



**Osman v Osman & 3 others (Suing on behalf of the Estate  
of the Deceased Ali Osman) (Environment and Land Appeal  
E006 of 2022) [2023] KEELC 16491 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16491 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT GARISSA  
ENVIRONMENT AND LAND APPEAL E006 OF 2022  
JM MUTUNGI, J  
MARCH 22, 2023**

**BETWEEN**

**MOHAMUD ALI OSMAN ..... APPELLANT**

**AND**

**HABIBA ALI OSMAN ..... 1<sup>ST</sup> RESPONDENT**

**ISMAIL ALI OSMAN ..... 2<sup>ND</sup> RESPONDENT**

**NURIA ALI OSMAN ..... 3<sup>RD</sup> RESPONDENT**

**GENYA KHALIF ADAN ..... 4<sup>TH</sup> RESPONDENT**

**SUING ON BEHALF OF THE ESTATE OF THE DECEASED ALI OSMAN**

**RULING**

1. The Appellant *vide* a Notice of Motion of application dated December 7, 2022 sought the following orders:
  1. That this Application be certified urgent, service be dispensed with in the first instance and be heard *ex parte* for the purpose of prayers 1, 2, and 3.
  2. That pending hearing and determination of this application, the Honourable Court be pleased to order Interim stay of execution of the Ruling dated November 25, 2022 and any ensuing order issued by Hon H M Nyaberi in Garissa Chief Magistrate Cause No ELC Suit E001 of 2022 restraining the Defendant from dealing and or collecting rental monies from the suit premises compromised of LR No Garissa Town/Block 1/81.
  3. THAT the Honourable Court be pleased to order stay of execution of the Ruling dated November 25, 2022 and any ensuing order pending the hearing and determination of the



Appeal issued by Hon H M Nyaberi in Garissa Chief Magistrate ELC Suit E001 of 2022 restraining the Defendant from dealing and or collecting rental monies from the suit premises compromised of LR No Garissa Town/Block 1/81.

4. Any other order(s) the Court deems just and fit.
2. The application was supported on the Affidavit sworn in support by the Appellant/Applicant. The Applicant in essence seeks to have the implementation of injunctive order issued by the Learned Trial Magistrate *vide* his Ruling delivered on November 25, 2022 stayed as well as the order requiring the Appellant to deposit the rent collected from the suit premises into a joint Bank Account of the Appellant and the Respondents. The Applicant averred that he was dissatisfied by the Ruling of the Learned Trial Magistrate and has appealed against the ruling before this Court. Principally the Applicant firstly argues that the Learned Trial Magistrate had no jurisdiction to deal with the matter, and secondly, that the Respondent had not satisfied the threshold for grant of an injunction. The Applicant further argues the order requiring that he deposits the rents collected into a joint account was unjustifiable. The Applicant thus prays for stay of the Learned Trial Magistrates orders pending the hearing and determination of the Appeal he has lodged.
3. The 1<sup>st</sup> Respondent, Habiba Ali Osman, filed a Replying Affidavit sworn on February 17, 2023 in opposition to the Applicant's application for stay. The 1<sup>st</sup> Respondent contended the Applicant had not met the requisite threshold for grant of stay under Order 42 of the Civil Procedure Rules. The 1<sup>st</sup> Respondent argued that the Applicant had not demonstrated that he would suffer any substantial loss if stay was not granted. The 1<sup>st</sup> Respondent contended that the orders issued by the Learned Chief Magistrate were not prejudicial to the Applicant as they sought to preserve the disputed property until the case was heard and determined. The order for payment of rent into a joint interest earning account, she averred was not prejudicial to any party as the rent would at the end be available to the party who would be decreed to be entitled to it. The 1<sup>st</sup> Respondent averred further that the Appellant had not approached the Court with clean hands as he had not complied with the orders of the Trial Court made on November 25, 2022 and for that reason does not deserve the orders he seeks. Further the 1<sup>st</sup> Respondent stated that the Applicant was misleading the Court that the Trial Court had ordered him to vacate the premises when the Court never made such an order.
4. The 1<sup>st</sup> Respondent further averred that the Appellant was being dishonest on the issue of jurisdiction since he had in 2020 filed a suit in the Chief Magistrate's Court Garissa *vide* Land Case No 3 of 2020 against his own siblings involving the same subject property seeking injunctive orders against them (copy of order issued by the SRM Garissa in the case on March 26, 2020 annexed as "HAOI"). The 1<sup>st</sup> Respondent contends that the Appellant cannot approbate and reprobate over the same issue of jurisdiction when it suits him. The 1<sup>st</sup> Respondent averred the issue of the two conflicting reports could only have been resolved if an independent valuer such as a Government valuer would have been tasked to undertake the valuation and was of the view that it would be inappropriate for this court to summon the valuers for cross-examination.
5. The 1<sup>st</sup> Respondent has disputed that the consent referred to by the Appellant before the Kadhi's Court in the Succession Cause was ever adopted and states that there was a pending objection before the Kadhi's Succession Case No 37 of 2020 by the Appellant.
6. I have carefully reviewed and considered the Notice of Motion application, the Affidavit in support and the Replying Affidavit filed in opposition to the application. I am mindful that the Ruling that has provoked the present Appeal and instant application was on an interlocutory application and that the main suit is awaiting determination on merits. One of the contentious issues raised both before the Learned Trial Magistrate and in the Memorandum of Appeal is whether the Learned Trial Magistrate



