



**Bowen & another v Bowen (Civil Appeal 5 of 2020)
[2023] KEHC 1114 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL 5 OF 2020
HK CHEMITEI, J
FEBRUARY 22, 2023**

BETWEEN

FREDRICK KIPKEMOI BOWEN 1ST APPELLANT

JUDY JEBET CHERUIYOT 2ND APPELLANT

AND

HENRY BOWEN RESPONDENT

*(Being An Appeal from the Judgement and Decree of Hon. J.N. Nthuku
(SRM) Dated 14. January, 2020 in Ravine Civil Case No. 22 of 2012)*

JUDGMENT

1. The late Chemonget Bowen died intestate on 30th October 1979 leaving behind a widow Rael Tungo Bowen and 7 children and several properties including land parcel number Lembus /Torongo/409. The widow thereafter petitioned for letters of administration which were granted and confirmed on 5th April 2018.
2. The respondent, a brother to the deceased, filed objection proceedings arguing that the suit parcel of land although registered in deceased name was done so vide the consent of their late father Kibowen Arap Tek. The deceased was therefore holding the land in trust for him and his other siblings who were still young at the time the land was undergoing registration.
3. The appellants filed their response objecting to the objection arguing that the deceased was the sole registered owner of the land and the objectors claim was baseless and ought to be disallowed.
4. The matter proceeded by way of viva voce evidence where all the parties called their respective witnesses. When concluded the trial court found in favour of the respondent and directed that the deceased was holding the suit land in trust for the respondent as well as his other sibling the late Allan and that the land be divided into three portions respectively.



5. Aggrieved by the said decision the appellants filed this appeal citing several grounds as can be deduced from the Amended Memorandum of Appeal. It must be noted that in the cause of time the widow passed on and the appellants sought letters of administration on behalf of her estate and thus be able to proceed with this appeal.
6. When the matter came up for directions the court directed the same to be disposed by way of written submissions.
7. Having perused the proceedings herein it is noted that the issue bedevilling the parties before the trial court was the ownership of the land parcel number Lembus /Torongo /409. The evidence that was presented before the trial court was basically whether the deceased held the same in trust for himself and his brothers as allegedly directed by their father.
8. Looking comprehensively at the proceedings, the pleadings and the evidence so presented, this court finds that the court exceeded its jurisdiction. What was before it was purely succession proceedings and not a determination on the ownership of the parcel of land.
9. The provisions and objects of the Succession Act Chapter 160 Laws of Kenya are succinct and clear. The same states as hereunder;

“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto”.

10. The proper court in my view was the Environment and Land Court, whether at the lower court or the high court depending on the geographical and pecuniary jurisdiction. Article 162 (2) (b) of *the Constitution* establishes the said court and its functions and responsibilities. It states that;
 - (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”
11. At the same time Section 13 of the *Environment and Land Court Act* states as follows;

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

 - (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 environmental 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, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012, Sch.”
12. Taking the above portions of the law cumulatively it is apparent that the succession court is not seized to determine any dispute relating to the question of title and or ownership of land. Factually and legally the Succession Act will only deal with undisputed testate and intestate matters. Anything which will compel the court to receive further evidence over land will have to be subjected to a proper court which in this case is the court dealing with land matters.
13. If parliament wanted to mix the two jurisdictions, then it would have done so clearly. For now, suffice to state that the contenting parties must subject themselves to the land court and thereafter depending on its findings apply the judgement in transferring by way of transmission the suit property to the deceased’s beneficiaries.
14. Consequently, it will be superfluous for this court to determine this appeal with this issue of jurisdiction hanging on.
15. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows
- ‘I think that it is reasonably plain that 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 right away on the material before it. 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. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’
16. In view of the above observations it is apparent that although the parties did not raise the question of jurisdiction at the trial court or this court, it cannot be ignored and as found above the same is everything. This court to the extent of the above authority down its tools in this appeal as far as jurisdiction is concerned.
17. At the same time, this court will not venture into the merit or otherwise of the appeal for the simple fact that the same shall be determine at a proper court and any iota of determination may seem to be taking sites. Let the intended court make its independent decision. In any case this court is not clothed with the relevant jurisdiction.



18. In the premises, the appeal herein is dismissed with no orders as to costs. The trial courts judgement dated 14th January 2020 is as well set aside. The parties be at liberty to seek legal redress at the Environment and Land Court appropriately. Land parcel number Lembus /Torongo /409 shall revert to the name of the late Chemonget Bowen pending further determination as directed above.

DATED SIGNED AND DELIVERED AT KABARNET VIDE VIDEO LINK THIS 22ND DAY OF FEBRUARY 2023.

H. K. CHEMITEL.

JUDGE

