



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 897 OF 2010

IN THE MATTER OF THE ESTATE OF PETER NGUMBI MULEI (DECEASED)

BETWEEN

1. JENNIFER MUTHUE NGUMBI.....1ST APPLICANT

2. KATHEKA-KAI CO-OPERATIVE SOCIETY LIMITED.....2ND APPLICANT

=AND=

KEVIN MULEI NGUMBI.....1ST RESPONDENT

STEPHEN KYALO NGUMBI.....2ND RESPONDENT

ERIC NDONYE NGUMBI.....3RD RESPONDENT

RULING

1. By a Petition filed on 15th December, 2010, the Respondents herein in their capacities as the sons of the deceased petitioned for letters of administration intestate of the estate of **Peter Ngumbi Mulei** (deceased). Pursuant thereto Letters of Administration were issued to the said petitioners on 6th March, 2011. Upon a subsequent Summons for Confirmation of Grant the said Grant was confirmed.

2. By Summons for Revocation or Annulment of Grant dated 29th July, 2019, the 1st Applicant seeks the following orders:

a) THAT that the grant of letters of administration to Kevin Mulei Ngumbi, Stephen Kyalo Ngumbi and Eric Ndonge Ngumbi made on the 12th day of April 2011 and confirmed on the 30th day of April 2013, be revoked.

b) THAT conservatory orders be and are hereby issued prohibiting Kevin Mulei Ngumbi, Stephen Kyalo Ngumbi and Eric Ndonge Ngumbi from interfering with, disposing, transferring, alienating, sequestering, attaching, levying distress, levying execution or dealing in any way prejudicial to the interest of the Applicant herein with any of the assets that are the subject of this Application pending the hearing and determination of this Application.

c) THAT conservatory orders be and are hereby issued prohibiting Kevin Mulei Ngumbi, Stephen Kyalo Ngumbi and Eric Ndonge Ngumbi or any person or entity herein from interfering with any of the assets that are the subject of this Application by way of using them as collateral or security to obtain or continue obtaining any financial accommodation from anyone or any financial institution which financial accommodation includes but is not limited to overdrawing accounts, borrowing new loans or topping up existing loans pending the hearing and determination of this Application.

d) THAT cost of this application be in the cause.

3. The second applicant also sought an order for revocation or annulment of the same Grant dated 28th August, 2019.

4. Initially the ruling on the two applications was due for delivery on 29th July, 2020 but on that day, the Court was informed that the 1st applicant and the Respondents had commenced negotiations with a view to arriving at a mutual settlement of their differences. Accordingly, the ruling as regards the 1st applicant's application was deferred.

5. The 2nd applicant's application was based on the fact that it is registered as a Co-operative Society and is composed of about 188 registered members. Upon its registration, the members who comprised of former employees of a British settler, **Peter Weber**, approached the settler and through the guidance and assistance from the settlement officers in the Ministry of Commerce and Co-operative Development purchased the settler's farm, totalling 3,150 acres, inclusive of the Farm houses, buildings, irrigation piping, dams, coffee processing factories, coffee plantation covering 227 acres and other improvements which was then known as **Weber Farm** and changed its name upon full payment to **Katheka- Kai Farm A**.

6. According to the 2nd applicant, upon purchase, members were settled on two-acre piece of land each and subsequently after survey, each of the 188 members were allocated land measuring 13.5 acres. Additionally, besides allocation to members as aforesaid, provision was made for dams, boreholes, primary and secondary schools for Katheka-Kai and Kimua, churches (ABC, AIC and Shrine) road Reserve, Market, Society offices, six coffee plantation blocks and a Coffee factory.

7. Subsequently, the 2nd Applicant made efforts towards the purchase of a second farm known as **Potha Farm** from **Mr. Richard Percival** later renamed **Katheka- Kai Farm B** constituting four parcels of land known as L.R No. 3879; L.R No. 355; L.R No. 7374/3 and L.R No. 11161 all measuring about 14,953 acres. The land was bought including houses, boreholes, cattle shed, livestock, 3 tractors, 2 operational boreholes and other assets and improvements. The 2nd applicant, gave each of the 188 members 40 acres divided into two portions of twenty acres per parcel, and provisions were made for schools (20 acres); market (10 acres); dam (24 acres); and roads (157 acres).

