



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**FAMILY DIVISION**  
**MISC. CAUSE NO.33 OF 2016**

**ELIZABETH WANJIKU NJOKA** (suing as the legal representative of Alice Kahaki Njoka (deceased)).....PLAINTIFF

**VERSUS**

**JUMA KIPLANGE** (sued as the Legal Representative of Philip Njoka Kamau (Deceased)).....1ST DEFENDANT  
 TERESIA NJERI.....2ND DEFENDANT  
 MARGARET DAMAT.....3RD DEFENDANT  
 LUCY WANJIKU.....4TH DEFENDANT  
 JAMES GICHERU.....5TH DEFENDANT  
 PETER NJOROGE.....6TH DEFENDANT

**RULING**

1. This ruling is in respect of three (3) preliminary objection (P.O.s) filed herein namely:

**a) The 9th Respondent preliminary objection filed on 6/10/2016.**

It is premised on the following points of law:

- i) This honourable court has no jurisdiction to entertain this suit.
- ii) The suit is time barred in view of the provisions of the Limitation of Actions Act having been brought more than 32 years after the supposed cause of action arose.
- iii) The action is *res sub judice* or *res judicata* in light of High Court Succession Cause No.497 of 2013: In the matter of the Estate of Philip Njoka (Deceased)
- iv) The action herein ought to have been brought under the provisions of the Law of Succession

Act, Cap 160 of the Laws of Kenya and not under the Civil Procedure Rules.

v) The court has no power, under Order 41 Rule 2 of the Civil Procedure Rules to remove the suit property from the possession or custody of the 9th Defendant or to appoint a receiver over the same as the Plaintiff herself has no existing present right over the suit property.

vi) The suit does not disclose reasonable cause of action.

**b) The 10th Respondent's objection filed on 24th October, 2016:**

This is premised on the following points:

i) The Honourable Court has no jurisdiction to entertain this suit under **Article 162** of the **Constitution of Kenya**

ii) The subject matter and the basis of the Plaintiff's suits arises from land disputes.

iii) The Honourable Court has no jurisdiction to grant any of the orders prayed as the matters on land is (are) solely seized by the Environment & Land Court as provided by the law.

**c) The 3rd Respondent's objection filed on 16th November, 2016:**

It is premised on the following points:

i. The said application is bad in law and an abuse of the process of the court in that:

ii. the suit has been filed without leave of the court contrary to Order 3 Rules 6 of the Civil Procedure Rules:

iii. the court has no jurisdiction to grant prayer 3 to 30 as the same is (are) not founded on the pleadings and reliefs claimed.

iv. the plaintiff is guilty of inordinate delay in bringing this suit.

ii. The Plaintiff has not met the threshold of granting temporary injunctions and for appointments of receivers/managers pending the hearing and determination of the suit.

iii. The prayer for temporary injunction on the suit properties pending the hearing and determination of the suit is superfluous and an abuse of court process as there are cautions placed against all the suit properties.

iv. Until the contrary is proved, the registered proprietor of the suit properties (is) the late Philip Njoka and the 2nd, 3rd, 4th Defendants and the late Waithera.

v. The 3rd Defendant is the registered proprietor of LR. No.Kiambogo/Kiambogo Block 2/34 and Bahati/Bahati/Block 1/489.

vi. The 3rd Defendant being the registered proprietor of LR.No.Kiambogo/Kiambogo/Block 2/34 between 2014 and 2015 and using her own money, has developed and constructed 9 self-contained two bed roomed maisonettes. The 3rd Defendant has been collecting rent since 2015 to rent since 2015 to recoup construction expenses incurred since 2015.

vii. The defendants are persons of means to mitigate any loss that might be occasioned by the refusal of temporary injunction.

viii. The late Alice Kahaki died 33 years ago and there is no evidence that the defendants are

threatening or intending to do that which they are not entitled to do or have not done for the last 33 years and the 3rd Respondent give notice to raise preliminary point of law on the above grounds.

ix. Affidavit of 3rd Respondent to follow.

2. Directions were given that all the preliminary objections be canvassed first and together and through written submissions.

### **The 9th Defendant's submissions**

3. The 9th respondent's submissions open with what I can describe as a vicious attack on the suit herein terming it a ghastly mongrel without a head or tail and with no legs to stand on. The suit is stated to be misconceived and incurably incompetent and defective at many different levels.

4. It is submitted that the 9th defendant's preliminary objection (p.o.) is a perfect specimen of a p.o. as it raises a pure point of law (that of jurisdiction) which is uncontested and easily ascertainable from the pleadings and no exercise of discretion is sought.

5. I am referred to the guiding principle as relates to p.o.s as set in the celebrated case of **Mukisa Biscuits Manufacturing Company Limited V. West End Distributors Limited** (1969) E.A. 696 where Law J.A. stated:

**"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"**

6. Emphasis is also laid on the words of **Sir Charles Newbold** in the same judgment where he said:

**"A preliminary objection is in the nature of what used to be a demurrer. It raise a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"**

7. It is urged that the dispute herein relates to title to land within the meaning of **Article 162(2)(b)** of the **Constitution** and as such this court not being an Environment and Land Court has no jurisdiction to entertain the matter.

8. Counsel has argued that it is indisputable and trite that the Environment and Land court (ELC) has the exclusive jurisdiction to hear and determine actions and proceedings relating to Land as provided under Article 162(2)(b) of the Constitution as read with Section 13 of the Environment and Land Act 2011 and Section 150 of the Land Act, 2012.

9. Am referred to the decision in **Samuel Kamau Macharia V. Kenya Commercial Bank Limited & 2 others**, [2012] eKLR where the Supreme Court held:

**"(68) 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 law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. .... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. ....Where the Constitution exhaustively provides for the jurisdiction of a Court of Law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the**

**scope defined by the Constitution."**

(Emphasis added)

10. Reference is further made to the decision in the case of **Owners of Motor Vessel "Lilian S" V. Caltex Oil (Kenya) Limited**, 1989 KLR 1 where Nyarangi JA stated:

**"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

11. It is the 9th defendant's case that this court must down its tools since it lacks jurisdiction and would not have the powers to transfer it to the proper forum (ELC) but rather would only have to dismiss it.

12. The decision in **Rob De Jong & Another V. Charles M. Wachira** [2012] eKLR is quoted to buttress this view. In that case, Ibrahim, J stated:

**"I concur with the position taken by the learned counsel for the Appellants that to invoke this power the matter should be before a court with jurisdiction. If the matter was filed in a court without jurisdiction then the suit is a nullity and there is nothing capable of being transferred"**

[Emphasis added]

13. Further in **Omwoyo V. African Highlands & Produce Company Limited**, (2002) 1 KLR 698 Ringera J (as he then was) stated:

**"..... the sole issue of determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. (In) Kagenyi V. Misiramo & Anor. [1968] EA 48, Sir Udoma Udoma CJ held in relation to Section 18 of the Uganda Civil Procedure Act - a provision which is in *pari materia* with section 18 of our code - that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to court which has jurisdiction to try it....."**

The decision found approval by Kimaru, J in **Bishop Christopher Ndung'u V. Andrew Abungu**, (2006) eKLR

14. The decision in **James Davis Njuguna V. James Chacha & 3 others** (2013) eKLR (Havelock, J) is relied on to show that **Section 18** of the **Civil Procedure Act** only covers the power of High Court to transfer cases instituted in a subordinate court but does not allow the transfer of a case from the High Court to any other court of equal status.

15. It is urged that this court lacks jurisdiction to entertain the suit herein and the power to transfer it to the ELC. The preliminary objection has dealt a fatal blow to the suit and the same should be dismissed.

