



Mutinda (Suing as the Legal Representative of the Estate of Syokau Kinama alias Beth Syokau Kinama) & another v Agutu & 2 others (Environment & Land Petition E009 of 2022) [2023] KEELC 20843 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION E009 OF 2022
A NYUKURI, J
OCTOBER 18, 2023**

BETWEEN

ROSE MWIKALI MUTINDA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SYOKAU KINAMA ALIAS BETH SYOKAU KINAMA) 1ST PETITIONER

DOROTHY MWONGELI MUTEVU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOYCE NDITI KINAMA) 2ND PETITIONER

AND

CHARLES OWITI AGUTU 1ST RESPONDENT

ROSEMARY ATIENO TOLO OWITH 2ND RESPONDENT

JACKSON MUTUKU KINAMA 3RD RESPONDENT

RULING

1. Before court is the application dated 2nd August 2022 filed by the 1st and 2nd Respondents seeking the following orders;
 - a. The instant petition be dismissed with the costs to the 1st and 2nd respondents.
 - b. Any other orders that meets the ends of justice.
2. The Application was supported by the affidavit sworn by Charles Owiti Agutu the 1st Respondent on 2nd August 2022. The grounds for the application are that the suit herein is Res Judicata, as the issues raised in the petition were raised and fully determined in Machakos ELC 313 of 2011; that this court lacks the Jurisdiction to determine the issues raised in the petition as the issues raised are in respect of inheritance and theft which ought to be determined by the family and criminal courts; that the



- petition does not disclose infringement of any right at all; that the petition is based on documents whose authenticity is doubtful; and that 1st Petitioner lacked capacity to bring this petition as she is the administrator of the estate of Beth Syokau Kinama and not Syokau Kinama.
3. On 18th August 2022, the Applicants/1st and 2nd Respondents filed a supplementary list of annexures attaching the plaint, notice of motion and grounds of opposition filed in Machakos ELC No. 313 of 2011.
 4. The Application is opposed. In response to the application, the 1st Petitioner swore a replying Affidavit dated 8th September 2022 on her own behalf and on behalf of her co-petitioner. On the allegation that the petition was res judicata, she deposed that the issues raised and the parties in ELC 313 of 2011 were not the same as those in this case and that the matter was not heard on its merit. In addition, she deposed that the Plaintiff in the former suit who was her elder brother, died in 2013 without leaving instructions or information about the matter.
 5. She further deposed that this court has jurisdiction to hear disputes relating to land contracts, instruments granting any enforceable interest in land and any other dispute relating to land.
 6. She averred that that the issues raised in the petition are purely based on a land contract the suit land being Mavoko Town Block 2/317 (hereinafter referred to as the suit land). She stated that the issues raised in the Petition about the land are:
 - a. Whether there was a legal sale of the land on 6th May 2001.
 - b. Whether the 1st & 2nd Respondents are bonafide purchasers for value without notice under law.
 - c. Whether the 1st & 2nd Respondents acquired possession of the title to the land legally.
 - d. Whether the caution registered against the title to the land by the 1st and 2nd respondents claiming Purchasers Interest on 25th April 2019 was lawful.
 7. The deponent stated that the 1st and 2nd Respondents claim purchasers interest on the land as evidenced in their caution against the title to the land, a matter that can only be conclusively decided by this honourable court. She further stated that if the 1st & 2nd Respondents had claimed beneficial interest then this matter would be a succession matter, but since they claimed purchasers interest this court is best placed to determine the validity of land contracts, any instrument granting enforceable interest in land and other land disputes.
 8. She further deposed that she has full legal capacity to bring this suit before this court as she has the grant letters of administration ad litem to the deceased's estate issued to her on 25th February 2022 by the High Court and that as stated in the petition, she is the last born daughter of Syokau Kinama as the rest of her siblings are deceased. She averred that Beth Syokau Kinama is the same person as Syokau Kinama and she died as correctly stated in the grant letters of administration ad litem on 16th May, 1999.
 9. She further deposed that the documents marked as COA 2(C-K) annexed by the 1st and 2nd Respondents in their application are authentic and it is clear that in the death certificate the deceased's name appears as Syokau Kinama and on the chief's letter dated 22nd February, her name appears as Beth Syokau Kiama. She stated that her late mother was known to them as Beth Syokau Kinama but on her death certificate and Title Deed Number Mavoko Town Block 2/317 her name appears as Syokau Kinama.
 10. It was also her argument that the 1st & 2nd Respondents cannot claim to know the late Beth Syokau Kinama better than herself who is the actual daughter of the deceased. She also stated that even though letters of administration intestate for the estate of Syokimau Kinama were issued to her late elder



