



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U)

PETITION NO. 12 OF 2020

RUTH MARANGA

HELLEN MARANGA

YUNIAH MARANGA

EVERLINE MARANGA

LOICE KWAMBOKA MARANGA.....PETITIONERS

VERSUS

SILAS OSOGO MARANGA

VERONICA MAKORI MARANGA

FELIX ONDONGA MARANGA

CALLEB NYATWORI MARANGA

EDNA KWAMBOKA MARANGA

SCOLASTIC NYANCHAMA MARANGA.....RESPONDENTS

RULING

1. The respondents/ applicants have moved this court vide an application dated 12th September 2020 for orders that:
 - a. The Honorable court be pleased to strike out and/or struck out, the petitioners' petition herein dated 31st August 2020 and lodged in court on even date;
 - b. Consequent to prayer (1) herein being granted, the Honorable court be pleased to dismiss the petitioners' petition herein;
 - c. Costs of this application together with the main petition be borne by the petitioners; and
 - d. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is supported by an affidavit sworn by the 1st respondent, Silas Osogo Maranga and is based on the following grounds set out in the body of the application;
 - a. The subject petition touches on and/or concerns the lawful dependants/ and or beneficiaries of the Estate of Wilfred Maranga Kegochi, now deceased;

- b. On the other hand, the petition touches and/or concerns the validity or otherwise of the “Will” that was executed by the deceased;
- c. Notwithstanding the foregoing, the petitioners herein have also anchored the petition on the issue and or claim of matrimonial property;
- d. However, the substratum of the Petition touches on and/or concerns the acquisition, ownership and Title in respect of LR No’s Bassi/Bosingi/ 1456 & 1526, respectively;
- e. Nevertheless, the issue as to acquisition, ownership and/ or title can only be dealt with and/or canvassed before the Environment and Land Court;
- f. In any event, the jurisdiction of this Honorable Court as far as constitutional disputes are concerned, are limited and/or circumscribed by the provisions of Article 162 (2) of the Constitution 2010;
- g. Besides the issues raised in the subject petition are omnibus;
- h. Nevertheless, the Honorable court herein is devoid and/ or divested of jurisdiction to entertain and/or adjudicate upon the subject dispute;
- i. In any event, the issues canvassed vide the petition do not disclose and/or otherwise establish a reasonable cause of action;
- j. On the other hand, the petitioners herein lack the requisite *locus standi* to commence and/ or maintain the instant suit;
- k. In view of the foregoing, the instant proceedings amounts to and/or constitutes an abuse of the due process of court;
- l. Nevertheless, the instant suit/petition is muddled up, irredeemably and/or hopelessly bad;
- m. At any rate, no amount of amendment would redeem the instant suit/petition; and
- n. It is in the interest of justice that the application herein be granted *ex- debito justitiae*.

3. In response to the application, the 5th Petitioner swore an affidavit on 20th November 2020. She deposed that the application was wrought with falsehoods and was only calculated to attract adverse orders against the 1st house of the late Wilfred Maranga Kegochi yet they were equally entitled to the estate of the deceased. She stated that the petition was not *res judicata* as the applicants wanted the court to believe. She reminded the court of its constitutional duty to administer justice without undue regard to procedural technicalities and added that the court would be doing justice if it heard the petition, as it disclosed a reasonable cause of action. The court was urged to dismiss the application for being devoid of merit.

4. The gravamen of the contested petition dated 31st August 2020 is that the respondents, who belong to the 2nd house of the late Wilfred Maranga Kegochi (“the deceased”), have fraudulently disinherited the petitioners, who belong to the 1st house of the deceased, of their rightful share of the deceased property. The petitioners claim that their various constitutional rights, including the right to own property and their freedom from discrimination on the basis of gender have been violated by the respondents.

5. They claim that the 5th petitioner was the deceased’s 1st wife and had been living peacefully with the deceased until he fell ill and travelled for further treatment to the U.S.A. While he was undergoing treatment, he lived with his 2nd wife, the 6th petitioner, and passed away and was buried in the U.S.A. The petitioners claim that after the demise of the deceased, they received a divorce certificate from the 6th petitioner which purported to annul the marriage between the deceased and the 5th petitioner yet the 5th petitioner had never taken part in the divorce proceedings.

6. They contest the validity of a will dated 18th April 2020 purportedly authored by the deceased for the reason that the deceased did not have the mental capacity to make the will due to his illness. The petitioners are doubtful that the deceased would deliberately exclude the first house from benefiting from his estate or leave out his bank accounts, intangible assets such as stocks and other properties from the will. According to them, the deceased was coerced into executing the will by the 2nd house.

7. The petitioners further aver that land parcels nos. Bassi/Bosingi/1456 and 1526 were acquired during the subsistence of the marriage between the deceased and the 5th petitioner with their joint efforts but the respondents connived with the deceased to transfer the matrimonial property to the respondents, leaving the 1st house destitute. These acts by the respondents are said to be in violation of the petitioners’ constitutional rights. They therefore seek the following orders in their Constitutional Petition against the respondents;

- a. Declaration that the will dated 18th April 2020 has no standing in law in light of the property known as parcel numbers Bassi/Bosingi/1456 and 1526, respectively and should be declared nullity in law in its totality, the petitioners having been and still being lawful beneficiaries of the estate of the late Wilfred Maranga Kegochi herein they are entitled to and/or obliged to benefit from the matrimonial property which was acquired and/or accumulated by the late Wilfred Maranga Kegochi and Loice Kwamboka Maranga the 1st wife respectively during the joint covertures and/or period of marriage;
- b. The deputy registrar and/or executive officer Kisii law court be directed and/or ordered to execute all the necessary transfer

instruments and all attendant documents to facilitate the transfer and registration of land parcel numbers Bassi/Bosingi/1456 and 1526 respectively or the matrimonial property in favour of the petitioners;

c. Costs of the petition be borne by the respondents;

d. Any other orders that the court may deem fit and expedient to grant.