had jurisdiction to handle the matter having regard to his pecuniary jurisdiction. Before the Trial Magistrate were two conflicting valuation reports, one fronted by the Appellant dated January 24, 2022 which indicated the market value of the suit property to be Kshs 40,000,000/- and the other fronted by the Respondents dated July 14, 2022 indicating the market value of the property to be Kshs 18,200,000/-. The difference in value was clearly glaring. The Learned Trial Magistrate apparently without expressly pronouncing himself on the question whether he had the pecuniary jurisdiction to handle the matter considered the reliefs sought by the Respondents (Plaintiffs in the Lower Court) and observed as follows:

“Obviously, from the Plaintiffs pleadings, I do not see any of the prayers directly disposing of the suit property but they revolve on the issue of a share of the deceased estate which includes the income of the estate of the deceased. It is the view of this court that the issue of pecuniary jurisdiction is farfetched and lacks merit.”

7. There is no doubt that the suit sought the determination whether or not the Appellant held the suit property as a beneficiary and on trust for the Respondents and/or on behalf of the deceased estate the subject matter in the suit was the property and its value was relevant in determining if the Trial Court had jurisdiction. In my view the issue as to whether the Trial Magistrate had the pecuniary jurisdiction to handle the matter was not farfetched and was a real and relevant issue that the Learned Trial Magistrate needed to determine. The Magistrate properly appreciated that if he had no jurisdiction he could not deal with the matter but then without dealing with the issue of the conflicting valuation reports, side stepped the pecuniary jurisdiction issue stating that it was farfetched.
8. In the face of the two valuation reports, it was incumbent upon the Learned Trial Magistrate to deal with them and if he accepted either, to give reasons for doing so and rejecting the other. There is doubt as to whether the Lower Court had jurisdiction (pecuniary) to deal with issues surrounding the property the subject matter of the suit as illustrated by the two valuation reports proffered by the opposing sides. The two differing valuation reports appear to have been tailored to be specifically used by the parties to aid their arguments before the Court. In the case of the Appellant, that the Lower Court lacked the pecuniary jurisdiction to deal with the matter. It is instructive to note that the Respondent filed their suit on January 20, 2022 and that the Appellant’s valuation report was made on January 24, 2022 presumably after being served with the suit papers. The Respondents in apparent response to the Appellant’s valuation report, commissioned the preparation of their own report dated July 14, 2022. Considering the scenario, it is quite probable that the valuers were influenced by their respective clients in the preparation of the reports.
9. Given the apparent situation where the Lower Court may or may not have had the pecuniary jurisdiction to deal with the matter, this Court in exercise of its supervisory jurisdiction over the subordinate Court considers that, in order to put the issue of jurisdiction to rest, it would be in the interest of justice to intervene and order that the suit pending before the Lower Court be transferred to this Court for hearing and determination, and it is so ordered. The intervention is made pursuant to furthering the overriding objective of the *Environment and Land Court Act* as expressed under Section 3(1) and (2) of the Act reproduced hereunder.
  - 3(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.
  - (2) The Court shall in the discharge of its functions under this Act give effect to the principal objective in subsection (1).