#### **10th defendant's submissions:**

16. It is submitted for the 10th defendant that the court lacks jurisdiction to entertain this suit as per **Article 162 (2)(b)** of the **Constitution of Kenya 2010**. The subject matter of the plaintiff's suit arises from a land dispute and the matter can only be determined by the ELC.

17. The holding in **Samuel Waweru V. Geoffrey Muhoro Mwangi** [2014] eKLR where the decision in **Mukisa Biscuits Manufacturing Company Limited**, (supra) was cited with approval is relied on.

18. It is urged that the Environment and Land Court Act provides that, it is an Act of Parliament to give effect to **Article 162(2)(b)** of the **Constitution**, to establish a superior court to determine disputes relating to Land and Environment. Section 2 of the Act defines the "*Court*" to mean the Environment and Land Court established under **Section 4** pursuant to **Article 162(2)(b)**.

19. To establish whether this court has jurisdiction to deal with the suit before it, the 10th defendant relies on the case of **Seven Seas Technologies Limited. V. Eric Chege** [2014] eKLR where the court cited the case of **The Owners of Motor Vessel "Lillian S" V. Calterx Oil Kenya Limited** (1989) KLR 1653 which I have discussed in the earlier submissions above.

20. Am referred to the words of Emukule, J in **John Kipng'eno Koech & 2 Others V. Nakuru County Assembly & 5 Others** (2013) eKLR where speaking on jurisdiction he said:

**"Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter."**

21. Am urged that the dispute now before court emanates from land. The constitution is clear that there should be a court of equal status as the High Court to handle land related matters. Reliance is placed on the decision by the Court of Appeal in **Karisa Chengo & 2 others V. Republic**, (2015) eKLR where the court held:

**"Given the above definition of a court, there is no doubt that courts are a creature of the Constitution. A court as an institution is an inanimate body that must be activated, run, managed and controlled by animate organs authorised by law. These are judges who must of essence be human beings and according to the Constitution the judges of the High Court, Employment and Labour Relations Court and Environment and Land Court must as of necessity in law be of equal rank and standing."**

**The Constitution has provided for the mode of appointment of judges and their qualifications. It is within the mandate of the Judicial Service Commission as provided for under Article 172(1)(a) of the Constitution to recommend to the President the appointment of judges to preside over the said court. In our view it is the court that a judge is appointed to, that determines the kind of jurisdiction that judge is seized of. In the premises we would agree with the submission that a judge appointed to any of the two specialized courts does not have jurisdiction to sit in courts other than the one he/she was specifically appointed to. We say so because section 2 of the Judicature Act has defined 'judge' to mean; 'the Chief Justice or a puisne judge appointed under section 61 of the old Constitution (the equivalent of now Article 166 (5) of the current Constitution) or a judge of the Court of Appeal appointed under section 64 of the old Constitution (the equivalent of now Article 166(4) of the current Constitution). Notably, both the Constitution and the Act are silent with regard to a judge appointed in the two specialized superior courts. Article 166 (2) of the Constitution provides for the qualifications that one must have to be appointed a judge of a superior court by the President...."**

22. It is urged that in interpreting the law a statute ought to be construed in accordance with the intention of parliament and the meaning given to the words used ought to be the ordinary and natural meaning. This is the plain meaning rule often referred to as the golden rule. This is enunciated in **County Government of Nyeri and & Another V. Cecilia Wangeci Ndungu**, [2015] eKLR where it was stated that the cardinal rule for construction of a statute is that a statute should be construed according to the intention expressed in the statute itself.

23. It is the 10th defendant's case that this court do interpret the provisions of the environment and land court Act *vis-a-vis* the provisions of the Constitution regarding jurisdiction and the matter before this court. On that basis this suit ought to be struck out.

### **3rd Defendant's submissions**

24. Counsel for the 3rd defendant has submitted that the suit herein is incomplete, bad in law and an abuse of the court process and the same should be struck out.

25. It is submitted that the issues raised in the plaint is the determination firstly whether the late Philip Njoka held upon trust for the late Alice Kahaki all the properties bequeathed to various beneficiaries as per Nakuru High Court Succession Cause No.497 of 2013 and secondly the separation of the properties of the estate of Philip Njoka Kamau from those of Alice Kahaki.

26. Other issues raised in the plaint are declarations that the defendants are inter-meddlers, accounts, general damages and restitution. These issues are secondary and determinable after the 1st two (2) issues.

27. It is urged that the first two (2) issues are pending for hearing and determination in cause No.497 of 2013 vide objection filed on 20/11/2013 by Christine Nyagitha Njoka. Ground 6 of the said objection reads:

**"The purported properties bequeathed to purported heirs were, at the time of making the will, held by the deceased herein as a trustee of his wife, Alice Kahaki who died before him."**

28. It is the 3rd defendant's contention that unless those two (2) issues are determined, the plaintiff has no right to commence institution of any claim against any of the thirteen (13) defendants. The plaintiff's suit is premature.

29. The court is asked to have regard to H.C.Succ. No.497 of 2013 and it would notice that the two (2) issues raised hereinabove and parties are also directly or substantially the issues in this suit and relating to same defendants.

30. The plaintiff, it is urged, should file a separate suit by way of plaint as against the 5th, 6th, 8th, 9th and 13th defendants who are not beneficiaries of either the estate of Philip Njoka or Alice Kahaki.

31. The plaintiff should move by way of originating summons as provided for under **Order 37** of the **Civil Procedure Rules** against all beneficiaries of the estate of Alice Kahaki Njoka and the estate of Phillip Njoka Kamau whom the plaintiff has sued as defendants 2, 3, 4, 6, 8, 10 and 11.

32. Reliance is placed on Odunga's Digest on civil law and procedure Vol.1.

33. Case Law cited were as follows:

1. **Standard Chartered Bank Limited V. Jeniffer Atieno Odok**, (Kisumu High Court Civil Case No.120 of 2003 where it was held:

**"It is not within the right of parties to engage in a multiplicity of suits as the multiplicity of suits is meant to obstruct the due process of law and when a party shows design to abuse the powers of the court, such action must be stopped to avoid unnecessary costs and waste of judicial time."**

2. **Kenya Re-insurance Corporation V. Adda Okello Owuor**, (Kisumu High Court Civil Application No.17 of 2005) where the court struck out the plaintiff's suit for filing numerous suits which revolved around the same issue as being an abuse of the process of the court.

### **1st, 4th, 5th, 6th, 7th, 8th 11th, 12th and 13th Defendants' Submissions**

34. For these defendants, it is submitted that the prayers sought by the plaintiff in her plaint clearly show that she seeks declaration of trust and the issue of ownership of the disputed parcels of land features prominently.

35. Counsel reiterates the fact that jurisdiction of the court is everything and where the court proceeds without jurisdiction, its decision amounts to nothing. The court is referred to **Article 162 (2)(b)** of the **Constitution** and the decision **Malindi Law Society V. The A.G. & Others**, (Malindi Constitutional Petition No.3 of 2016) where the court held that **Article 165(5)** of the **Constitution** prohibits the High Court from exercising jurisdiction on matters of Employment and Labour Relations and matters of the environment, use, occupation and title to land.

36. The jurisdiction of the family court is expounded by the citing of the decision in **Alexander Mbaka V. Royford Muriuki Rauni & 7 Others**, (2016) eKLR, where the court in determining the jurisdiction of the family court relied on the case of **Jackson Kamau Nthiga V. Humprey Kirimi Mbuba & Another**, (Chuka H.C. Succ.Cause No.660 of 2015 (UR) where the court held:

**"The net holding in those decisions was that the jurisdiction of a family court dealing with a Succession Cause is limited. Such court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate. Such a court cannot delve into establishing the validity of a claim such as the one before this court. In the case before this court, there are serious issues that need to be established and/or ascertained by either the lower court or the court which has jurisdiction to entertain a claim to land. That however, does not bar a family court from ascertaining if one is a creditor of an estate. In the circumstances of this case, the Interested Party and the Objector have not yet been so determined by a court of law. This court cannot determine their claims in these proceedings."**

(Emphasis added).

