



Case Number:	Environment and Land Case E20 of 2021
Date Delivered:	20 Jan 2022
Case Class:	Civil
Court:	Environment and Land Court at Muranga
Case Action:	Ruling
Judge:	Lucy Nyambura Gacheru
Citation:	Winnie Wambui Mbutia & 2 others v Godfrey Muchiri Kamanu & another [2022] eKLR
Advocates:	M/s Nzioka for the Plaintiffs/Applicants Mr. Kang'atta Defendants/Respondents
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C. NO. E20 OF 2021

WINNIE WAMBUI MBUTHIA.....1ST PLAINTIFF/APPLICANT

CATHERINE WANJIKU NJUGUNA.....2ND PLAINTIFF/APPLICANT

ANNE WANGARI GATHURA.....3RD PLAINTIFF/APPLICANT

-VERSUS-

GODFREY MUCHIRI KAMANU.....1ST DEFENDANT/RESPONDENT

JAMES KAMANU GATHURA.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion Application dated **1st July 2021**, the Plaintiffs/Applicants sought for the following orders;

a. That this Honourable Court be pleased to issue conservatory orders directed at the Defendants/Respondents whether by themselves or their representatives, servants, agents, and/or assigns to preserve the properties and restraining them from selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as Title Numbers Loc. 3/Gichagini/280 and or its sub-divisions being Loc.3/Gichagini/860, Loc.3/Gichagini/861, Loc.3/Gichagini/ 862, Loc.3/Gichagini/863 and Loc.3/Gichagini/864 and Title number Evurore/Kathera/1806, pending the hearing and determination of this application inter-parte and pending determination of this suit.

b. That this Honourable Court be pleased to grant an injunction restraining the Defendants/Respondents whether by themselves, their agents and/or servants from dealing, interfering or otherwise disposing of the Title numbers Loc.3/Gichagini/860, Loc.3/Gichagini/861, Loc.3/Gichagini/ 862, Loc.3/Gichagini/863, Loc.3/Gichagini/864 and Title Number Evurore/Kathera/1806 pending the hearing and determination of this application and pending of this suit.

c. That costs of this application be provided for.

2. The application is premised on the **GROUND**s stated on the face of the application and also on the Supporting Affidavit of Catherine Wanjiku Njuguna.

These grounds are; -

a. That on **16th May, 1990**, Florence Wachera Kamanu (deceased) being mother to the parties herein petitioned for Letters of Administration intestate in the Matter of the Estate of her husband **Geoffrey Kamanu Gathura**.

b. That Florence Wachera Kamanu applied for confirmation of Grant through a certificate of urgency dated **5th November 1991**, and the Court issued her with the Certificate of Confirmation of Grant in which she disposed off **L.R. Gichugu Settlement Scheme/487** and L.R. No **Ngariama/Ngariambu/1816**, in order to settle off the Geoffrey Kamanu Gathura's

debts.

c. That the Applicants filed an application for revocation of Grant dated 27th April 2007, because they are children of Geoffrey Kamanu Gathura (deceased) and they had been left out.

d. That while the Applicants' application for revocation of grant was still pending, Florence Wachera Kamanu, illegally and without the knowledge and or consent of the Plaintiffs/Applicants proceeded to subdivide Title Number Loc.3/Gichagini/280, into title numbers Loc. 3/Gichagini/ 860,Loc.3/Gichagini/861,Loc.3/Gichagini/862,Loc.3/Gichag-ini/863 and Loc.3/Gichagini/864 and further illegally and without any color of right transferred title No. Loc.3/Gichagini/860 to the 1st Defendant/Respondent and Loc.3/Gichagini/863, to the 2nd Defendant/Respondent.

e. That the Applicants' application for revocation was heard on 24th October, 2014, and on the same date the Grant of Letters of Administration issued on 7th August, 1990 was revoked.

f. That despite the revocation, both Florence and the Respondents have to date failed, neglected and or refused to surrender the title deeds for cancellation by the Registrar of lands despite demand from the Applicants and notice of intention to institute proceedings against them.

g. That there is an ongoing suit that is Nairobi Succession Cause 627 of 1990, where the Court directed parties to agree on the mode of re-distribution.

h. That despite the directions of the Court, the Respondents illegally sub-divided and transferred the properties to themselves after the Court revoked the Grant of letters of Administration.

i. That one of the Respondents has purported to illegally, unlawfully and without any color of right to mortgage one of Properties which is subject to re-distribution.

j. That the Defendants will not suffer any prejudice if the orders to preserve the subject matter of this suit sought herein are granted.

k. That it is in the interest of justice that the suit property should be preserved and not sold and/or alienated by any of the parties until the hearing and determination of the suit.

