



REPUBLIC OF KENYA



Muriu & 3 others v Onesmus & 2 others (Environment & Land Case E061 of 2022) [2023] KEELC 22230 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E061 OF 2022
A OMBWAYO, J
DECEMBER 15, 2023**

BETWEEN

**DR. FRANCIS KINUTHIA MURIU 1ST PLAINTIFF
CHRISTINE MUTHONI WANJEMA 2ND PLAINTIFF
ERIC MURIU WANJEMA 3RD PLAINTIFF
JEAN GATHONI WANJEMA 4TH PLAINTIFF**

AND

**MICHAEL WANJIHIA ONESMUS 1ST DEFENDANT
THERESA MUKUHI MACHARIA 2ND DEFENDANT
CECELIA WANGUI MUTURI 3RD DEFENDANT**

RULING

1. Dr.Francis Kinuthia Muriu and Christine Muthoni Wanjema, Erick Muriu Wanjema and Jean Gathoni Wanjema, (hereinafter referred to as the plaintiffs) have sued Michael Wanjihia Onesmus, Theresa Mukuhi Macharia and Cecelia Wangui Muturi(hereinafter referred to as the defendants) stating that at all material times to this suit the late Mary Wanjiku Kinuthia was the registered owner and / or proprietor of all that parcel of land known as (Plot No 452 /XXI 1/5) now Nakuru Municipality Block 4/114.
2. The plaintiffs aver that the said Mary Wanjiku Kinuthia was a sister to the mother of the 1st plaintiff, the defendants and the late James Wanjema Muriu, that is to say the late Felistas Wariara Muriu but the said Mary Wanjiku Kinuthia was unmarried and had no children as a result of which she gave the parcel of (Plot No 452 /XXI 1/5) now- Nakuru Municipality Block 4/ 114 to the male children of her sister that is to say the 1st plaintiff, the 1st defendant and the late James Wanjema.



3. It is the plaintiffs' case that, the 1st defendant has always wanted to sell the said parcel of land without considering the interests of the 2nd 3rd & 4th plaintiffs which is a fact well captured in the Judgement of this Hon. court dated 30/3/2017 in Nakuru high court case No 596 of 2013 when the court nullified a sale agreement between the 1st defendant and a 3rd party even before the 1st defendant obtaining a confirmed grant to the Estate of the late Mary Wanjiku Kinuthia.
4. The plaintiffs aver that after obtaining letters of Administration and the confirmed grant to the Estate of the said Mary Wanjiku Kinuthia because James Wanjema Muriu had died on 19th December 1999, so as to secure the land, the confirmed grant in the Estate of the said Mary Wanjiku Kinuthia was issued for the property in the Joint names of the 1st plaintiff and the 1st defendant in Nakuru Court Succ.Cause No 1773 of 2005, title was also later issued in the names of the 1st plaintiff and the 1st defendant to the said parcel of land (Plot No 452 /XXI 1/5) now- Nakuru Municipality Block 4/114 on or about 21st July 2009 pending the grant of Letters of Administration to the Estate of their deceased brother James Wanjema Muriu.
5. On or about August 2022 the 1st plaintiff reliably learnt that the 1st defendant had secretly subdivided the land (Plot No 452/XXI 1/5) now- (Nakuru Municipality Block 4/114) into two between 1st March 2022 and 4th April 2022 without considering the equal interests of their deceased brother James Wanjema Muriu and the 1st defendant has-caused two Title to be issued being:-
 - (a) Nakuru Municipality Block 4/ 493 in the name of the 1st defendant. (b) Nakuru Municipality Block 4/ 494 - in the name of the 1st plaintiff (Francis Kinuthia Muriu).
6. It is the plaintiffs' case that even though the parcel of land (Plot No 452 /XXI 1/5) now Nakuru Municipality Block 4/ 114 was in the names 1st plaintiff and the 1st defendant as per the Title issued Jointly on 21st July 2009, the plaintiffs were all along aware that the interests of their deceased brother James Wanjema Muriu was therein, but it is no longer the case after the 1st defendant without the knowledge or consent of the 1st plaintiff subdivided the land into two.
7. The plaintiffs avers that the two Titles currently in the name of the plaintiff and the 1st defendant which are a subdivision of the mother Title ought to be cancelled so that three new Titles be issued in the names of the 1st plaintiff, 2nd, 3rd & 4th plaintiffs Jointly and that of the 1st defendant before the defendant goes ahead to start selling his parcel being Nakuru Municipality Block 4/493.
8. The plaintiffs avers that on or about 3/11/2022, as a further confirmation and evidence that the 1st defendant intention was to sell Nakuru/municipality Block 4/493 which got registered in his name after the secretive subdivision so as to further defeat the interests of his deceased brother (as represented by the 2nd 3rd & 4th plaintiffs) when this matter was before this Hon-Court and after being served with the plaint & the application dated 31/10/2022 the 1st defendant again secretly anferred the parcel to the 2nd & 3rd defendants.
9. The plaintiff's prays that This Hon. court be pleased to cancel Titles to Parcel Nos. Nakuru Municipality Block 4/493 in the name of the 2nd & 3rd defendants and Nakuru Municipality Block 4/494 in the name of the 1st plaintiff.
10. This Hon. Court be pleased to issue order that (Plot No 452 /XXI 1/5) now Nakuru Municipality Block 4/114 be equally subdivided into three portions after cancellation of the Titles in the names of the 2nd & 3rd defendant and the 1st plaintiff, that is to say Nakuru Municipality Block 4/493 and Nakuru Municipality Block 4/494 and the Land Regisar Nakuru be ordered to issue new titles as follows:-
 - a. One, in the name of the 1st plaintiff



