



**Okeyo v Nasur (Environment & Land Case 50 of 2018)
[2023] KEELC 18779 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 50 OF 2018**

**MN KULLOW, J
JUNE 27, 2023**

BETWEEN

JACKSON OMONDI OKEYO PLAINTIFF

AND

RAJAB NASUR DEFENDANT

RULING

1. On 08/11/2022 when the matter was coming up for directions on the disposal of the Applicant's Originating Summons; Mr. Odhiambo Kanyangi for the Plaintiff raised an objection on the interpretation of the Ruling by the Kadhis' Court in Migori. This court on its own motion therefore issued directions to the parties to submit on the court's jurisdiction to entertain the matter as filed.
2. Both parties filed their rival submissions together with authorities which I have read and considered;

Plaintiff's Submission

3. Counsel for the Plaintiff submitted that there were 3 major issues arising from the matter; Ruling dated 6/3/2015, ruling dated 21/7/2017 delivered by the Senior Resident Kadhi in Migori and the Applicant's title deed for the suit land No. Suna East/Wasweta I/ 11602. It was his claim that the ruling dated 6/3/2015 was between the Respondent herein and one Jamila Nyaboye Nasur and the matter was thereafter referred to the Kadhi Court. However, at the time of the transfer of the suit, the suit parcel had already been transferred and registered in the Applicant's name.
4. The matter proceeded in the Kadhis' court; the same was heard and determined vide a ruling delivered on the 21/7/2017, whose effect was to distribute the estate and/or inheritance of the deceased Fatuma Fadhamula Malashsen. The suit land, which is registered in the name of the Plaintiff herein was included as part of the distributed inheritance hence the instant suit.



5. It is his contention that the Applicant herein could not participate in the Kadhis' court proceedings to protect his interests in the suit land No. 11602 by virtue of Article 170(5) of the Constitution, which addresses the jurisdiction of the Kadhi's Court since he is a Christian. Further, it is his claim that he could not lodge an Appeal against the said ruling by the Kadhi's court since he was not a party to the proceedings.
6. Thus, owing to the said circumstances, they instituted the instant suit pursuant to Order 37 Rule 1 (a, b, e and f) of the Civil Procedure Rules 2010 as read with Article 40 and 165 (6) & (7) of the Constitution. He averred that the fact that he is the registered owner of the suit land was not revealed in the proceedings before the Kadhi court.

Defendant Submissions

7. Counsel for the Respondent submitted that the suit had been presented before a wrong forum. It was his contention that the jurisdiction of the honourable court is outlined under section 13(2) of the Environment and Land Court Act, which specifically enumerates the nature of the disputes that can be entertained by the Environment and Land Court and the same does not confer jurisdiction to hear disputes emanating from the law of succession or probate and administration generally.
8. It was also his submission that the Plaintiff did not demonstrate the attempts/ efforts he made to be enjoined in the proceedings before the Kadhi's court as a creditor in the estate. Further, it was his claim that appeals from the Kadhi's Court can only be entertained by the High Court and not this court pursuant to Rule 86(1) of the Kadhi's Court (Procedure and Practice) Rules.
9. In conclusion, he maintained that this court lacked the requisite jurisdiction to hear and determine the matter since the Applicant lost his proprietorship of the suit property when the grant in Migori PM'S Court Succession Cause No. 303 of 2007 was revoked.
10. The sole issue for determination before me is whether this court is vested with the requisite jurisdiction to hear and determine the dispute as filed;
11. It is now well settled that jurisdiction is everything, without it, a court has no power to make one more step and must down its tools. The Supreme Court in the case of Samuel Kamau Macharia & another vs Kenya Commercial Bank & 2 others[2012]eKLR held as follows:-

“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, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 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.”



