



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 265 OF 2017

BEATRICE WAMBUI KIARIE.....1st PLAINTIFF/APPLICANT

MARGARET WANJIRU NZIOKA.....2nd PLAINTIFF/APPLICANT

RUTH KARITI KAHIA.....3rd PLAINTIFF/APPLICANT

-V E R S U S-

TABITHA WANJIKU NG'ANG'A.....1st DEFENDANT/RESPONDENT

REUBEN KAMAU MUIRURI.....2nd DEFENDANT/RESPONDENT

PHILIP WAWERU KURIA.....3rd DEFENDANT/RESPONDENT

JOHN MUCHUKU KURIA.....4th DEFENDANT/RESPONDENT

BEATRICE WAMBUI NG'ANG'A.....5th DEFENDANT/RESPONDENT

LUCY WABAI KURIA.....6th DEFENDANT/RESPONDENT

JOSEPHAT NDUNGU KURIA.....7th DEFENDANT/RESPONDENT

STEPHEN MWANG KURIA.....8th DEFENDANT/RESPONDENT

JENIFFER WAGIO NG'ANG'A (Sued as the administrator of Estate of

DENIS NG'ANG'A KURIA.....9th DEFENDANT/RESPONDENT

ESTHER WATIRI GITAU (Sued as the administrator of the Estate of

JOSEPH GITAU KURIA).....10th DEFENDANT/RESPONDENT

RULING

1. This matter was instituted vide a plaint dated the 2nd September 2016 and filed on the same date. Together with the plaint, the Plaintiff also filed their application, vide a Certificate of urgency, for interim orders of injunction which were dated and filed on the same date as above stated.

2. On the 21st September 2016, the court certified the matter as urgent but declined to issue any orders and directed for service to be effected upon the Defendants/Respondents for inter-parte hearing.

3. On the 24th April 2017, the parties entered a consent to have the Application compromised which consent was recorded by the court and parties were directed to Comply with the provisions of Order 11 of the Civil Procedure Rules and the matter was then set down for mention to confirm compliance for the 29th May 2017. On the day in question, Counsel for the Plaintiff raised an objection on the consent that parties had recorded seeking for the same to be set aside for being ambiguous wherein the court ruled that for such orders to issue, Counsel had to

file and serve an appropriate application.

4. That the Plaintiffs then filed the relevant application dated the 14th June 2018 but pending its hearing and determination, it was brought to the attention of the court that there had been a pending Preliminary Objection that had been filed on the 29th May 2017 that was yet to be disposed of.

5. Since the said Preliminary Objection touched on the jurisdiction of the court and sought to strike out the whole suit, it was agreed with approval of the court that the said application be disposed of in the first instance by way of written submissions.

6. Parties filed their respective submissions and on the 23rd April 2018, while the Plaintiffs chose to rely entirely on their filed submissions, the Defendants on the other hand, highlighted on theirs.

The Defendant's Case

The Defendant's Preliminary Objection was based on three issues namely

- i. That the Plaintiff's had no locus standi to institute the present suit.
- ii. That the court lacked jurisdiction over this matter
- iii. That the suit was time barred by limitation of statute.

7. On the first issue of locus Standi, the Defendants' submission was based on the dispositions made in the Plaintiff's plaint to the effect that;

- i. Under para 4 of the plaint, the Plaintiffs had disposed that their mother, now deceased, and who we shall refer to as the deceased for ease of reference in this case, was also the mother to the 1st Defendant and the proprietor of the suit property.
- ii. Under Para 5 the Plaintiffs stated that they and others are beneficiaries of the deceased's estate.
- iii. Under Para 12 they stated that they had the intention of seeking letters of administration in respect to the deceased's estate.
- iv. Under Paragraph 14 (f) they contend that the 1st Defendant had sub-divided the suit property in contravention of a purported will dated 10th June 1994
- v. Under paragraph 6 they had prayed for the re-instatement of the deceased's property to her name at their.

8. In essence thereof the Plaintiffs were seeking to espouse a claim in respect of the deceased's estate. That they were trying to sustain a claim that survived the deceased.

9. The Defendants submitted that under Section 82 of the Laws of succession, the Plaintiffs had no locus to do what they sought to do in their plaint.

10. The provisions of Section 82 (a) are clear to the effect that:-

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;

11. That the Plaintiffs were not personal representatives of the deceased in respect of the provisions of Section 3 of the Act which defines a personal representative to include the executor or administrator, as the case may be, of a deceased person.