37. In the **Alexander Mbaka** case (supra), the judge concluded:

**"To my mind what the court was saying in the said case is that, the role of the family court is well set out in the Act, to ascertain the assets, the liabilities, if any, the beneficiaries and determine the mode of distribution of an estate period. It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. That claim is to be considered as a liability to the estate. This court, in my view cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such a right has not yet crystallised. The right must first be shown to have crystallised before the family court can entertain it as a liability in succession proceedings."**

(Emphasis added)

38. On the issue of limitation of time under the Limitation of Actions Act, counsel has submitted that **Section 7** of the **Limitation of Actions Act** provides that an action for recovery of land may not be brought by any person after the end of 12 years from the date when the right of action accrued.

**Section 9(2)** of the Act proceeds to elaborate that where a person brings an action to recover land of a deceased person, whether under a will or on intestacy and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land, the right of action accrues on the date of death.

39. The deceased Alice Kahaki died in 1983. The claims by the plaintiff have been brought 33 years after her death and 22 years after the grant was confirmed. All along the plaintiff was aware of the grant and the distribution but chose not to pursue the matter until 2016. Such a claim cannot be sustained and as such the plaint and all the pleading thereof ought to be dismissed with costs to the defendant. Am urged to dismiss the suit and the application dated 6th September, 2016.

## **2nd Defendant's submissions**

40. There are no submissions on record on behalf of the 2nd defendant.

## **Plaintiff's submissions**

41. It is the plaintiff's submission that all the contentions that this court lacks jurisdiction to entertain the suit are wrong in conception, substantive Law and procedure.

42. The court is referred to Volume 10 of Halsbury's Laws of England and paragraph 108 of a 3 judge bench judgment delivered in Malindi High Court Petition No.3 of 2016. **Malindi Law Society V. The A.G. & Others.**

43. At **Paragraph 715** of volume **10 Halsbury's Laws of England** jurisdiction is defined as follows:

**"Meaning of jurisdiction: by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by similar means."**

44. In paragraph 108 of the Judgment in Malindi Law Society case (supra), Jurisdiction is described as follows:

**"108 Jurisdiction according to Black's Law Dictionary, is the court's power to decide matters presented to it and to enforce its decisions."**

And according to the decision of the Court of Appeal in the case of **The Owners of the Motor Vessel "Lillians S" V. Caltex Oil (Kenya) Limited**, [1989] 1 KLR referring to words and phrases legally defined - Vol.3 - Vol. 1-N page 113, Nyarangi JA said:

**"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters that are presented in a formal way for its decision. The limits of this authority are imposed by statute charter, or commission under which the court is constituted, and may be extended or instituted in the like means."**

45. Counsel submits and, I think correctly so, that the objections herein call for:

- i. the application of the concept of preliminary objection in civil litigation;
- ii. an examination of the nature of the concept of unlimited, original jurisdiction in criminal and civil matters of a High court **firstly** in England, whose jurisdiction was introduced into Kenya in 1897 through the East Africa Order in Council now taking the form of **Section 3** of the **Judicature Act**; and **secondly**, in Kenya both before the 2010 Constitution came into force and after;
- iii. the interpretation of the Constitution generally by the Supreme Court and specifically of **Articles 162** and **165** of the **Constitution**;
- iv. the interpretation of **Article 165(3)(e)** of the **Constitution** which expressly confers jurisdiction on the High Court through legislation; the specific legislation implicated in this suit includes the Judicature Act, the Married Women's Property Act, 1882 and the Law of Succession Act;
- v. the interpretation of the Limitation of Actions Act;
- vi. the interpretation of **Section 47** of the **Law of Succession Act** which vests jurisdiction of intestate and testate succession in the High Court;
- vii. interpretation of the Civil Procedure Act as concerns the appointment of receivers and managers and the procedure to approach this Honourable Court to enforce causes of actions founded on such equitable doctrines as the trust, fiduciary, account, tracing or following a beneficiary's property into any form it might have taken;

viii. the nature of a spouse's property rights acquired during coverture and enforcing the same by the estate after the spouse dies against a legal representative, a fiduciary or any other person presently holding that property.

46. It submitted that only some of the objections by the 9th and 10th defendants satisfy the requirements of a preliminary objection laid down in **Mukisa Biscuits Manufacturing Company Limited V. West End Distributors Limited** (1969) E.A. 696 I have recapped this authority earlier and I need not belabour it here.

47. It is urged that the objection by the 9th defendant that the suit is time barred in view of the provisions of the Limitation of actions Act having been brought more than 32 years after the supposed cause of action arose is based on a misapprehension of the law as stated by the Court of Appeal in **Stephen & Others V. Stephens & Another**, (1987) KLR 185 and by Justice Musyoka in **Re-Estate of Charles Ngotho Gachunga** (deceased) [2015] eKLR. There is no limitation of action where the institution of trust or fiduciary relationship is involved as is made clear by **Section 20(1) of the Limitation of Actions Act**.

48. On the issue of *res subjudice* or *res judicata* raised, it is submitted that this objection is confused. None of the issues raised in this suit have been determined in High Court Succession Cause No.497 of 2013 - **In the matter of the estate of Philip Njoka** (deceased).

49. On the issue of this suit being *sub judice*, it is submitted that there is nothing to stop a court from deciding an issue raised in another suit as long as it has not been determined. **Section 6 of the Civil Procedure Act** gives the court power to stay proceedings where an earlier suit is pending.

50. It is urged that where matters are complex, this court when exercising jurisdiction under the Law of Succession Act, requires that a suit be brought under **order 37 of the Civil Procedure Rules**. As held by the Court of Appeal in **Mnazi Moja Estates Limited V. Mistry & 5 Others**, [1987] KLR 269, where a matter is complex because the facts to be investigated are many and involve many parties, the suit should take the form of a plaint and where it has been commenced by way of an originating summons, the court has power to convert it into a suit filed by a plaint.

51. It is submitted that the plaintiff in this case commenced the suit by way of plaint because she realised that although the subject matter is covered by **Rule 1 of Order 37**, a stage would be reached where it would be converted into one by way of a plaint. Besides there are many parties who are not usual parties in originating summons brought under **Order 37 of the Civil Procedure Rules**.

52. Objection No.4 of the 9th defendant is challenged on the basis that it is an admission that the plaintiff has filed this suit in the proper Division as the Law of Succession Act is enforced by the Family Division of the High Court.

53. Objection 5 of the 9th defendant is attacked as misconceived because it raises issues of fact which cannot be taken up in a preliminary objection and secondly, as a matter of law it is wrong as demonstrated in **Nassir Ibrahim Ali V. Kamlesh M. D. Pattni**, Civil Appeal No.72 of 1998 and also **in Kerr on Receiver's 16th edition page 5**. Whenever property ownership is in dispute, the court has jurisdiction to appoint a receiver manager.

54. Page 5 of **Kerr on receivers 16th edition** is quoted as stating the Law as follows:

**"The second class of cases includes those in which the appointment is made to preserve property and where required, to ensure its proper management pending litigation to decide the rights of the parties or to prevent a scramble among those entitled as where the receiver is appointed pending a grant of probate or administration."**

55. Objection 6 is attacked on grounds that it seeks to have the court exercise the draconian power to strike out pleadings which is exercised only in plain and obvious cases and this case is not one of them.