3. In her Supporting Affidavit, **Catherine Wanjiku Njuguna**, the 2nd Plaintiff/Applicant herein averred that both the Applicants and the Respondents are siblings and Children of **Florence Wachera Kamanu** (now deceased on **15th May 2021**), and the late **Geoffrey Kamanu Gathura**. She reiterated that on **16th May 1990**, their mother **Florence Wachera Kamanu**, petitioned for grant of letters of Administration Intestate in the Estate of **Geoffrey Kamanu Gathura**, vide **Succ. Cause No 627 of 1990**, at Nairobi.

4. Further, that the said Florence applied for Confirmation of grant on **5th November 1991**, to enable her dispose off some properties to settle the debts owed by the late **Geoffrey Kamanu Gathura**. That the said grant was confirmed and Florence transferred to herself two properties which this Court has noted fall outside Jurisdiction of this Court. She contended that the Plaintiffs/Applicants herein had been excluded as beneficiaries of the estate and they filed an application dated **27th April 2007**, for revocation of the said grant issued to **Florence Wachera Kamanu**. That the said Florence in her Replying Affidavit admitted to have omitted the Applicants beneficiaries by mistake (as per annexure (CWN 5).

5. Further that while the said application for revocation was pending, the said **Florence Wachera Kamanu**, illegally and without the knowledge and or consent of the Applicants proceeded to subdivide **Loc.3/Gachagini/280**, into various plots being **Loc.3/Gichagini/860 – 864**.

6. Further that the said **Florence Wachera Kamanu** illegally transferred **Loc.3/Gichagini/860**, to the 1st Respondent and **Loc.3/Gichagini/ 863** to the 2nd Respondent as per annexure (CWN 6).

7. That on **24th October 2014**, the application for revocation of Grant was heard and allowed and the Grant issued on **7th August 1990**, was revoked as per annexure (CWN 7). It was her contention that despite the revocation of grant, both **Florence** and the Defendants/Respondents have to date failed, neglected and/or refused to surrender the title deeds for cancellation by the Registrar of Lands, despite demand from the Plaintiffs/Applicants and Notice of Intention to institute proceedings against them.

8. Therefore, it is met and just that the Court do order surrender and cancellation of all the titles and further directs that the Land Registrar do rectify the register and restore the titles in the original names of **Geoffrey Kamanu Gathura**. She urged the Court to issue both conservatory and injunctive orders as prayed.

9. The Application is opposed and **Godfrey Muchiri Kamanu**, the 1st Defendant/Respondent filed a Replying Affidavit dated **21st July 2021**, and admitted that the Applicants and the Respondents are indeed children of the late **Florence Wachera Kamanu** and **Geoffrey Kamanu Gathura** and they are nine (9) Children. He averred that there is another case being **HCC Succ Cause No. 627 of 1990**, wherein Letters of Administration were issued to **Florence Wachera Kamanu** on **7th August 1990**, and confirmed on **5th November 1991**. However, on **28th October 2014**, the grant of Letters of Administration issued to their late mother on **7th October 1990**, was revoked by the Court pursuant to an application for revocation of grant filed by the Plaintiffs/Applicants herein on **23rd April 2007**.

10. Further that on **6th August, 2018**, the Plaintiffs/Applicants herein filed an Originating Summons within the said Succession Cause No **627 of 1990**, seeking to have **Florence Wachera Kamanu** and **Winnie Wambui Mbutia**, the 1st Plaintiff/Applicant and 2nd Defendant being appointed as the joint Administrators of the estate of their late father **Geoffrey Kamanu Gathura**, the same was marked **GMK 1**. He contended that it is upon being served with the said Originating Summons that their late mother and the Defendants/Respondents got to know that the grant of Letters of Administration issued to their late mother on **7th August 1990**, had been revoked by the Court on **28th October 2014**. Further that though the order for revocation of grant was made on **28th October 2014**, the same was not extracted by the Plaintiffs/Applicants until **25th June 2018**, as an evident from **GMK – 2**.

