



REPUBLIC OF KENYA



**In re Estate of Patrick Kaangah (Deceased) (Succession Cause  
14 of 2016) [2022] KEHC 11508 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11508 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 14 OF 2016**

**EM MURIITHI, J**

**MAY 31, 2022**

**BETWEEN**

**SAFINA NKATHA KAANGA ..... APPLICANT**

**AND**

**WILSON KIRIMA KAANGA ..... OBJECTOR**

**AND**

**JERUSHA KAGENDA KAANGA ..... INTERESTED PARTY**

**MURURU KIRIMA MEEME ..... INTERESTED PARTY**

**RULING**

1. By Chamber Summons dated 30/1/2020 the 1<sup>st</sup> interested party/applicant who claims a purchaser's interest in Kangeta/Kangeta/2804 which is part of the deceased's estate from which a certificate of confirmed grant, upon Judgment of the court of 14/11/2019 has already been issued, prays to be enjoined in the proceedings and seeks review of the Judgment with respect to the said parcel only.
  - “2. That this Honourable court be pleased to have Mururu Shadrack Meemeenjoined in these as an interested party.
  3. That this Honourable court be pleased to review the judgment delivered on 14/11/2019 and re-open the matter for hearing limited to the distribution of land parcel LR No Kangera/Kangeta/2804 only.”
2. The grounds of the application were set out in the Summons as follows:

“The Grounds



- i. That the interested party bought land parcel No Kangeta/Kangeta/2804 from the deceased on 4/7/2014.
- ii. That the petitioner witnessed the land sale agreement and was dishonest for failing to inform the court that the IP had bought the land from the deceased.
- iii. That the petitioner in furthered the dishonesty by alleging that land parcel No. 2804 was sold to one David Mbirithu instead of the Interested Party.
- iv. That the Interested Party has developed land parcel No. 2804 by planting seasonal food crops, timber/wood trees and fruit trees among other developments since the year 2014 up to date.
- v. That the interested party was never informed of the existence of this cause until now when he was informed by his farm hand that the deceased's children were claiming that the land was subjected to succession process and distributed to them.
- vi. That there was non-disclosure of material facts and concealment of material facts to the court over land parcel 2804 which has resulted to an injustice to me.”

The application was supported by a supporting Affidavit sworn by the applicant on setting out the facts relied on by the applicant.

3. An application in the meantime dated 25/8/2020 for injunction against the Petitioner, the Objector and one Jerusha Kagendo Kaanga restraining interfering with the said plot and for orders of inhibition on the said plot Kangeta/Kangeta/2804 was resolved by the court in terms that maintained the status quo of that particular parcel of land so that it “is not to be dealt with until the application dated 30/1/2020 is heard and determined [and] the prayer to restrain Jerusha Kagendo Kanga from interfering with the suit land in terms of Prayer no. 2 of the Summons is hereby declined.” See the court’s ruling dated 10/12/2020.
4. Before the application of 30/1/2020 could be heard, Counsel for the Respondent has taken a preliminary objection dated 15/10/2021, principally, on the jurisdiction of the court and contending that jurisdiction over the matter lies with the Environment and Land Court (ELC), as follows:

“Preliminary Objection

Take Notice that the interested party herein at the earliest possible opportunity raise a preliminary objection on the sustainability of the applications dated January 30, 2020 on the Grounds:

- (a) That the Honourable court has no jurisdiction to determine the matter as the court of succession is functus officio upon confirmation of grant and issuance of title deeds in execution of confirmation orders.
- (b) That the applications offend section 51 of the *Land Act* which provides that the Environment and Land Court (ELC) has jurisdiction to hear and determine such disputes.
- (c) That the present applications are just attempts to forum shop by the applicants which amounts to abuse of court process.



- (d) That this application is incompetent, bad in law, misconceived, made in bad faith and an abuse of court process.

Reasons Wherefore the interested party prays that the said applications be dismissed with costs.”

### Written submissions

5. Counsel for the parties filed respective written submissions on the preliminary objection, respectively October 28, 2021 and November 17, 2021 for the respondent and the applicant. The respondent urges section 150 of the *Land Act* and relies on the case law authority of Gikonyo, J. in Meru HC Succession Cause No. 720 of 2013, *Priscila Ndubi & anor. v. Gerishom Gatobu Mbui* adding that the court is functus officio upon confirmation of Grant in the Succession Cause, in Written Submissions dated 28/10/2021 as follows:

“Your Lordship, the applicant's claim is that he bought a portion of land parcel No Kangeta/ Kangeta/2804 from the deceased herein on 04.07.2014, in his supporting affidavit filed in court on 30<sup>th</sup> January 2020, he annexed a land sale agreement which he marked as MSM1 'a'.