56. Reference is made to the decision in **Sarwan Singh V. Michael Notkin**, (1952), 19 EACA 117 where the law was stated as follows:

**"I am of the opinion that in construing a judges function under order 6 rule 29, we should follow the same broad principle which establishes that the power to strike out under the rule is a discretionary one and one that should not be used except in plain and obvious cases"**

57. On jurisdiction, it is submitted that the jurisdiction invoked by the plaintiff is the one under **Article 165 (3) (a) and (e) and (5) of the Constitution**. It is urged that the dispute touches on properties other than land i.e money, shares, motor vehicles, bank accounts or debts.

58. It is the plaintiff 's submissions that the reliefs claimed in the plaint are reliefs the court can give exercising its unlimited civil jurisdiction. These are not available within narrow jurisdiction of the Environment and Land Court.

### **Analysis and Determination**

59. I have had occasion to consider at length the objections lodged herein and the respective submission by the parties. I acknowledge counsel's industry in expounding the issues before court.

60. From the objections and material on record, the issues for determination crystalize into the following:

- a) Whether this court has the requisite jurisdiction to hear and determine this suit.
- b) Whether this suit is statute barred.
- c) Whether this suit is *sub judice*
- d) Whether this suit is *res judicata*.

61. Of necessity, I must start in determining the question on jurisdiction. This is so because as held in the case of **The Owners of The Motor Vessel "Lillians S" V. Caltex Oil (Kenya) Limited**, [1989] 1 KLR, jurisdiction is everything. Without it, a court has no power to make one more step and I must down my tools the moment I hold I have no jurisdiction.

62. What readily comes to mind is that in trying to resolve the question of jurisdiction, this court must pose the inevitable question, that is; what is the real dispute before the court?

63. The answer to this question will undoubtedly be found in the statement of the claim as laid out in the plaint.

64. By way of a plaint in what is titled as Misc. Case No.33 of 2016, Elizabeth Wanjiku Njoka suing as the legal representative of Alice Kahaki Njoka and in discharge of her statutory duties and power under **Sections 82 and 83 of the Law of Succession Act** sought the following orders:

1. A declaration that at the time of his death on 1st May, 2012 the late Philip Njoka Kamau held Nakuru Municipality/Block 10/5 (Pinkam House), Pangani/USAID House No.102 RL 11582 - a bungalow, Nakuru Municipality Block 21/72, Nakuru Municipality Block 3/4, Githunguri/Githunguri/3047, Githunguri/Githunguri/3050, Githunguri/Githunguri/3051 and Githunguri/Githunguri/1426 upon trust for the estate of the Plaintiff's mother in the ratio of 95% in favour of the said estate and 5% in favour of the 1st Defendant;
2. An order that the 1st Defendant transfers to the plaintiff forthwith her 95% share in the said Nakuru Municipality/Block 10/5 (Pinkam House), Pangani/USAID House No.102 RL11582 - a bungalow, Nakuru Municipality Block 21/72, Nakuru Municipality Block 3/4, Githunguri/Githunguri/3047, Githunguri/Githunguri/3050, Githunguri/Githunguri/3051 and

Githunguri/Githunguri/1426;

3. A declaration that the late Philip Kamau Njoka held, as of 1st May, 2012, the entire legal estate in:

a. LR No.452/2/32;

b. Nakuru Municipality Block 5/70 (Molo House) upon a resulting trust for the estate of the late Alice Kahaki Njoka as from 1972 and 1984, respectively, when the same were transferred to him;

4. A declaration that after the registration of LR No.452/2/32, under the Registration of Titles Act, was converted into a registration under the repealed Registered Land Act in 1987, and was subdivided and became Nakuru Municipality Block 21/321 to 340, in the name of the said late Phillip Njoka Kamau, the latter held the same upon a resulting trust for the estate of the late Alice Kahaki Njoki.

5. A declaration that at the time of his death on 1st May, 2012, the late Phillip Njoka Kamau held the following properties curved from former Nakuru LR No.452/2/32 registered in his name, upon trust for the estate of his late wife, the plaintiff's mother the said Alice Kahaki Njoka:

<b>No.</b>	<b>Plot No.</b>	<b>Registered Proprietor</b>
1	Nakuru Municipality Block 21/322	Philip Njoka Kamau
2	Nakuru Municipality Block 21/324	Philip Njoka Kamau
3	Nakuru Municipality Block 21/325	Philip Njoka Kamau
4	Nakuru Municipality Block 21/326	Philip Njoka Kamau
5	Nakuru Municipality Block 21/327	Philip Njoka Kamau
6	Nakuru Municipality Block 21/328	Philip Njoka Kamau
7	Nakuru Municipality Block 21/329	Philip Njoka Kamau
8	Nakuru Municipality Block 21/330	Philip Njoka Kamau
9	Nakuru Municipality Block 21/331	Philip Njoka Kamau
10	Nakuru Municipality Block 21/332	Philip Njoka Kamau
11	Nakuru Municipality Block 21/333	-----
12	Nakuru Municipality Block 21/334	Philip Njoka Kamau
13	Nakuru Municipality Block 21/335	Philip Njoka Kamau
14	Nakuru Municipality Block 21/336	Philip Njoka Kamau
15	Nakuru Municipality Block 21/337	Philip Njoka Kamau
16	Nakuru Municipality Block 21/338	Philip Njoka Kamau
17	Nakuru Municipality Block 21/339	Philip Njoka Kamau

- |  |                    |
|--|--------------------|
| 18 Nakuru Municipality Block 21/340            | Philip Njoka Kamau |
| 19 Nakuru Municipality Block 5/70 (Molo House) | Philip Njoka Kamau |

6. An order that the 1st Defendant transfers forthwith to the Plaintiff the following properties:

<b>No. Plot No.</b>	<b>Registered Proprietor</b>
1 Nakuru Municipality Block 21/322	Philip Njoka Kamau
2 Nakuru Municipality Block 21/324	Philip Njoka Kamau
3 Nakuru Municipality Block 21/325	Philip Njoka Kamau
4 Nakuru Municipality Block 21/326	Philip Njoka Kamau
5 Nakuru Municipality Block 21/327	Philip Njoka Kamau
6 Nakuru Municipality Block 21/328	Philip Njoka Kamau
7 Nakuru Municipality Block 21/329	Philip Njoka Kamau
8 Nakuru Municipality Block 21/330	Philip Njoka Kamau
9 Nakuru Municipality Block 21/331	Philip Njoka Kamau
10 Nakuru Municipality Block 21/332	Philip Njoka Kamau
11 Nakuru Municipality Block 21/333	-----
12 Nakuru Municipality Block 21/334	Philip Njoka Kamau
13 Nakuru Municipality Block 21/335	Philip Njoka Kamau
14 Nakuru Municipality Block 21/336	Philip Njoka Kamau
15 Nakuru Municipality Block 21/337	Philip Njoka Kamau
16 Nakuru Municipality Block 21/338	Philip Njoka Kamau
17 Nakuru Municipality Block 21/339	Philip Njoka Kamau
18 Nakuru Municipality Block 21/340	Philip Njoka Kamau
19 Nakuru Municipality Block 5/70 (Molo House)	Philip Njoka Kamau

7. A declaration that in addition to the properties in (1) to (6) above, at the time of his death on 1st May, 2012, the late Philip Njoka Kamau held the following properties upon trust for the estate of the plaintiff's mother which are now held by the 1st Defendant upon trust for the estate of the Plaintiff's mother:

1. Mwariki Block 27/69;

2. Kiambogo/Kiambogo Block 2/34;
3. Kiambogo/Kiambogo Block 2/519;
4. Kiambogo/Kiambogo Block 2/203;
5. Lion Hill Plot No.37;
6. Njoro Ngata.Block1/65;
7. Njoro/Ngata/Block 1/58;
8. Kampi ya Moto/Menengai Block 1/670;
9. Longonot/Kijabe/Block 1/75
10. Bahati/Bahati/Block1/489

