



Awuor v Deputy County Commissioner, Butala Sub County of Busia County in her Capacity as the Chairperson of Butula Divisional Land Control Board & 4 others; Ogutu (Interested Party) (Constitutional Petition 1 of 2023) [2023] KEHC 25758 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CONSTITUTIONAL PETITION 1 OF 2023
WM MUSYOKA, J
NOVEMBER 24, 2023**

BETWEEN

ALICE AKINYI AWUOR PETITIONER

AND

**DEPUTY COUNTY COMMISSIONER, BUTALA SUB COUNTY OF BUSIA
COUNTY IN HER CAPACITY AS THE CHAIRPERSON OF BUTULA
DIVISIONAL LAND CONTROL BOARD 1ST RESPONDENT
LAND CONTROL BOARD BUTULA DIVISIONAL AREA ... 2ND RESPONDENT
CABINET SECRETARY MINISTRY OF INTERIOR 3RD RESPONDENT
CABINET SECRETARY MINISTRY OF LAND 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT**

AND

PETER OUMA OGUTU INTERESTED PARTY

JUDGMENT

1. The background is that the petitioner had initiated succession proceedings, in Busia CMCSC No. E040 of 2021, in the estate of the late Mukabi Akula, the deceased. The petitioner was a daughter of a brother of the deceased, known as Remujus Awuor Akula, who is also deceased. The deceased was the father of the interested party. The deceased and the father of the petitioner had both resided on and occupied Marachi/Bumala/708. The petitioner was forced out of the land, by the interested party, after the deceased and her father died. The deceased was the registered proprietor of Marachi/Bumala/708. The grant made to the petitioner was confirmed, and a certificate of confirmation of grant was issued. The petitioner, in an effort to have the property transmitted as per the certificate of grant, approached



- the 2nd respondent, and obtained consent for the transmission of the land. However, the 1st respondent refused or declined or neglected to sign the consent form, and she was asked for a bribe, and pressure was brought upon her to reach agreement with the interested party before the consent form could be signed.
2. The complaint is that the acts of the 1st respondent, of not signing and releasing the consent to her, was discriminatory, and denied her her right to own property in Kenya. It is averred that the refusal is driven by ulterior motive or purpose, calculated to deny her her rights, and to defeat the transmission of the property in accordance with succession law. It is argued that there is no provision, in section 9 of the [Land Control Act](#), Cap 302, Laws of Kenya, which gives discretion to the 1st respondent, as chairperson of the Land Control Board, to decline to sign the document after the board has already given its approval. It is further averred that the 1st respondent had acted in bad faith.
 3. The petitioner seeks an interpretation that the matter was properly before the High Court, as the provisional land control appeal board did not exist, to review the decision of the local land control board, and, therefore, she had exhausted the mechanisms provided for under section 11 of the [Land Control Act](#). She also seeks declarations that the refusal to sign the consent form was driven by ulterior motives, and was calculated to defeat the transmission process and to deny her rights to own property, and that the said denial was unconstitutional. She also asks for a permanent injunction and compensation.
 4. Several documents are attached to the affidavits lodged in the cause, with the petition and the Motion dated 24th March 2023. There is a certificate of confirmation of grant, dated 30th August 2022, issued in Busia CMCS No. E040 of 2021, in the estate of the deceased herein. There is a limited grant ad litem, made on 1st April 2021, to the petitioner, in Busia CMCS No. E40 of 2020, in the matter of the estate of her father, Remujus Awuori Akula. There is a citation order, made in Busia CMC Citation Cause No. 85 of 2019, on 3rd November 2020, and issued on 23rd November 2020. There is a grant of letters of administration intestate, made on 13th August 2021, and issued on some unclear date in September 2021, in Busia CMCS No. E040 of 2021, in the estate of the deceased herein. There are certificates of death for Mukabi Akula, the deceased herein, and Remujus Awuori Akula, the father of the petitioner. There is an application under the [Land Control Act](#), which is undated, for consent of the 2nd respondent, in respect of Marachi/Elukhari/708. There are copies of certificates of official searches, and a mutation form for Marachi/Elukhari/708. There is a court order, made in Busia CMCS No E40 of 2020, severing the joint ownership of Marachi/Elukhari/708, and directing the court administrator to sign relevant transfer documents for the petitioner on behalf of the interested party, and others named in that order. Finally, there are complaint letters addressed to the 3rd and 4th respondents.
 5. The respondents were served. They entered appearance, on 25th April 2023, through a memorandum filed by the 5th respondent, dated 12th April 2023. The memorandum was filed simultaneously with a notice of preliminary objection, dated 19th April 2023, arguing 2 points. One, that the High Court lacked jurisdiction in the matter, on account of Article 162(2)(a)(b) of [the Constitution](#), and section 13 of the Environment and [Land Act](#), No. 9 of 2011, which has reserved jurisdiction over disputes relating to title to land, and its use and occupation, for the Environment and Land Court. Two, the affidavits sworn by the petitioner, in support of the petition and the Motion, contravened sections 5 and 7 of the [Oaths and Statutory Declarations Act](#), Cap 15, Laws of Kenya.
 6. The 1st respondent, Pamela A. Otieno, the current Chairperson of the 2nd respondent, swore an affidavit on 25th April 2023. She concedes that the petitioner had approached the 2nd respondent in 2022, seeking a consent for transmission of Marachi/Elukhari/708. That application was rejected at first instance,