12. That the Plaintiffs herein had not obtained letters of administration and as such had not demonstrated that they are executors of the deceased's will as they had not moved any court to propound the deceased's will if at all it existed.

13. The Defendants relied on the case of **Geoffry Muguna Mburugu vs Attorney General [2005] eKLR** where Justice Ojwang held that a party could not espouse a claim like the one the Plaintiffs sought to, without being legal representatives of the deceased.

14. On the 2nd issue that the court lacked jurisdiction over this matter, the Defendants took issue as to whether the suit before court was a suit in respect of use and occupation of land as contemplated by Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act which was within the jurisdiction of this court or whether the issue was purely a succession dispute within the meaning of section 47 and 48 of the Law of Succession Act and Article 165 (2) (a) and 165 (5) of the Constitution.

15. It was their submission that the case before the court was purely a succession dispute which was not within the jurisdiction of the court because:-

i. Under paragraph 4 of the plaint, the Plaintiff contended that the suit land was supposed to be inherited by the 1st Defendant, that under paragraph 5, the Plaintiffs contend that the deceased had left 5 beneficiaries including them.

ii. Under Paragraph 7, they had contend that the deceased was manipulated to sub divide the land wherein the suit land was sub-divided in favor of a non-beneficiary to the deceased's estate.

iii. That at Paragraph 14(f) they had contend that the deceased had left a will dated 10th June 1994 which ought to be considered.

iv. That at Prayer (c) of the plaint the Plaintiffs had prayed for the suit property to be re-instated under the deceased's name.

16. That as a whole, the Plaintiffs sought to have a succession dispute between them and the 1st Defendant in respect of their mother's estate determined by this court, a matter that was not the preserve of this court.

17. The Defendants submitted that Under Section 47 of the Succession Act, Articles 162 (2) and 165 of the Constitution it was not within the jurisdiction of this court to determine the dispute the Plaintiffs were raising or to determine whether the Plaintiffs are beneficiaries of the deceased's estate and further whether or not the deceased had left a will or otherwise or to determine who is entitled or not entitled to the deceased's estate; which are matters well within the jurisdiction of High Court and some Magistrate's court.

18. The Defendants relied on the cases of **David Rummage and 4 others vs. the cabinet Secretary, Ministry of Energy and Pet and 7 others (2017) eKLR** and the case of **Malindi Law Society vs. Attorney General and 4 others (2016) eKLR** to buttress their submissions.

19. On the final issue on limitation, the Defendants relied on the provisions of Section 7 of the Limitation Act that 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 actions accrued to him.....”

20. At paragraph 7 of the plaint as read with paragraph 4 which are relevant on this issue, the Defendant submitted that the dispute was in respect of parcel of land No. LR Nyandarua/Silbwet/24, which parcel of land was at some point divided into two parcels i.e. 759 and 760.

21. That at Paragraph 8 of the plaint, the Plaintiffs contended that on the 2nd December 1992, parcel No 759 was sub divided into two i.e. 1734 and 1735. Their cause of action was therefore when the 1st sub division occurred on the 22nd December 1992, the present suit was not filed until 2nd December 2016 more than 24 years since the cause of action arose. That the suit cannot therefore stand by virtue of the provisions of Section 7 of the Limitation of Actions Act, that further Section 9(2) of the same Act cannot come to the aid of the Plaintiffs in the circumstance.

22. From the above captioned submissions the Defendants prayed that the court finds that the Plaintiffs have no locus, that this court has no jurisdiction to determine the matter and that the claim is statute barred having been filed 24 years after the cause of action arose. They prayed for the suit to be struck out with costs.

The Plaintiffs' response

23. The Plaintiffs' written submissions filed on the 23rd April 2018 was to the effect that in law the term Locus Standi meant the right to bring action, to be heard in court or to address the court on a matter before it. That it was the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

24. That order 1 Rule 1 of the Civil Procedure Rules stipulates parties to be enjoined in a suit to include;

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

25. That the Plaintiffs herein, who are siblings to the 1st Defendant are beneficiaries of the parcel of land Known as Nyandarua/Silbwet/24, the suit property herein. That the 1st Defendant illegally subdivided the said suit land herein transferring part of it into her name and the others to the other Defendants without consent of the Plaintiffs. That efforts to file for letters of administration had been fruitless as they had failed to get the 'title deeds' from the 1st Defendant, thus they filed the instant case so as to recover the title deeds from the 1st Defendant.