8. An order that the 1st Defendant transfers forthwith to the Plaintiff the following properties:

- i. Kiambogo/Kiambogo Block 2/34;
- ii. Kiambogo/Kiambogo Block 2/519;
- iii. Kiambogo/Kiambogo Block 2/203;
- iv. Lion Hill Plot No.37;
- v. Njoro Ngata.Block1/65;
- vi. Njoro/Ngata/Block 1/58;
- vii. Kampi ya Moto/Menengai Block 1/670;
- viii. Longonot/Kijabe/Block 1/75
- ix. Bahati/Bahati/Block1/489

9. An order that the 1st Defendant accounts to the Plaintiff the following:

- a. the cash balance in the business account with Standard Bank Limited, Nakuru Branch of Alice Kahaki Wholesalers as of 25th August, 1983
- b. Kshs.4,5million, the proceeds of sale of stock in trade of the Alice Kahaki Wholesalers of January, 1985;
- c. 95% of the rent fetched by Nakuru Municipality/Block 10/5 (Pinkam House) from 25th August, 1983 to date;
- d. all the rent fetched by Nakuru Municipality/Block 5/70 (Molo House) from 25th August, 1983 to date;
- e. all the rent fetched by Mwariki Block 27/70 and Mwariki Block 27/73 since 25th August, 1983 to date;
- f. all the rent fetched by LR No.8836/525 also known as Nakuru Municipality Block 3/4 since 25th

August, 1983 to date;

g.all the rent fetched by the butchery, retail shop and tailor shop, housed by the semi-permanent buildings between 1983 and 1994 when they were replaced by Ngatha House on Nakuru Municipality Block 21/323;

h.dividends paid by the 13th Defendant between 25th August, 1983 and 1st May, 2012;

i.the proceeds of sale of the following properties:

i. Njoro/Ngata/Block 1/333; sold to Felix Ochieng Orege;

ii. Njoro/Ngata Block 1/334; sold to Margaret Nyawera Kamanga;

iii. Nakuru Municipality Block13/371; sold to Joseph Mwaura Muhunyo;

iv. Nakuru Municipality Block 13/372; sold to Christopher Mwai;

v. Dundori/Muguathi Block 1/1563; sold to Mary W. Wachira;

vi. Nakuru Municipality Block12/52; sold to Menengai Crescent Properties Limited;

vii. Plot No.307 comprising 37.5 acres issued to Phillip Njoka Kamau by Eleri Farm Company and sold to Narumoro Farmers' Co-operative Society for Kshs.462,000.

10.An order that the 1st defendant accounts to the Plaintiff the proceeds of sale of the following motor vehicles after the death of the Plaintiff's mother in August, 1983:

i. KLG 893;

ii.KLL 969;

iii.KLS 520;

iv.KLU 352;

v.KQM 857;

vi.KSD 320;

vii.KSC 900;

viii.KLD 279

ix.KLN 483;

x.KLS 570;

xi.KLZ 001;

xii.KLS 457

xiii.KLS 482; and

xiv.KYT 025.

11. A declaration that the monies in the following bank accounts opened, by the late Phillip Njoka Kamau, at the Githunguri Branch of the 10th Defendant belong to the estate of the Plaintiff's mother:

a.002-0000200077 - Personal Current Account;

b. 002-000005052 -Business Account;

c. 002-000010635 -Personal Savings Account;

d.002 - 000023510 -Fixed Deposit Account

12.A declaration that the monies held at CFC Bank, Nairobi, in the name of Phillip Njoka Kamau in the following accounts belong to the estate of the Plaintiff's mother:

a.020 -0427408 - Current Account in the name of Pinkam Holdings;

b.020-0427416 -Foreign Account;

c.LDO 631100007 -Fixed Term Deposit

13. A declaration that the monies held at Kenya Commercial Bank, Nairobi, in the name of Phillip Njoka Kamau in the following accounts belong to the estate of the Plaintiff's mother:

a. 043-255645331 - Personal Current Account;

b. 043-255750227 -Current Account in the name of Pinkam Holdings

c. 110 - 471145 -Golden Account;

d. 043 - 40243004 -Foreign Account

14. A declaration that the monies held at NIC Bank, Nakuru, in the name of Phillip Njoka Kamau in the following accounts belong to the estate of the Plaintiff's mother:

1. CAI-130-000012 - Personal Current Account

2. 3-300-000577 - Fixed Term Deposit Account

15. A declaration that the monies held at the Barclays Bank of Kenya, Nairobi, in the name of Phillip Njoka Kamau in the following accounts belong to the estate of the plaintiff's mother:

a. 057-1015102 - Savings Account;

b. 027-8111393 - Current (Naivasha Branch);

c. 057-1054841 - Fixed Term Deposit

16. An order that the monies in paragraph 13 or 17 above, be paid to the plaintiff.

**AGAINST THE 2ND DEFENDANT'S:**

1) a declaration that the 2nd Defendant hold Nakuru Municipality Block 21/323 upon trust for the estate of the plaintiff's mother;

2. an order that the 2nd Defendant accounts to the estate of the plaintiff's mother, all the rent received from houses standing on Nakuru Municipality Block 21/323, Nakuru Municipality Block

21/324, Nakuru Municipality Block 21/337 and Nakuru Municipality Block 21/240, respectively, from, 1st May, 2012, to the date of judgment;

3) an order that the 2nd Defendant transfers to the plaintiff the said Nakuru Municipality Block 21/323;

4) an order that the 2nd Defendant gives to the plaintiff forthwith, the vacant possession of the said Nakuru Municipality Block 21/323, Nakuru Municipality Block 21/324 and Nakuru Municipality Block 21/328, Nakuru Municipality Block 21/337 and Nakuru Municipality Block 21/340;

5) a declaration that the 2nd Defendant has committed the tort of trespass to land on Nakuru Municipality Block 21/328 since August, 1983;

6) an order that the 2nd Defendant pays *mesne* profits/general damages in respect of Kampi ya Moto/Menengai/Block 1/670 from August, 1983 to the date of judgment.

7) an order that the 2nd Defendant pays *mesne* profits/general damages to the Plaintiff;

8) an order that the 2nd Defendant accounts to the Plaintiff monies deposited by the Plaintiff's father through the 7th Defendant in the joint account number **03 027 3691413, Barclays Bank, Nakuru**, in the names of herself and the late Phillip Njoka Kamau.

#### **AGAINST THE 3RD DEFENDANT**

1) a declaration that the 3rd Defendant hold Kiambogo/Kiambogo/Block 2/34 upon trust for the Plaintiff's mother's estate;

2) a declaration that the 3rd Defendant holds Kiambogo/Kiambogo/Block 2/519 upon trust for the Plaintiff's mother's estate;

3) a declaration that the 3rd Defendants holds Bahati/Bahati/Block1/489 upon trust for the Plaintiff's mother's estate;

4) an order that the 3rd Defendant transfers forthwith (1) to (3) above to the plaintiff;

5) an order that the 3rd Defendant accounts to the estate of the Plaintiff's mother, all the rent received from houses standing on (1) to (3) above;

6) *mesne* profits for user of (1) to (3) above.

