



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 2 OF 2019**

**BETWEEN**

HENRY OLOO OKETCH.....1<sup>ST</sup> APPELLANT

MARY OGOLA GARI.....2<sup>ND</sup> APPELLANT

SIPROSA ADERO OKETCH.....3<sup>RD</sup> APPELLANT

MAURICE OYUGI OKETCH.....4<sup>TH</sup> APPELLANT

GEORGE OUMA OKETCH.....5<sup>TH</sup> APPELLANT

**- VERSUS -**

ANGELINE AKINYI ADUDA.....RESPONDENT

*(Appeal from the Judgment and decree of the Principal Magistrate’s Court at Bondo*

*delivered by Hon E.N.Wasike on the 5<sup>th</sup> Day of December, 2018 in Succession Cause No. 63 of 2016)*

**JUDGMENT**

1. This appeal has to be determined on a preliminary issue of jurisdiction because without jurisdiction, a court of law acts in vain. In addition, jurisdiction is conferred by the Constitution or statute and not by parties. See **The Owners of the Motor Vessel Lilian ‘S’ v. Caltex Kenya Limited (1989) KLR 1; Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, S.C Application No. 2 of 2011, and on the source of court’s jurisdiction, see Kenya Ports Authority V Kunston (Kenya) Limited (2009)2 EA 212.**

2. In **Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR**, the Court of Appeal citing with approval its own decision in **Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577** stated that it had quite sufficiently summarized the law on jurisdiction as follows:

“1.....

*2. The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.*

*3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

*4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

*5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.*

6. ....

7. ....” (Our emphasis).

*We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:*

*“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself*

*- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.” [Emphasis added]*

*(See All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, ex nihilo nihil fit (out of nothing comes nothing).”*

3. The land in question and subject of the succession proceedings that gave rise to this appeal, being **North Sakwa/Ajigo/1** was registered in 1978 when the operative law was the Registered Land Act (repealed). Section 101 (1) of the Registered Land Act provides:

*“An instrument made in favour of two or more persons and the Registration giving effect to it shall show:*

*(a) Whether those persons are joint proprietors in common; and (b) where they are proprietors in common, the share of each proprietor”*

4. The contemplation of the above law is that in all cases where the proprietors are more than one, the register will reflect whether their registration is joint or in common.

5. Under Section 103(1) of the said Registered Land Act, *(1) where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor, his share shall be administered as part of his estate.*

*(2) No proprietor in common shall deal with his undivided share in favor of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.*

6. What the above provision stipulates is that where land is owned in common, each co-proprietor has a separate share only that the same is undivided and held together with the other proprietor as one whole and therefore if one proprietor dies, his share does not vest in the surviving proprietor but vests in his estate.

7. In the instant case, the Green card annexed clearly shows that the land parcel No. N. Sakwa/Ajigo/1 measuring 13.8 Ha was registered in the names of **Joseph Okech and Odhonji Gari** in common and the share for each co-proprietor is given as half meaning, the deceased subject of these proceedings exclusively owned ½ share (6.9ha) of the whole and upon his demise, the share vested in his estate.

8. The evidence on record is undisputed that the Petitioner and her sister are the surviving children of the deceased and therefore by law, they are entitled to administer his estate. As to whether this estate was held in trust for some other family members as alleged by the objectors is not stated on the register. Even if it was to be presumed, it is not for this court or a succession court to determine as a succession court is deprived of any jurisdiction to determine the elements of trust in succession proceedings.

