



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 174 OF 1999

IN THE MATTER OF THE ESTATE OF KINOBU MUKIRIA (DECEASED)

PETERSON KABUITU MWANGI.....APPLICANT

VERSUS

CHRISTOPHER MUKUNGA MUNYI.....1ST PROTESTOR

JOSEPHAT MUTAHI RICHARD.....2ND PROTESTOR

BONIFACE MWANGI MIANO.....3RD PROTESTOR

JUDGEMENT

Brief facts

1. This is a judgment for protests of the 1st protestor on one hand and the 2nd and 3rd protestor on the other hand filed on 16/05/2019 and on 31/12/2019 respectively.
2. The protests were consolidated and heard together by way of viva voce evidence based on the affidavits filed by the parties. Submissions to support the arguments of the parties were filed.

The 1st Protestor's Case

3. The 1st protestor objects to the mode of distribution as outlined by the applicant in his summons for confirmation dated 18th January 2019. The 1st protestor contends that he was a joint administrator in this cause with the applicant's father Elias Mangi Kabuitu who later passed on. It is the 1st protestor's case that he entered into a sale agreement in 1978, with the deceased to buy a portion of 3 acres out of Land Parcel No KIINE/RUIRU/646 belonging to the deceased measuring 6 acres. The agreed consideration was Kshs. 18,000/- and the deceased acknowledged part payment of Kshs. 7,000/- upon execution of the agreement before Ghadialy & Company Advocates. The balance of Kshs. 11,000/- was to be paid upon delivery of duly executed transfers. Upon the death of the deceased, the 1st protestor states that he paid the petitioner the balance.
4. Upon execution of the agreement, the 1st protestor was put in possession and has been in occupation on the property for over 4 decades without any interruptions. He further contends that he extensively developed the land by building structures and carried out farming on the land. The land is currently

valued at Kshs. 4,800,000/- and together with the developments it is valued at Kshs. 5,060,000/-.

5. The 1st protestor states that on 18th November 2008, he together with the applicant were issued jointly with letters of administration intestate. However the grant was revoked and a new grant was issued between the 1st protestor and the applicant but the applicant in his summons for confirmation left him out of the distribution of the estate Kiine/Ruiru/646. The 1st protestor contends that pursuant to **Section 30(g) of the Registered Land Act** he has an overriding interest in the estate property which cannot be defeated by any law. As such, the 1st protestor urges the court to consider his beneficial interest by virtue of being a purchaser and having resided on the suit property for over 4 decades. He states that the remaining three (3) acres after he gets his share ought to be distributed amongst the beneficiaries of the estate including the applicant.

6. On re-examination the 1st protestor stated that one Miano Kaburugo bought the remaining 3 acres of the deceased's land and built a home on the property and that his sons are the 2nd and 3rd protestors in the instant case.

The 2nd and 3rd Protestors' Case

7. PW2, the 2nd protestor testified that he knew the deceased and the late Miano Kaburungo who purchased 3 acres from the deceased. He further testified that Mr. Miano built a home on the suit property and his family has been in occupation of the land and that the 3rd protestor has also built his home on the said land Kiine/Ruiru/646.

8. The 2nd & 3rd protestors, PW3 and PW4, state that they are the sons of Miano Kaburungo. Their father purchased 3 acres of land out of Land Parcel No. KIINE/RUIRU/646 from the deceased. The said suit property was demarcated into two portions plot 798 and 799 measuring about 3 acres each. The 2nd & 3rd protestors state that they have been in continuous and uninterrupted occupation of the land since 1966 to date. They further state that they have buried their father and step mother on the property.

9. The 2nd & 3rd protestors contend that they know the 1st protestor as he has been in occupation of the parcel neighbouring theirs still on the land of the deceased and that neither the applicant nor his dependants have ever lived on the suit property.

10. The 2nd & 3rd protestors state that their father and the deceased had the land surveyed and beacons erected before the land registrar and the Chief Mururiini where the deceased affixed his thumb print on the identity certificate as the seller and their father as the buyer. Further, their father paid for the surveyor fees, mutation and registration fees whereas the deceased paid for the land registration and consent fees.