- b. 2nd Title in the joint names of the 2nd 3rd and 4th plaintiffs
- c. The 3rd title in the name of the 1st defendant.

Costs of this suit be-done borne by the defendants jointly and severally.

11. On the 10th day of November 2023, the 1st defendant filed an application dated 6th November 2023 asking the court to find that it lacks jurisdiction to entertain the instant suit as it seeks to amend a confirmed grant of administration of an estate of a deceased person to introduce new beneficiaries which is not a preserve of this court. That the court does discharge all orders made in the case on the basis that the court lacks jurisdiction.
12. The application is made on grounds that the instant suit was in the first instance instituted by the 1st Plaintiff on 31st October, 2022 as against the 1st Defendant in the pretext of acting in the interests of the 2nd, 3rd and 4th Plaintiffs, seeking inter alia that Title Parcel Numbers Nakuru Municipality Block 4/493 and Nakuru Municipality Block 4/494 be cancelled and subsequently Plot No 452/XX11/5 (Now Nakuru Municipality Block 4/114) be equally subdivided into three portions and three titles be issued to include a title in the joint names of the 2nd, 3rd and 4th Plaintiffs;
13. That Plot No 452/XXL 1/5 (Now Nakuru Municipality Block 4/114) (the suit property) which formed part of the Estate of the Late Mary Wanjiku Kinuthia and which is the subject matter of the instant suit was the subject of a distribution of that estate pursuant to the terms of the Confirmed Grant of Administration of the said estate.
14. The 1st Defendant, being the Administrator of the said estate, while performing his lawful duties thereto, subdivided the property and shared it equally to the respective beneficiaries as is indicated in the confirmed Grant, effectively giving rise to Title Parcel Numbers Nakuru Municipality Block 4/493 and Nakuru Municipality Block 4/494.
15. That the 1st Plaintiff, for an unknown reason, has through the instant proceedings sought to amend the Confirmed Grant and introduce unknown beneficiaries to the Estate of the late Mary Wanjiku Kinuthia, being the 2nd and 3rd defendants.
16. The Court has hereinbefore hitherto issued directions in respect to the instant-suit: despite the obvious lack of jurisdiction to entertain this matter, as the gravamen of the instant matter is a thinly veiled maneuver to amend a confirmed grant of administration of the Estate of one Mary Wanjiku Kinuthia (deceased) dated 18th June, 2008, which is the preserve of the High Court, sitting as a Family Court and not the Environment and Land Court;
17. It is the law that a Court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written. It cannot arrogate to itself jurisdiction exceeding that which is conferred, upon it by Law. It is therefore extremely urgent that the Honorable Court stays and/or halts any further proceedings in this matter and considers whether it even has jurisdiction to entertain this matter in the first place;
18. It is in the interest of justice that this court considers the instant application, urgently and in any event exparte and grants the orders sought. It is in the interest of the much-cherished canons of justice that the orders prayed for herein be granted. The supporting affidavit of Michael Onesmus Wanjihia restates the grounds of the application.