#### **AGAINST THE 4TH DEFENDANT**

1. an order that the 4th Defendant gives forthwith vacant possession of Dundori Lanet/Kiamunyeki A Block5/216 to the Plaintiff;

2. a declaration that the 4th Defendant has committed trespass to land on Nakuru Municipality Block 27/69 since she moved into a house purportedly constructed for her by the late Phillip Njoka Kamau using the plaintiff's mother's estate's money;

3. an order that the 4th Defendant accounts for all the rent collected from Nakuru Municipality (Mwariki) Block 27/70 since August, 1093;

4. an order that the 4th defendant accounts for all the rent collected from Nakuru Municipality (Mwariki) Block 27/73 since they were constructed;

5. an order that the 4th Defendant accounts to the estate of the Plaintiff's mother, all the rent

received from houses standing on the said Dundori Lanet/Kiamunyeki A Block 5/216 since the flats/houses were constructed to the date of judgment;

6. *mense* profit in respect of Nakuru Municipality Block 27/69;

7. an order that 4th Defendant accounts for the revenue receive from toilets, showers and restaurants constructed on the parking bay of Pinkam House, Nakuru Municipality/Block 10/5 since construction of the same.

8) an order that the 4th Defendant accounts to the Plaintiff monies deposited by the Plaintiff's father through the 7th Defendant in the joint account number **03 027 3691421, Barclays Bank, Nakuru**, in the names of herself and the late Phillip Njoka Kamau.

#### **AGAINST THE 5TH DEFENDANT**

1) a declaration that the 5th defendant holds Lion Hills Pipeline Plot No.37 upon trust for the plaintiff's mother's estate;

2) an order that the 5th Defendant gives forthwith vacant possession of (1) above to the Plaintiff;

3) an order that the 5th Defendant transfers forthwith (1) above to the Plaintiff;

4) an order that the 5th Defendant pays *mense* profits for occupation of (1) above;

5) an order that the 5th Defendant pays *mense* profits for occupation of an office in Nakuru Municipality Block 10/5 (Pinkam House);

6) an order that the 5th Defendant surrenders to the Plaintiff all her mother's documents in his custody;

7) an order that the 5th Defendant accounts to the plaintiff's mother's estate all dividends paid in respect of her share in the 13th Defendant from 1983 to the date of judgment;

8) an order that the 5th Defendant to pay *mesne* profits for occupation of Pangani/USAID House No.102 RL 11582 between 1997 and 2013.

#### **AGAINST THE 6TH DEFENDANT**

1) a declaration that the 6th Defendant hold 95% of Nakuru Municipality Block 3/4 upon trust for the Plaintiff's mother's estate and 5% upon trust for the estate of the Plaintiff's father;

2) an order that the 6th Defendant give forthwith vacant possession of (1) above to the Plaintiff.

3) an order that the 6<sup>th</sup> defendant accounts to the plaintiff 95% of the evenue from the garage ran on (1) above from 1<sup>st</sup> July, 1994 to the date of judgment;

4) *mesne* profits for occupying the said Nakuru Municipality Block  $\frac{3}{4}$ ;

5) an order that the 6<sup>th</sup> Defendant transfers forthwith (1) above to the plaintiff and the 1<sup>st</sup> defendant;

6) an order that the 6<sup>th</sup> defendant jointly with the 8<sup>th</sup> defendant do pay *mesne* profits in respect of the premises of Nakuru Municipality Block 10/5 on which they carry on the business known as Pinkam Ventures.

#### **AGAINST THE 7<sup>TH</sup> DEFENDANT**

1. a declaration that the 7<sup>th</sup> defendant is and has been a constructive trustee/intermeddler with the estate of the Plaintiff's mother since 1983;

2. an order that the 7<sup>th</sup> Defendant accounts to the plaintiff all the rent received from the properties described in paragraph 22 above since his appointment by the late Philip Njoka Kamau in August 1983, and by the 2<sup>nd</sup> to 4<sup>th</sup> and 8<sup>th</sup> defendants in May 2012.

### **AGAINST THE 8<sup>TH</sup> DEFENDANT**

1. a declaration that the 8<sup>th</sup> defendant is and has been an intermeddler with Nakuru Municipality Block 2/531 since 2014;

2. an order that the 8<sup>th</sup> defendant gives forthwith vacant possession of (1) above to the plaintiff;

3. an order that the 8<sup>th</sup> defendant accounts to the plaintiff all the rent received from Nakuru Municipality Block 2/531 since 2014;

4. an order that the 8<sup>th</sup> defendant accounts to the plaintiff for 95% of the revenue received from advertisement billboards placed on Nakuru Municipality Block 10/5 (Pinkam House);

5. an order that the 8<sup>th</sup> defendant jointly with the 6<sup>th</sup> defendant do pay *mesne* profits in respect of the premises on Nakuru Municipality Block 10/5 (Pinkam House) on which they carry on the business known as Pinkam Ventures;

6. an order that the 8<sup>th</sup> defendant pays *mesne* profits for occupation of Pangani/USAID House No.102 RL 11582 since 2013;

7. an order that 8<sup>th</sup> defendant accounts for the revenue yielded by Githunguri/Githunguri/3051 and Githunguri/Githunguri/1426;

8. an order that the 8<sup>th</sup> defendant do pay *mesne* profits for the office space occupied by him in Pinkam House, 1<sup>st</sup> floor since May 2012.

### **AGAINST THE 9<sup>TH</sup> DEFENDANT**

i. declaration that the 9<sup>th</sup> defendant holds Kiambogo/Kiambogo Block 2/519 upon trust for the estate of the plaintiff's mother;

ii. an order that the 9<sup>th</sup> defendant transfers the said Kiambogo/Kiambogo Block 2/519 to the plaintiff;

iii. an order that the 9<sup>th</sup> Defendant gives to the plaintiff vacant possession of the said Kiambogo/Kiambogo Block 2/519;

iv. general damages;

v. as an alternative to (4) above, *mesne* profits.

### **AGAINST THE 10<sup>TH</sup> DEFENDANT**

1. a declaration that the 10<sup>th</sup> defendant intermeddled with the estate of Alice Kahaki (Deceased) before May, 2012, on instruction of the late Philip Njoka Kamau by permitting the opening and operating of the following accounts at its Githunguri Branch:

- i. Account Number 002 – 0000200077 – Personal Current Account;
- ii. 002 – 000005052 – Business Account;
- iii. 002 – 000010635 – Personal Savings Account; and
- iv. 002 – 000023510 – Fixed deposit Account.

2.a declaration that the 10<sup>th</sup> defendant has intermeddled with the estate of Alice Kahaki (Deceased) after 18<sup>th</sup> May, 2012, on instruction of the 2<sup>nd</sup> to 4<sup>th</sup> and 8<sup>th</sup> defendants, by permitting the opening and operating, among others at its Githunguri Branch, account No.002 – 00000 – 22387;

3.an order that the 10<sup>th</sup> defendant accounts to the plaintiff all the monies deposited in the accounts referred to in (1) and (2) above;

4.an order that the 10 defendant pays to the plaintiff all the monies held in the accounts mentioned in (1) and (2) above.

#### **AGAINST THE 11<sup>TH</sup> & 12<sup>TH</sup> DEFENDANTS JOINTLY AND SEVERALLY**

1.a declaration that the 11<sup>th</sup> and 12<sup>th</sup> defendants hold 95% of Githunguri/Githunguri/3050 upon trust for the estate of the plaintiff's mother and 5% upon trust for the estate of the plaintiff's father;

2.an order that the 11<sup>th</sup> and 12<sup>th</sup> defendants transfer forthwith 95% of Githunguri/Githunguri/3050 to the plaintiff;

3.an order that the 11<sup>th</sup> and 12<sup>th</sup> defendants do forthwith give vacant possession of Githunguri/Githunguri/3050 to the plaintiff;

4.*Mesne* profits for occupying the said Githunguri/Githunguri/3050 since 2009.