Your Lordship, in paragraph 5 of the supporting affidavit, the applicant avers that as evidenced by the sale agreement he invested his hard earned Kshs 800,0001 on the material parcel of land.

Your Lordship, the interested party herein Jerushakage Do Kaangahas filed a preliminary objection to the said application in which she avers inter alia as follows:-

“That this Honourable lacks jurisdiction to determine the matter as the court of succession is functus officio upon confirmation of the grant and issuance of title deeds in execution of confirmation orders.

That the application offends section 150 of The *Land Act* which provides that Environment and Land court has jurisdiction to hear and determine land disputes.

Your Lordship, we submit further that this court lacks the jurisdiction to determine the validity or enforceability of the agreement dated July 4, 2014. The applicant's remedy lies in filing a suit in the Environment and Land Court under order 37 Rule I of the Civil Procedure Rules, 2010. It is the court which is constitutionally mandated to determine such matters”.

Your Lordship, for the above proposition we wish to rely on the *Meru Succession Cause 720 of 2013* Priscilla Ndubi & Another-vs- Gerishon Gatobu Mbui. (A copy of which is annexed to these submissions) at page 6 Justice F Gikonyo, stated as follows:-

“I am aware that this court does not have jurisdiction to detennine the validity or enforceability of the said agreement, Environment and Land Court does, it is the court which is constitutionally mandated to determine such matters (underlining ours)

Your Lordship, in the aforesaid decision the learned judge proceeded to order at page 10 as follows:-

“I hereby make a finding that the dispute on the ownership in respect of L.R. No. Nyaki/Mula Thankari/2244 cannot be conveniently determined in these proceedings.



And I accordingly subject to the provisions of Section 82 of the Act, by order appropriate and set aside L.R. No. Nyaki/Mulathankarii 2244 to abide the determination of the question in proceedings under ORDER 37 RULE 1 of the Procedure Rules, subject to the Proviso TO section 71 (2) of the Act and consent of the beneficiaries herein, the court may proceed with the distribution of rest of the estate" (underlining ours).

Your Lordship, in light thereof we urge you to find that this Honourable court is functus officio and lack jurisdiction to determine this matter upon confirmation of grant and issuance of titles in execution of confirmation orders.

Your Lordship, the interested party humbly prays that the Applicant's application dated 30<sup>th</sup> January 2020 be dismissed as the same is vexatious and an abuse of the process of the court for aforesaid reasons and analysis and proceed to uphold the preliminary objection herein."

6. For the applicant, it was urged in the written submissions of November 17, 2021 that the matter before the court was not a land dispute but a succession dispute, properly within the jurisdiction of the court and that the interest of the applicant was not disclosed at the time of confirmation of grant and, therefore, the avenue of determination of ownership through the ELC by an originating summons under order 37 of the *Civil Procedure Rules* is inappropriate, as follows:

"Argument on the Law

My Lord the 1st interested party filed the summons dated 30/1/2020 seeks to review the judgment delivered on 14/11/2019 limited only to land parcel LR No.

Kangeta/Kangeta/2804 since he tendered evidence that he had bought the land from the deceased herein who made an application to transfer of the land to the 1st interested party before The Land Adjudication and Settlement Officer but somehow the transfer 'was never effected.

The 1st interested party was put into possession by the deceased and it is only after the confirmation of the grant that the 2nd interested party forcibly entered the land culminating to the application dated 25/8/2020 where the 1st interested party sought to restrain the petitioner, the objector and the 2nd interested party from interfering with his occupation and user of the subject land.

My lord vide a ruling delivered on 10th December 2020 the orders sought in the application dated 25/8/2020 were declined and orders that title no. Kangeta/Kangeta/2804 not to be dealt with until the application dated 30/1/2020 was heard and determined.

There was no appeal preferred against that ruling that against.

My lord a preliminary objection dated 15th October 2021 has 4 grounds but only 2 is based on a point of law. A preliminary objection on a point of law must disclose the law the suit offends. Therefore, grounds (a), (c) and (d) are none starters and ought to be dismissed for not disclose any point of law.

