



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 150 OF 2010**

**IN THE MATTER OF THE ESTATE OF PAUL MUHANDA AGONYA (DECEASED)**

**RULING**

1. I am tasked with determining a preliminary objection on a point of law, dated 4<sup>th</sup> February 2020, which is brought at the instance of the administrator, and which is in the following terms:

“That this Honourable Court has no jurisdiction to entertain the Interested Party’s application as the said application goes deep to the root of land ownership and this issue can only be canvassed before the Environment and Land Court.”

2. The application referred in the preliminary objection is the Motion, dated 22<sup>nd</sup> October 2019. The person referred to as the interested party is David Igumiru Segero, the applicant in the said Motion. The application seeks that the said applicant be joined as interested party to the cause or be recognized as a beneficiary of the estate, on grounds that he had bought a portion of the estate, being Isukha/Kambiri/139, from the deceased. He avers that he had settled on the land for the last twenty-five years and developed the same. He has attached to his affidavit in support of the application a purported handwritten sale agreement, allegedly dated 8<sup>th</sup> December 1993, to support his case.

3. There is a reply to the application, by Diphina Khatonde Muhanda and Getrude Achitsa Muhanda, through a joint affidavit they swore on 25<sup>th</sup> February 2020. They are applicants in a summons for revocation grant dated 14<sup>th</sup> October 2016. They appear to be complaining about delay in the prosecution of their revocation application. They oppose the Motion dated 22<sup>nd</sup> October 2019, on grounds that the applicant had transacted with a person known as Paul Muhanda Asanya, and not the deceased herein, Paul Muhanda Agonya.

4. They swore a further affidavit, on some unknown date, which they filed in court on 39<sup>th</sup> April 2020. They aver that the court lacked jurisdiction to entertain the application since it seeks to enforce an agreement after the period of limitation. They also aver that the estate asset is a property known as Isukha/Kambiri/1327, and not Isukha/Kambiri/139 which is the subject of the sale agreement between the applicant and the person who sold it to him, and which did not form part of the estate of the deceased. They express surprise that the applicant has been in occupation for twenty-five years without regularizing the title. They have also challenged the purported sale agreement on various other grounds.

5. The applicant himself swore an affidavit on 28<sup>th</sup> February 2020, in response to the preliminary objection, essentially reiterating what he had averred in his affidavit in support of the application.

6. The applicant is not a child of the deceased, and, therefore, he does not lay claim to a stake in the estate in that capacity. Rather, he claims as a creditor, that is a person who had bought a stake in the estate during the deceased’s lifetime. He could be described as a person who claims to be a liability of the estate. It would appear, however, that the estate does not recognize him as such, and the indebtedness of the estate to him is contested. He, therefore, has to prove his claim, that he transacted with the deceased over an asset of the estate; therefore, warranting him being given a share of that property. He claims to have been on the land for over twenty-five years. He would like to be joined to the proceedings for the purpose of agitating his case within these proceedings.

7. The issues that arise in that application, or at any rate, the issues that the applicant wants to agitate within this cause, touch on title to property and use or occupation of land. He would like this court, in this cause, to make a determination as to whether he is entitled to a portion of the estate land, having bought it from the deceased and taken possession. It is about title and ownership of land, for sale of land is about acquisition of proprietary rights. A person who asserts that they bought land from another is asserting a right to title or ownership. Similarly, a person who claims to have been in occupation of land for over twenty years is claiming occupation and user rights, and inherently title founded on the doctrine of adverse possession. Joinder of the applicant to these proceedings, would, no doubt, give him a platform to agitate a claim that he is entitled to the land that he allegedly bought from the deceased, and this court would have to decide whether or not he acquired a title to that portion of land through sale or by adverse possession.

8. Since the issues raised would revolve around title to land, and its use and occupation, it is no surprise that the administrator has chosen to raise the issue of jurisdiction. Under the constitutional regime that was ushered in by the promulgation of the new Constitution in 2010, the High Court no longer has jurisdiction to deal with questions that touch on title or ownership of land, as well as relating to the right to use and occupy it. Jurisdiction over determination of disputes over such matters has been conferred on a new court known as the Environment and

Land Court.

9. The High Court has no jurisdiction over matters that the Environment and Land Court has jurisdiction over, by virtue of Articles 162(2), as read together with Article 165(5), of the Constitution, which state as follows:

“162. (1) ...