brother Michael Muange Kinama on 1st February 2002, they were never confirmed so he never had the chance to collect the assets of the estate or distribute the estate and that he died on 4th February 2006. It was also her opinion that in any case the widow and beneficiary of the estate of the late Michael Muange who is Rose Nthenya Muange consented to the court granting her letters of administration ad litem as evidenced by annexure CAO 2 H.

11. She also stated that she has the capacity to bring the petition before this court because she holds valid grant of letters administration ad litem for the estate of her late mother.
12. It was also her position that the petition discloses infringement on their right to property as Petitioners of both estates and that the 1st and 2nd respondents have blatantly refused to give back their mother's title to the land so that they can proceed to file a succession matter and distribute the property among the beneficiaries.
13. The deponent further stated that the 1st and 2nd respondents have not clearly stated which specific documents are not authentic and that it is clear that their intentions are disingenuous and are aimed to derail this matter. She also stated that all the documents presented in the petition and specifically in their list of documents dated 22nd April 2022 are genuine and authentic save for the copy of the sale agreement and typed schedule of payments that were supplied to them by the 1st Respondent to establish his claim to the land.
14. She also deposed that if the 1st & 2nd Respondents want to abandon the said sale agreement and typed schedule of payments, they can do so and relinquish all claims to the land, return the original title deed of the land to the Petitioners and withdraw their caution registered against the title dated 25th April 2019. It was also their argument that this abandonment of their own documents is explicit evidence of the fraud, deceit and illegality perpetuated by the 1st & 2nd respondents as they have no valid or legal claim to the suit property and continue to hold the original title of the land with impunity.
15. On 7th February 2023, the Applicants informed court that they had abandoned the ground of res judicata.
16. The Application was canvassed by way of written submissions. On record are the Applicants'/1st and 2nd Respondents' submissions filed on 9th February 2023 and the Respondents'/Petitioners' submissions filed on 16th November 2022.

Applicant' Submissions

17. Counsel for the Applicants submitted that as the Petitioners' claim was a claim of the estate of a deceased person, that was a succession matter which is outside the jurisdiction of this court. They relied on Section 47 of the [Law of Succession Act](#) as read with Rule 73 of the Probate and Administration Rules to argue that it is the High Court that has jurisdiction to determine succession matters. Counsel argued that the jurisdiction of the ELC Court under Article 162 (2) (b) of [the Constitution](#) was on occupation, use and title/registration to land and not on where to keep the title.
18. On whether the petition disclosed infringement of the Petitioners' right, the Applicants argued that the position of a personal representative does not confer a right to property but a duty to ensure that every person entitled to a share of the estate is provided for. To support this, they cited the case of Nairobi Probate Cause No.21 of 1994-The Estate of Fatuma Binti Mwanzi for the proposition that an administrator appointed in the event of intestacy, does not automatically become a beneficiary of the estate of the deceased.



19. On the petition being founded on documents whose authenticity is doubtful, counsel submitted that Beth Syokau Kinama and Syokau Kinama are two different persons and that the Petitioner ought to first obtain the appropriate letters of administration as the suit property is not registered in the name of Beth Syokau Kinama. It was also their contention that all the documents for the process of acquiring the letters of administration ad litem bore the name Beth Syokau Kinama and that there was no document that indicates that Beth Syokau Kinama was also known as Syokau Kinama. They argued that the Petitioners only went to the chief for a letter confirming that both names belong to the same person only after the Applicants challenged that position. They argued that the Petitioners were fishing for evidence and that a chief has no authority to authenticate or confirm names. They also submitted that the sale agreement relied upon by the Petitioners was not signed whereas the sale agreement that was relied on in case No.313 of 2011 was duly signed. They asked for the dismissal of the Petition.

