



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: G.V Odunga, J)

SUCCESSION CAUSE NO. 58 OF 1986

IN THE MATTER OF THE ESTATE OF MUIA MALINDA (DECEASED)

MUNEE MUIA.....OBJECTOR

VERSUS

DOMINIC KIMWU MALINDA.....1ST ADMINISTRATOR

TERESIA MWONGELI MUIA.....APPLICANT

RULING

1. By an Amended Summons for Revocation or Annulment of Grant, dated 4th March, 2020, the Applicant seeks the following orders:-

1. **THAT** the Grant of letters of administration issued to Dominic Kimeu Malinda and Mune Muia on 15th December, 1988 be revoked and a new grant be issued to the Applicant Teresia Mwangeli Muia the daughter of the deceased and the guardian ad litem acting on behalf of Mune Muia.

2. **THAT** any distribution, transfers and dispositions of any kind and/or by the Administrator of land title Makueni/Unoa/174 be declared unlawful, null and void and the registration of the said properties be restored in the name of Muia Malinda (Deceased).

3. **THAT** the costs of this application be borne by the Respondents.

2. The Summons are grounded on the fact that that the Respondent as a co-administrator and not one of the beneficiaries of the estate of Muia Malinda wrongfully and in breach of trust registered the only asset of the estate in his name thus defrauding the rightful beneficiaries of their entitlement of the asset of the estate. According to the Applicant, the grant issued has become useless to the rightful beneficiaries of the estate hence it should be revoked or annulled. The Applicant stated that the Respondent's actions are oppressive, unjustified and unlawful. Her family stand to be disinherited

3. In her supporting affidavit, the Applicant deposed that the deceased herein **Muia Malinda** died on 15th April, 1959 and a grant of letters of administration was made to the Respondent herein and **Mune Muia** jointly on 30th March, 1988 and duly confirmed on 15th December 1988. She averred that her mother is the widow of the deceased while the Respondent is the brother to the deceased herein. According to the deponent, the Respondent was not entitled to benefit from the estate of the deceased but join the Applicant's mother as an administrator. She deposed that the Respondent was not entitled to be included in the confirmed grant without indicating that he was not heir to the estate. According to her, the Certificate of Confirmation of grant does not specify the shares of heirs.

4. According to the deponent, after the grant was confirmed, the Respondent and her mother lodged before the Land Registrar and application Form R.L.19 to cause them to be registered as proprietors by transmission of the Title No. Makueni/Unoa/174, 'the suit property' to enable them distribute to the lawful beneficiaries. However, a follow up on the title processing established that the Respondent and the Applicant's mother's name were mysteriously deleted and it now reflected the Respondent as the sole proprietor of the title. She deposed that it was plainly obvious that the registration of the Respondent as the proprietor was achieved through unlawful means hence null and void *ab initio*.

5. Based on the Respondent's actions the Applicant believes that the grant which facilitated the registration of the title into the Respondent's name ought to be annulled and a fresh grant issued to her mother and/or herself on behalf of the rightful beneficiaries of the estate.

6. In opposition to the Summons, the Respondent swore a replying affidavit on 13th May, 2020 in which he deposed that he is the 1st Administrator in the estate of **Muia Malinda**, the Deceased herein. According to him, the application was premised on dishonesty and falsehoods. It was his case that in 1950 **Muia Malinda** (Deceased) left Matungulu, Machakos County and settled on Plot No.9 Mwaani Settlement Scheme in Makeni County with the Objector herein where the Objector and deceased sired two children but after the death of the deceased on 15th April, 1959, the Objector deserted the home and remarried in Yatta Division, Machakos County wherein she bore other three children.

7. According to the deponent, he was advised by their parents to settle on the land so as to prevent strangers from grabbing the land and he has never parted with possession of the land. According to the deponent, all his eight children were born on the said land. However, in 1980 he found out at the land registry the land was registered in the name of the deceased since 2nd August, 1967. Upon inquiry from the land registry, he was informed that there was a mistake committed by the settlement officers. He stated that since the Objector had no interest in the land and went back to Matungulu in 1980, their Clan resolved that since the Objector did not provide a goat to mark the dissolution of the marriage known as '**Mbui ya Ulee**', the Objector had possessory interest in the land. However, the Objector stated that she can never settle on the land and since the 1st Administrator's sons had developed the entire land, they had acquired proprietary interest on the land.

8. According to deponent, it was agreed that he should surrender his ancestral land in Matungulu, Machakos County being parcel of land No. Matungulu/Kyaume/2070 in exchange of parcel of land No. Makeni/Unoa/174. As the suit property was bigger than his parcel of land in Matungulu, it was resolved that he would pay the Objector Kshs. 8,000/- as compensation for the excess acreage vide a sale agreement and that they should jointly petition for letters of administration. Accordingly, a joint Grant of Letters of Administration Intestate was issued on 30th March, 1988 and a Certificate of Confirmation of Grant on 15th December, 1988 to enable them to be registered as proprietors by transmission unto themselves then to him on 17th March, 1989 owing to the Agreement mentioned above. Subsequently, he was duly issued with a Title Deed of the suit property on 1st April, 1989. It was his position that the whole succession process and transfer by transmission was legal and transparent and that he was ready to transfer the parcel of land in Matungulu/Kyaume /2070 to the Objector.

9. According to the deponent, the Objector did file a suit by way of Originating Summons dated 16th June, 2008 seeking inter alia a Declaration that the interest in and title to estate of Muia Malinda of his free property including the suit property be held in trust for the benefit of the heirs in the Estate but the suit was withdrawn by the Objector upon realizing that it had no merit.

10. It was therefore his averment that the Amended Summons for determination is not only Res Judicata but also an abuse of the court process and he denied that he perpetuated fraud but asserted that it is the Objector who has concealed material facts to the court and the revocation or annulment Summons is an afterthought which should be dismissed with costs.

11. On behalf of the Applicant, it was submitted that the Respondent was only supposed to be a joint administrator to the Applicant's late mother, **Munee Muia**. It was submitted that at the time of filing the Petition, the Applicant was a minor. According to the Applicant a Grant of letters of administration was confirmed in the joint names of the Respondent and Applicant's late mother without stating their respective shares and the suit property was registered in their names as per the Green Card. According to the Applicant, the Respondent had not demonstrated how the suit property jointly registered in their names changed to his name solely. To the Applicant, this is a breach of trust and fraud perpetrated against the rightful beneficiaries entitled to the suit property.

12. On the second issue, it is submitted that the orders sought are necessary to protect the interest of rightful beneficiaries since the Respondent has failed to demonstrate how the suit property was registered solely in his name. According to the Applicant, the Respondent can no longer be trusted in the administration of the estate to protect the beneficiaries' interest hence the title should be revoked.

13. On behalf of the Respondent, it was submitted that the Applicant denounced her right over the suit property and acknowledged the fact that the Respondent's sons had married and developed the suit property. According to the Respondent, the Applicant has not proved any of the grounds of revocation set out under Section 76 of the **Law of Succession Act** and the burden of proof required under Section 107 to 109 of the **Evidence Act**. Reliance was placed **In the Matter of the Estate of PWM (Deceased) [2013] eKLR** and in **Augustine George Moi Kirigia vs. Catherine Muthoni Isumali Kirimi [2017] eKLR** for the proposition that fraud must be supported by sufficient particulars.

14. It is further submitted that this court lacks jurisdiction to cancel and/or nullify the title and that it is the Environment and Land Court under Article 162(2) of the Constitution and Section 13 of the **Environment and Land Court Act** that has the jurisdiction. Reliance is also placed in **Re Estate of Makai Kaluti Ndunda(Deceased) [2018] eKLR** where the court stated that in the event it becomes necessary to cancel the title, the court clothed with jurisdiction is the ELC by dint of Section 80 of the **Land Registration Act No.3 of 2012**. Further reliance was placed on Section 93(1) of the **Law of Succession Act** and the landmark case of "**Lilian S**" **[1989] eKLR**.

15. On who should bear the costs, it is submitted that under Rule 69 of the **Probate and Administration Rules** costs follow the event. According to the Respondent, the Applicant has come to this court with unclean hands and the application seeking revocation or annulment of the Grant is devoid of merit hence the same should be dismissed with costs. The Respondent asserted the Grant was obtained legally and the court lacks jurisdiction to cancel the registrations and/or transfers effected using the Grant.

Determination

16. I have considered the Chamber Summons, affidavit in support and in opposition as well as the written submissions.

17. Section 76 of the **Law of Succession Act**, Cap 160, Laws of Kenya provides 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.”

18. Before dealing with the merits of the case, the Respondent herein has taken up the issue of jurisdiction on the ground that the Applicant's Summons touches on the validity of the title. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with *in limine*.

19. In Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1, Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

20. Similarly, in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 the same Court expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It 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 and 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

21. Lastly, on the same issue, the Supreme Court in the case of Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed that:

“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...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.”

22. It therefore behooves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings.

23. It is clear from the Applicant's affidavit that her contention is that though Land Title No. Makueni/Unoa/174 was the property of the deceased, the Respondent who was appointed as one of the administrators of the Estate of the deceased fraudulently registered himself as the owner thereof. It is therefore clear that the said title is no longer in the name of the deceased or his beneficiaries but is now registered in the name of the Respondent who claims that he properly acquired title to the said land.

24. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to "*determine the jurisdiction and functions of the courts contemplated in clause (2)*", Parliament did enact ***The Environment and Land Court Act, 2011*** which Act commenced on 30th August 2011. Section 13 of the said 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) 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.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(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.

[Underlining added]

25. It is therefore clear that the Court which has been bestowed to hear and determine disputes relating to instruments granting any enforceable interests in land and any other dispute relating to environment and land is the Environment and Land Court. The matters which the 2nd Applicant has placed before this Court would necessarily require this Court to determine the aforesaid issues before the Court can arrive at a decision whether or not to revoke or annul the subject grant. To do that would amount to usurpation of jurisdiction particularly as

the 2nd Applicant has disclosed that it has commenced the process of institution of legal proceedings to protect its interest.

26. **Musyoka J in Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** expressed himself 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.”

27. In my view, the issues regarding the manner in which the Respondents acquired the said properties ought to properly be dealt with by the Environment and Land Court. In determining what order to make I am guided by the position adopted in **In re estate of P N N (Deceased) [2017] eKLR**, where it was held that:

“According to Article 162(2) of the Constitution the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the Constitution. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the Constitution, meaning that this court then, by virtue of Article 165(5) of the Constitution, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri. Under Rule 41(3) (4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.”

28. In the premises I find that the issue of the propriety of the registration of the Respondent as the proprietor of the suit land ought to be determined first and since this Court is stripped of the jurisdiction to determine the same, the matter ought to be dealt with by the Environment and Land Court. I must however state that the Applicant is not entirely remediless. As was appreciated by **Gikonyo, J in Gituma Kigora vs. Doris Mukiri Magiri & Another [2017] eKLR**:

“The protestors are not left without remedy or recourse as they are at liberty to pursue their claim in the appropriate court. I note the protestors’ action may have been a legitimate quest for justice albeit filed in the wrong court.”

29. If the Applicant proves her claim that the Respondent was fraudulently registered as the proprietor of the said land, she would still be at liberty to move his Court for revocation of the Grant based on the said decision.

30. Accordingly, while I decline to grant the orders sought in the Summons, the order that commends itself to me and which I hereby grant is that there shall be an injunction restraining the Respondent from alienating, disposing off or in any other manner interfering with the title to Land Parcel No. Makueni/Unoa/174 for a period of 45 days to enable the Applicant take the necessary steps before the Environment and Land Court.

31. There will be no order as to costs.

32. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of November, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Mukula for the 1st Administrator

Mr Muema for Mr Langalanga for the Objector

CA Susan