8. According to the deponent of the supporting affidavit, he and his current office bearers took over management of the 2nd Applicant Society following the society's election held on 26th July 2016. Upon doing so, the former office bearers did not fully hand over to them necessitating them to move to Court for legal redress namely; Cooperative Tribunal Case No. 189 of 2017 and Judicial Review Application No. 314 of 2018. It was deposed that the 2nd applicant's members verily believe that its former office bearers illegally and through corrupt scheme disposed of the 2nd applicant's properties without the consent and/or involvement of its members, keeping the details thereof secret, facts only coming to light from and after the year 2016 when there was change of leadership.

9. It was averred that the new management went through the scanty records handed over to them and the members having suspected fraudulent transfer and disposal of society's properties resolved that action be taken including the making of a report to the director of CID Kiambu Road for disposal of the big farms transferred to Mwambi Properties. The report was made, investigations done and while the society awaits the outcome, it has since filed suit for recovery of those three parcels of land so reported. Further, the society has since embarked on a fact finding exercise comprised of a broad committee visiting the ground to obtain the ground status as a preliminary step towards preparation of the long process of acquiring individual titles to the society's members since none has been issued to any member. It was pursuant to such exercise that the 2nd applicant discovered certain persons said to be trespassers on some society's properties and amongst them were the Respondents herein.

10. Consequently, the 2nd applicant instructed its advocates who wrote to the Respondents amongst other persons seeking to be furnished with documents if any in respect of the following society's properties that they have fenced namely; KATHEKA-KAI /BLOCK4/170B, 195, 17, 266, 80 and BLOCK 5/123 and 355 but to date no response has been given. The 2nd applicant thereafter instructed its advocates to file suit for recovery of the said properties namely; KATHEKA-KAI /BLOCK4/170B, 195, 17, 266, 80 and BLOCK 5/123 and 355. Prior to filing suit, the said advocates carried out due diligence since the Respondents are administrators of the Estate of their late father and therefore perused and obtained some photocopies of relevant documents that they found in the court file relating to the properties under question. From the said documents, they established the following;

- a) That the respondents moved this Court for a grant for letters of administration intestate and the same was issued by the High Court on 12th day of April 2011.
- b) In support of the Petition for letters of administration intestate, the Respondents in the list of assets included the 2nd applicant's properties under the immovable properties.
- c) That the late **Peter Ngumbi Mulei** in respect of whose estate the Petition was filed was not a member of the 2nd applicant.
- d) That whereas some of the properties listed therein may have been purchased from members and duly transferred, a fact yet to be established, the singled out seven (7) portions each measuring 20 acres were reserved properties that had not been allocated and or disposed of.
- e) That the said advocates informed the 2nd applicant that he has since perused the court file and whereas the Respondents attached some documents in support of the Petition, there is absolutely no document attached to court in support of their claim in respect of the said seven (7) parcels of land belonging to the interested party namely; KATHEKA-KAI/BLOCK4/170B, 195, 17, 266, 80 and BLOCK 5/123 and 355.
- f) That though the certificate of confirmation listed the said seven parcels of land forming the subject matter of this application as having been confirmed to, amongst many other properties, to be given to the Respondents herein to hold in equal shares, a perusal of the file and in particular the application for confirmation of grant established that no document was given to court by the Respondents to support the claim of ownership of the said properties by the late **Peter Ngumbi Mulei**.

11. The 2nd applicant therefore believed that the said grant was obtained fraudulently by the making of false statements, by the concealment from the court of material facts, by means of untrue allegation of fact essential in law to justify the grant in that:-

- a) The Respondents in their Petition fraudulently listed the said seven parcels of land as properties belonging to the deceased, while the said properties had never been owned and or transferred to the deceased.
- b) The Respondents never disclosed to court both at the time of application for Grant as well as on application for confirmation that said properties were not registered in the name of their deceased father.
- c) The Respondents falsely and by deceit described the said properties as commercial an allegation not true.
- d) The Respondents concealed the said seven properties amongst other properties in a long list that could easily pass the attention of the trial judge and thereby obtained proprietary interest of properties not forming part of the estate of their late father.
- e) The said properties had neither been sold nor transferred by the 2nd applicant to the estate of the deceased herein.
- f) No consent or any form of communication and or confirmation was sought from the 2nd applicant prior to the making of the said application for grant and subsequent confirmation.
- g) Accordingly, the 2nd applicant's properties were fraudulently declared as assets of the deceased.