Petitioner's submissions

20. Counsel for the Petitioners submitted that this matter was not res judicata, as the issues and the parties in Machakos ELC Case No. 313 of 2011 were different from those in this case, and that the matter was not heard and determined on its merit. Reliance was placed on the case of Joseph Kaguthi & 11 Others v Permanent Secretary Ministry of Interior & Co-ordination of Government & Another [2021] e KLR.
21. On the question of jurisdiction, counsel was of the view that the ELC has jurisdiction to hear all matters related to contracts in land and that the land in question is Mavoko Town Block 2/317. It was their argument that the 1st and 2nd Respondents claim purchaser's interest over the suit property as evidenced in their caution against the title to the land, and not a beneficial interest which could have rendered the matter a subject of the succession court.
22. In regard to the allegation of lack of capacity by the 1st Petitioner to bring this petition, counsel contended that the 1st Petitioner had capacity by dint of the grant of letters of administration ad litem issued on 25th February 2022 to file this petition. They cited the case of Hawo Shanko v Mohammed Uta Shanko [2018] eKLR for the proposition that a party can only file a suit for the deceased's estate if they have a grant of letters of administration. On whether the petition discloses infringement of the Petitioners' rights, counsel submitted that the rights of the Petitioners as the beneficiaries of the estate of both deceased proprietors have greatly been infringed upon. They submitted that the Respondents have blatantly refused to hand over the titles over the suit property for purposes of succession and distribution of the estate of the deceased.
23. On the question of authenticity of documents, counsel submitted that all documents presented to the court are genuine except the copy of the sale agreement and typed schedule payments which were supplied by the Respondents to prove their claim.

Analysis and determination

24. The court has considered the application and the affidavits in support, the response thereto and the rival submissions by the parties. Counsel for the Respondents having abandoned the ground of res judicata, on 7th February 2023, the remaining objections are therefore on this court's jurisdiction; capacity of the 1st Petitioner to file this suit; authenticity of the Petitioners' documentation; and whether the Petitioners' rights were infringed. Since the petition is yet to be heard, I take the position that the questions of whether the Petitioners' documents are authentic and whether the petition demonstrates violation of the Petitioners' rights go to the core of the substantive dispute and are therefore matters that can only be determined on trial upon taking evidence from the parties, and cannot be determined by way of notice of motion.



25. On whether the 1st Petitioner has capacity to institute the petition, the Applicant's contention is that Beth Syokau Kinama is a different person from Syokau Kinama. It is not disputed that the 1st Petitioner has grant of letters of administration for the estate of Beth Syokau Kinama. Considering submissions on both sides, I take the view that the question of whether Beth Syokau Kinama is one and the same person as Syokau Kinama is a matter of evidence which ought to be determined by a trial and not by way of application.
26. On the question of jurisdiction, it is trite that jurisdiction emanates from *the constitution* or statute or both and a court cannot arrogate itself jurisdiction that it does not have.
27. The jurisdiction of this court is derived from Article 162 (2) (b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act* which grants the ELC the jurisdiction to hear and determine matters in respect of use, occupation of, and title to land and the environment.
28. On the question of jurisdiction, the Applicants argued that the matters raised in the petition are matters under the *Law of Succession Act* which are determined by the probate division of the High Court as the matters raised concern a claim of the estate of the deceased. The Petitioners on their part argue that what is in dispute is the alleged sale transactions. A perusal of the petition reveals that the Petitioners' claim that the deceased's title is in the Respondent's hands illegally as they are not bona fide purchasers of the suit property. They sought declaratory orders as well as orders of injunction to restrain the Respondents from interfering with the suit property. They further sought removal of a caution and surrender of the title deed.
29. Therefore, the issue before court is whether the Respondents have a bona fide claim on the suit property to legitimise their holding onto the title of the suit property and to maintain a caution on the suit property.
30. The claim herein concerns title to land as the Petitioners disputes the allegation that the Respondents are purchasers of the suit property. I do not agree with the Respondents' contention that a claim in respect of property alleged to belong to a deceased person must be a claim under the *Law of Succession Act*. If the issue is on ownership and not distribution, then it is a matter for the ELC, even if one of the parties is deceased. In the premises I hold and find that the claim herein being on whether the Respondents are bona fide purchasers is a matter for determination by the ELC and not the Probate and Administration Court.
31. Having found that this is a matter for the determination by the ELC, I then must answer the question as to whether this court can proceed to hear this matter in view of the fact that Machakos ELC 313 of 2011 was dismissed for want of prosecution by this court on 23rd February 2018.
32. As Machakos ELC 313 of 2011 was dismissed for want of prosecution, then it is clear that that suit was not heard on merit and it follows that that determination cannot render this suit as res judicata under Section 7 of the *Civil Procedure Act*.
33. How does Machakos ELC 313 of 2011 (former suit) relate to this suit? Having considered the Plaint in the former suit, I note that one Joseph Mutua Kinama, an administrator of the estate of the late Syokau Kinama, filed suit against Shangilia Baba na Mama and Mutuku Kinama alleging that by an agreement of 1999, the 2nd Respondent purported to sell 9 acres of the suit property to the 1st Defendant. He faulted the alleged sale on grounds that the suit property belonged to the late Syokau Kinama and Nditi Kinama, who were both deceased and that no grant had been obtained for their estates and that the sale was therefore tainted with fraud. He also contended that the sale was not blessed with a consent from the land control board. By a Notice of Motion dated 28th November 2012 filed in court on 17th