26. That they did not file this suit as administrators of the estate but in their capacity as beneficiaries of the estate. Further that they did not sue the estate of their deceased mother but sued the Defendants in their personal capacities for cancellation of an illegally acquired title and for the reinstatements of the title in their late mother's name. That this was not a succession cause where they required the letters of Administration but a case wherein they had sought to protect their interests.

27. In further submitting that they had the locus standi, the Plaintiffs relied on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** wherein the court laid down the basis on what constituted a prima facie case to show locus standi to which:

The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a

preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

On the issue of whether the court had jurisdiction to hear and determine this matter, it was the Defendant's submission that the court was established pursuant to the provisions of Article 162(2) (b) and (3) of the Constitution which laid down its powers.

28. That pursuant to Article 162(3) of the Constitution, the Environment and Land Court whose functions are as per Section 4 of that Act so that as per the reading of Article 162(2) (b) of the Constitution and Section 4 and 26 of the Environment and Land Court Act, this court had unlimited and original jurisdiction to deal with dispute relating to environment, use and occupation of title to land.

29. The Plaintiffs relied on the case of **Salome Wambui Njau Suing as the administratrix of the Estate of Peter Kiragu Njuguna(deceased) v Caroline Wangui Kiguru [2013] eKLR** to buttress their submission on the fact that this was not a succession matter since they had sued the Defendants so as to recover the title deeds for the parcel of land known as Nyandarua/Silbwet/24 and therefore the court had jurisdiction to hear and determine the matter.

30. On whether the matter was statute barred, the Plaintiff relied on Section 7 and Section 9(2) of the Limitation of Actions Act as well as on the provisions of Article 40 of the Constitution to submit that although their deceased mother died in the year 2008, they did not have in their possession the title deeds to the suit property to enable them take out the letters of administration until later when they conducted a search and discovered that the Defendants had illegally acquired title to the suit land that is when they filed the present case on the 2nd September 2016.

31. The Plaintiff relied on the case of **Justus Tureti Obara vs Peter Koipetai Nengiso [2014] eKLR** wherein Justice S. Okong'o had held that although under Section 7 of the Limitation of Actions Act stipulates the time frame for the for claim for recovery of property to be 12 years, yet Section 26(a) of the same Act stipulates that the limitation period begins to run from the time of the discovery of the fraud. The Plaintiff submitted that that notwithstanding, the case was not time barred since it was only 7 years since the deceased passed away. The Plaintiff thus prayed for the Preliminary Objection to be dismissed with costs.

32. I have considered the Defendants application on a point of Preliminary Objection to the effect that the suit should be struck out for reasons that the Plaintiff's have no locus standi to institute the present suit, that the court lacks jurisdiction over this matter and finally that the suit was time barred by limitation of statute.

33. In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

“---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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

34. The summation of the Defendant's Preliminary Objection is that this matter was filed by the Plaintiffs who had no locus standi as per the provisions of Section 82 of the Laws of succession because they had not taken out their letters of Administration, secondly that this court lacked jurisdiction to hear and determine the said matter since it was a matter that concerned a have a succession dispute which as the preserve of the High court. Lastly the Defendants' Preliminary objection was based on the fact that the Plaintiff's claim was for the recovery of land which was time barred since it was brought after 12 years from the date on which the right of action accrued to them.

35. The Matters for determination are:

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the said Preliminary Objection has merit and should be upheld.

36. On the first issue as to whether the Plaintiffs herein had the locus standi to file this suit, indeed it is not contested that the original suit property herein being Nyandarua/Silbwet/24 was registered in the name of both the Plaintiff's and the 1st Defendant's mother who passed away in the year 2008. From the annexures (register of land parcel No. Nyandarua/Silbwet/24) herein filed by the Plaintiffs, it is clear that the title to this parcel of land was closed on the 18th April 1994 upon subdivision of the same resulting into parcels No. 759 and 760.

37. That parcel No 759 was further subdivided into parcel numbers 1734 and 1735. It is against this backdrop that the Plaintiffs pleaded that the 1st Defendant had illegally and/or unlawfully sub-divided the deceased's parcel of land No. Nyandarua/Silbwet/24 and had transferred the resulting parcels of land to her co-defendants herein.

38. The Plaintiffs' prayer in their Plaint is therefore to cancel the said titles and to reinstate the parcel of land into their late mother's name.