12. In a further affidavit, it was deposed that the subject properties have not given rise to any individual titles to the members or any other person and as such the 2nd applicant remains the registered owner, while its members who were allocated portions, retain a beneficial interest/ownership until individual titles are issued and that since the late **Peter Ngumbi Mulei** was not a member of Kathekakai Co-operative Society, the 2nd Applicant herein and therefore was not entitled to allocation of any property and by extension could not and cannot own any part of the 2nd applicant's Property unless he acquired the same either by way of purchase and/or gift if any.

13. According to the 2nd applicant, Kathekakai Farm "B" was divided into Block 4 and 5 and that each member was given 20 acres of Block 4 and another 20 acres of Block 5. No member was given two portions of 20 acres in either of the Block nor was any other member allocated more than 2 plots each of 20 acres on either side of the Block with an additional one commercial plot of 25 by 100.

14. The 2nd applicant averred that with respect to Block 5/123 **Aron Wambua Makau** was not and has never been a member of the 2nd applicant and was therefore not and could not be allocated the said plot. It was its case that the purported land transfer form purporting to be the transfer of the said Block 5 /123 is fictitious and forged by one **Joseph Mutavi Kithu** who has sworn an affidavit attached to the affidavit by the deponent **Stephen Kyalo Ngumbi**. The falsity of the said document, according to the 2nd applicant, is due to the fact that the purported transfer is neither agreed by the purported seller (Transferor) nor by the purported buyer (the Transferee); is valueless and does not amount to a transfer since it has neither signatures of both the Transferor and Transferee; any event this form does not exist in the record of the society.

15. It was disclosed that the said signatory of the form, **Joseph Kithu**, was a former office bearer who never handed over the 2nd applicant's property including the former rubber stamp and letterheads which he is using in cahoots with the former the 2nd applicant's surveyor to continue fraudulently alienating the 2nd applicant's property, a matter which was reported to the police at the Machakos Police Station and the matter is pending investigation. It was averred that it is apparent from the face of the form that the maker of this false document has conspicuously and by design inserted the words "*previously sold to Aron by Ms Mwikali Kisenge*" which words purportedly transferred Block 5/123 and dated 19th September 2005 was done by the same pen and same time with the next transfer form for Block 4/170B dated 13th September 2005 by the type of ink pen used on the inserted sentence as opposed to the pen used in filing the land transfer form in Block 5/123.

16. It was the 2nd applicant's case that it is incumbent upon the Respondents to demonstrate how if at all, they acquired this parcel of land by way of Agreement for Sale if any, payments and acknowledgment. However, there is no evidence furnished by the Respondent to confirm that Block 5/123 measures 3 acres only which allegation in any event is false as the sub-division of the entire property was done in a uniform manner of 20 acres per member.

17. Regarding property known as Block 4/170 B, the 2nd applicant averred as follows;

- a) It is not true that the property measures 3 acres only.
- b) The said **Aron Wambua Makau** was not a member of Kathekakai Co-operative Society.
- c) It is also apparent that the purported transfer dated 13th September 2005 exhibited by the deponent Stephen Kyalo Ngumbi that by way of afterthought and in furtherance of a fraud, the maker of the document has inserted the words "*property sold to Aron by Mrs Alice Kyule.*"
- d) The said purported land transfer form dated 13th September 2005, like the first transfer form is neither signed by the buyer (transferor) nor the seller (transferee).

e) The maker of the false document was unable to forge the signatures of the late **Aron Wambua Makau** and **Peter Ngumbi Mulei**, both of whom are deceased, since this form was prepared purposely for this suit.

f) In any event, there are no supporting documents of the sale either between the late **Aron Wambua** and **Peter Ngumbi Mulei** or from **Alice Kyule** to **Aron Wambua**.

g) That the document is a false document and the Respondent has not proved that the said property was a free property owned by the deceased as at the time of applying for grant of letters of administration herein.