9. In the **Matter of the Estate of Peter Igamba Njoroge, Succession Cause No.432 of 2009 (Unreported)** the court stated as follows on the issue of probate court's jurisdiction to resolve a claim based on land held in trust. He stated:

*“I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father.*

*In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.*

*The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.*

*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 the 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 dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.*

*In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.*

*I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset.*

*Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction to the court. This will only go to the question of costs.”*

10. From the foregoing, it is clear that the mandate of the probate court is limited. A distinction ought to be made between a claim against the estate of a deceased and a claim on inheritance in respect of the estate of the deceased. As was held in **H.C. Succession Cause No.864 of 1996 [2015]e KLR:**

*“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. 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 trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant 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.*

*Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.*

*In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”*

11. The upshot is that this court and the succession court at that, lacks jurisdiction to resolve the proprietary interest on land based on the alleged trust. The available option was for the objectors/appellants herein to articulate their claim by instituting proceedings against the estate of the deceased by suing the administratrix to obtain orders on declaration of a trust leading to enforcement of their proprietary interests on the land.

12. Having said so, I note from the evidence of the Petitioner that she caused the subdivision of the said land to cause ½ of the whole to vest in her and her sister as sole beneficiaries. She also stated that in her portion it was vacant whereas in her sister’s portion there were some structures. It is not clear when those structures were erected on that portion and who was in occupation thereof. That in itself would raise other legal issues which this court and the trial court as a succession court would not resolve as the issues revolve around the alleged rights of occupiers. That is a matter within the mandate of the Environment and Land Court as contemplated in Article 162(2) (b) of the Constitution as implemented by the Environment and Land Court Act

13. The deceased **Alex Odhoni Gari** died on 12.10.1991, however, the Succession proceedings were conducted in the post 2010 Constitution and legislation. Section 91(5) of the Land Registration Act stipulates that (a) if any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased’s share shall be treated as part of their estate (b) No Tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

14. Under Subsection (8), the Registrar may upon receipt of adequate proof dispense with the consent under Subsection (b) if the Registrar considers that the consent cannot be obtained or is being withheld unreasonably and the Registrar shall note on the register and on the instrument the reasons for dispensing with the consent. A person who is aggrieved by the decision of the Registrar may apply to the court for necessary orders.

15. No doubt, ½ share of the whole of 13.8 Ha of N. Sakwa/Ajigo/1 belonged to the estate of each of the co-proprietors and upon their demise, then the same vested in their respective estates and therefore the Petitioner being a daughter of the co-proprietor, she was entitled to so petition for grant in respect of her late father’s estate. However, Section 6 of the Land Registration Act No. of 2012 stipulates that no tenant in common shall deal with their undivided share in favour of any person other than another tenant in common except with the consent in writing of the remaining tenants, but such consent shall not be unreasonably withheld. From the material on record, the other tenant in common who was the co proprietor is also deceased.

16. There is no evidence that the Petitioner being administrator of the estate of Alex Odhoni Gari sought consent of Joseph Okech or his administrator when she dealt with the land which was held in common between her father and Joseph Okechi, after obtaining a confirmed grant, by disposing it off to third parties.

17. However, as the property in issue has changed hands after confirmation of the grant, and as the third parties who are now owners of the said ½ share of 13.8 Ha. are not parties to these proceedings, this court is devoid of jurisdiction to make any adverse orders against them without affording them an opportunity to be heard as that would be contrary to Article 47 of the Constitution on the right to fair administrative action and Article 50(1) of the Constitution on the right to fair hearing.

18. Furthermore, as stated earlier, the appellants lay claim to the land as family land thereby implying a trust. That being the case, this court is devoid of jurisdiction to determine such dispute as the jurisdiction is vested in the Environment and Land Court and gazetted subordinate

courts.

19. Therefore, as the estate of the deceased Alex Odhonji is fully administered, this court cannot and has no jurisdiction to reverse the process which involves cancellation of titles to land already transferred to third parties who are not parties to these proceedings.

20. For all the above reasons, this appeal fails. It is dismissed.

21. Each party to bear their own costs of this appeal, in view of their filial relationship.

Orders accordingly.

**Dated, signed and Delivered at Siaya, this 29<sup>th</sup> Day of May 2020 via Skype due to COVID-19 situation.**

**R.E. ABURILI**

**JUDGE**

Mr. Nyanga Adv. for Appellants on skype

Mr. Odongo Adv. for the Respondent present on skype

CA: Brenda Ochieng