Boundaries Commission vs. Kiai & 5 others (2017) EKLR.***

Plaintiffs' submissions

12. The Plaintiff opposed the preliminary objection. She contended that the suit was properly before this Court by dint of **Article 162 (2) (b) of the Constitution. And Section 13 of the Environment and Land Court Act.**

13. It was her contention that the dispute before this court was in respect to the sale and purchase of land that was still under administration

14. According to the Plaintiff the Succession Court could not determine the question of sale and buying of land for lack of jurisdiction.

15. She urged the Court to dismiss the preliminary objection with costs and allow the matter to proceed before this Court to its

logical conclusion.

Analysis and Determination

16. I have considered the preliminary objection, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the preliminary objection is merited.

17. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696* has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR* also pellucidly captured the legal principle when it stated as follows:

“...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...”

18. This statement of the law has been echoed time and again by the courts: see for example, *Oraro -v- Mbaja [2007] KLR 141*.

19. In *Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR* the Supreme Court stated that

“... 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”. [emphasis added]

20. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with first.

21. In *Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA* expressed himself as follows:

“Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

22. **Article 162(2)(b) of the Constitution** states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, **Section 13 of the Environment and Land Court Act** expounds on the jurisdiction of this Court 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.”

23. The dispute herein involves property situated on a parcel of land known as DAGORETTI/RUTHIMITU/589 which was part of the estate of the deceased TABITHA NYAMBURA KINUTHIA that was sold to the Defendant during the pendency of **Nairobi Succession Cause No. 2948 of 2013** and which estate was under administration. The specific prayers sought by the Plaintiff in the plaint dated 21st May 2020 are a declaration that the Defendant’s claim to have a portion the suit property before the conclusion of the succession process and issuance of the confirmation of Certificate of Grant was null and void. Clearly this is a dispute or declaration that can only be issued by the Succession Court. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3).

24. In the case of *Beatrice Wambui Kiarie & 2 Others v Tabitha Wanjiku Ng’ang’a & 9 Others [2018]* the ELC declined jurisdiction in cases concerning succession disputes.

25. Hearing of all parties in a succession cause is as vital as in any other proceedings. In the case of *Mpatinga Ole Kamuye v Meliyo Tipango & 2 others [2017] eKLR* the court observed as follows:

“...before distribution of the estate of the deceased under Section 71 of the Law of Succession act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased’s estate and are available for distribution after settling all liabilities and having the net estate for distribution.

“The Court has to hear evidence where each claimant establishes their claim so as to enable the Court grant an informed decision. He who alleges must prove their claim so as to inform the Court whether there an asset belonging to the deceased’s estate available for distribution. If so who holds proprietary interest, possessory interest and or beneficial interest to the said asset and how much of the asset is the relevant party entitled to.

“So whether, it is a beneficial interest, proprietary interest, or debt recovery from the estate, it is only after hearing all the parties laying claim in the asset that belonged to the deceased and is now subject to distribution that the Court can conclusively determine what interest takes priority.”

26. It is possible for this court to foresee that this suit, if determined on the basis of the contents of the plaint, defence and the evidence on record, may lead to great detriment to either party herein.

27. The other limb of the preliminary objection is whether this suit falls on all fours of **section 7 of the Civil Procedure Act** which stipulates as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

28. Courts have rendered many rulings on the doctrine of res judicata which essentially frowns upon the use of the courts to abuse processes. The moment the court concludes that the suit is res judicata, then the court should not shy away from pronouncing itself as such.

29. The Judgment and Rulings delivered by by **Muchelule J. on 28th of October 2019**, **Musyoka J. on 27th of July 2018** and a ruling also delivered by **Mutuku J. on 21st July 2021** in respect to **Nairobi High Court Succession Cause No. 2948 of 2013 (In the Matter of the Estate of Tabitha Kinuthia)** were availed to court. The Court has perused the decision rendered in those proceedings and it agrees with the Defendant’s submissions that this matter has already been determined by a competent court of the concurrent jurisdiction and further that the subject matter and parties in the current suit are directly and substantially in issue with this case. If the plaintiff was dissatisfied with the outcome of the Succession cause in respect to the decisions that were rendered against her then she should have filed an appeal or review. She ought not to have another suit. The action of instituting a fresh suit is itself an abuse of the court process.

30. It is unfortunately that matters that were within the realm of the Succession Proceedings in **Nairobi High Court Succession No. 2948 of 2013** have overflowed into this suit.

31. It is clear that this is a case that falls on all fours within the doctrine of res judicata. What more would a party require to prove that a case is res judicata" In the case of ***Henderson vs Henderson (1843) 67 ER 313*** res-judicata was described as follows;

"...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time".

32. Filing of a fresh suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.

33. In the end, I find that this suit is *res judicata* and an abuse of the court process. This court doesn't have jurisdiction to entertain the same.

34. The preliminary objection is meritorious and hence upheld. The Plaintiff's case is dismissed with costs to the Defendant.

35. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021.

E. K. WABWOTO

JUDGE

In the Virtual Presence of:-

N/A for the Plaintiff.

Mr. Mulanya for the Defendant/Objector.

Court Assistant: Caroline Nafuna.

E. K. WABWOTO

JUDGE



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