for lack of a certificate of official search. The petitioner then reapplied, after obtaining the certificate of official search, but the application was rejected as it was not signed by the other beneficiaries. The 2nd respondent advised the petitioner to get the signatures of the other beneficiaries, or, as alternative, a court order allowing the executive officer of the court to sign on behalf of the other beneficiaries, or to apply to the Land Registrar to dispense with the consent of the other beneficiaries, under section 94 of the [Land Registration Act](#), No. 3 of 2012. She asserts that there was no violation of rights, and the petition was in abuse of court process.

7. The petitioner reacted to that reply, by her further affidavit, sworn on 16th May 2023, and filed herein on even date. She avers that her application for partition had initially been approved by the 2nd respondent on 13th October 2022, but it was later cancelled, after she was unable to raise the bribe money sought from her. She further states that the same was later reissued, but the 1st respondent refused to release it after the other beneficiaries expressed disagreement with the certificate of confirmation of grant. She asserts that she is the administratrix or personal representative of the deceased, and she was obliged to distribute the assets, and complete administration, and produce in court a full and accurate account of the completed administration. She said that she had approached the land registrar, on the matter of the executive officer of the court signing the forms on behalf of the beneficiaries, but the land registrar had insisted that the consent of the 2nd respondent was mandatory.
8. On the same date, the petitioner also filed grounds of opposition to the preliminary objection. That was quite unnecessary. Preliminary objections are not challenged, by way of further filings. Parties simply submit, either orally or in writing, to the points of law raised. She argues that the issue is around transmission of the estate, and the High Court has jurisdiction by dint of Article 165(3)(e) of [the Constitution](#) and section 47 of the [Law of Succession Act](#). She further argues that where there is obstruction of transmission, section 6(3) of the [Land Control Act](#) applied, and the High Court has jurisdiction. She further argues that section 83(f)(g)(i) of the [Law of Succession Act](#) and section 6(3) of the [Land Control Act](#) give the power to address such obstruction to the High Court. She argues that Article 162(2)(b) of [the Constitution](#) and section 13 of the [Environment and Land Court Act](#) do not confer jurisdiction on the Environment and Land Court to determine obstruction to transmission. She asserts that she is the administratrix of the estate, and she got consent of the court to distribute, and the Environment and Land Court had no jurisdiction. She further argues that the High Court has jurisdiction to grant injunctive and compensatory relief under Article 23(3)(b)(e) of [the Constitution](#), section 45(1)(2)(b), Rule 63 of the Probate and Administration Rules, and Order 40 Rules 1(b) and 2(1) of the Civil Procedure Rules.
9. It was directed, on 20th July 2023, that the petition and the Motion be canvassed by way of written submissions. Both sides have complied, by filing their respective written submissions.
10. Directions were given, on 10th May 2022, for canvassing of the petition by way of oral evidence, based on affidavits.
11. The petitioner submits that the 1st respondent unreasonably declined to issue to her the consent of the 2nd respondent. On jurisdiction, she submits that she claims no land from the respondents, and her case is just about the unreasonable withholding of the consent. She submits that the High Court has jurisdiction, by dint of Article 165(3)(b)(d)(ii)(e) of [the Constitution](#), section 47 of the [Law of Succession Act](#), and Rule 63 of the Probate and Administration Rules. The respondents have only submitted on jurisdiction, and have cited Article 162(2)(b) of [the Constitution](#) and section 13 of the [Environment and Land Court Act](#), to assert that the High Court has no jurisdiction.
12. The preliminary objection raises an issue of jurisdiction. That should be addressed first, for without jurisdiction, the court would act in vain. The background is that the petitioner is the administratrix



of the subject estate. She obtained confirmation of her grant, paving way for distribution of the estate. After confirmation, the next step is that of transmission of the property in accordance with the confirmation orders. Confirmation of grant is a process which is provided for by the Law of Succession Act, and transmission is a process provided for under land legislation, that is to say the Land Registration Act and the Land Act, No. 6 of 2012. The Law of Succession Act does not provide for transmission at all. In fact, the word “transmission” is not used in any of the provisions of the Law of Succession Act. It is provided for in sections 60 to 62 of the Land Registration Act and sections 49 to 51 of the Land Act. Significantly, both the Land Registration Act and the Land Act carry provisions which oust the jurisdiction of the High Court. These provisions are in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

13. The 2 sets of provisions on transmission provide as follows:

“Transmission on death of joint proprietor.

