



**Maina v Maina (Environment and Land Appeal E012 of 2022)
[2023] KEELC 18487 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E012 OF 2022
LN GACHERU, J
JUNE 29, 2023**

BETWEEN

STEPHEN GITHGATU MAINA APPELLANT

AND

EDWARD MWANGI MAINA RESPONDENT

*(Being an appeal against the Judgment of Hon. S. Mwangi delivered on 21
st July, 2022 in Murang'a Chief Magistrate Court ELC No. E80 of 2021)*

JUDGMENT

1. The Appellant moved the Court in Murang'a CMC ELC No. E80 of 2021, against the Respondent seeking to bar the Respondent from burying his deceased mother on land parcels no. Loc. 15/Gathukiini/1251 and Loc. 15/Gathukiini/ 121. He also claimed testamentary rights over the suit properties. The trial Court in its judgment dismissed the Plaintiff's (Appellant) suit with costs to the Defendant (Respondent) and directed the Plaintiff (Appellant) to pay mortuary expenses.
2. Aggrieved by the orders of the trial Court, the Appellant preferred the instant appeal raising Four Grounds
 1. The Learned Magistrate erred in law and fact by failing to consider that there was no denial nor a defence to controvert the Plaintiff's claim
 2. The Learned Magistrate erred in law and fact by failing to consider that the suit properties are subject to a pending succession cause being chief magistrate's Court at Murang'a Succession Cause Number 351/2020 (Estate of Githatu Wanjohi)
 3. The Learned Magistrate erred in law and fact by failing to consider that the suit properties are testamentary lands and should not be interfered with.



4. The Learned Magistrate erred in law and fact by failing to take into account the evidence on record.
3. The facts founding the filing of the suit were that the Respondent sought to bury his deceased mother on one of the suit properties. The Appellant(Plaintiff) had alleged that he is the administrator of the Estate of Githatu Wanjohi, who was the registered proprietor of the suit properties. He averred that he did not know the Defendant (Respondent) or the deceased person, and as such the Defendant (Respondent) should not be allowed to bury his deceased mother on the suit property.
4. The Defendant (Respondent) had entered appearance, but did not file a defence. The matter was set down for hearing and the Plaintiff (Appellant) maintained that the Defendant (Respondent) was a stranger and that the suit properties belonged to his deceased grandfather. The Respondent on the other hand testified that the parcels of land belonged his grandfather and that Geoffrey Maina Githatu, his father had married two wives, his mother and the Plaintiff's (Appellant) mother. He asserted that his mother ought to be buried where her husband was buried, which was on Block 15/ Gathukiini/121, which is the land that belonged to their grandfather.
5. The trial Court in its judgment found that the Plaintiff's mother and the Defendant's (Respondent) mother were both wives of Geoffrey Maina Githatu. The trial Court found that the Defendant (Respondent) had on a balance of probability proved his case and in concluding that there was a presumption of marriage between the Respondent's mother and Geoffrey Maina Githatu, directed that the deceased be buried next to her husband. Thus this appeal.
6. The Appeal was dispensed with by way of written submissions. The Appellant filed his written submissions on 17th May 2023, through the Law Firm of Triple N.W & Co. Advocates and raised three issues for determination by this Court.
7. On the first issue on failure to consider that there was no denial or defence, the Appellant submitted that there being no Defence as required under Order 7 Rule 1 of the Civil Produce Rules, the suit was unopposed and ought to have been allowed. The Appellant in highlighting the role of pleadings quoted the case of Raila Amolo Odinga & Another vs IEBC & 2 Others {2017} eKLR, where the Court in holding that parties are bound by their pleadings expressed itself that the absence of pleadings, evidence if any produced by parties cannot be considered.
8. The Appellant submitted on the second issue, of failure to consider the succession cause, that the Court ignored that the suit property was subject to a succession cause, and the issue of distribution had not been determined. Reliance was placed on the case of *Re Estate of John Gakunga Njoroge* {2015} eKLR, where the Court pronounced itself on the authority to deal with the Estate of a deceased person and held that authority stemmed from issuance of a Grant of Representation. It was his submissions that the outcome of the succession cause will have a significant forbearance on the Respondent's burial exercise.
9. Further, and the third issue, on failure to take into account the evidence on record, the Appellant submitted that the trial Court failed to be guided by the applicable laws on testamentary rights. That the trial Court ought to have considered the effect of the Orders granted on the succession cause. The Appellant submitted that he is entitled to the costs of the appeal. He urged this Court to allow the appeal and find that the Respondent was not entitled to the orders granted by the trial Court.
10. The Respondent filed his Submissions on 26th May 2023, in opposing the appeal. He submitted that the trial Court had the jurisdiction to determine the matter and which she did procedurally. It was his submissions that the Appellant's rejection of having the deceased buried on the suit property was because he denied knowledge of the Respondent. That he buried his deceased mother on the parcel of



land, Loc.15/Gathuki-ini/121, which is the property of his father. He further submitted that subject to the orders of the Court, he buried his mother and thus the reliefs sought in the appeal have already been overtaken by events. He urged this Court to uphold the decision of the trial Court.