18. Regarding the property referred to as Block 5/355 it was averred that:-

i) The property does not measure 1.5 acres and there is no evidence furnished by the deponent to support the contention.

ii) The 2nd applicant never sold any such property to the late **Peter Ngumbi Mulei**.

iii) There is no sale Agreement furnished to support the purported sale from the 2nd applicant.

iv) There is no pleading as to how much the property was sold for if at all sold, and there are no accompanying evidence of payment to that effect.

v) The purported transfer dated 19th September 2005 was a false document, just like the other previously mentioned transfer forms.

vi) The said transfer form having been prepared recently for purposes of this suit, is not signed by the transferee by late **Peter Ngumbi Mulei** as he was already deceased.

vii) The insertion of the marginal notes that "*parcel near the Potha Market sold to P.N. Mulei please refer to minute no. CMM/6/2005*" is an afterthought and the same has been crafted and by scheme inserted to create a sense of legitimacy which is lacking.

viii) In any event, no such minute exists and/or has been exhibited.

19. With regard to the properties known as Block 4/266, 4/80 and 4/195 it was averred that;

a) The property known as Block 4/80 does not measure 6 acres as purported and no evidence has been furnished to support the reduction of acreage from 20 to 6.

b) There is no evidence of how the said property if at all were acquired, were gotten from the late **Abednego Nyamai Makau**.

c) No member in the entire society was allocated more than 20 acres in Block 4 or Block 5 as earlier stated each member was allocated 20 acres Block 4 and another 20 acres in Block 5 plus a commercial plot measuring 25 by 100 and as such it is not practicable that the late **Nyamai** could have been allocated three different parcels of land two measuring 20 acres and one measuring 6 acres.

d) Regarding the purported transfer dated **16th November 2006** for 6 acres, **16th November 2006** purportedly for 20 acres and the one for **16th November 2006** for another 20 acres, it was averred that;

i) Just like the previously transfer the insertion of the acreage and reference to receipt number is by fraudulent scheme.

ii) None of the said transfers are signed by the late **Abednego Nyamai Makau**.

iii) None of the purported transfers are signed by the purported buyer **Peter Ngumbi Mulei**.

iv) As such transfers not signed by both transferor and transferee are no transfers and or which does not contain either signature of a transferor or a transferee.

20. With respect to the plot referred to as Block 4/17 the 2nd applicant contended that;

a) A property that had not transferred to the deceased cannot form part of the estate of the deceased as defined in the **Law of Succession Act** in terms of free property of the deceased.

b) No details have been given as to how the said property was acquired and or being acquired if at all.

21. In response to an Affidavit attached to the one of **Stephen Kyalo Ngumbi** sworn by **Joseph Mutavi Kithu** the 2nd applicant averred as follows;

a) It is true that **Joseph Mutavi Kithu** was a former office bearer prior to the team that took over; however the information given here is false as the said deponent is a suspect in the illegally disposed of properties of the 2nd applicant and is being investigated for retaining company tools of trade that include the former society rubber stamp.

b) There are no documents attached to his affidavit to support the said averments.

c) In any event the former office bearers have sworn affidavits, stating that no documents were handed over to them including minutes.

22. The Court was therefore urged to make a finding that the grant herein and the confirmation was obtained by the making of an untrue allegation and it included properties that have been fraudulently classified as part of the Estate of the deceased and as such the said grant and Letters of administration should be annulled.

23. The 2nd applicant, therefore prayed for annulment so that its properties and any other property of its members listed therein and confirmed as forming part of the estate of the deceased be removed and made available for the 2nd applicant and its members.

