



REPUBLIC OF KENYA



In re Estate of Beatrice Muthoni Njiru (Deceased) (Succession Cause E018 of 2021) [2023] KEHC 269 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEHC 269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE E018 OF 2021
LM NJUGUNA, J
JANUARY 25, 2023**

IN THE MATTER OF THE ESTATE OF BEATRICE MUTHONI NJIRU (DECEASED)

IN THE MATTER OF

MOSES NJIRU APPLICANT

RULING

1. The applicant herein moved this court vide an application dated September 12, 2022 and wherein he sought for orders that:
 - i. This Honorable court direct the Land Registrar Embu to dispense with the production of the original title deeds for Land Parcel Gatari/Nembure/10344, Gatari/Nembure/ 8015, Gatari/Nembure/2446, Gatari/Nembure/5691 and Embu Municipality Plot No 1263.
 - ii. Costs of the application be provided for.
2. The application herein brought under Rule 73 of P&A Rules, is supported by the affidavit sworn by the applicant on September 12, 2022.
3. The applicant's case is that the deceased herein was the custodian of the title deeds for Land Parcels Gatari/Nembure/ 10344, Gatari/Nembure/8015, Gatari/Nembure/2446 Gatari/Nembure/5691 and Embu Municipality Plot No 1263. That he has searched for the said title deeds at every possible places, which efforts have proved futile and as such, he believes that the said titles are lost and cannot be traced. This court has therefore been urged to allow the application as prayed.
4. I have perused the application herein and I form the view that this court has been called upon to determine whether the orders sought for herein can be granted.
5. I have considered the application together with the affidavit filed in support thereof. As I have stated earlier, the application has been brought under Rule 73 of *P&A Rules*.



6. Rule 73 of *Probate and Administration Rules* provides that:

“73 Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
7. Under the said Rule, can this court issue the orders herein given that the process of succession is complete and now what remains is transmission?
8. In the case of *Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru*, Nairobi ELC suit No (2013) eKLR, the court was of the view that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the *Constitution* and the High Court as the Succession Court under section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.
9. I hold the view that this matter touches on the jurisdiction of the Environment and Land Court under Article 162 for the reason that, Section 31 of the *Land Registration Act, 2012* (“the Act”) provides that unless the Land Registrar dispenses with the production of a certificate of title or a certificate of lease, the same must be produced during the registration of any dealing with the land or lease to which it relates.
10. Section 33 of the *Act* on the other hand deals with the procedure for replacement of lost or destroyed certificates of title and registers of land. It provides that, in case of loss or destruction of a certificate of title or certificate of lease, an application for replacement is to be made to the Land Registrar by the proprietor of the land or lease accompanied by evidence of such loss or destruction. If the Land Registrar is satisfied with the evidence of such loss or destruction, he shall issue a replacement thereof after expiry of 60 days of publication of the application in the Gazette and in any two local newspapers of nationwide circulation.
11. There is no provision in either Sections 31 or 33 of the *Act* allowing the court to intervene in the exercise by the Land Registrar’s powers under those sections of the Act.
12. Section 86 of the *Land Registration Act* donates authority to the court under article 162 of the *constitution* to review the exercise by the Land Registrar of the powers conferred upon him under the Act. Section 86(1) of the *Act* gives the court power to review decisions made by the Land Registrar in exercise of any power or in the performance of any duty conferred or imposed on the Land Registrar by the Act on an application made by an aggrieved party.
13. Section 31(1) of the Act allows the Land Registrar to dispense with the production of a certificate of title to land or lease during the registration of any dealing with the land or lease. The application for such dispensation should be made to the Land Registrar who shall determine whether to allow it or not. The court can intervene in the matter under Section 86(1) of the *Act* in case a party is aggrieved by the decision of the Land Registrar on the issue as already explained above.
14. A perusal of the record before me shows that there is no evidence that an application for dispensation with the production of the certificate of title of the land parcels herein had been made to the Land Registrar before this application was filed.
15. As I have stated earlier, section 33 of the Act provides for the procedure for replacement of a lost or destroyed certificate of title or lease. The Act has not given the court any power to direct the Land Registrar to dispense with any of the steps set out in the said section which are to be followed before



a lost or destroyed title can be replaced. In my view, the said steps are intended to protect the land registration system and sanctity of title. They are intended to prevent fraud and other illegal dealings with land.

16. In reference to the matter herein, the question that I ask myself is whether this court is possessed with the jurisdiction to give such kind of orders?
17. It is important to note that, with the enactment of the *Environment and Land Court Act* of 2012, the jurisdiction to determine disputes relating to ownership and use of land is bestowed on the Environment and Land Court. It is my considered view, as such, that issues arising out of the instant application are not within the jurisdiction of this Honourable Court. [See the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No 19 of 2018- paragraph 40).

This is for the reason that 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. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing as jurisdiction must be acquired before a case can be heard.

[See the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR].

18. Similarly, in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where the Supreme Court held as hereunder;

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

[Also see Articles 165 (5) and 162 (2) of the Constitution; and Section 13 of the *Environment and Land Court Act*].

19. From a reading of the above Sections/ Articles, it is clear that the Constitution intended to create special courts with special jurisdiction in land matters. That jurisdiction is not therefore donated to the High Court and as such, this court humbly downs its tools.
20. In the end, the application is hereby struck out.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JANUARY, 2023.

L. NJUGUNA

JUDGE

.....**for the Applicant**