On ground [b] the 1st interested party having bought the land from the deceased, he ought to have been involved in the succession process or the very least the land parcel LR No. Kangeta/Kangeta/2804 held in abeyance for the ownership dispute to be determined if the agreement between the deceased and the 1st interested party had been disclosed to the court.



Distributing the same to the 2nd interested party meant that she was the absolute beneficiary of the same and the 1st interested party's claim has no standing.

The 2nd interested party raising the preliminary objection and in the event the ELC court if her route was to be followed found that the land belongs to the 1st interested party what remedy would she have over the estate since what she was provided for is no longer available? The subject matter land having been dealt with as part of the deceased's estate in the cause and the court having pronounced itself over the same this is the right court to deal with the issue. Besides that, the 1<sup>st</sup> interested party can only claim against the administrator of the estate who failed to disclose to the court the existence of the deceased's dealing with the 1<sup>st</sup> interested party. That can only be done in this cause.

Most logical thing is to have the pending application dated 30/1/2020 dealt with and the 2<sup>nd</sup> interested party will stake her claim in the estate in the event adverse orders are issued over the distribution of the subject land to her.

The 2<sup>nd</sup> interested party preliminary objection dated 15/10/2021 is baseless since the matter at hand is not a land dispute but a succession dispute. The relevant law is the [Law of Succession Act](#) (cap 160 Laws of Kenya) since that is the law that distributed the land claimed by the 1<sup>st</sup> interested party.

We pray that the preliminary objection dated 18/10/2021 be dismissed with costs.”

## Determination

### Whether court functus officio

7. With respect to counsel, the succession court does not generally become functus officio upon a determination of an application for confirmation of Grant. There may be filed subsequent to confirmation of Grant applications for rectification or amendment of Grant and even revocation or annulment of the Confirmed Grant. See section 74 and 76 of the [Law of Succession Act](#). Section 74, for example, provides as follows:

“74. Errors may be rectified by court

Errors in names and descriptions, or in setting fourth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

8. Again, on its own motion or on application by any interested party, the Court may reopen and revoke or annul a grant in the circumstances set out in section 76 of the [Law of Succession Act](#) including fraudulent concealment of material facts and untruthful allegation relevant on point of law as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;



- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
  - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - ii. to proceed diligently with the administration of the estate; or
  - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

9. Any person interested, or claiming an interest, in an asset of the estate of the deceased interested party may, therefore, move the court to be joined as an interested party to the succession proceedings thereupon seeks order for rectification, amendment or revocation or annulment under the provisions of sections 74 and 76 of the [Law of Succession Act](#).

Jurisdiction of the succession court over in disputes over land assets

10. Article 165 (5) of [the Constitution](#) also ousts the jurisdiction of the High Court in matters which fall under the jurisdiction of the courts established under Article 162 (2) of [the Constitution](#), as follows:

“The High Court shall not have jurisdiction in respect of matters—

- (a) ....
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

11. The Environment and Land Court (ELC) is established under Article 162(2) of [the Constitution](#) and under section 13 (1) of the [Environment and Land Court Act](#) 2012, the court has its jurisdiction delimited 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.”



12. Similarly, under section 150 of the [Land Act](#) 2012 the jurisdiction over land disputes is given exclusively to the court, as follows:

“Jurisdiction of Environment and Land Court.”

150. The Environment and Land Court established in the [Environment and Land Court Act](#) is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

13. The question before the court in the preliminary objection is whether the court has before it a land dispute within the exclusive jurisdiction of the ELC.
14. A distinction may be made between determination of land dispute over question of ownership of land and the succession dispute whether the deceased had transferred his estate or part thereof during his life, and the question would be whether that asset forms part of the estate available for distribution. In the latter case, the matter is one for determination by of succession court.
15. In this matter, the question is whether the deceased had sold his interest in the estate asset subject of this application is a matter of succession law, and not purely one of a land dispute on the validity of the contract of sale of the property, as would be the case in the case of two living parties. It is a matter within the competence of a succession court.