Respondents' Case

24. In response to the 2nd Applicant's application, it was deposed by the Respondents that the properties owned by the 2nd applicants were divided to the members thereof long time ago and some have changed ownership several times. It was disclosed that the deceased acquired for value the twenty seven properties which were initially allotted to members of the 2nd applicant and that in his lifetime and thereafter the beneficiaries have openly and without interruption occupied and used the same without any complain or interruption from either the members or officials of the 2nd applicant.

25. It was deposed that whereas the 2nd applicant exhibited the mother title of the properties it is variously acknowledged that the said properties were subdivided to the members yet the 2nd applicant has surreptitiously isolated only seven properties out of the twenty seven which were owned by the estate of the deceased for attack. According to the Respondents, it cannot be that the deceased whom the 2nd applicant describes as a non-member did actually own the other properties initially allotted to other members within the Society which are not questioned yet the ownership of the seven isolated ones are being questioned merely on the ground of membership.

26. It was averred that the mere fact that there were changes in the 2nd applicant's office bearers does not obviate the facts regarding ownership of the various properties since the estate of the deceased is not and has never been a party to the 2nd applicant's inter office skirmishes. The Respondents noted that the fact that the 2nd applicant admits that there are scanty details regarding the state of properties does not justify the grant of the orders sought based on fishing expedition. It was averred that it is clear that the 2nd applicant has not even shown the interest it has in the isolated properties and it has not been demonstrated that the said properties were not allocated or were reserved.

27. The Respondents averred that the deceased acquired the seven properties on different times and from the records held by them the said properties were of different sizes contrary to the assertion that they all measure 20 acres. According to them property Nos Block 5/123 (3 acres), Block 4/170B (3 acres) were acquired from **Aron Wambua Makau**; Block 5/355 (1,5 acres) was acquired directly from the society; Block 4/80 (6 acres), Block 4/195 (20 acres) and Block 4/266 (20 acres) were acquired from **Abednego Nyamai Makau**; and the deceased was in the process of acquiring Block 4/17 before his demise and though the same was not transferred, his estate has an interest in it based on the exhibited transfer forms.

28. It was disclosed that the then secretary of the 2nd applicant, **Joseph Mutavi Kithu**, whose affidavit he annexed, confirmed that he personally sanctioned the transfers of the said properties upon their procedural acquisition by the deceased. The Respondents therefore denied that they are trespassers or that the said properties were neither allocated to nor disposed of by the 2nd applicant.

29. It was their position that they have occupied the said properties openly and without interference and that the grant was procedurally obtained and that at no time did any party raise any objection to the issuance and the subsequent confirmation of the grant hence the attempt by the 2nd Applicant is belated and unwarranted. It was averred that the said properties have been under occupation and usage by the deceased and the Respondents which they have fenced over the years for over a decade and the 2nd applicant's officials have recognised their ownership thereof.

30. They therefore prayed that the application be dismissed.

31. In the said affidavit sworn by **Joseph Mutavi Kithu** which the Respondents annexed, the deponent who deposed that he was the 2nd applicant's secretary during the period between 1999 and 2006 averred that being the custodian of the 2nd applicant's records then, he was aware of the transactions undertaken by the 2nd Respondents. He confirmed that he oversaw the transfer of the properties mentioned by the Respondents from their previous owners to the deceased and confirmed the validity of the various transfers relied upon by the Respondents.

32. According to him the properties originally owned by the 2nd applicant but were subdivided and allocated to various members and have since changed hands several times though the titles are yet to be processed and transfers done.

Determination

33. I have considered the application, the affidavits both in support of and in opposition to the present application and the submissions filed.

34. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

35. According to the 2nd Applicant, its former office bearers illegally and through corrupt scheme disposed of the 2nd applicant's properties without the consent and/or involvement of its members, keeping the details thereof secret, facts only coming to light from and after the year 2016 when there was change of leadership. It was averred that the new management went through the scanty records handed over to them and the members having suspected fraudulent transfer and disposal of society's properties resolved that action be taken including the making of a report to the director of CID Kiambu Road for disposal of the big farms transferred to Mwambi Properties. The 2nd applicant thereafter instructed its advocates to file suit for recovery of the said properties namely; KATHEKA-KAI /BLOCK4/170B, 195, 17, 266, 80 and BLOCK 5/123 and 355. It was disclosed that whereas some of the properties listed by the Respondents in their summons for confirmation of grant may have been purchased from the 2nd Applicant's members and duly transferred, a fact yet to be established, the singled out seven (7) portions each measuring 20 acres were reserved properties that had not been allocated and or disposed of.