60. If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.

Transmission on death of a sole proprietor or proprietor in common.

61.

- (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of [deceased]” or “as administrator of the estate of [deceased]”, as the case may be.
- (2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—
 - (a) any transfer by the personal representative; and
 - (b) any surrender of a lease or discharge of a charge by the personal representative.
- (3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

Effect of transmission on death.

62.

- (1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of



the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

- (2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.”

“49. Transmission on death of joint proprietor

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.

50. Transmission on death of a sole proprietor or proprietor in common

- (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of () [deceased]” or “as administrator of the estate of () [deceased]”, as the case may be.
- (2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—
 - (a) any transfer by the personal representative; and
 - (b) any surrender of a lease or discharge of a charge by the personal representative.
- (3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

51. Effect of transmission on death

- (1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose



of any dealing the person shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

- (2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor.”

14. The 2 batches of provisions on jurisdiction state as follows:

“Interpretation.

2. In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the [Environment and Land Court Act](#), 2011, No. 19 of 2011: ...

Jurisdiction of court.

101. The Environment and Land Court established by the [Environment and Land Court Act](#), 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

2. Interpretation

In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the [Environment and Land Court Act](#), 2011 (No. 19 of 2011); ...

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the [Environment and Land Court Act](#) and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

15. Transmission is a process which concerns land, and it is provided for under land legislation, that is to say the [Land Registration Act](#) and the [Land Act](#). The effect of the provisions cited above is to oust the jurisdiction of the High Court, with respect to transmission, and any disputes, actions and proceedings concerning it ought to be placed before the court or courts envisaged under that legislation, which do not include the High Court. See *In re Estate of Festo Likhaya Shilesera (Deceased)* [2019] eKLR (Musyoka, J). One may wonder whether transmission is about title. Yes it is. It is about transmitting title from the dead to the living individuals named in the certificate of confirmation of grant. That squarely places it within the jurisdiction of the Environment and Land Court, and the empowered subordinate courts.

16. The petitioner has argued that she is the administratrix of the estate of the deceased, and the [Law of Succession Act](#), and the Rules made under it, empower her to distribute the assets and render an account of the completed administration. Her case is that that completion process includes transmission, and should be overseen by the High Court, which is the court, under section 47 for the purposes of succession. The petitioner is quite right. The High Court is “the court” for the purposes of the [Law of Succession Act](#), and the magistrate’s court only exercises jurisdiction upon delegation by the Chief Justice. However, the jurisdiction of the High Court is limited to making decisions on how the property is to be distributed. Once that decision is made, at confirmation, the process of implementing



it is outside the jurisdiction of the High Court, and the High Court cannot supervise it. The High Court is pretty much *functus officio*, after confirmation of grant, in terms of having no role whatsoever over transmission of the assets. See *Beatrice Wangui Kamau alias Beatrice Wangui Kagunda vs. John Kariuki Kamau & another* [2016] eKLR (Ombwayo, J), *In re Estate of Wangechi Wangombe* [2020] eKLR (Ngaah, J) and *In re Estate of Laban Mogire Magogo (Deceased)* [2020] eKLR (Ougo, J).