39. It is however not contested that the Plaintiffs have neither applied for nor obtained letters of administration in respect of the estate of their late mother and/or in respect to Plot No. Nyandarua/Silbwet/24 which in essence means that they had no *locus standi* to file suit or to be sued until such a time as they shall have taken out the letters of administration.

40. The Plaintiffs contend that they do not need a grant of representation to their late mother's estate in order to protect their interests in the same.

41. However the Court of Appeal has authoritatively delivered itself on the issue of locus standi in case of **Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730 where it was held that'**;

" To determine who may agitate by suit any cause of action vested in the deceased at the time of his death , one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone "

42. Section 82 (a) of the law of succession Act provides 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. Section 3 of the law of succession Act provides that an Administrator is a person whom a grant of letters of administration has been made.

44. The Law of Succession Act, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.

45. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** the Court of Appeal gave meaning to the term locus-standi by stating:

"to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

46. **To that effect thereof I find that the issue on locus standi** is a primary point of law almost similar to that of jurisdiction and since the Plaintiffs herein did not take out the letters of Administration, they lacked the capacity to sue or be sued which renders the suit incompetent.

47. On the second issue, as to whether this court has the jurisdiction to hear and determine this matter, it has not been disputed that the original suit land being Nyandarua/Silbwet/24 belonged to the deceased one Maria Wabai Nganga. That upon her death, the Plaintiffs submitted, that the 1st Defendant proceeded to unlawfully sub-divide and transfer the resultant parcels of land to her co-defendants. That this was done irrespective of the deceased's will herein annexed in the Plaintiffs list of documents. That the Plaintiffs are now desirous of cancelling the titles and having the land reverted into their mother's name.

48. There having been a will in place, I do find that that although it is clear from the provisions of Article 162 (2) (b) of the Constitution and sections 4 and 26 of the Environment and Land Court Act that this court has unlimited and original jurisdiction to deal with disputes relating to the environment and the use and occupation of, and title to land in the whole country. However in the present case and looking at the plaint filed by the Plaintiff, and the annexures thereto, I find that the issue raised herein is a succession dispute that ought to have been filled either in the High Court or the Chief Magistrates' Court.

49. I find that this court has no jurisdiction to try matters pertaining to succession disputes. Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there will 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 that it is without jurisdiction.

50. On the third issue as to whether the suit was time barred by limitation of statute;

51. I have considered the submissions and the annexures herein as well as the Plaintiff's plaint wherein it was depicted that at all times their mother Maria Wabai Nganga(deceased) was the registered proprietor of land parcel No Nyandarua/Silbwet/24. That prior to her demise she lived with the 1st Defendant who manipulated her to subdivide the parcel of land into Nyandarua/Silbwet/ 759 and Nyandarua/Silbwet/760 which parcels of land she caused to be transfer into her name (1st Defendant) and later to her children. This cause of action occurred sometime on the 22nd December 1992 see paragraph 8 of the plaint. Maria Wabai Nganga subsequently passed away on 10th August 2008. The particulars of fraud were articulated vide paragraph 14 (a-f) of the Plaintiffs' plaint.

52. To contextualize the Defendants' point of Preliminary Objection, on this point, it is necessary to set out the relevant provisions of the Limitation of Actions Act which they rely on and I set the same out hereunder:-

Section 4 (2) provides as follows:

"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

53. Section 26 of the Limitation of Actions Act provides as follows;

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:

54. Section 4(2) of the Limitation of Actions Act provides that an action founded on tort may not be brought after three years. Time therefore started running on 22nd December 1992 and the period of three years ended on 22nd December 1995.

55. Although the Plaintiff would want this court to believe that the cause of action accrued on the 27th June 2016 when they received the certificates of the official search, yet based on their own pleadings, I do not agree with this position.

56. 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

57. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Defendant having transferred the suit land into her name and that of the co-defendants on the 22nd December 1992 and thereby claiming ownership in the same, the Plaintiffs could only seek to recover it from the Defendants, but only if they did so within twelve years after the Defendants had accrued the suit land.

58. There is no doubt that the period of about twenty four years had lapsed from the date of the occurrence of the cause of action to the date this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. The Plaintiffs needed to commence their claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time the Plaintiffs filed this suit, their claim was statute barred.

59. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation 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.

60. I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

61. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection herein succeeds in its entirety with the result that the Plaintiff’s suit is herein struck out with costs to the Defendants.

Dated and delivered at Nyahururu this 3rd day of July 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE