



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**SUCCESSION CAUSE NO.414 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE KAARA MUGERA.....(DECEASED)**

**EVA HELLEN MICERE & 5 OTHERS.....APPLICANTS**

**VERSUS**

**LIVINGSTONE KAARA EVAN & ANOR.....RESPONDENTS**

**DIRECTIONS**

1. Livingstone Kaara Evan was issued with grant of letters of administration in the estate of Kaara Mugera and the same was confirmed on 11/02/2016 whereby the deceased's estate **Baragwe/Kariru/562** was shared equally between Livingstone Kaara Evan and Margaret Kanini Kaara.
2. The applicants herein proceeded to file an application for revocation /annulment of the grant dated 30/10/2018. The basis of their application is that deceased being their first born brother was registered as the proprietor of the suit land during demarcation to hold in trust for himself and the siblings of Mugera wa Kaara.
3. The respondent raised a Preliminary Objection dated 13/12/2018 based on the following grounds;
  - a. That the application is incompetent and bad in law and does not lie under **Section 76 of the law of succession Act.**
  - b. The cause of action of the applicant is based on trust which is legally triable by an Environment and Land Court and thus the application contravenes **Article 162(2) and 165(5) of the Constitution of Kenya** and further Section 4 as read together with **Section 13 of the Environment and Land Act.**
4. For the respondents it was submitted that the shaping of a preliminary objection needs clarity and care as it is intended to invoke the jurisdiction to determine the case in summary. That the applicant's application does not meet the threshold for revocation of grant under **Section 76 of the law of succession Act.** It is further submitted that the only cause of action disclose is based on trust and the court with jurisdiction is the Environment and Land Court established under **Article 162 (2) of the Constitution and Section 13 of the Environment and Land Court Act.**
5. I have considered the preliminary objection. No submissions were filed by the applicants.

**Preliminary Objection**

Locus standi is defined in the Oxford Dictionary of Law ,5<sup>th</sup> Edition as 'the right to bring an action or challenge some decisions'. It is defined in Black's Law Dictionary ,9<sup>th</sup> edition as '***the right to bring an action or to be heard in a given forum***'. The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity.

In the case of **The owner of motor vessel, Lillian S-v.Caltex Oil Kenya Limited,(1989)KLR,** Nyarangi JA stated as follows

***“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there will be no basis for continuation of proceedings pending other evidence. A court of law down its tools in respect of the matters before it the moment it holds that it is without jurisdiction.”***

The applicant has filed an application for revocation of grants.

**Section 76 of the Law of Succession Act Cap 160** provides:

*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 a means of an untrue allegation of a facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.**

The applicant claim based on trust as their brother though registered as proprietor of the sui land, he was to hold it on trust.

**Article 162(2) of the constitution of Kenya** provides:

*Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-*

- a. employment and labour relations; and;**
- b. the environment and the occupation of, and title to, land.**

**Article 165(5) of the Constitution of Kenya** provides:

*The High court shall not have jurisdiction in respect of matters-*

- a) reserved for the exclusive jurisdiction of the supreme court under this constitution; or**
- b) falling within the jurisdiction of the courts contemplated in Article 162 (2).**

**Section 4 of the Environment and Land Act** provides;

- 1) There is established the Environment and Land Court.**
- 2) The Court shall be a superior Court of record with status of the High Court.**
- 3) The court shall have and exercise jurisdiction throughout Kenya.**

**Section 13 of the Environment and Land Act** provides;

*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 environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuation, 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.**

6. The High Court constituted as Probate and Administration court has proceeded to determine the issue of trust in the following cases:

**Aurenzia Gikira Njeru v Kimani Kabenge & 2 others (2014) eKLR**

The court dismissed the appeal and stated as follows'

This element of a trust was not registered in the land register. It therefore became a matter of evidence. The respondents who were relying on it had the duty to prove that fact.

**He who pleads a fact must prove it” .....**

The respondents ought to have called much older independent witnesses or even clan elders to explain to the Court how this trust came about.

7. In addition, the court stated:

**My finding is that though registered as the proprietor, the deceased allowed the 1<sup>st</sup> and 2<sup>nd</sup> respondents to live on this land because he knew they were landless.... Under the peculiar circumstances of this case, I do find that the learned trial Magistrate well applied the provisions of Section 27 and Section 29 of the Law of Succession Act. The respondents are brothers to the deceased and are covered under Section 29(b) of the Law of Succession Act. The ends of justice will only be served if the 1<sup>st</sup> and 2<sup>nd</sup> respondents are apportioned the areas they occupy on the suit land.**

**In re Estate of Lante Osman Sharriff Omar Noor A.K.A (Osman Omar) (Deceased)(2015)eKLR**

The court revoked the grant on ground that the objector had proved existence of trust and further that there was non-disclosure of materials facts, it stated as follows;

**I find that the respondent has not rebutted the evidence adduced by the objector as such I find that the objector has proved the existence of trust and that the said parcel of land was held in trust by the deceased on behalf of his others siblings.....**

**I find that Plot no.9923/24 listed as an asset in the deceased’s estate was held by the deceased in trust for the applicant and this other sibling.**

**In Re Estate of Jennifer Wangechi Kibuchi-(Deceased) (2014) eKLR**

Summons for Revocation of Grants was lodged on ground that the deceased property was family property which the deceased held in trust the applicant and his siblings. The court stated as follows;

**On whether there was a trust which should have provided basis for involving the applicant and his siblings in the administrator of estate my view is that no trust was established by the applicant. He only mentioned at paragraph 10of his affidavit that the said property was held in trust, but he adduced no evidence whatsoever to prove existence of such trust.....**

**Since no trust existed in favour of the applicant and his siblings there was no basis for involving the applicant and the others in administration of the estate.**

8. However, there has been diverse opinion on the subject and the following courts held that the issue of trust cannot be determined in Succession Cause:

**In re Estate of James Muiruri Kamau (Deceased)(2018)eKLR**

The Court stated;

**I quote with approval Ibrahim J (as he then was) in re the Estate of Kimani Kinuthia (Deceased)Supra where he stated at page 4;**

***“Secondly, I do not think that these succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove that trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession Court where the claimant is neither a beneficiary or a dependant. Succession proceedings are also appropriate for the resolution of serious contested claims against an Estate by third parties”.***

The Court went ahead to hold that the Court had no jurisdiction to determine the claim of trust or to give any relief in respect thereof.

**Monica Wangari Njiiri & 4 others v Eunice Wanjiru Igamba &another (2016) eKLR**

The Court stated;

**The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trust. It is not a matter of the probate court behind incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and revelant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.**

9. My view is that through the mandate of the probate and Administration Court is to deal with intestate and testamentary Succession as stated in the preamble to the Act where an issue of trust arises in the course of proceedings the probate and Administration Court ought to hear and determine the issue in that cause.

10. Be that as it may in this case both parties have stated that there exists **Kerugoya ELC No. 26 of 2018** where the issue for determination is whether Evan Kaara Mugeru was registered as proprietor of **Baragwe/Kariru/562** in trust for himself and the plaintiff therein. The doctrine of sub-judice is applicable here since both cases involve ownership of **Baragwe/Kariru/562** by virtue of trust.

11. Sub- judice rule is described in **Section 6 of the civil procedure Act** as follows: -

*“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.*

12. Considering the substance of both cases, there is no justification in having the two cases being heard parallel to each other. The claim herein can perfectly be litigated in **Kerugoya ELC No 26 of 2018** since the plaint was filled on 24/04/2018 before the application for revocation of grant in this matter which was filed on 30-10-2018.

13. I therefore direct that the parties shall proceed with the matter in Kerugoya ELC No. 26/2018. The application for revocation shall be stayed pending the outcome of the case before the ELC Court.

**Dated at Kerugoya this 29<sup>th</sup> day of May 2020.**

**L. W. GITARI**

**JUDGE**