17. I reiterate, that transmission is not provided for nor governed by the [Law of Succession Act](#), and for that reason alone, the High Court has no jurisdiction over it. See *In re Estate of Daniel Khasievera Anusu (Deceased)* [2022] eKLR (Musyoka, J). It is provided for and governed by land legislation, the [Land Registration Act](#) and the [Land Act](#). It is the courts vested with jurisdiction over land disputes under that legislation, who would have jurisdiction over it. Those courts do not include the High Court. Therefore, going by that, the High Court would have no jurisdiction to superintend over transmission of assets, and to resolve any disputes or questions arising over that process. Once transmission is done or completed, under the land legislation, and after any arising disputes and questions are resolved by the courts with jurisdiction, under the land legislation, the administratrix would be expected, under section 83 of the [Law of Succession Act](#), to come back to the High Court, to report that she had completed administration.
18. From the above discussion, it ought to be clear that the High Court has no jurisdiction to handle disputes around transmission of assets after confirmation of the grant. But what happens where the issue arising at transmission is framed as a constitutional issue? The Court of Appeal has, in recent decisions, held that the courts envisaged in Article 162(2) of [the Constitution](#), have jurisdiction to determine constitutional questions, even in a constitutional petition, so long as they fall within the matters that are subject to the jurisdiction conferred on those courts by Article 162(2) of [the Constitution](#) and the legislation establishing those courts. See *Nakuru County Assembly vs. Kenneth Odongo & others Nakuru CACA No. E136 of 2022 (Sichale, Ochieng & Achode, JJA)*(unreported), *Public Service Commission & 4 others vs. Cheruiyot & 20 others* [2022] KECA 15 (KLR)(Musinga, W. Karanja & Murgor, JJA) and *National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 others* [2023] KECA 80 (KLR)(Okwengu, Warsame & Mativo, JJ).
19. The court, in this case is the Environment and Land Court, the jurisdiction it exercises is that conferred on that court, by Article 162(2) of [the Constitution](#) and section 13 of the Environment and Land Court, around title to land, and use or occupation of that land, outside of which the Environment and Land Court would have no jurisdiction to entertain such constitutional petitions or questions. The issue in this matter arises within the context of title to land, to the extent that transmission, under the [Land Registration Act](#) and the [Land Act](#), is about transfer of title from the dead owner to his successors. The constitutional petition herein is not brought in public interest, by a person who is not directly affected. Rather, the petitioner is the administratrix of the estate, she is the one seeking to have transmission done, in accordance with confirmation orders that were made to her. It is about transmission of title in Marachi/Elukhari/708. The petition should have been lodged at the court with jurisdiction, by dint of the [Land Registration Act](#) and the [Land Act](#).
20. The petitioner has largely hinged her case on the [Land Control Act](#), and argues that, under that legislation, the “court” would be the High Court. The [Land Control Act](#) is the relevant legislation for the purposes of these proceedings, for the dispute is about denial of a consent under that legislation. The transactions controlled under that legislation all relate to title to land. Under section 6(3)(a) of the [Land Control Act](#), transmission of land by will or in intestacy, which could result in division of the land into or more parcels, to be held under separate titles, would be among the transactions that are controlled under the Act, and which would require consent of the 2nd respondent. Under section 8 of the [Land Control Act](#), the High Court is granted discretion to extend the period within which consent



may be sought. That would suggest that the High Court would have jurisdiction to deal with matters arising under the Land Control Act. However, the Land Control Act predates the Constitution of Kenya, 2010, and the Land Registration Act and the Land Act. It commenced in 1967. It is a well-established principle of law that in the event of a conflict in the provisions of 2 statutes, the latest prevails. Section 8 of the Land Control Act is superseded by the Constitution of Kenya, 2010, and the Land Registration Act and the Land Act, so that where a question arises, whether under section 8 or any other, relating to matters the subject of the Land Control Act, the court with jurisdiction, would not be the High Court, but the Environment and Land Court.

21. I believe that I have said enough, to demonstrate that I have no jurisdiction, as a Judge of the High Court, to determine the dispute that the petitioner has placed before me.
22. Even if there was jurisdiction, I doubt whether the issue arising amounted to a constitutional question, that could only be addressed through a constitutional petition. From the affidavit of the 1st respondent, it would seem that the petitioner had been advised of the options open to her. She exercised some of the options, for she got an order of the court, for the executive officer of the court to execute certain documents on behalf of recalcitrant beneficiaries, but she has not stated what she did with that order. She does not disclose whether she presented the order to the 1st and 2nd respondents, and with what result. She has also not deposed whether she approached the land registrar, to get his consent for the waiver under section 94 of the Land Registration Act.
23. The other objection is technical, on the affidavits sworn in support of the petition and the Motion. The respondents have not submitted on what the issue with the said affidavits is. It is argued that the affidavits contravene sections 5 and 7 of the Oaths and Statutory Declarations Act. Section 5 is about the “Particulars to be stated in the jurat and attestation clause,” and it is provided that

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

I looked at both affidavits. They indicate Busia as the place where the affidavit was made, by a commissioner for oaths, whose address is given as PO Box 1104 Busia. The date is also given, the 24th March 2023. I see no non-compliance with section 5. Section 7 criminalizes the conduct of unlawfully acting as a commissioner for oaths. There is no allegation that the commissioner for oaths, Maxwell Okeyo Ochiel, unlawfully acted as a commissioner for oaths, when in fact he had not been so appointed, and no material was placed on record in that respect.

24. As I have come to the finding and holding that I have no jurisdiction over the petition herein, I should not say more, as I may prejudice what the petitioner may choose to do hereafter. I shall strike the petition out, as I hereby do. Each party shall bear its own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA THIS 24TH DAY OF NOVEMBER 2023

W. MUSYOKA

JUDGE

Alice Akinyi Awuor, the petitioner, in person.

Advocates: Mr. Juma, instructed by the Attorney - General, for the respondents.

