



Litecrete Kenya Limited & another v Leposo & another (As the administrators of the Estate of Hassan Iddi Malambu (Deceased) & another (Originating Summons 47 of 2019 & Environmental and Land Originating Summons E001 of 2020 & 45 & 46 of 2019 (Consolidated)) [2023] KEELC 21786 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21786 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ORIGINATING SUMMONS 47 OF 2019 & ENVIROMENTAL AND LAND
ORIGINATING SUMMONS E001 OF 2020 & 45 & 46 OF 2019 (CONSOLIDATED)**

MN GICHERU, J

NOVEMBER 22, 2023

BETWEEN

LITECRETE KENYA LIMITED 1ST APPLICANT

DR. ALI KOLELA MONTET 2ND APPLICANT

AND

**SHABAN HASSAN LEPOSO AND LUCY NYAMWIZA-MUTAGURWA (AS
THE ADMINISTRATORS OF THE ESTATE OF HASSAN IDDI MALAMBU
(DECEASED) 1ST RESPONDENT**

MAJOR SHAABAN LEPOSO 2ND RESPONDENT

RULING

1. This ruling is on the notice of preliminary objection on a point of law dated 10/2/2023. The preliminary objection which is by the first and second defendants is based on the following grounds.
 - i. This court has no jurisdiction to hear and determine the issues raised in the Amended Originating Summons as the same have been determined conclusively by the probate and succession court in probate and administration cause no. 64 of 2016 – in the matter of the estate of Iddi Malambu Hassan (deceased).
 - ii. That the property subject matter of this suit was litigated over in cause no. 64 of 2016 where the court delivered two rulings on 19/3/2018 and 23/4/2020.



- iii. That the plaintiff having not appealed the decision aforesaid, the instant suits constitute an invitation to this court to sit on appeal in a matter already determined by a court of concurrent jurisdiction.
 - iv. That the suit is a concealed attempt at appealing against the decision in the concluded succession cause which court has since confirmed the grant and distributed the estate of the deceased.
 - v. That this court has no jurisdiction to sit on appeal over a decision made by the succession court which is a court of equal status as per Article 165 (3) (e) of *the Constitution* of Kenya.
 - vi. That the suit is misconceived and an abuse of the court process as both are attempts to undermine the jurisdictional mandate of succession court which heard and conclusively determined the ownership of the suit property in the consolidated suits.
 - vii. That the suit is devoid of merit and is solely intended to circumvent the adverse finding in the succession cause which cancelled the Plaintiff's titles and reverted them to the estate of the deceased.
 - viii. That the consolidated suits are a gross abuse of the court process and ought to be struck out in limine.
2. The Plaintiffs' counsel filed written submissions dated 15/5/2023 in which he identified only issue for determination which is as follows.

Whether this court has jurisdiction to try the consolidated suits?

3. In urging that this court has jurisdiction, the plaintiffs' counsel raised the following points.

Firstly, the suit before the High Court was only concerned with establishing the rightful administrators of the estate of the deceased and its dependants. In this case, the applicants are seeking to be included in the estate of the deceased after they were left without recourse after property that they had purchased was distributed to others.

Secondly, the applicants were not parties to the probate and administration cause No. 64 of 2016 as they were foreigners to the estate who just happened to purchase property that forms part of the estate of the deceased Iddi Malamba Hassan.

Thirdly, it is trite law that an outsider to an estate who is not a beneficiary of the deceased cannot lay claim to the property within the estate through probate and administration proceedings.

Finally, the applicants' counsel urges that the preliminary objection does not raise any valid point of law to which it objects but it merely waffles around the facts of the case in order to defeat the hearing of the applicants' suit. He therefore prays that it be dismissed and the court hears the suit on merit.

4. The counsel for the respondents had filed written submissions dated 19/4/2023 and identified the same issue namely, jurisdiction, as the single issue for determination in this preliminary objection. The submissions elicit the following points.

Firstly, the suit relates to probate and administration and is governed by Section 2 of the *Law of Succession Act* and this court has no jurisdiction as it derives its jurisdiction from Section 13 of the *Environment and Land Court Act*.



Secondly, the High Court has already delivered two rulings in this case and this court cannot sit on appeal over the decision of a court of equal status.

Thirdly, in the absence of jurisdiction under the *Law of Succession Act* and as an appellate court, the only option open to this court is to down its tools and allow the preliminary objection.

5. I have carefully considered the preliminary objection in its entirety including the legal issues raised therein, the submissions by the learned counsel and law cited therein. I make the following findings.

Firstly, I find that the first applicant in this case is owned by the second applicant. This is from the second applicant's supporting affidavit dated 17/5/2019 where he says in paragraph 2 thereof

“That I am the managing director of the 1st applicant which company is the proprietor of title numbers Kajiado/ Ngong/Ngong/54508 and 54509...

In High Court Succession Cause No. 64 of 2016 at Kajiado, the first applicant Dr. Ali Kolela Montet was the first respondent. He was to begin with, one of the administrators of the estate of the deceased Idadi Malamba Hassan. Since he was a party to the suit, the first applicant cannot be heard to say that he was left out without recourse. He participated in the suit as a key party. He acquired the land that he claims through the succession cause as a beneficiary of the estate of the deceased. His company, the first applicant, cannot also be heard to say that it did not participate in the High Court suit because its managing director participated.

6. The applicant's having lost the tag of outsiders and third parties to the Succession Cause, we now come to the so called third parties.

At paragraph 8 of the affidavit dated 17/5/2019 the second applicant had this to say,

“That out of the proceeds of sale of parcels of land sold to Jabe Investments Limited, Kellen Kairitu Kebara and other purchasers, I built the said Hassan Iddi Malambu a house and also paid for the education of the deceased's grandchildren and general upkeep of his beneficiaries which includes the respondents herein”.

7. It is clear from the above deposition that those mentioned in the above paragraph are claiming through the applicants. The High Court has already found that the second applicant did not acquire suit property lawfully as a result of which it revoked the grant that enabled him acquire the said property in the first place.

8. Article 40(6) of the Constitution does not protect unlawfully acquired property. It provides as follows.

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

The Supreme Court of Kenya has had occasion to pronounce itself in regard to this particular provision in *Dina Management Limited –versus- County Government of Mombasa and 5 others* Petition No. 8 (E010) of 2021 where it stated as follows at paragraph 111 of the judgment dated 21/4/2023.

- (III) Article 40 of *the Constitution* entitles every person to the right to property subject to the limitation set out therein. Article 40(6) limits the rights as not extending therein to any property that has been found to have been unlawfully



acquired. Having found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser”.

9. It is my finding that all those claiming land through the second applicant in this case have no cause of action against the respondents in this case because the person through whom they claim lost in the succession cause.
10. In conclusion and in dealing with the only issue to be determined in this preliminary objection, I find that this court has no jurisdiction to entertain this suit as well as the related suits because the key player who is the second respondent was exhaustively heard by the High Court which made a final decision in the matter, not once but twice. The only option left to the second applicant was to appeal to the court of appeal.
11. I uphold the preliminary objection and strike out this suit and the related suits with costs to the respondents.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 22ND DAY OF NOVEMBER, 2023.

M.N. GICHERU

JUDGE