11. It is the 2nd & 3rd protestors' case that the petition for letters of administration dated 16th April 1999 filed by Elias Mwangi Kinogu admits that his father's estate owed their stepmother, Esther Gathoni Miano Kshs. 4,500/- a refund of the purchase price of the sale of the 3 acres. The 2nd & 3rd protestors state that they have an overriding interest pursuant to **Section 30(g) of the Registered Land Act** purchasers and or as a result of adverse possession. Considering the sale transaction took place in 1966 and the deceased passed away in 1980, the protestors state that the deceased had over 14 years to transfer the land to their father or evict him from the land if his occupation was illegal or unlawful. Further, the 2nd & 3rd protestors' state that the applicant has never evicted them from the said property nor did he prevent their parents from been buried on the said property.

The Petitioner/Applicant's Case

12. The applicant testified that he is a grandson to the deceased that his father was Elias Mwangi Kinogu, the original petitioner of the estate and a son to the deceased.

13. The applicant stated that in 1999 his father filed the instant succession cause but the 1st protestor objected to the mode of distribution. The court then directed that the 1st protestor pursue his claim in the Environment and Lands Court. The applicant took over this cause from his deceased father and the court directed that the land be distributed amongst the deceased's children. In 2019, the 1st protestor filed his protest and the court set aside the proceedings and thereafter the 2nd & 3rd protestors filed their protests.

14. It is the applicant's case that the protestors never purchased any land from the deceased. The 1st protestor occupied the land in 2018 and the applicant further states that his cousin Lydia Wanjiku is the one residing on the portion claimed by the 2nd & 3rd protestors. As such, the applicant urges the court to distribute the land to the children of the deceased and their families. He further stated on cross examination that his father had two sisters who gave him their consent to inherit solely from their father having forfeited their interests in the estate.

15. On cross examination, the applicant stated that he knew Esther Mwangi, the step mother of the 2nd & 3rd protestors and that she used to live with a neighbour called Mwangi Karanja but did not occupy deceased's land.

16. Parties filed submissions to support their cases.

The 1st Protestor's Submissions

17. The 1st protestor reiterates what he has averred in his affidavit and oral evidence and further relies on the cases of **Nyeri Civil Appeal No 26 of 2011 Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri** and **Eldoret Civil Appeal No. 51 of 2015 Willy Kimutai Kitlit vs Michael Kibet** to deal with the issue of consent pursuant to the Land Control Act in response to the applicant's query over obtaining consent. The 1st protestor further submitted that though he is entitled to the valuation of the improvements he is interested to his entitlement of the 3 acres that he purchased.

The 2nd & 3rd Protestors' Submissions

18. The 2nd & 3rd protestors rely on **Section 47 of the Law of Succession Act** and the case of **In the Estate of Andrea Ooko Tianga (Deceased) [2019] eKLR** and submit that this court has jurisdiction to determine the dispute herein. The 2nd & 3rd protestors argue that the claim by the protestors over the suit property is so closely linked to the succession cause that it is impossible to separate the succession aspect and the land ownership aspect. To support their contention, the protestors rely on the case of **Re Estate of Teresa Wangui Muruga (Deceased) [2021] eKLR.**

19. The 2nd & 3rd protestors rely on the case of **Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR** and submit that there is a valid sale agreement between the deceased and their father which sale is supported by the law of contract. Further, the protestors argue that they are entitled to the land by virtue of adverse possession as they have been in a continuous and uninterrupted possession from 1966 till date. As such, they have an equitable and overriding interest in the land and rely on the case of **Mwangi & Another vs Mwangi (1986) KLR 328** to support their contention. The 2nd & 3rd protestors thus pray that their protest be allowed in entirety and that they be determined as the owners of the 3 acres of the suit property.

The Petitioner/Applicant's Submissions

20. The applicant submits that the protestors did not produce any written document to prove that there was any sale agreement that was executed by the deceased. **Section 3(3) of the Law of Contract** requires that a suit based on contract of disposition of interest in land ought to be entertained only if the contract is in writing, executed by the parties and attested. The applicant submits that the 1st protestor alleged that he entered into a sale agreement with the deceased on 4/5/1978 for the purchase of 3 acres out of the

deceased's estate. Assuming that there was such a sale, the applicant contends that the sale was subject to the Land Control Board Act which requires that consent should always be applied and obtained for any transaction relating to agricultural land. Thus in 1978, the consent was supposed to have been obtained within three months from the date of the sale agreement. The applicant further contends that the 1st protestor did not establish whether the application for consent was ever made during the lifetime of the deceased. As no consent to sub-divide and transfer the portion alleged to, the applicant submits that the sale agreement became null and void in all purposes.