- (3) The parties and their duly authorised representatives, as the case maybe, shall assist the Court to further the overriding objective and participate in the proceedings of the Court.

The Court having regard to the provisions of the Article 159(2)(d) of the Constitution and Section 19(1) of the Environment and Land Court Act is enjoined to render substantive justice without being unnecessarily shackled by technicalities of procedure. Article 159(2) (a)(b) and (d) of the Constitution provides:-

159(2) in exercising judicial authority, the Courts and Tribunals shall be guided by the following principles –

- a. Justice shall be done to all, irrespective of status;
- b. Justice shall not be delayed;
- c. ....
- d. Justice shall be administered without undue regard to procedural technicalities;

Section 19(1) of the ELC Act, 2011 provides as follows:-

19(1) In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.

10. The Court further having regard to Article 48 of the Constitution that guarantees every person's right to access Justice and Article 50(1) of the Constitution that entitles every person to a fair hearing, it would in my view be an affront to the administration of Justice if the parties dispute in the instant matter cannot be substantively adjudicated on account of a dispute whether or not the Court seized of the matter had jurisdiction. At least, it is not disputed that this court has unlimited jurisdiction as far as the value of the subject matter is concerned.
11. The Court having ordered the transfer of the suit pending before the subordinate Court for trial before the ELC Court, the Appeal lodged against the Ruling of the Lower Court becomes moot. The Appeal has been superceded by the transfer order of the Lower Court file to this Court for hearing and determination. In those circumstances, this court is obligated to appraise the application before the Lower Court which gave rise to the impugned Ruling, to affirm whether the Learned Trial Magistrate was justified to make the orders that he made.
12. In the application dated January 9, 2020 before the Lower Court the Applicants/Plaintiffs principally sought inter alia an order for deposit of rent collected from the suit premises into Court and for temporary injunction pending the hearing of the suit and the registration of an inhibition against the title. The Applicants case was that the Respondent had evicted them from the premises following the death of the deceased. It was their contention that the deceased was sustaining them out of the proceeds of the rental collections from the suit premises. The pleadings did not indicate there were rent paying tenants in the premises or the rent they were paying.
13. The prayer for accounting of rent was a prayer in the alternative in the plaint and was without prejudice to prayers (a) and (b) in the Plaint and was not a principal prayer and could only be available if the principal prayers were not granted. The prayers sought in the plaint could only crystallise at the conclusion of the suit in the event the Plaintiffs were successful. In my view the issue whether the Defendant held the suit premises in trust for the Plaintiffs can only be established by way of evidence at the trial. It is not disputed that indeed the deceased had transferred the suit property to the Defendant



long before he died. The issue for determination is whether he intended that the Defendant was to hold the property as a trustee. That can only be established through evidence.

14. Given the circumstances, the court is of the view that the order that would have been appropriate to grant is one preserving the suit property until the suit was heard and determined. In that regard the Court vacates the orders issued by the Learned Trial Magistrate on November 25, 2022 and in place thereof the Court makes the following orders:-
  1. That the parties shall maintain and observe the prevailing status quo in regard to land parcel Garissa Town Block 1/81 and in particular the Defendant shall not sell, transfer, alienate and/or charge the property pending the hearing and determination of the suit.
  2. That Garissa CM's Court ELC No E001 of 2022 is hereby ordered transferred to the ELC for hearing and determination.
  3. The transferred suit under (2) above to be given a fresh ELC number and the parties to be notified.
  4. Matter to be mentioned on April 26, 2023 at Garissa ELC for pre-trial directions.

**RULING DATED, SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF MARCH 2023.**

**JOHN M MUTUNGI**

**ELC- JUDGE**