36. According to the 2nd Applicant, the subject properties have not given rise to any individual titles to the members or any other person and as such the 2nd applicant remains the registered owner, while its members who were allocated portions, retain a beneficial interest/ownership until individual titles are issued and that since the late **Peter Ngumbi Mulei** was not a member of Kathekakai Co-operative Society, the 2nd Applicant herein and therefore was not entitled to allocation of any property and by extension could not and cannot own any part of the 2nd applicant's Property unless he acquired the same either by way of purchase and/or gift if any.

37. The Court was therefore urged to make a finding that the grant herein and the confirmation was obtained by the making of an untrue allegation and it included properties that have been fraudulently classified as part of the Estate of the deceased and as such the said grant and Letters of administration should be annulled. It prayed for annulment so that its properties and any other property of its members listed therein and confirmed as forming part of the estate of the deceased be removed and made available for the 2nd applicant and its members.

38. On their part the Respondents contended that that the properties owned by the 2nd applicants were divided to the members thereof long time ago and some have changed ownership several times. It was disclosed that the deceased acquired for value the twenty seven properties which were initially allotted to members of the 2nd applicant and that in his lifetime and thereafter the beneficiaries have openly and without interruption occupied and used the same without any complain or interruption from either the members or officials of the 2nd applicant.

39. The Respondents averred that the deceased acquired the seven properties on different times and from the records held by them the said properties were of different sizes contrary to the assertion that they all measure 20 acres. According to them property Nos Block 5/123 (3 acres), Block 4/170B (3 acres) were acquired from **Aron Wambua Makau**; Block 5/355 (1,5 acres) was acquired directly from the society; Block 4/80 (6 acres), Block 4/195 (20 acres) and Block 4/266 (20 acres) were acquired from **Abednego Nyamai Makau**; and the deceased was in the process of acquiring Block 4/17 before his demise and though the same was not transferred, his estate has an interest in it based on the exhibited transfer forms.

40. The Respondents' contention was supported by an affidavit sworn by the then secretary of the 2nd applicant, **Joseph Mutavi Kithu**. It was their position that they have occupied the said properties openly and without interference and that the grant was procedurally obtained and that at no time did any party raise any objection to the issuance and the subsequent confirmation of the grant hence the attempt by the 2nd Applicant is belated and unwarranted. It was averred that the said properties have been under occupation and usage by the deceased and the Respondents which they have fenced over the years for over a decade and the 2nd applicant's officials have recognised their ownership thereof.

41. They therefore prayed that the application be dismissed.

42. It is clear that the 2nd Applicant's case is premised on the allegation that the Respondents in collusion with the said **Joseph Mutavi Kithu** fraudulently alienated the 2nd Applicant's parcels of lands to the deceased herein. The 2nd applicant has in fact disclosed that it has instructed an advocate to file a suit in respect of the said allegation. According to the 2nd Applicant, the Respondents concealed its interest in the said parcels while applying for the Grant and its subsequent confirmation. The Respondents on the other hand are claiming that the said seven properties were duly purchased by the deceased and therefore the deceased acquired lawful interests therein. It is clear that both the 2nd Applicant and the Respondents are claiming interests in the said properties.

43. 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) (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 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]

44. 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.

45. **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.”

46. 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.”

47. In the premises I disallow the 2nd Applicant’s Summons. I must however state that the 2nd Applicant is not entirely remediless. As was appreciated by Gikonyo, J in **Gituma Kiogora 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.”

48. If the 2nd Applicant prove their claims before the ELC they would still be at liberty to move his Court for revocation of the Grant based on the said decision.

49. There will be no order as to costs.

50. It is so ordered.

Read, signed and delivered online at Machakos this 30th day of July, 2020.

G V ODUNGA

JUDGE

Delivered online to the email of the advocates for the parties with their consent.