19. In the replying affidavit, the plaintiff states that application is incompetent and misconceived. The plaintiffs states that the jurisdiction of the succession court ended on confirmation of grant and that the jurisdiction of this court is conferred by the *Environment and Land Court Act* 2011.
20. When the application came for hearing Mr Abuya, learned counsel for the applicant submitted that the plaintiffs are attempting to amend a grant of the estate of Mary Wambugu Kinuthia and the 2nd, 3rd and 4th plaintiffs seek to become beneficiaries of the said estate. According to Mr Abuya the plaintiff intend to confer jurisdiction to this court through their pleadings. Citing the case of the *Orange Democratic Movement v Yusuf Ali Mohamed* counsel submits that a party cannot through pleadings confer jurisdiction to a court where none exists. That jurisdiction is conferred by the law and not through pleadings or legal draftsmanship. That it is the substance of the claim and relief that determines the competence of a court. The court ought to look at the pleadings and relief sought. The applicant argues that the plaintiffs are attempting to convert a succession dispute to a land use and planning issue. The applicant argues that the court's jurisdiction flows from the *Constitution* or legislation or both. That a confirmed grant was issued on 18th June 2008. The plaintiff moved the court to protect the interests of the 2nd, 3rd and 4th plaintiffs as beneficiaries and yet the court has no power to determine beneficiaries of the estate of the deceased.
21. Mr Wambugu, learned counsel for the plaintiffs submits that jurisdiction is raised by a preliminary objection and not an application and that the court should down its tools where the court finds that it lacks jurisdiction. He argues that the jurisdiction of this court is well spelt out in Article 162 2 (b) of the *Constitution* of Kenya 2010 and section 13 of the *Environment and Land Act*. The plaintiffs' counsel submitted that the issue is not the confirmed grant but title because the moment the grant is confirmed the jurisdiction of the family court ends and that any dispute on title ought to be handled by the Environment and land court.
22. I have carefully perused the pleadings and do find that the dispute revolves on the disibution of the property of the deceased one Mary Wanjiku Kinuthia that was done in the High court at Nakuru, Succession cause Number 1773 of 2005, in the summons for confirmation of grant in the matter of the Estate of Mary Wanjiku Kinuthia, a certificate of confirmation of grant was issued pursuant to section 71 of the *Law of Succession Act* on 18th June 2008 to Michael Wanjihia Onesmus . In the schedule of disibution Michael Wanjihia Onesmus and Francis Kinuthia Muriu were granted property No 452/XXII/5 (now 4/114 Nakuru to share equally).
23. Mr Michael Wanjihia Onesmus the adminisator of the estate went further to subdivide the property and caused the same to be registered in their different names as per the confirmed grant. The defendant sold his portion to the 2nd, 3rd and 4th defendants. The plaintiffs case principally requires this court to cancel the titles issued to the 2nd, 3rd and 4th defendants and the 1st plaintiff and revert the plot No 452/XXII/5 now Nakuru Municipality Block4/114 to be equally subdivided into three portions after cancellation of the titles in the names of the 2nd and 3rd defendants and the 1st plaintiff. That is to say Nakuru Municipality Block4/493 and Nakuru/Municipality /Block 4/494 and that the Land Regisar to issue new titles to the plaintiffs and 1st defendant.
24. This court observes that the plaintiffs are requesting this court to re-disibute the property of Mary Wanjiku Kinuthia to the 2nd, 3rd and 4th plaintiffs. Should the court entertain this dispute? The answer to the question as to whether the environment and land court has jurisdiction to delve into probate matters lies in understanding the respective jurisdictions of the ELC and probate courts.



25. In the locus classicus case of *Owners of the Motor Vehicle M.V. Lillians v Caltex Oil (Kenya) Limited* (1989) KLR1, the court had this to say on the issue of jurisdiction;

Jurisdiction is everything. Without it, a court has no power to make one more step”.

26. The jurisdiction of this court to hear and determine disputes relating to the environment, use and occupation of and title to land lies with Article 162(2)(b) of the *Constitution* of Kenya, 2010, Section 13 of the *Environment and Land Court Act*. While the probate court’s jurisdiction in intestate or testamentary succession to the estates of deceased persons is derived from Section 2 of the *Law of Succession Act*.
27. The distinct and separate legal regimes of these two courts has led to the Environment and Land Court declining to enter into the realm of succession disputes and vice versa. These can be found in several authorities including; *Beaice Wambui Kiarie & 2 others v Tabitha Wanjiku Ng’ang’a & 9 others* (2018) eKLR and *Isaac Kinyua & 3 others v Hellen Kaigongi* [2018] eKLR, *Wilson Mthui Mutungu v Beaice Gathoni & Another* (2016) eKLR.
28. In the case of *Republic v Chief Land Registrar & another*, JR ELC No 11 of 2010 [2019] eKLR, the court held as follows on the issue of distinctiveness of jurisdiction of the High Court and courts of equal status as follows: -

Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! ...The drafters of the *Constitution* were very clear on the limits of this court’s jurisdiction and the jurisdiction of the courts of equal status.”

29. *The Practice directions on proceedings in the environment and land courts*, and on proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other courts has provided a clear delineation on the jurisdiction of the Environment and Land Court and probate courts as follows;

All cases touching on inheritance, succession and disibution of land under the *Law of Succession Act*, Cap. 160 Laws of Kenya shall continue to be filed and heard by the High Court or the Magisates Courts of competent jurisdiction”.