11. He also contended that upon learning that the grant issued on **7th August 1990**, had been revoked, their late mother filed an application dated **15th April 2019**, seeking to have the said **revocation Order** set aside, as is evident from **GMK – 3**. The said application is still pending at the High Court in Nairobi. It is apparent from the above application that their late mother had alleged that the said revocation of the grant was obtained fraudulently.

12. He also averred that from the Confirmation of grant issued on **5th November 1991**, the parcel of land **Loc. 3/Gichagini/280**, was transferred to their mother's name on **1st March 1995**. That the above was done with the full knowledge and agreement of all the Children of the late **Geoffrey Kamanu Gathura** including the Applicants herein. Further, the title **Loc. 3/Gichagini/280**, was closed after subdivision on **6th January, 1998**. Further that the resultant subdivisions being **3/Gichagini/860,864** and **863** were transferred to **Godfrey Muchiri Kamanu, Humphrey Njuguna Kamanu** and **James Kamanu Gathura** on **22nd May 2009**. That the said transfer of land in favour of the above were drawn and witnessed by the 2nd Plaintiff/Applicant, who is a practicing Advocate as per annexure **GMK 4**. It is therefore apparent that the said transfer was done in full knowledge of all the brothers and sisters and that is the reason why three of the sisters are not parties to this case. Further, though **Loc.3/Gichagini/864** was transferred to **Humphrey Njuguna Kamanu**, one of their brother, just like the Defendants/Respondents herein, he has not been sued as a Defendant herein.

13. It was his further contention that the orders sought herein could be prejudicial to the Respondents since the resultant subdivisions were transferred to them in the **year 2009**, and they have been cultivating thereon and granting of orders sought would mean that they would not even be able to tend to their tea bushes or even pick the said tea and thus would be forced to lay off the persons who have been working on the said parcels of land.

14. He also contended that the Defendants/Respondents have never been served with **Demand** letter to surrender the titles to their respective parcels of land and have never been served with Notice of the intention to institute Court proceedings. There is also no order directed at them that cancelled the titles of their respective parcels of land. Further, they were not served with the Court order that nullified the certificate of Confirmation of grant issued on **5th November, 1991**.

15. He also denied that one of the Defendants/Respondents has tried to mortgage one of the properties and that the Plaintiffs/Applicants have failed to specify which of the two Defendants has tried to mortgage the property. Further that the Plaintiffs/Applicants should have specified the property that has allegedly been tried to be mortgaged.

16. That the Plaintiffs/Applicants herein knew way back in **2009**, that the Defendants/Respondents had been registered as the owners of land parcels No. **Loc.3/Gichagini/863** and **3/Gichagini/860** and they have been in possession and have been cultivating their respective parcels of land since then and therefore their claim to have the said titles cancelled is belated. Further that the matter in issue herein are awaiting determination in the **High Court Succ. Cause No. 627 of 1990**, and thus the suit herein should be stayed and await the hearing and final determination of the two applications that are still pending in the said Succession Cause. Thus the present suit is unnecessary as the issues raised in the present suit could have been raised in the said **Succession Cause No. 627 of 1990**.

17. The Defendants also filed a Notice of **Preliminary Objection** dated **21st July 2021**, and averred that;

1. That the dispute herein is essentially a Succession Cause dispute and not a land dispute. The dispute ought to and should be heard by the Family Division of the High Court of Kenya where it has been pending as Nairobi High Court Succession Cause No. 627 of 1990. Consequently, this Court lacks the requisite jurisdiction to hear and or determine the dispute.

2. That the matters in issue in the present suit are directly and or substantially the same matters in issue and are awaiting determination by the High Court in Nairobi in Succession Cause No. 627 of 1990. In the circumstances, the suit herein ought to be stayed to await the hearing and final determination of the applications that are still pending hearing and determination in the said Succession Cause.

