



REPUBLIC OF KENYA



**In re Estate of Augustinus Ojwang Okut (Deceased) (Miscellaneous Succession Cause E054 of 2024) [2024] KEHC 13032 (KLR) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13032 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS SUCCESSION CAUSE E054 OF 2024  
RE ABURILI, J  
OCTOBER 28, 2024  
IN THE MATTER OF THE ESTATE OF AUGUSTINUS OJWANG OKUT (DECEASED)  
IN THE MATTER OF**

**BETWEEN**

**DANIEL OTIENO OGOLLA ..... OBJECTOR**

**AND**

**JACOB NYAKWAR OJWANG ..... 1<sup>ST</sup> RESPONDENT**

**GORDON NYAKWAR ..... 2<sup>ND</sup> RESPONDENT**

**CHAJU CONSTRUCTION & BUILDING LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**KISUMU LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. The applicant Daniel Otieno Ogolla vide a Notice of Motion application dated 16<sup>th</sup> September 2024 filed under certificate of urgency seeks the following orders:
  - i. That this honourable court be pleased to hear this application Exparte in the first instance and on a priority basis.
  - ii. This honourable court may be pleased to grant temporary order injunction restraining the defendants from trespassing and continue to carry out any or all unlawful and illegal excavating murrum, stones and or prospecting activates and or continuing to stay and or causing any further damages to the plaintiff private land and property hereon namely parcel title deed no. 2734 Kisumu Kanyakwar B (hereinafter referred to as the suit land) pending the inter-parties hearing and final determination of this application dated on 20th July 2024.



- iii. That this honourable court be pleased to issue an order to sermon director of NEMA and environment Kisumu, DO Kisumu or chief area for Kanyakwar for failure to act for the excavation of murrum.
  - iv. That order of this court be served th officers commanding Kisumu Central Police Station or any near police station for reinforcement and maintain compliance purposes that cost of this application.
2. It is the applicant's case that he is the owner of the land parcel No. Kisumu/Kanyakwar B/2734 upon which the respondents have trespassed and that the respondents ignored a determination from the National Land Commission dated 17<sup>th</sup> July 2017 which stopped them from dealing with the suit property.
  3. The applicant averred that the 3<sup>rd</sup> respondent used false information and illegal documents to trespass onto the suit land and two other parcels specifically Kisumu Kanyakwar B 385 & 844 with the former parcel being registered in his name while the later was registered in the name of the deceased Gordon Mark Agola Hongo as was determined in ELC Case No. 62 of 2014.
  4. The applicant further averred that the National Land Commission (NLC) subsequently directed the Kisumu Land Registrar to revoke all illegal titles that were resurveyed, subdivided and transferred to the respondent. He further averred that the same was communicated to the respondents who still proceeded with the trespass and excavations which activities posed a health risk to the elderly and sick people residing within the applicant's household as well as the risk of the said individuals as well as animals of falling into the deep excavations.
  5. The applicant reiterated his averments in his oral submissions before this Court. He went on further to state that the deceased was his father's cousin and that he fraudulently obtained the title to land subject of the Succession proceedings herein and commenced excavation works on the suit land. The applicant further submitted that he wanted the grant to be cancelled.
  6. In response, Mr. Indimuli for the respondents made oral submissions to the effect that the suit land was in Kanyakwar whereas the succession was in Dago. Mr. Indimuli further submitted that the instant suit ought to be struck out and the applicant proceed to the land court to challenge the Kanyakwar land.
  7. Mr. Indimuli Counsel for the respondents submitted that the applicant was not a beneficiary of the estate of the deceased. He further stated that no wastage of the estate had been demonstrated and further that parcel number Kisumu Dago 208 was not the land of the applicant. Mr. Indimuli reiterated that the issues being raised were within the purview of the ELC and not the Succession court.