11. Having considered the instant appeal and the rival written submissions, it is important to point out at the earliest that neither a title deed nor a copy of certificate of search was availed before the trial Court or even this Court. It is thus not clear who the registered proprietor of the suit properties is. While the issues raised points out to interest in land, it is also evident that some issues canvassed boarder on “free properties” of a deceased person and dependants thereof, which are preserve of the High Court.

12. Be that as it may, the Appellant has moved this Court on appeal. The role of this Court on appeal is well laid out in Section 78 of the Civil Procedure Act which is to re-evaluate, reassess and reanalyze the evidence as contained in the Record of Appeal. This was stated by the Court in the case of Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court rightly held: -

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

13. The discretionary power of the trial Court just like this Court is donated by the Constitution as well as Statute and as such, this Court cannot unnecessarily interfere with the discretion. The circumstances that this Court can interfere with such discretion was well laid out by the Supreme Court in the case of Apungu Arthur Kibira Vs Independent Electoral & Boundaries Commission & 3 others [2019] Eklr whether the Court held:

We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious.”

14. The Superior Court quoted the pronouncement by the *New Zealand Supreme Court case of Kacem v. Bashir*(2010) NZSC 112; (2011) 2 NZLR 1 (Kacem),where it was held [paragraph 32]:

In this context, a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

15. Presently, the Appellant faulted the judgment of the trial Court on four grounds set out on the face of the Memorandum of Appeal. The tone of the judgment of the trial Court informs this Court that it was its finding that the Appellant and the Respondent were children of Geoffrey Maina Githatu. As a result of which the that Court directed that the remains of the Respondent’s mother be interred next to her husband, Geoffrey Maina Githatu in the land of her father-in-law, Githatu Maina at Gathukiini. What this Court gathers is that Beatrice Wambui Maina, died in 2021, and his son, the Respondent, sought to bury her on either land parcel No. Loc. 15/ Gathukiini/1251, or Loc. 15/ Gathukiini/121. From the Respondent’s submissions, he confirmed that the deceased has since been buried.

16. Having analysed the rival written submissions and considered the Record of Appeal, this Court must first determine whether it is clothed with the requisite jurisdiction to determine this matter. Even



though no party has raised the issue of jurisdiction, this Court has the power to do so suo moto. This was held in *Lemita Ole Lemein v. Attorney General & 2 Others* [2020]eKLR, where the Court held:

In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo moto determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction, even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal.”

17. Jurisdiction grants a Court the power to hear and determine a matter, whether on appeal or trial. This Court is a creation of the Constitution under Article 162(2)(b), with its powers spelt out in Section 13 of the *Environment and Land Court Act*, which provides:

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

18. Matters jurisdiction were well determined in the case of *Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited* (1989) IKLR, where the Court held:

Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

19. To determine whether this Court has jurisdiction or not can only be gathered from the pleadings and the prayers sought therein. From the Record of Appeal, it is indisputable that the properties in question belong to Githatu Wanjohi. Both the Appellant and the Respondent are claiming to be grandchildren and/ or beneficiaries of the registered proprietor. While the Appellant averred in his pleadings that the Respondent is a stranger, the Respondent on the other hand maintained that the Appellant is his step-brother. That, the Appellant’s mother was the second wife to his deceased father Geoffrey Maina Githatu, and his deceased mother was the first wife, facts disputed by the Appellant. The Respondent



claimed that he intended to inter the remains of his mother in his father's parcel of land, a move the Appellant refused necessitating the filing of the suit at the lower Court.

20. The Appellant attached to the Record of Appeal a copy of a grant over the estate of Githatu Wanjohi, which gave him the power to administer the Estate of the deceased. However, against any backdrop of doubt, the issues giving rise to the suit is the Respondent's right to bury his deceased mother. As is evident in prayer (a) of the Plaint, the Appellant sought for an order of "permanent injunction do issue against the Defendant, his servants or agent from burying the said Beatrice Wambui Maina on land parcels Loc. 15/ Gathukiini/1251, Loc. 5/ Gathukiini/121"
21. While the Appellant's right over the land are at play, the Respondent's "Customary rights" are also matters worth consideration, noting his claim over the land. Additionally, the Appellant sought for testamentary rights over the suit properties.
22. A perusal of the pleadings and the judgment of the trial Court informs this Court that the nature of the dispute is no doubt burial dispute. Even though, the Appellant was seeking to assert rights over the suit land, it is clear from paragraphs 5 & 6 of the Plaint that the Appellant raised issues touching on customary rights on burial and dependants within the meaning of it in Section 29 of the Law of Succession. Additionally, prayer No. 2 of the Plaint points out to testamentary rights, which is a preserve of the High Court.
23. Just because the pleadings as drafted touch on land does not mean that the matter should be heard and determined in this Court. Pleadings do not confer jurisdiction. This position was well set out by the Court in the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adege & 3 others* [2020] eKLR where it held:

A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings.

24. Having found that this Court does not have the requisite jurisdiction to determine this Appeal, this Court finds and holds that the Appeal as filed is incompetent and proceeds to strike it out wholly.
25. Having carefully considered and analysed the instant appeal, the Court finds and holds that it has no Jurisdiction to deal with it, as it emanates from issues related to succession. Consequently, this Court proceeds to down its tools and strike out the instant appeal entirely with costs to the Respondent herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29TH DAY OF JUNE, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Ndungu for the Appellant

Edward Mwangi (Present in Person) - Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE



29/6/2023