3. That the Plaintiffs herein having known as far back as May 2009, that the Defendants had become registered as the owners of the parcels of land known as Loc.3/Gichagini/63 and Loc.3/Gichagini/860 respectively, and that they have been in possession and have been cultivating their respective parcels of land since then, their belated claim to have the Defendants' Titles to their respective parcels of land cancelled is time barred by the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.

18. The Defendants/Respondents urged the Court to **stay** this suit awaiting the hearing and determination of the pending **Succession Cause No. 627 of 1990**.

19. The two, the **Notice of Motion Application** and the **Preliminary Objection** were canvassed simultaneously by way of written submissions.

20. The Plaintiffs/Applicants through the Law Firm of **Wanyonyi & Muhia Advocates**, filed their written submissions dated **11th November 2021** and submitted on the issue **Notice of Motion Application only**. However, the Plaintiffs later filed further submissions dated **23rd December 2021** and submitted on the **Preliminary Objection**.

21. The Plaintiff/Applicant urged the Court to allow their Notice of Motion application and submitted that they have met the threshold for grant of injunctive orders as enunciated in the case of **Giella v Cassman Brown & Co Ltd [1973] EA 358**. It was submitted that the Plaintiffs/Applicants have established a **Prima facie case** with probability of success given that they are beneficiaries of the estate of **Geoffrey Kamanu Gathura**, but they were left out in the Grant issued **7th August, 1990**, confirmed on **5th November 1991**, and later revoked by the Court. However, the Defendants/Respondents have failed to surrender the titles of the suit properties and one of property is on the verge of being mortgaged.

22. The Plaintiffs/Applicants also submitted that if the orders are not granted, they will suffer irreparable loss which would not be adequately compensated by an award of damages, since if the suit properties would move to third parties, then it would take another couple of years to have the property transferred back to the Plaintiffs/Applicants in the event they succeed in this suit. This could further subject the Plaintiffs/Applicants to untold financial suffering and poverty.

23. The Plaintiffs/Applicants relied on the case of **Mbutia vs Jimba Credit Finance Corporation & Another (1988) eKLR** where the Court held that **"it is usual to grant injunctions in land cases"**.

24. Further, they relied on Halsbury's Laws of England, which states;

“where the Court interfere to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; -first, that the injury is irreparable and second that it is continuous. By the term irreparable injury, is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction. If his right cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”.

25. Further on the issue of the Court is in doubt, it should decide on the balance of convenience, the Plaintiffs/Applicants submitted that the balance of convenience tilts in favour of them as they stand to suffer extreme irreparable loss and damages in the event that the Defendants/Respondents are not stopped from selling or interfering with the suit property. That the Defendants/Respondents have severally taken potential buyers to the suit properties and intend to illegally sell off the suit properties to the detriment of the Plaintiffs/Applicants.

26. On their part, the Defendants/Respondents filed their written submissions dated **13th November 2021**, through the **Law Firm of Mutimu Kang’atta & Co. Advocates** and submitted on both the Notice of **Preliminary Objection** and the **Notice of Motion Application** dated **1st July 2021**.

27. On the **Notice of Preliminary Objection**, the Defendants/ Respondents submitted that the Plaintiffs/Applicants failed to file a Further Affidavit on the **Preliminary Objection** and therefore the Defendants objection on the Courts Jurisdiction remain unchallenged. It was submitted that the dispute herein is essentially a succession dispute and not a land dispute and thus the dispute ought to have been heard at the **Family Division** of the **High Court** and not in the **Environment and Land Court**. Further that there is a pending **Succession Cause No. 627 of 1990**, and therefore this Court lacks jurisdiction.

28. It was further submitted that since the Plaintiffs/Applicants are seeking for Conservatory orders to preserve the assets of the estate of the late **Geoffrey Kamanu Gathura**, then the said Orders ought to have been sought in the pending **Succession Cause No. 627 of 1990**. That there was no need to file the present suit and the **Notice of Motion Application**.

29. Further, even if the Court has jurisdiction to hear this matter, the issues in the present suit are directly and or substantially the same matters in issue and are awaiting determination in **Succession Cause No 627 of 1990**. Therefore, this suit offends the provisions of **Section 6** of the **Civil Procedure Act** and thus the suit ought to be stayed. The Court was urged to decline the issue the orders sought.