December 2012, Charles Owiti Agutu and Rosemary Atieno Tolo sought to be joined to that suit by virtue of having purchased the suit property. From the documents filed by the parties, the Plaintiff in the former suit has a full grant of letters of administration for Syokau Kinama. It is clear therefore that the claim in the former suit and in this suit is whether Mutuku Kinama had capacity to enter into a contract for sale of the suit property. I have considered the petition herein and what is in contention is the capacity of Mutuku Kinama to purport to sell the suit property to the 1st and 2nd Respondents. In my view therefore this suit, like the former suit concern the same parties and the same course of action. The former suit was dismissed for want of prosecution on 23rd February 2018. That order has neither been reviewed, set aside nor appealed against and therefore still stands.

34. Order 17 Rule 2 (6) of the Civil Procedure Rules provides in regard to matters dismissed for want of prosecution as follows;

A party may apply to court after dismissal of a suit under this order.

35. Therefore, where a suit is dismissed for want of prosecution a party is allowed to make an application they deem fit if they are still interested in having the dispute determined on merit. For that reason therefore, a party whose suit is dismissed for want of prosecution ought not file a fresh suit but should apply to reinstate their suit. Filing a fresh suit would make a mockery of the order of dismissal for want of prosecution and in my view would amount to abuse of the court process.

36. I associate with the decision in *Mumira v Attorney General* (Constitutional Petition E007 of 2020 [2022] KEHC 271 (KLR) (8 April 2022) (Ruling) where the court held as follows;

...there is yet another important issue which was not addressed in the said cases, which is, whether it is open for a party to file a fresh suit based on the same facts and circumstances after the earlier suit is dismissed for want of prosecution. My view is that it is not open for a party to file a fresh suit after the earlier suit is dismissed for want of prosecution.

In my view, the proper cause of action for the Petitioner was to apply to set aside the order dismissing the petition for want of prosecution or apply to review the order or prefer an appeal against the dismissal. It is not open for the Petitioner to initiate a fresh suit disguised as a constitutional petition replicating the same issues now camouflaged as a breach of constitutional rights. Such an approach is impermissible and if allowed, it would create endless litigation and open a window for parties to evade orders dismissing suits for want of prosecution or for non attendance and then file fresh suits vexing respondents twice with the same suit.

37. In the instant matter, it is immaterial that the former suit was commenced by plaint, while this suit was commenced by a constitutional petition, as the facts and circumstances relied upon and the question that the court has been invited to address is the same. Even the fact that there is a different administrator of the estate of Syokau Kinama in the former suit and the current suit, cannot be a justification for filing a fresh suit when the former suit was dismissed for want of prosecution. The attempt by the Petitioners to convert their claim into a constitutional petition when plainly it is the same claim filed earlier and subsequently dismissed by this court, is an abuse of the court process which this court will not countenance. For the above reasons, this petition is found to be an abuse of the court process and is hereby dismissed with costs to the 1st and 2nd Respondents.

38. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM



A. NYUKURI

JUDGE

In the presence of:

Mr. Makau for 1st and 2nd Petitioners

Ms. Atieno holding brief for Mr. Orondo for 1st and 2nd Respondents

Mr. Mwiti for 3rd Respondent