#### **AGAINST THE 13<sup>TH</sup> DEFENDANT**

1)an order that the 13<sup>th</sup> Defendant accounts to the estate of the Plaintiff's mother all the revenue from the business of Alice Kahaki Wholesaler transferred to it after 25<sup>th</sup> August, 1983;

2)an order that the 13<sup>th</sup> defendant accounts to the estate of the Plaintiff's mother all the money held in its accounts with CFC Bank Limited, Kenya Commercial Bank Limited, Standard Bank and Family Bank Limited;

3)an order that the 13<sup>th</sup> defendant supplies to the plaintiff copies of documents pertaining to its affairs for the period between August, 1983 to the date of judgment herein.

65. A summary of this claim would read as follows:

That Alice Kahaki Njoka (deceased) was married to Philip Njoka Kamau, (deceased). During their marriage, they jointly acquired property. Alice Kahaki Njoka (deceased) made the bigger contribution. The estate of Alice Kahaki Njoka is entitled to a share of the property jointly acquired. Alice Kahaki Njoka pre-deceased Philip Kamau Njoka.

Since the death of Alice, Phillip has used the property (including the share of property to which Kahaki's estate is entitled) for his own use and for the benefit of others who are now jointly sued with his estate.

66. Let me punctuate this ruling with some short comment on a serious concern that the courts continue to

grapple with relating to documentation filed in court recent in recent times.

67. A tendency has emerged where parties have tended to be overzealous when it comes to material presented to court in a given case. sometimes this has resulted in unnecessarily bloated pleadings that are not specifically helpful to a case.

68. The rules guiding the drawing of pleadings have often been thrown out of the window and whereas it is the right of a party to articulate their cases in the best way possible, a right even insulated by the Constitution, care must be taken to avoid convolution of issues.

69. In the new constitutional dispensation we have moved away from draconian steps like striking out pleadings on technicality courtesy of Article 159 of the Constitution. This, however is not a blanket licence to allow flouting of procedure especially when such procedures are well codified in our laws for instance the provisions of **Order 2 rule 3(1)** of the **Civil Procedure rules**.

70. A look at quite a number of the paragraphs in the plaint herein shows a clear mix of pleading and evidence a situation that should have been avoided.

71. This situation is not peculiar to our jurisdiction. Indeed it has generally been held that too many documents spoil the case. Application (suits) should be conducted proportionally.

72. In Alsaifi V. Amunwa [2017] EWHC 1443 QB Mr. Justice Warby reminded parties of the need for bundles and documents to be relevant and proportional.

He stated:

**"I make these points to emphasize the importance of parties to litigation of this kind ensuring that they conduct their cases proportionately. Parties have a duty to help the court to ensure that the case is conducted in accordance with the overriding objective. It is unreasonable and tends to obstruct that objective, if the parties deluge the court with so much written material on an application of this kind.**

**I must add that considerable expense, time and effort (and a few trees) could be saved if parties produced bundles that contained only the relevant documents as opposed to every single conceivable document."**

73. The framing of the suit and the enormous documentation has tended to obfuscate issues. And while I will be reluctant to label the suit a ghastly mongrel as done by counsel for the 9th defendant, I must state that the suit as framed borders on a breach of rules on the drawing of pleadings.

74. In the preface to the 1st edition of the book *"pleading and practice in civil actions in the High Court of Justice"*, the author W. Blake Odgers states:

**"the system of pleading introduced by the Judicature Act is in theory the best and wisest, and indeed the only sensible, system of pleading in civil actions. Each party in turn is required to state the material facts on which he relies; he must also deal specifically with the facts alleged by his opponent, admitting and denying each of them in detail; and thus the matters really in dispute are speedily ascertained and defined....."**

75. The principal objects of pleadings are thus, firstly to define the issues of fact and questions of law to be decided between parties and secondly to give each of them distinct notice of the case intended to be set up by the other and thus to prevent either party being taken by surprise at the trial and thirdly, to provide a **brief summary of the case of each party.** (emphasis added)

76. Our very own **Order 2 rule 3(1)** provides;

**"Order 32 (i) - Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits."**

A cursory look at the drawing of the claim herein promptly shows a departure from these well set parameters in pleadings.

77. As I understand it, this is a claim to establish the net estate of Alice Kahaki Njoka as at the time of her death. The legal representative of the estate of Alice Kahaki Njoka has embarked on a journey to, in the words of **Section 82(a)** and **Section 83(b)** of the **Law of Succession**.

**"S.82(a)- to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death."**

**"S.83(b)- to get all free property of the deceased, including debts owing to him and monies payable to his personal representatives by reason of his death."**

78. Needless to state, and given the lapse of time since the death of the deceased and the various activities in respect of the estate, the plaintiff's journey (legal mandate) to enforce the above rights has sucked in many other parties, some beneficiaries and others not related to the deceased and this is what gives rise to other aspects of these proceedings which I shall revert to hereafter.

79. Thus, before court is first and foremost a matrimonial property case whereby the legal representative of Alice Kahaki Njoka has approached the court to enforce the rights of Alice Kahaki Njoka under the Married Women's Property Act, the statute of general application for such matters in our jurisdiction at the material time and the precursor of our new matrimonial property Act.

80. This suit cannot fall under **Order 37** of the **Civil Procedure Rules** for the simple reason that it is a matrimonial property claim under the **Married Woman Property Act 1882**. The basic question for determination is what is the contribution of Alice Kahaki Njoka (deceased) in the acquisition of the property held jointly in her name and that of Phillip Njoka Kamau or which is registered in the names of Phillip Njoka Kamau but in trust for Alice Kahaki Njoka (in so far as her proven share is concerned, if at all).

The question whether other defendants sued are holding property in trust for the estate of Alice Kahaki Njoka shall only arise when tracing of any property found due to the estate of Alice Kahaki Njoka is found in their possession or in their title.

81. The procedure for a suit under the **Married Woman Property Act of 1882** was institution of a suit through an originating summons. It is not quite clear why the plaintiff opted for the filing of this suit through what is titled a miscellaneous suit.

82. I however consider this procedural lapse as not fatal to the case. I wish to emphasize however that the suit as framed does not require the exercise of my jurisdiction under the Law of Succession Act. Thus as stated above. **Order 37** of the **Civil Procedure Rules** is not applicable. The plaintiff's submission that the suit was filed in the present format since the matters are complex and the court has the power to direct that the suit proceeds by way of a plaint does not hold in the circumstances of this case.

83. I do appreciate the many parties and the myriad of issues raised. Filing suit by way of originating summons in the circumstances of this case may not have been the appropriate route given the summary nature of proceedings through originating summons. I treat the suit as filed as regular noting that no party will be prejudiced by the form.

84. The question that springs to mind then is whether this cause of action survives the deceased. The ready answer is found in the Married Women's Property Act 1882 Section 23 thereof which provides:

**"For the purposes of this Act, the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."**

Again under **Section 2(1)** of the **Law Reform Act** causes of action vested in a deceased at the time of death survive for the benefit of his estate. **Section 2(1)** provides:

**"Subject to the provisions of this section, on the death of any person after commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."**

**Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery"**

85. It follows then that the primary dispute in this suit is the determination of the share of matrimonial property the estate of Alice Kahaki Njoka is entitled to (if at all) as against the estate of Philip Njoka Kamau.

86. Indeed in a ruling in High Court Succession Cause No.16 of 1984 (**In the matter of the estate of Alice Kahaki Njoka**) dated 15/6/2016, this court appointed the plaintiff herein as the administratrix of the estate of Alice Kahaki Njoka. At page 10 (paragraph 29) of the said ruling the court stated:

**"Having found that the grant is one that merits revocation and that new letters of administration should issue, the to be newly appointed administrator(s)' duties by virtue of Section 82 and 83 of the Act, will now be to identify, collect and preserve all the free property which belonged to the deceased. Section 82 of the Act confers upon the administrator(s) powers to enable him/her discharge his/her duties. The sections provides....."**

87. This suit is primarily a compliance with those directions of the court. As stated above, the primary dispute is as to what constitutes the estate of Alice Kahaki Njoka. The other issues raised in the plaint are secondary and incidental to the main issue herein.