### **Analysis & Determination**

8. I have considered the pleadings herein together with the respective oral submissions by the parties herein. From the pleadings and affidavits, the 1<sup>st</sup> respondent is the administrator of the estate of the deceased Augustinus Ojwang Okut in Kisumu HC Succession Cause No. 320 of 2010 which grant was issued to him on 21<sup>st</sup> September, 2010 and confirmed on 9<sup>th</sup> November, 2010. The estate which was to be administered and subject of the Succession Cause is Kisumu/Dago/208. As per the search certificate attached to the petition for the grant. The land measures 0,5 hectares. The filed death certificate shows that the cdeceased died on 9<sup>th</sup> October, 1990, over 34 years ago. He was survived by three sons- peter Adhola Ojwang, Samuel Oduke Ojwang and Jacob Nyakwa Ojwang.
9. The Applicant made oral submissions to the effect that the grant issued to the 1<sup>st</sup> respondent be cancelled. The applicant's claim seems to flow from the assertion that the land parcel No. Kisumu/



- Kanyakwar B/ 2734, with no evidence of its nexus to the land which was subject of the Succession cause, belongs to him and that the respondents have trespassed on the same and subsequently commenced excavations on the said parcels thus putting his whole family at risk.
10. I note that there are orders issued by the County Commissioner stopping excavation on land which is not related to the succession parcel herein as no information is given on the nexus if any. There also appears to be a pending land Case before the Environment and Land Court over Kisumu/ Kanyakwar B/ 385 between the applicant herein and Sylvano Otieno Kola.
  11. On their part, the respondents through their counsel contend firstly that this court lacks jurisdiction to entertain this suit as the issues raised by the applicant fall within the purview of the Environment & Land Court and secondly that in any case, the applicant is not a beneficiary of the estate of Augustinus Ojwang Okut, the deceased.
  12. I have considered the aforementioned in light of which the initial issue for this court's determination is its jurisdiction to entertain the application and grant the orders sought. It is well settled that 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. See the case of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.
  13. Evidently, if this court finds that it is devoid of jurisdiction, then there is no point of going to the merits of the applicant's motion.
  14. The Supreme Court of Kenya in the case of Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011 stated quite authoritatively, that a court's jurisdiction flows from either *the Constitution* or legislation or both. Additionally, jurisdiction cannot be arrogated by the Court. Neither can the parties to a dispute confer jurisdiction to the Court, even if they all consented to such jurisdiction.
  15. Article 165(3) of *the Constitution* confers the High Court with jurisdiction and provides: -
    - (3) Subject to clause (5), the High Court shall have-
      - a) Unlimited original jurisdiction in criminal and civil matters.
  16. It is instructive to note that the jurisdiction is subject to Article 165(5) of *the Constitution* which provides: -
    - (5) The High Court shall not have jurisdiction in respect of matters:
      - a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
      - b) Falling within the jurisdiction of the courts contemplated in Article 162(2).
  17. Pursuant to Article 162(2)(b) of *the Constitution*, the *Environment and Land Court Act* 2011 was enacted and under Section 13, the Act confers the Environment and Land Court jurisdiction as follows: -
    - (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 environment 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, chooses in action or other instruments granting any enforceable interests in land; and
- e) Any other dispute relating to environment and land.

18. The *Law of Succession Act* in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows: -

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

19. Rule 41(3) of the Probate and Administration Rules provides that:

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

20. In the case of Priscilla Ndubi and Zipporah Mutiga vs Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, held: -

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

21. Applying the above principles to the present case, it is evident that the bone of contention goes to the ownership of Land Parcel title No. Kisumu/Kanyakwar B/ 2734. Both the applicant and the respondents claim to be rightful owners of the parcel of land in issue.

22. I find that pursuant to Article 165(5) of *the Constitution*, this Court lacks jurisdiction in matters to do with the use and occupation of, and title to, or ownership of land.

23. Consequently, having found that this court has no jurisdiction to determine the issues raised in the application dated 16<sup>th</sup> September 2024, the application is hereby struck out for being incompetent and improperly before the court.

24. I order that each party shall bear their own costs of the application.

25. The file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF OCTOBER, 2024**



**R.E. ABURILI**  
**JUDGE**