30. On the merit of **Notice of Motion Application** dated **1st July 2021**, it was submitted that the Defendants/Respondents have been cultivating tea bushes on their respective parcels of land since 2009, and if the instant application is allowed, the Defendants/Respondents would have to give up cultivating the said tea bushes on their respective parcels of land and that would be highly prejudicial and injurious to them. Further, that the Plaintiffs/Applicants have not specified who of the two Defendants is allegedly seeking to mortgage his parcel of land. The Plaintiffs/Applicants have made allegations with no particulars. The Court was urged to dismiss the instant application.

31. On the Notice of Preliminary Objection, the Plaintiffs/Applicants in their submissions summarized three issues; -

a. Whether the Court is vested with jurisdiction to hear and determined the matter;

b. Whether the matter in issue in the present suit is directly and substantially the same matter on issue before High Court Succession Cause No. 627 of 1990 and whether the suit ought to be stay;

c. Whether the suit herein is time barred by the Limitations of Actions Act;

32. On whether the Court has jurisdiction, it was submitted this suit is for cancellation of the title deeds of various parcels of land which are subdivisions of **Loc.3/Gichagiini/280** and thus this Court is the one with jurisdiction and not the High Court. They relied on the case of **Mariam Mathias Mwasi vs Rama Adam (2020) eKLR** and also the case of the Estate of late **M’Kuura Mukindia (deceased) 2021 eKLR** where the Court held;

“The High Court however cannot assume jurisdiction over an environment and land matter let alone to make an order that is intended to directly affect an environment and land matter because that is the domain of a specialized Court, namely the Environment and Land Court which is of the same status as the High Court”.

33. On whether the matter in issue herein is directly and substantially the same is in **Succession Cause No. 627 of 1990**, it was submitted that **Succession Cause No. 627 of 1990**, deals with redistribution of the estate of the late **Goeffrey Kamanu Gathura** whereas the suit herein deals with unlawful and illegal subdivisions of **Loc.3/Gichagini/280**, one of the property of the deceased and transfer of the resultant subdivisions to the Defendants. They urged the Court not to stay the suit herein as the Plaintiffs have been deprived of their lawfully acquired inheritance also deprived of their right to property under **Article 40 of the Constitution**. That the parties in the two suits are different and the matters are pending in two different Courts and also different reliefs have been sought.

34. On whether the suit is time barred, it was submitted that the same is not time barred and they relied on Section 26 of Limitation of Actions Act which provides;

“Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it: Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

ii. (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made”.

They urged the Court not to strike out the suit but instead should dismiss the **Preliminary Objection** for being **misconceived** and misplaced. They further urged the Court to proceed to hear the matter and grant the Plaintiffs an opportunity to have their case heard and determined on merit.

35. Upon consideration of the pleadings and the annexures thereto, the written submissions and the relevant provisions of Law the Court finds the issues for determination are;

i. Whether the Notice of Preliminary Objection dated 21st July 2021, is merited.

ii. Whether the Notice of Motion dated 1st July 2021, is merited.

36. From the available evidence, there is no doubt that the parties herein are siblings and they are all children of the late **Geoffrey Kamanu Gathura** and the late **Florence Wachera Kamanu**. The dispute herein is over the properties of the estate of **Geoffrey Kamanu Gathura**. It is also evident that there exist **Succession Cause No. 627 of 1990**, wherein Letters of Administration had been issued to the late **Florence Wachera Kamanu**, the mother of the parties herein on **7th August 1990**. It is not in doubt that the said letters were confirmed on the **5th November 1991**.

37. As the Court stated earlier land Parcels **No. Gichugu settlement Scheme/487** and **Evurore/Kathera/1806**, do not fall under the

jurisdiction of this Court as thus this Court will not deal with them at all.

38. It is also evident that **Loc.3/Gichagiini/280**, which is one of the assets and subject of distribution of the estate of the Late **Geoffrey Kamanu Gathura** was subdivided into various parcels of land being **Loc.3/Gichagiini/860,861,862,863 and 864**.

39. Further it is evident that on **22nd May 2009**, the three parcels of land being **Loc.3/Gichagiini/860,861 and 863** were transferred to the three sons of the late **Geoffrey Kamanu Gathura** and the two recipients of **Loc3/Gichagiini/860 & 861** are the Defendants/ Respondents herein. However, the recipient of **Loc.3/Gichagiini/864**, one **Humphrey Njuguna Kamanu** is not a party to this suit.

40. It is also not in doubt that the Grant issued on **7th August 1990**, was revoked in the year **2014**, and an application to set aside the said revocation is pending in Court in **Succession Cause No. 627 of 1990**.

41. From the pleadings, it is also evident that the mother to the parties herein one **Florence Wachera Kamanu**, died on **13th May 2021**. This suit was filed on **5th July 2021**, two months after her death. The Court would only be left to wonder why the Plaintiffs/Applicants did not file this suit during the life time of **Florence Wachera Kamanu**, given that Letters of Administration had been issued to her on **7th August 1990**, and that the grant was revoked on **28th October 2014**, and the said Order was extracted on **25th June 2018**.

42. The above being the undisputed facts, the Court will now deal with the issues pointed out for determination.

i. Whether the Notice of Preliminary Objection dated 21st July, 2021 is merited.

43. The Defendants have raised three points in their Preliminary Objection. The first one is that the Court has no jurisdiction to hear and determine this matter as this matter is a Succession matter. Secondly, the matter is directly and substantially the same in **Succession Cause No. 627 of 1990**, and thus offends the provisions of **Section 6** of the **Civil Procedure Act**. Thirdly, the disputed parcels of land being **Loc.3/Gichagiini/860 and 863** were registered in **2009** and thus the suit is time barred by the “the **Limitation of Actions Act Chapter 22** Laws of Kenya”.

44. Before going to the merit of the Preliminary Objection, the Court will determine whether the above points qualifies to be Preliminary Objection. In *Mukisa Biscuits Manufacturing Ltd vs West End Distributors Ltd (1969) EA. 697*, the Court held;

“A Preliminary Objection is in the nature of what used to be called a demurrer. It raises pure point of law which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judicial discretion.”

45. The Defendants have alleged that the Court does not have jurisdiction and that the suit herein has been barred by Limitation of time. These are pure points of law. In the case of *Oraro vs Mbaja 2005 1KLR 141*, the Court held as follows;

“A Preliminary Objection consist 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 off 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”.

46. Having found that the two issues of **jurisdiction** and **Limitation of Actions** are pure point of law, the Court finds that the objection herein then falls under the description of what Preliminary Objection as per *Mukisa Biscuits case (supra)*.

46. If the issues raised herein are pure points of law, is the Notice of Preliminary Objection therefore merited"

48. Before delving into the merit of Preliminary Objection, the Court will first address the submissions by the Defendants that since the Plaintiffs/Applicants did not file a further Affidavit to address the **Preliminary Objection**, then the Defendants' said **Preliminary Objection** is not challenged. However, the Court finds that a **Preliminary Objection** is argued on pure points of Law and thus Affidavit evidence is not required. See the case of *Mumias Agricultural Transporters Ltd vs Chanan Agricultural*

Contractors Nairobi HCCC No. 786 of 1996, where the Court held that;

“In a Preliminary point of Law, affidavit evidence is inadmissible”.

49. Further, the Plaintiffs have addressed the issues raised in the **Preliminary Objection** through their elaborate written submissions dated **23rd December 2021**. Therefore, the Defendants cannot be heard to say that their **Preliminary Objection** stands unchallenged.

50. It is clear that jurisdiction is everything and without jurisdiction a Court has no option but to down its tools. See the case of **“the owners of the Motor Vessel “Lilian(s)” vs Caltex Oil (K) Ltd (1989) KLR 1”** where the Court held that; -

“Jurisdiction is everything without it, a Court has no power to take one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

51. Although it is evident that the issue of jurisdiction can be raised at any stage of proceedings, it is however important to raise the question of jurisdiction at the earliest opportunity”. See the case of *Ndimu vs Ndimu & Another (2007) of EA 269* where the Court held;

“A question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue straight away”.

52. The Plaintiffs in their submissions have vehemently denied that the Court lacks jurisdiction. It was their submissions that the prayers sought are for cancellation of the titles and only the **Environment and Land Court** has such jurisdiction. That the High Court deals with distribution of the estate of the deceased person and that is the issues being canvassed in **Succession No. 627 of 1990**.