21. The applicant further submits that the issue of sale of any portion of the estate of the deceased cannot be entertained or determined through succession proceedings and can only be dealt with by the Environment and Land Court. As such, the protestors ought to file their claim in the Environment and Land Court.

22. Similarly, the applicant submits that the 2nd & 3rd protestors' claim is null and void as they did not obtain any consent to sub-divide and transfer the sold portion of the suit property. Further the applicant submits that although the protestors have claimed the suit property by way of adverse possession, such a claim cannot be entertained in succession proceedings but only in the Environment and Land Court. As such, the applicant submits that the protestors' protests be dismissed with costs.

Issues for determination

23. After careful analysis, the main issues for determination are:-

- a) Whether this Honourable Court has jurisdiction to hear and determine the issues raised herein;
- b) If so, the court determines whether the protestors are entitled to the shares claimed in the estate.

The Law

Whether this Honourable Court has jurisdiction to hear and determine the issues raised herein;

24. The locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows:-

"I think that 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 its stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

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25. Evidently, if this court finds it lacks jurisdiction, then there is no point of going to the merit of the protest.

26. A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011** stated thus:-

“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. This court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

27. **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;

28. 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).

29. Pursuant to **Article 162(2) of the Constitution**, the **Environment and Land Court Act 2011** was enacted and in **Section 13** it confers the Environment and Land Court with 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 plannings, 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, leases in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.

30. 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.

31. **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.

32. 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.”

33. Applying the above principles to the present case, it is evident that the bone of contention goes to the ownership of Land PARCEL No KIINE/RUIRU/646. The protestors all claim that they are purchasers for value, which sale took place before this succession cause was filed but the land was not transferred to them by the deceased in his lifetime. Furthermore, the 2nd & 3rd protestors have urged the court to find that since they have occupied the land since 1966 without any interruptions they are entitled to the land by way of adverse possession.

34. 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, land. It is also apparent that when a dispute regarding ownership in respect of the property of a deceased person arises, then the court can set aside the share in dispute to await the outcome of the resolution of the dispute from the court with jurisdiction. As such, the dispute as to ownership of land can only be determined by the Environment and Land Court. Once the ownership of the suit property is ascertained by the Environment and Land Court, the probate court may proceed to distribute the said property to the rightful dependants. Furthermore, the probate court cannot deal with issues of adverse possession which the 2nd & 3rd protestors claim as an alternative remedy. For such a claim of adverse possession, the claim must be taken to the right forum being the Environment and Land court. Notably, the 1st protestor attached sale agreements and an agreement acknowledging balance of the purchase price as his evidence to show that he bought the land from the deceased. The applicant however disputes the sale stating that the protestors did not obtain the requisite land consent pursuant to the Land Control Board Act. These issues cannot be resolved by this probate court.

35. The 1st protestor relies on the Court of Appeal case of **Macharia Mwangi Maina & 7 others Vs Davidson Mwangi Kagiri Civil Appeal No. 26 of 2011**. This was a case that was heard by the High Court before the Environment and Land court was established. On appeal, the court set aside the judgement of the High Court having found that the appellant had acquired a beneficial right of ownership by having been in possession of the property for a long time. The case before me is distinguishable from the said decision in that the High court had original jurisdiction in land matters before the Environment and Land Court was established. before me is a succession cause whose mandate is to distribute the estate of the deceased as opposed to ownership of land.

36. I have also perused the case relied on by the 2nd & 3rd protestors, **In the Matter of the Estate of Andrea Ooko Tianga [2019] eKLR** where the petitioners argue that if the issues to be determined are so intrinsically intertwined such that you cannot separate the succession matter from the environment matter, the succession court has jurisdiction to determine the matter. I have looked at the case and note that it is

not entirely comparable to the instant matter. In the said decision, the applicants had a decree from the Land Disputes Tribunal and what was pending was execution of the decree of the Chief Magistrate's Court orders which adopted the ruling of the Tribunal. This is not the case herein, whereby the ownership of the suit property has not been determined.

37. Consequently, I find that this court has no jurisdiction to determine the issues raised in the protests.

38. The protests of the 1st, 2nd and 3rd protestors are hereby struck out for being incompetent and improperly before the court.

39. In the interests of justice, I hereby stay these proceedings pending the filing of the protestors claim in the right court and determination of the same.

40. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 24TH DAY OF FEBRUARY, 2022.

F. MUCHEMI

JUDGE

Judgment delivered through videolink this 24th day of February, 2022