30. I have discerned the pleadings, it is quite obvious the suit relates to the sharing of the property of a deceased person to beneficiaries who are the brothers of the deceased person and their children.
31. It is the considered view of this court that a case by case analysis of the facts of each case has to be considered in determining which court has jurisdiction and the predominance principle as elucidated in the case of *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] Eklr has to be applied. The court in this case stated as follows on the issue of concurrent jurisdiction of the high court and courts of equal status;

...When faced with a conoversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test...”

32. The Court of Appeal in the case of *Co-operative Bank of Kenya Limited v. Paick Kangethe Njuguna & 5 others* [2017] eKLR has dealt with the Pre-dominant Purpose Test where the court held as follows:



- “35. Accordingly, for land use to occur, the land had to be utilized for the purpose for which the surface of the land, air above it or ground below it was adapted. Therefore, to the law, land use entailed the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land was adapted. Neither the *cujus docine* nor Article 260 of the *Constitution* whether expressly or by implication recognized charging land as connoting land use._
36. By definition, a charge was an interest in land securing the payment of money or money’s worth or the fulfillment of any condition. As such, it gave rise to a relationship where one person acquired rights over the land of another as security in exchange for money or money’s worth. The rights so acquired were limited to the realization of the security so advanced. Therefore, the creation of that relationship had nothing to do with use of the land as defined. That relationship was simply limited to ensuring that the chargee was assured of the repayment of the money he had advanced the chargor.
37. Further, Section 2 of the *Land Act* recognized a charge as a disposition in land. A disposition was distinguishable from land use. While the former created the relationship, the latter was the utilization of the natural resources found on, above or below the land. Land use connoted the alteration of the environmental conditions prevailing on the land and had nothing to do with dispositions of land. Saying that creation of an interest or disposition amounted to use of the land, was akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constituted land use. The mere acquisition or conferment of an interest in land did not amount to use of that land. If that were the case, there would neither be absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.
38. Consequently, the assertion that a charge constituted use of land within the meaning of Article 162 of the *Constitution* had to fail. In addition, the cause of action before the Court was not the validity of the charge, but a question of accounts...
40. To the Appellant, the charge was an insument granting an interest in the land, hence jurisdiction in the matter lay with the Environment and Land Court. However, under Section 2 of the *Environment and Land Court Act*, an insument was a writing or enactment which created or affected legal or equi rights and liabilities. For the purposes of the instant suit, that insument was the charge. The cause of action was never the charge (insument) but the amounts due and owing thereunder. Neither the charge insument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.
41. Furthermore, the jurisdiction of the Environment and Land Court to deal with disputes relating to conacts under Section 13 of the *Environment and Land Court Act* ought to be understood within the context of the Court’s jurisdiction to deal with disputes connected to ‘use’ of land. Such conacts, ought to be incidental to the ‘use’ of land; they did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. By parity of reasoning, the dominant issue in the instant case was the settlement of amounts owing from the Respondents to the Appellant on account of a conactual relationship of a banker and lender.



42. While exclusive, the jurisdiction of the Environment and Land Court was limited to the areas specified under Article 162 of the Constitution, Section 13 of the Environment and Land Court Act and Section 150 of the Land Act; none of which concerned the determination of accounting questions. Consequently, the dispute did not fall within any of the areas envisioned by those provisions. On the other hand, the jurisdiction of the High Court over accounting matters was without doubt, as evidenced by article 165(3) of the Constitution. The Appellant's objection on jurisdiction was rightly dismissed."
33. Applying the predominant purpose test as applied by the court of appeal in the above case, I do find that this suit is predominantly hinged on the sharing of the property of the late Mary Wanjiku Kinuthia who died intestate and had neither a spouse nor children and therefore her property was to devolve in accordance with the provisions of section 39 of the Law of Succession Act and the only court that can determine the distribution is the High Court as per the provisions of the Law of succession Act. This section provides as follows:-
34. Where intestate has left no surviving spouse or children
- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-
 - (a) father; or if dead
 - b) mother; or if dead
 - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - (d). half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
 - (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.
35. I do agree with the defendant that the dispute herein as to whether the 2nd, 3rd and 4th plaintiffs are entitled to the property can only be determined by the court in a succession cause because it revolves on the disibution of the property in the estate of a deceased person. Granting the order sought will cause the review of the confirmed grant upon determination of the beneficial interest of the 2nd, 3rd and 4th defendants. I do uphold the preliminary objection in the application dated 6th November 2023 and do sike out the suit with no order as to the costs as the parties herein are family members.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF DECEMBER 2023.

A. O. OMBWAYO

JUDGE