53. As the Court observed earlier, the parcel of land **Evurore/Kathera/1806**, is outside the Geographical jurisdiction of this Court and thus, the Court finds **and** holds that it has no jurisdiction to deal with the said parcel of land; - **Evurore/Kathera/1806**.

54. Further, this Court did observe that the dispute herein arises out of the distribution of the estate of the late **Geoffrey Kamanu Gathura**. There is in existence **Succession Cause No. 627 of 1990**, wherein Grant of Letters of Administration had been granted to **Florence Wachera Kamanu**. Given that the issues herein relates to the estate of **Geoffrey Kamanu Gathura**, the Court concurs with the Defendants; submissions that the issues herein can best be canvassed in the existing **Succession cause**. Indeed, this is a Succession matter and the Court herein has no jurisdiction.

55. The Court had observed that the Grant that had been issued to **Florence Wachera Kamanu** was revoked in the year 2014. The said **Florence Wachera Kamanu** had transferred the alleged parcels of land herein to the Defendants in the year 2009. The Plaintiffs did not file this suit when the said **Florence Wachera Kamanu** was alive. They filed it immediately after her demise. That action is suspect and smuck of misuse of the Court process. However, having found that this Court has no jurisdiction, then the ordinary thing is to find and hold that the Court has no option but to down its tool.

56. Further, it is evident that the Grant issued on **7th August 1990**, having been revoked, and the fact that the said **Succession Cause 627 of 1990** is still pending, the Court finds that the issues raised herein are directly and substantially the same as the issues that are in dispute in the said **Succession Cause No. 627 of 1990**. Even though the Plaintiffs submitted that the parties in the two suits are different, the Court finds that the subject matter is the same.

57. On the issue of Limitation of time or the suit is time barred, it is evident that **Loc.3/Gichagiini/860** and **863** were subdivided on **22nd May 2009**. The suit herein was filed in **July 2021**. That was well over a period of 12 years.

58. Section 7 of the Limitation of Actions Act provides;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

The Defendant herein became the registered owner of the suit property on **22nd May 2009**, and the suit was filed on **July 2021**, well after **12** years. The Plaintiffs ought to have filed their claim within the period prescribed under Section 7 of the Limitation of Actions Act. They failed to do so and by the time they filed the suit, the claim was statute barred as was held by the Court in the case of *Edward Moonge Lengusuranga V James Lanaiyara & another* [2019] eKLR(2019) eKLR which quoted with approval the case of *Bosire Ongera vs Royal Media Services (2015) eKLR* and held that;

“the issue of Limitation of goes to the jurisdiction of the Court to entertain claims and therefore if a matter is statute barred, the Court has no jurisdiction to entertain the same”.

59. The Plaintiff sought for revocation of grant in the year 2007 and the same was granted in 2014. Further, they submitted that they became aware of the transfers in the year 2013. Even if they are basing their claim on fraud, Section 26 of Limitation of Actions Act, cannot aid them since from 2013 to 2021, that was likely more than 3 years.

60. This suit is statute barred and thus the Court has no jurisdiction to entertain it.

61. Having found that this Court has **no jurisdiction** and that the suit is **statute barred**, the Court has no other option but to down its tools and thus strike out this suit entirely for want of jurisdiction.

ii. Whether the Notice of Motion Application dated 1st July 2021 is merited

62. Having found that this Court has no jurisdiction to deal with the matter and having struck out the suit entirely for want of jurisdiction, this Court finds that the **Notice of Motion Application** dated **1st July 2021**, has thus been overtaken by event as there is no suit in existence having been struck out for want of jurisdiction. There is therefore no need to deal with the merit of the said application.

63. The end results, herein is that the Defendants **Notice of Preliminary Objection** dated **21st July 2021**, is upheld and the Court proceeds to strike out the Plaintiffs entire suit for want of jurisdiction with costs to the Defendants herein.

64. It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20TH DAY OF JANUARY, 2022

L. GACHERU

JUDGE

Delivered online:

In the presence of

M/s Nzioka for the Plaintiffs/Applicants

Mr. Kang'atta Defendants/Respondents

Kuiyaki - Court Assistant

L. GACHERU

JUDGE



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