(2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

(a) ...

(b) *the environment and the use and occupation of, and title to, land.*”

163 ...

164 ...

165. (1) ...

(2) ...

(3) ...

(4) ...

(5) *The High Court shall not have jurisdiction in respect of matters—*

(a) ...

(b) *falling within the jurisdiction of the courts contemplated in Article 162 (2).*”

10. Article 162(3) of the Constitution commanded Parliament to pass legislation to give effect to Article 162 (2) of the Constitution. Parliament complied with that directive, and passed the Environment and Land Court Act, No. 19 of 2011, to establish the court envisaged in Article 162(2)(b), which delineated the jurisdiction of the court envisaged under that Article. The preamble to the Environment and Land Court Act states the objective of the Act to be: -

“... to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes.”

11. The scope and jurisdiction of the said court is set out in section 13 of the Act, which states as follows:

“13. *Jurisdiction of the Court*

(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 the 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.*”

12. A determination of the question as to whether there was a valid sale of registered land, such as Isukha/Kambiri/139, and, therefore, entitling the buyer to a right to have the interests sold transferred to him, in accordance with the relevant land legislation, is an issue that is

well outside the jurisdiction of the High Court, by virtue of Articles 162(2) and 165(5) of the Constitution and the Environment and Land Court Act.

13. Isukha/Kambiri/139 is registered land. Such land is governed and regulated by both the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012, which carry provisions which state the jurisdiction of the court with regard to the application and interpretation of the provisions of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

14. The provisions in the Land Registration Act state as follows:

*“Interpretation.*

*2. In this Act, unless the context otherwise requires—*

*“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011: ...*

*Jurisdiction of court.*

*101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

15. The Land Act carries similar provisions; which state as follows:

*“2. Interpretation*

*In this Act, unless the context otherwise requires—*

*“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011); ...*

*150. Jurisdiction of the Environment and Land Court*

*The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

16. I understand these provisions, in the context of the application before me, to mean that any disputes or questions or issues that require court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confer jurisdiction on the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference, in the two statutes, to court is to the Environment and Land Court, and any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes.

17. The plain effect of these provisions is that the High Court has no jurisdiction to address itself to matters that fall under the jurisdiction of the Environment and Land Court. The issue that is raised in the instant application relates to sale of land, which is regulated by the Land Registration Act and the Land Act. Contracts relating to sale of land are about title, for the agreement concerns conveyance of the title in the land from the vendor to the purchaser. After sale transfer should follow. All these processes are regulated and governed by the Land Act and the Land Registration Act, and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court, as envisaged by the Land Act and the Land Registration Act. Similarly, the applicant claims that he took possession of the land after he had allegedly bought it, and developed it. These issues turn around occupation and use of the land. All these are matters covered under the Land Registration Act and the Land Act, and, going by what I have stated above, the High Court has no jurisdiction over disputes that arise with respect to matters provided for under both statutes.

18. In his written submissions, the administrator has raised the issue of lack of consent of the relevant land control board, suggesting that the sale alleged by the applicant fell afoul of the Land Control Act, Cap 302, Laws of Kenya. I do not know where the administrator got this one from, for it was not averred to by any of the parties who filed affidavits, either for or against the application. The administrator is being speculative, by raising issues, through written submissions, that have not been deposed in any of the affidavits on record. In any event, those are issues that the parties should place before the Environment and Land Court.

19. In the end, I agree with the administrator, that the joinder of the applicant to these proceedings will be of no use, to the extent that this court will not have the jurisdiction to pronounce as to whether the applicant is entitled to a portion in the estate of the deceased. The applicant is better off before the Environment and Land Court, which has jurisdiction to address the issues that he proposes to place before this court, should he be joined or added as a party.

20. It bears emphasizing that jurisdiction goes to the heart of exercise of power by the court. Where there is no power for the court to act with respect to a particular issue, it ought not touch it. It should let it go. Jurisdiction is what enables a court to act, where there is no jurisdiction the court cannot move an inch. That was underscored by the Court of Appeal in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, in the following words:

*“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.”*

21. It is my finding and holding that the preliminary objection, dated 4<sup>th</sup> February 2020, is merited. It is hereby upheld. The application, dated 22<sup>nd</sup> October 2019, is accordingly struck out. Each party shall bear their own costs. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 16<sup>th</sup> DAY OF October, 2020**

**W. MUSYOKA**

**JUDGE**