12. The jurisdiction of the Environment and Land Court flows from Article 162(2) (b) as read with and section 150 of the Land Act which vests the court with the exclusive jurisdiction to hear and determine actions, proceedings and disputes relating to land.
13. Section 13(2) and (7) of the Environment and Land Court Act further sets out in details the jurisdiction of this court and provides 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 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.....
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?
- (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs.
14. It is the Plaintiff’s contention that he did not and could not participate in the proceedings in Kadhis’ court even though the same touched on the subject matter herein by dint of Article 170 (5) of the Constitution, since he is a Christian. It was his claim that the said section only provides for persons who profess the Muslim religion to be subjected to the jurisdiction of the Kadhis’ Court. He therefore maintained this court is vested with the requisite jurisdiction to determine
15. The Defendant on the other hand contends that this court lacks the requisite jurisdiction to hear and determine disputes emanating from the law of succession and further that the Plaintiff did not demonstrate the efforts he made to be enjoined in the proceedings before the Kadhis Court as a creditor in the estate.



16. Article 170(5) of the Constitution of Kenya provides as follows: -

“(5) The jurisdiction of a Kadhis’ court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.

17. Section 5 of the Kadhis Court Act on the jurisdiction of the Kadhi’s Court further provides that: -

“A Kadhi’s court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

18. In interpreting the above provisions on the Jurisdiction of the Kadhis Court, I am guided and persuaded by the Court of Appeal decision in Genevieve Bertrand v Mohamed Athman Maawiya & another [2014] eKLR where the court while addressing the jurisdiction of the Kadhis Court stated as follows: -

“In the case of the Kadhi’s Court, it is a creature of the Constitution (section 66 of the retired Constitution and Article 169 of the current Constitution). The jurisdiction of the Kadhi’s Court is specifically defined under Article 170 (5) of the Constitution and Section 5 of the Kadhi’s Act, as “determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s Court”. Thus, the jurisdiction of the Kadhi’s Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party’s Muslim faith, and the party’s submission to the jurisdiction of the Kadhi’s Court.” (emphasis mine)

19. Both parties agree that the subject matter herein was included in the inheritance and distribution of the estate of the deceased *vide* the decision of the Kadhis Court issued on 21/7/2017. It is also common ground that the Kadhi’s Court was vested with the requisite jurisdiction to entertain the claim relating to inheritance of the estate of the deceased Fatuma Fadhamula Malashsen. However, the question that follows is whether the Applicant herein submitted to the said jurisdiction of the Kadhi’s Court.

20. One of the limitations set by the law on the jurisdiction of the Kadhis’ Court is that both parties must profess the Muslim faith. In this case, it is not in dispute that the plaintiff herein does not profess the Muslim faith. Consequently, he could not be enjoined in the proceedings to ventilate his ownership claims in respect of the subject matter herein, which was involved in the inheritance and distribution of the estate of the deceased Fatuma Fadhamula Malashsen. At the time of the said proceedings, the subject matter was registered in the name of the Plaintiff herein.

21. This court is however conscious not to comment on the validity of the registration in favor of the plaintiff and the ownership status conferred by such registration as that would be delving into the merits of the main suit, which is still pending for determination. Further, the validity of the sale between the Applicant herein and one Jamila Nasur Nyaboke as submitted by the Defendant/ Respondent, are matters that can only be determined by the court on merit and upon adducing the respective evidence in support of the rival position by the parties.



22. I have critically looked at the instant suit and the orders sought in the Originating Summons and I do note that the same touches on the ownership of the suit land and a determination of who is the rightful registered owner of the suit. This in my opinion falls within the confines of section 13 of the ELC Act as read with the Constitution and the Land Act. It is therefore my finding that this court is clothed with the requisite jurisdiction to hear and determine the claim as filed. However, the said jurisdiction is limited on the issues touching on the ownership and/or title of the suit land as sought by the Plaintiff.
23. Further, I have looked at the value of the subject matter herein and I do note that the same falls within the pecuniary jurisdiction of the Magistrates court. I accordingly direct that the matter be transferred to the Magistrates' Court ELC for hearing and determination. Mention before the Migori Senior Principal Magistrate's Court on 31.07.2023. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27TH DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistant- Tom Maurice/ Victor