Competence of application of 30/1/2020 for joinder of the 1<sup>st</sup> Interested Party

16. Even if the issue were taken to be one for determination by the Environment and Land Court pursuant to article 162(2) and sections 13 and 150 of the [Environment and Land Court Act](#) and [Land Act](#), respectively, the application for joinder of the person interested in the asset must be dealt with to establish his locus standi and allow the court to exercise its powers to appropriate and set aside the asset in question to await the determination of the beneficial ownership thereof.
17. The court on the hearing of an application for confirmation, is permitted, under rule 41 (3) of the [Probate and Administration Rules](#), to appropriate and set aside an asset to allow determination of any question of beneficial ownership by separate proceedings as follows:

“ 3. 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 or 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.”

18. The rule 41 (3) procedure is clearly a discretion of the court where the court takes the view that the question “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 complexity of the transaction of disposal may be one reason for making it inconvenient to deal with at the stage of confirmation of grant.
19. It is clear that, however, the procedure for appropriation and setting aside of a property to facilitate reference under order 37 of the [Civil Procedure Rules](#) to the Court or ELC now established under the



*Environment and Land Court Act* is a remedy of the Succession Court in dealing with disputed assets of the estate whose beneficial interest in which “cannot at that stage be conveniently determined”. It is an order that could only have been made in this case at the hearing of the confirmation of Grant in terms of rule 41 of the *Probate and Administration Rules* set out above, if the matter had been taken up at the time.

20. In other words, the order for appropriation and setting apart of asset in question, under rule 41 of the probate and Administration Rules, can only be made in the Succession proceedings in which any person claiming to be beneficially interested is permitted to participate and in this case it is upon the hearing of the application for joinder dated 30/1/2020 that the court may make directions and issue orders for the dealing with the suit asset Kangeta/Kangeta/2804 pending determination by suitable proceedings on the question of the beneficial ownership of the asset claimed by the 1<sup>st</sup> interested party.
21. Where, as claimed by the intended interested party here, the applicant does not become aware of the succession proceedings so that he does not put in his interest by objection of protest proceedings, the court is not able to make an order for such appropriation and setting aside of the disputed asset, and a person interested may properly seek to the revocation of the grant, if he could place the case within the purview of section 76 of the *Law of Succession Act*, and for that purpose the joinder in the matter.
22. As pointed out by the counsel for the applicant, his claim to ownership of the particular asset Kangeta/Kangeta/2840 is against the estate of the deceased and not the person to whom it has by the confirmed grant been distributed. If the succession proceedings proceed to completed distribution upon the confirmed grant, the applicant’s interest in the asset will be defeated and even if he were successful in the litigation before the Environment and Land Court his right to ownership would have been rendered nugatory. It is, in my view, for such consequences that the procedure must exist for appropriation and setting apart of assets on which there are disputes as to beneficial ownership was factored in the confirmation hearings.
23. But how could an applicant take benefit of such procedure unless he was part of the proceedings either before the confirmation of the grant or enjoined by application in that behalf after the confirmation of the grant.
24. Even if it is accepted that the Succession Court cannot as part of the High Court has no jurisdiction pursuant to article 165 (5) (b) of *the Constitution*, to deal with questions of ownership of land “falling within the jurisdiction of the courts contemplated in article 162 (2)”, then the Succession Court must preserve the asset (s) in question for distribution upon the determination of the ownership dispute. The applicant could only secure the preservation of the asset in which he claims beneficial interest if he were in the succession proceedings. This court has, however, held that it is a question whether the deceased had transferred a part of his estate during his life for which the succession court has jurisdiction.
25. Such being the view of this court, the order that commends itself on the preliminary objection dated 15/10/2021 is for dismissal to allow the intended interested party to seek joinder in these proceedings and thereafter specific order on the preservation and distribution of the estate asset in question as appropriate. The court has jurisdiction to deal with the application dated 30/1/2020, and the preliminary objection will be dismissed.

## Orders

26. Accordingly, for the reasons set out above, the respondent’s preliminary objection dated October 15, 2021 is declined. The court directs that the 1<sup>st</sup> interested party’s application dated 30/1/2020 be heard on a date to be fixed in consultation with the counsel for the parties.



27. Costs in the cause.

Order accordingly.

**DATED AND DELIVERED ON THIS 31<sup>ST</sup> DAY OF MAY, 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

M/S Gichunge Muthuri & CO. Advocates for the 1<sup>st</sup> Interested Party/Applicant.

M/S Mutembei & Kimathi Advocates for the 1<sup>st</sup> Petitioner.

M/S Kaberia Arimba & CO. Advocates for the 2<sup>nd</sup> Petitioner and the 2<sup>nd</sup> Interested Party.