88. It is only after the legal representative establishes the entitlement of the estate of Alice Kahaki Njoka, be it on capital or non-capital assets, that the court would delve into the issues of intermeddling or illegal transfers if at all.

89. So is this suit one about **the environment and the use and occupation of and title to, land**? Counsel from both divides have very ably submitted on the special jurisdiction conferred on the environment and Land Court and they both capture the legal position correctly. They only part ways, when applying the said law to our particular case.

90. As expounded above, in my understanding, this suit is not about the environment and the use and occupation of and title to Land. Granted capital assets form part of the subject matter of the suit. However, title to the said assets is being claimed through the Married Womens Property Act 1882. This is within the realm of the High Court and specifically the Family Division Court that this court is!

91. In a nutshell, this is a claim of a spouse's rights to property acquired during coverture under the Married Women's Property Act 1882. This is far removed from a claim for the use and occupation of and title to land envisaged under **Article 162 2(b)** of the **Constitution of Kenya**.

The suit is principally for the separation, by virtue of the Married Women's Property Act, of the estate of a wife from the estate of her husband as happened in **Dorcas Wangari Macharia V. Kenya Commercial Bank & 2 others**, Nairobi H.C. Civil Case No.18 of 2003 O.S. (unreported), Eldoret Probate and Administration Cause No.244 of 2007. Re: **In the Matter Estate of Ephanstus Gathatu Waithaka, (Deceased)** and Kisii H.C. Success Cause No.451 of 1996 - **In the Matter of the estate of James**

**Nyamweya, (Deceased).**

Once this is determined, all the other claims against other defendants, be they beneficiaries or otherwise shall be ripe for determination through tracing which is as defined by Black's Law dictionary is:

**"The process of tracking property's ownership or characteristics from the time of its origin to the present."**

92. At this stage, it is important to mention that some of the parties may appear to be prematurely in the matter given that they may not be directly involved in the dispute between the "spouses" over matrimonial property but to the extent that they hold or occupy or have dealt with property whose real ownership may well depend on the determination of the matrimonial claim herein; they become necessary parties to the suit to protect their interest. Their inclusion in this suit avoids a multiplicity of suit enabling all the issues, even though varied, to be resolved at once.

93. I do not wish to belabour the distinction of the jurisdiction of the High Court and that of the the Courts of its equal status which as stated earlier has been very well captured by counsel on both divides and which issue has now been laid to rest by the supreme court in **Republic V. Karisa Chengo & 2 Others**, S. C. Petition No.5 of 2015.

94. It's plain and obvious from the pleadings herein that the intertwined issues of use and occupation of and title to land will rear their head in the course of these proceedings. Nevertheless, guided by the decision in **Tasmac Limited V. Roberto Marc & 2 Others**, (2013) eKLR, where a matter falls under the Jurisdiction of the High Court and also that of the other specialist courts, either of them has Jurisdiction.

I must add that it is the court that has the jurisdiction to handle the primary dispute (in our case the dispute on spousal property rights) that would be more suited to try the matter. The court must put into account the principal issues in determining which court should be seized of the matter before it.

95The cumulative effect of the foregoing is that the objection by the defendants in regard to Jurisdiction must come a cropper. Firstly, it fails because the facts are disputed and thus falling short of the threshold in the **Mukisa Biscuits** rule and secondly, this court's analysis (even assuming the objection was a pure point of law) has shown that this court has the necessary Jurisdiction.

96. I must be quick however to bring out clarity about a possible mix-up of issues as raised by the plaintiff in the pleadings and submissions.

For the upteenth time, I will restate that the claim by the plaintiff is one for the enforcement of property rights of a wife under **Section 17** of the **Married Women's Property Act 1882**.

97. Both the husband and wife are deceased. The suit is therefore between the respective legal representatives and other interested parties. Whatever assets will be found due to either of the estates shall then be listed as assets – in the respective succession cases relating to the 2 estates i.e.:

i) Nakuru High Court Succession Cause No. 16 of 1984 - **In the estate of Alice Kahaki Njoka**

ii) Nakuru High Court Succession Cause No. 497 of 2013

**In the Estate of Philip Njoka Kamau.**

98. I raise this issue in good time noting that the plaintiff has in the pleadings and submissions raised the issue of the deceased, Phillip Kamau Njoka intermeddling with the estate of Alice Kahaki Njoka (deceased) to put the parties on notice that the issue of intermeddling can and shall only arise if and when the extent of the estate of Alice Kahaki Njoka is determined, in simple terms, when her claim to matrimonial property is established, if at all.

99. On the issue No. (b), the question is whether the suit herein is time barred.

The ready answer is found in the Law and of course tied to the nature of the claim as discussed at length when dealing with the issue of Jurisdiction.

100. This is a matrimonial property claim. **Section 42(b)** of the **Limitations of Actions Act** (Cap.22 Laws of Kenya) provides:

**"S. 42(1) This act does not apply to -**

**(b) Matrimonial proceedings.....**

The suit is not statute barred.

101. In her pleading, the plaintiff implies a trust on the part of Philip Njoka Kamau on behalf of his wife Alice Kahaki Njoka. It is her case that the said Philip Njoka Kamau held a share of the properties to which Alice Kahaki Njoka had contributed in acquisition in trust for Alice Kahaki Njoka.

102. That aspect of the claim in my considered view shields it from the provisions of the Limitation of Actions Act. **Section 20** of the Act provides:

**"20 (1)None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action-**

**a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or**

**b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use."**

103. This position is given credence by the findings in **Stephen & Others V. Stephens & Another**, (1987) KLR 185, where it was held that the Limitation Actions Act does not apply to fiduciaries.

104. This objection too must fail. I propose to deal with issues (c) and (d) on the suit being *sub judice* and *res judicata* respectively, together.

**105. Section 6** of the **Civil Procedure Act Cap 21** Laws of Kenya provides:

**"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."**

106. A look at the pleading in this suit and in Nakuru High Court Succession Causes Nos.16 of 1984 and 497 of 2013 clearly shows that though some of the parties herein are the same as in those matters, the claim herein is separate and distinct. Indeed, it is the finding in this suit that will unlock the issues in those 2 succession matters as the outcome herein will ascertain the respective estates of Alice Kahaki Njoka (deceased) and Phillip Njoka (deceased).

107. Of note is that the current suit is a claim of the estate of Alice Kahaki Njoka against the estate of Phillip Njoka Kamau and others with a view to establishing the extents of both estates. This suit is not *sub judice*.

108. Both Nakuru High Court Succession Causes Nos. 16 of 1984 and 497 of 2013 have not been heard and finally determined. **Section 7** of the **Civil Procedure Act** provides:

**"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

109. The essential elements in *res judicata* are:

1. An earlier decision on the issue.
2. A final judgment on the merits.
3. The involvement of the same parties or parties in privity with the original parties

110. The matters raised in this suit are not directly and substantially in issue in the Succession Causes above. They are not between the same parties or capacities and the same have not been heard and determined. The claim here is a distinct suit pitting the estate of Phillip Njoka Kamau (deceased) against the estate of Alice Kahaki Njoka through their legal representatives.

As stated above, this suit will be the panacea to the stalemate experienced in both succession causes.

111. The net result is that all the preliminary objections are found to be without merit and dismissed. The legal representative of the estate of Alice Kahaki Njoka shall have her day in court to articulate her case in furtherance of the interest of the estate with all other parties having the opportunity to defend the respective claims as may touch them jointly or severally as the case may be.

**Dated, Signed and Delivered at Nakuru this 26th July, 2017**

**A. K. NDUNG'U**

**JUDGE**