



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1904 OF 2010

IN THE MATTER OF THE ESTATE OF ROSEBELL WANGECHI GICHANGI (DECEASED)

DANSON GITHINJI MARINGA.....APPLICANT

VERSUS

ANDREW MBOGO KAMAU.....1ST RESPONDENT

DAVID NJOROGE WAKANA.....2ND RESPONDENT

ALICE WAITHERA NJUGUNA.....3RD RESPONDENT

THE LANDS REGISTRAR RUIRU.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated 5th May 2021.
2. The Applicant who is a beneficiary to estate of the Deceased DANSON GITHINJI MARINGA had filed a summons dated 21st March 2021 seeking *inter alia* the following orders:-

“(i) THAT this court be pleased to make a declaration that the transfer(s) of TITLE NO. RUIRU/KIU BLOCK 3/125 between the 1st, 2nd and 3rd Respondents without confirmation of Grant of the letters of Administration after the death of the deceased is intermeddling with the property of the deceased and therefore null and void.

(ii) THAT this Honourable court be pleased to rescind, recall, vary and/or annul any subsequent change of ownership after the deceased.

(iii) THAT this Honourable court be pleased to grant an order directing rectification of the register in respect of any transfer on TITLE NO. RUIRU/KIU BLOCK 3/125 restoring the same as wholly and solely owned by the deceased Rosebell Wangechi Gichangi and be transferred and/or distributed as per the confirmed grant of 16th June 2011.

(iv) THAT this Honourable court be pleased to make such other and/or further orders maybe just and expedient in the circumstances.”

3. Before the aforementioned summons could be heard the LAND REGISTRAR RUIRU (the 4th Respondent) and the HON ATTORNEY-GENERAL (the 5th Respondent) filed this Notice of Preliminary objection premised on the grounds that:-

“i. That this application contravenes the provisions of Article 162(2)(b) of the Constitution and section 13(1) of the Environment and Land Court to grant the orders sought.

ii. That this Honourable court does not have jurisdiction to grant the orders sought in this Application.”

4. The Administrator in turn filed a Reply to the Preliminary Objection dated **28th September 2021**. The matter was canvassed by way of written submissions. The Respondents filed the written submissions dated **6th October 2021** whilst the Administrator relied upon his written submissions dated **4th November 2021**.

BACKGROUND

5. This Succession Cause relates to the estate of one **ROSEBELL WANGECHI GICHANGI** (hereinafter ‘the **Deceased**’) who died Testate on **26th November 2008**. A copy of the Death Certificate Serial Number **245045** is annexed to the Petition for Grant of letters of Administration with written will dated **23rd September 2010**. The Deceased left a written Will dated **11th November 2003** (which Will is also annexed to the Petition).

6. Following the demise of the Deceased Grant of Probate with written Will was on **16th June 2011** issued to **HENRY MURIUKI MWANIKI** and **JACINTA MUTIO WAMBUA** who were the Executors named in the Will. The Grant was duly confirmed on **22nd February 2012**.

7. The Applicant herein **Danson Githinji Maringa**, a son to the Deceased was one of the beneficiaries named in the written Will. In that Will the property known as Title No. **RUIRU/KIU BLOCK 3/125** (hereinafter ‘the **Suit Property**’) was bequeathed to the Applicant.

8. Sometime in this year **2011** the Applicant visited the suit property and found that the same was occupied. Upon enquiry the occupants (1st – 3rd Respondents) informed him that they had purchased the suit property from the Deceased. The Applicant conducted a search at the **Lands Registry** and confirmed that the property had in fact been transferred to the Respondents. The Applicant alleges that said transfers had been illegally backdated.

9. The Applicant reported the matter to **Kasarani Police Station** and to the **Department of Criminal Investigations** but to date no action has been taken. He then approached the **Probate Court** seeking a declaration that the transfer of the suit property to the Respondent was fraudulent, illegal, null and void. The Applicant further sought orders to have the said transfer of the suit property rescinded and/or annulled and that Title be rectified and restored back into the name of the Deceased **Rosebell Wangechi Gichangi**.

10. The 4th and 5th Respondents by this Preliminary Objection assert that this court does **not** have the jurisdiction to entertain the summons filed by the Applicant nor to grant the orders sought therein.

ANALYSIS AND DETERMINATION

11. I have carefully considered this Preliminary Objection, the Replying Affidavit as well as the written submissions filed by both parties.

12. It is trite that jurisdiction is everything. In **OWNERS OF THE MOTOR VESSEL LILLIAN ‘S’ – VS CALTEX OIL (KENYA) LTD 1989** the court held thus:-

“Jurisdiction is everything. Without it, a court has no power to make to take one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it hold the opinion that is without jurisdiction.”

13. The dispute between the Applicant and the Respondents relates to the question of ‘**ownership**’ of the suit land. **Article 162 (2) (b)** of the **Constitution of Kenya 2010** established specialized courts which include the **Environment and Land Court (ELC)**.

14. **Section 13 of the Environment and land Court Act** provides as follows:-

“(1) 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.

15. This court sitting as a Probate Court is empowered to decide on issues relating to the distribution of an estate to the legitimate heirs of the Deceased. This court has **no mandate** to determine question of **ownership** of land, which lies under the exclusive mandate of the **Environment and Land Court**.

16. The law vide **Article 162 (2) (b)** of the Constitution and **Section 13** of the **Environment and Land Court Act** reserves to the **ELC** the **exclusive** jurisdiction to determine disputes touching on the use, possession, control, Title and compulsory acquisition of land.

17. In the case of **ABDULLAHI ALI ABDI & Another – vs – MINISTRY OF LANDS & 6 others [2021] eKLR** the court held as follows:-

“24. Article 162(2)(b) and Section13(2) of the ELC Act confer exclusive jurisdiction to ELC in respect of disputes relating to environment and the use, occupation of and title to land. The High Court jurisdiction is explicitly ousted under Article 165(5)(b) of the Constitution, although both are courts of juridical status. The High Court therefore cannot hear and determine disputes within Environment and Land Court’s jurisdiction.” (Own emphasis)

18. The Applicant in his submissions submits that the **ELC** does not have **exclusive** jurisdiction over land matters. The Supreme court in the case of **Republic – vs Karisa Chengo & 2 others [2017] eKLR** made it clear that the parity in hierarchy between the High Court and the specialized courts does not mean that those specialized courts are the High Court. In that case it was held as follows:-

“As Article 165(5) precludes the High Court from entertaining matters reserved to the **ELC and ELRC, it should, by the same token, be inferred that the **ELC and ELRC** to cannot hear matters reserved to the jurisdiction of the High Court....**The constitution though does not define the word ‘status’.** The intentions of the framers of the Constitution in that regard are obvious given the choice of ... words they used; that the three courts (High court, ERC and ELC) are of the same judicial hierarch and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the high court in performance of its judicial function, in its specialized jurisdiction but they are not the High Court.”**

19. In **RE ESTATE OF STONE KATHULI MUINDE (Deceased)[2016] eKLR** Hon Justice William Musyoka observed as follows:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.” (own emphasis)

20. Accordingly the Applicant ought to have filed his suit against the Respondents in the **ELC**. He cannot obtain the orders sought in a succession cause.

21. For the above reasons I find merit in the Notice of Preliminary Objection. Accordingly I strike out the summons dated **21st March 2021** filed by the applicant. His redress lies in the **ELC** court. Each party to bear its own costs.

DATED IN NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

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MAUREEN A. ODERO

JUDGE