



**Totoitich & another v Kimeto & another (Environment & Land Case
76 of 2022) [2023] KEELC 22273 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 76 OF 2022**

L WAITHAKA, J

DECEMBER 19, 2023

**IN THE MATTER OF THE ESTATE OF KIMETO KOITOROR
CHESIRE ALIAS KIMETO ARAP CHESIRE (DECEASED)**

BETWEEN

TABARBUCH TOTOITICH 1ST PLAINTIFF

JOSEPH KITAI CHESIRE 2ND PLAINTIFF

AND

FRANCIS KIPTOO KIMETO 1ST DEFENDANT

BENJAMIN KIPLAGAT 2ND DEFENDANT

RULING

Introduction

1. This ruling is in respect of the notice of Motion/Application dated May 23, 2023. Through the Application, the 1st and the 2nd defendants (hereinafter jointly referred to as the applicants) seek to strike out the proceedings before this court on the ground that the court lacks jurisdiction to handle an objection in succession proceedings; that the suit/dispute before the court is a succession cause and that the suit before it is incompetent.
2. The Application is supported by the Affidavit of the defendants' counsel, Elijah Momanyi Mogona, sworn on May 23, 2023 on which the grounds on the face of the Application are reiterated.
3. It is opposed by the 2nd plaintiff/respondent on the grounds that it is an abuse of the process of the court. In this regard, the 2nd plaintiff/respondent through the Replying Affidavits he swore on June 23, 2023 and October 13, 2023 has deponed that *vide* an Application dated December 20, 2018, the Applicants challenged the competency and tenability of the summons for revocation; that their



- Application was rejected by the court and that the Applicants appealed against the decision of the court.
4. Arguing that having appealed against the decision of the trial court, the Applicants cannot raise a similar issue before this court, as they have done through the instant Application. The 2nd plaintiff/respondent maintains that the application is an abuse of the court process. The 2nd plaintiff/respondent further depones that the issues raised by the applicants have been taken up severally before the high court hence *res judicata*. In that regard, reference is made to the Application dated December 20, 2018 which the applicants lost. It is pointed out that the applicants had raised the issue of the court's jurisdiction to adjudicate a claim for trust to land. It is also pointed that through their Replying Affidavit filed on April 24, 2019, the applicants deponed that the summons for revocation was incompetent as it involved a declaration of trust. It is pointed out that the objection was dismissed and that the applicants never appealed that decision.
 5. Wilson Kipruto Chebett filed a Replying Affidavit sworn on October 30, 2023 ostensibly supporting the application on the grounds that the matter before the court is a succession matter as opposed to a land matter and that the application for revocation and annulment of grant issued on May 16, 2014, is yet to be heard as the proceeding have been transferred to this court.
 6. Pursuant to directions given on October 11, 2023, that the application be disposed off by Written Submissions, the parties filed submissions reiterating the position advanced in their pleaded cases.
 7. Through their Submissions filed on May 23, 2023 the defendants/applicants have reiterated their contention that this court lacks jurisdiction to hear the case transferred to it to determine because it is an objection in a succession cause. According to the applicants, the plaintiffs/respondents should file a suit based on trust which suit the respondents would respond to in the normal way. The court is urged to find that it has no jurisdiction to deal with issues of trust to land filed in a succession cause.
 8. In their submissions filed on November 17, 2023 the plaintiffs/respondents have reiterated their contention that the application is *res judicata* hence an abuse of the process of the court. It is the plaintiffs' case, that the reliefs sought are well placed within the jurisdiction of this court; these are declaration of a trust and cancellation of title. The objection by the applicants is said to be on form and not substance.
 9. The objector filed submissions dated November 15, 2023 reiterating his contention that this court lacks jurisdiction to handle or deal with objection proceedings filed in a succession cause. According to the objector, the succession cause was transferred to this court by mistake. The order for transfer of the cause to this court for hearing and determination is said to have been made based on a mistaken belief that the case was a land matter. The foregoing notwithstanding, the objector acknowledges that the issues raised relate to land parcel numbers Iron/Iten/3652; 3653, 3654, 3655 and 3656.
 10. Like the applicants, the objector submits that the plaintiffs/respondents ought to file a land suit.

Analysis and determination

11. I have carefully read and considered the application by the applicants, the arguments advanced by the applicants and the objector in support of the application and the response by the plaintiffs/respondents.
12. The sole issue for determination is whether this court has jurisdiction to hear and determine the dispute brought before it.



13. Regarding that issue, it is common ground that the suit began as a succession dispute. An issue as to whether the parcels of land that were the subject matter of the succession cause are subject to trust arose in the succession proceedings. Directions on how to deal with the issue were given by the court, Kimondo J, on May 23, 2016 in the following terms:-
- “ 1. The objection herein shall be determined by *viva voce* evidence;
 2. The objectors shall now be the plaintiffs;
 3. The petitioners shall be the defendants;
 4. The Affidavits and the pleadings filed by the objector and the defendant shall constitute the plaint or defence as the case may be.
 5. All witnesses to be called shall file and serve witness statements. At hearing, they shall identify their statements and be submitted for cross examination.
 6. The parties shall exchange any documents and conclude discovery at least 30 days before the hearing.
 7. A hearing day shall be taken at the registry.
14. I have read the pleadings filed in the succession cause and noted that the major issue is whether the parcels of land in question are subject to a trust in favour of the objectors, now plaintiff. Whereas the application by the applicant raises pertinent issues concerning the form of the case, I do find that issue was addressed by the court through the order or directions given May 23, 2016. Those orders clearly addressed the issues raised by the applicant by converting the pleadings filed by the parties to a plaint and statements of defence as the case may be. It is the considered view of this court, that it is this court and not the succession cause which has mandate to hear and determine the issue of trust pleaded by the objectors/now plaintiffs and denied by the petitioners now the defendants. I agree with the respondents submission that the issue of want of form of the pleadings should not be elevated to fetish at the expense of substantive justice which the court is required to dispense to parties without undue regard to procedural technicalities. Through their responses and submissions, the applicants have submitted that the respondents need to file a suit based on trust. The court record shows that there is already a suit based on trust. The suit though began as a succession cause, was converted by the court to a plaint and the pleadings filed by the petitioners converted into statements of defence. If the applicants were aggrieved by the directions given by the court, they ought to have appealed against those directions.
15. I note with concern, that none of the parties has addressed the court on the meaning and import of the order/directions issued on May 23, 2016, which in my view renders the issues raised by the applicants *otiose*. Though this is not to say that the court conferred jurisdiction on this court. The jurisdiction arises out of the fact that there is now a plaint and defence raising issue of trust which this court has jurisdiction to hear and determine pursuant to article 162(2) of the [Constitution](#). It has not been demonstrated by the applicants and the objector what prejudice if any, they stand to suffer if this court proceeds with the case before it and makes a determination as to whether the parcels of land in question are subject to a trust in favour of the respondents. In making that determination, this court would be acting within its constitutional remit.
16. If there are remedies sought that fall outside the legal and constitutional mandate of the court, the court will decline to address those issues.



17. The upshot of the foregoing is that the application dated May 23, 2023 lacks in merits. Consequently, I dismiss it with costs to the plaintiffs/respondents.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 19TH DAY OF DECEMBER, 2023

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the presence of:-

Mr. Mogambi for the Plaintiff

Mr. Nyambegera for the Objector

Mr. Wainaina holding brief for Mr. Momanyi for the Defendants

Court Asst.: Christine