8. The respondents have filed an answer to the petition contending that the petitioners are not seized with the requisite *locus* to institute the petition. They deny the contents of the petition in *toto*. In particular, they deny that the 5th petitioner contributed to the acquisition of land parcel numbers Bassi/Bosingi/1456 and 1526 or that the 5th petitioner was not involved in divorce proceedings carried out by the deceased. The respondents also maintain that the Will dated 18th April 2020 was lawfully made and executed by the deceased which had, in any event, been superseded by previous transfers of properties to the respondents. It was also their case that the issues of divorce, matrimonial property and the execution of the will were issues that could not be addressed in the instant petition.

9. The parties canvassed the application by way of written submissions which I have duly considered.

10. The respondents' application is primarily based on whether this court has jurisdiction to hear and determine the petition. They argue that the issues raised in the petition are within the purview of the Environment and Land Court and the probate court and this court is divested of jurisdiction to interrogate the matter.

11. For their part, the petitioners maintain that they are entitled to institute the proceedings herein by virtue of Article 22 and Article 258 (1) of the Constitution. They submit that they have raised a wide range of constitutional issues including the fact that they have been denied the constitutional right to own property. They maintain that they have established the threshold that is required for the determination of a constitutional petition by setting out the constitutional provisions that have been violated and providing the particulars of the said violation.

12. In support of their position the petitioners have cited the case of ***Leisure Lodges Ltd v Commissioner of Lands and 967 Others [2016]eKLR*** where the court held as follows:

42. Finally, whereas we recognize the duality or concurrent and coordinate jurisdiction of the High Court and Environment and Land Court, we are also keenly aware of the need to have the Petition expeditiously disposed of, and it would be more appropriate to determine the Petition before this court. The public interest as expressed in Article 159 of the Constitution demands that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.

13. Questions relating to the jurisdiction of a court must, of necessity, be disposed of before an enquiry into merits of a case. (See ***Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013]eKLR***)

14. It is now well established that where there are other legal processes through which a matter may be disposed of, the court will not decide a constitutional question. The court in the case of ***Alphonse Mwangemi Munga & 10 Others v African Safari Club Limited Petition 564 Of 2004 [2008] eKLR*** pronounced this legal principle thus:

“In our considered view this application is a total abuse of the court process because notwithstanding the court of appeal’s decision in RASHID ODHIAMBO ALOGGOH & 245 OTHERS – VS – HACO INDUSTRIES CA 110/01 where that court said that once one alleges violation or threatened violation of his fundamental rights the court should hear him, that does not give the licence to every litigant to come to court by way of a constitutional application even where there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations.”

15. Similarly, the Supreme Court in the case ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others Petition 14, 14A, 14B & 14C of 2014 [2014] eKLR*** held as follows:

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

16. The petitioners' central complaint is their exclusion from inheriting from the deceased's estate which they blame on the 2nd house. They

question the validity of a Will dated 18th April 2020 which purported to bequeath land parcels nos. Bassi/Bosingi/1456 and 1526 to the respondents and also claim that the 5th petitioner contributed to the acquisition of those parcels of land and had a matrimonial stake in them.

17. In response, the respondents claim that land parcels nos. Bassi/Bosingi/1456 and 1526 did not form part of the deceased's free property or matrimonial property. They claim that the parcels of land were registered in the joint names of the respondents and the deceased thus the deceased's share of the property was vested in the respondents who were the deceased's survivors pursuant to section 60 of the Land Registration Act.

18. An evaluation of the petition in question and the respondent's reply shows that in determining the matter, this court would have to interrogate *inter alia* whether the 5th petitioner was the spouse of Wilfred Maranga Kegochi, the deceased; whether the deceased died testate or intestate; whether the petitioners are rightful beneficiaries of the estate of the deceased; whether land parcel numbers Bassi/Bosingi/1456 and 1526 formed part of the deceased's estate; whether land parcel numbers Bassi/Bosingi/1456 and 1526 constitute matrimonial property and whether the parcels of land should be transferred to and registered in favour of the petitioners. I have no difficulty in finding that these issues do not raise a constitutional question.

19. The Law of Succession Act has set out an elaborate mechanism to address matters relating to succession and the administration of the estates of deceased persons. The probate court would therefore be best placed to determine the matters relating to the estate of the deceased. The questions relating to title to land parcel numbers Bassi/Bosingi/1456 and 1526 are matters within the jurisdiction of the Environment and Land Court which has the mandate to deal with the use, occupation and title to land as provided in Article 162 (2) (b) of the Constitution. Since there are clear procedures prescribed by law to address petitioners' grievances, it would be an affront to the law to allow the petitioners to circumvent those procedures.

20. The petitioners sought refuge in **Article 159 (2) (d)** of the **Constitution** which provides that justice shall be administered without undue regard to procedural technicalities. In my view Article 159 of the Constitution cannot come to the aid of the petition which conflates issues within the jurisdiction of different courts.

21. The Supreme Court in **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR** cited with approval the dissenting opinion of Kiage J. in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** where the learned Judge held that Article 159 of the Constitution and the oxygen principles were not meant to overthrow or destruct rules of procedure which serve to make the process of judicial adjudication and determination fair, just, certain and even-handed.

22. The inevitable conclusion to be drawn from the above is that the application dated 12th September 2020 is merited. The petition dated 31st August 2020 is hereby dismissed with costs to the respondents/ applicants.

Dated, signed and delivered at Kisii this 15th day of December, 2020.

A. K. NDUNG'U

JUDGE