



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 1905 OF 2012**  
**IN THE MATTER OF THE ESTATE OF THE ESTATE OF NJUGUNA IGWIMA**  
**RULING**

**PLEADINGS**

Njuguna Igwima died on 16th January 1987.

Kanyi Igwima brother of the deceased filed citation to accept or refuse letters of administration intestate to the son of the deceased John Kanyi Njuguna. Kanyi Igwima filed petition on 27th March 2013 and obtained grant on 10th December 2013. The children of the deceased Igwima Njuguna, John Kanyi, Pauline Wambui Njihia and Mary Wanjiru Waithaka filed Summons for revocation of grant on 19th May 2014.

The deceased's brother Kanyi Igwima filed Summons for Confirmation of grant and the children of the deceased filed Affidavit of Protest on 21st June 2016 that the suit properties were not ancestral or trust land but the property of the deceased available to the children of the deceased.

The matter proceeded with hearing of the administrator's evidence and it is at that point that the children of the deceased through Counsel filed Preliminary Objection which ought to be disposed of first.

**PRELIMINARY OBJECTION**

Pursuant to Notice of a Preliminary Objection filed on 5th April 2017 by the Respondents (children of the Deceased) to the Applicant's Application for confirmation of grant and sought to have it struck out on grounds that:

I. The Court lacks jurisdiction to entertain the Application and Claim by the Applicants based on customary trust and that the Application/claim is in any event incompetent and contravenes **Article 162(2), 165(5) of the Constitution, 2010** and **Section 4** as read with **section 13 of the Environmental and Lands Act, Cap 12A**.

The brief facts of the case are that the Deceased Njuguna Igwima died intestate on 16<sup>th</sup> January 1987 domiciled in Kiambu within the Republic of Kenya. Kanyi Igwima brother to the Deceased Petitioned for a grant of letters of administration of the Estate of the Deceased on 27<sup>th</sup> March 2013 after being cited to enter an appearance on 15<sup>th</sup> November 2012.

The persons listed as those who survived the Deceased were;

- I. John Kanyi Njuguna - Son
- II. Igwima Njuguna - Son
- III. Pauline Wambu Njihia - Daughter
- IV. Mary Wanjiru Waithaka - Daughter
- V. Peter Gitau - Son (Deceased)
- VI. KanyiIgwima - Brother

Assets that were left by the Deceased are:

- I. Land Parcel No. NGENDA/GATHAGE 233
- II. Plot No. NGENDA/GATHAGE/T.56

In the Affidavit in support of the Petition, the Petitioner stated that their late father solely owned an ancestral parcel of land. Upon his death the land was divided equally between the Deceased and himself. He deposed that upon attainment of independence, the government of Kenya issued a policy of amalgamating small ancestral pieces of land into one unit to facilitate registration. Pursuant to this, the two parcels were amalgamated and registered under the name of the Deceased as Administrator and Trustee of the Ancestral Land. The Deceased held and Administered the Estate land parcel no. NGENDA/GATHAGE/233 and Plot No. NGENDA/GATHAGE/T.56.

Grant of Letters of Administration Intestate were issued to the Petitioner on 10<sup>th</sup> December 2013. Summons for confirmation of grant dated 4<sup>th</sup> July 2015 were later filed. In the Affidavit in support of the summons, the proposed mode of distribution of the Assets of the Deceased was as follows:

- I. L.R NO. NGENDA/GATHAGE/233 – ½ Share to the Petitioner (the Respondent herein) and ½ share to the Children of the Deceased
- II. L.R NO. NGENDA/GATHAGE/T.56 – ½ Share to the Petitioner and ½ shares to the Children of the Deceased.

The Respondents herein had filed a Protest dated 20<sup>th</sup> June 2016 opposing to the Petitioner's Application for confirmation of grant. He stated that he is a grandson to the late Igwima Kamau and son to the late John Njuguna Igwima; the Deceased herein. He claimed that their late grandfather had parcels of land which were consolidated to form a large parcel measuring approximately 4.2 acres registered as Title No. Ngenda/Gathaga/223. The said land was registered in the name of the Deceased as evidenced by a copy of title to the parcel of land. The said parcel then gave rise to plot title No. Ngenda/Gathage/T.104 also registered under the name of the Deceased. Both plots were said to have been registered under the name of the Deceased to hold in trust for the sons of the grandfather including his father, the Deceased. The parcels were later consolidated to form Title No. Ngenda/Gathage/233 of approximately 1.2 acres and the plot arising there from known as Plot No. Ngenda/Gathage/T.56; both of which belonged to the Deceased. He further stated that they (children of the Deceased) were the only beneficiaries and their Uncle, the Petitioner was not entitled to inherit since he had his own portion which measured approximately 4.2 acres registered under his name despite the fact that the land was held in trust for him.

The Respondents filed for Revocation of Grant vide an Application dated 14<sup>th</sup> May 2014. In the said Application, they submitted that they were the only Children of the Deceased and thus entitled to inherit his Estate, a right which they had been deprived of due to the Petitioner's fraud and concealment of material facts.

## **APPLICANT'S SUBMISSIONS**

In regard to the Preliminary Objection raised challenging the Jurisdiction of the Court to entertain a claim based on Customary Trust, the Applicant filed their submissions dated 19<sup>th</sup> May 2017 wherein they relied on **Article 162(2) of the Constitution, 2010** which provides that,

***“Parliament shall established Courts with the Status of High Court to hear and determine relating to inter-alia the environment and the use and occupation of, and title to, land”***

They also relied on **Section 4 of the Lands and Environment Act, Cap 12A** which establishes the Land and Environmental Court and **Section 13** which give the Court powers to hear and determine disputes relating to land and environment. Pursuant to the highlighted statutory provisions, they argued that the Environmental and Land Court is exclusively clothed with the jurisdiction to hear disputes relating to title in land. They argued that the Succession Court's jurisdiction is only limited to dealing with cases on testate and intestate succession and to the Administration of the Estate of Deceased person as espoused in **Section 2(1) of the Law of Succession Act**.

They further submitted that the Petitioner's claim was that the parcels of land were held by the Deceased in trust for himself which meant that he claimed the parcels as an owner thereof and not in his capacity as a beneficiary of the Estate. Further, they submitted that the Petitioner/Respondent was not an heir of the Deceased and thus not entitled to inherit his property.

In submitting that a distinction ought to be made between a claim against the Estate of the Deceased and a claim on Customary trust, they relied on **SUCCESSION CAUSE 432 OF 2009, MONICA WANGARI NJIRI & 4 OTHERS V EUNICE WANJIRU IGAMBA & ANOTHER [2016] EKLR** where it was held:

***“The mandate of the probate court is limited. A distinction ought to be made between a claim against the Estate of the Deceased and a Claim on inheritance in respect to the Estate of the Deceased. In our instant suit, the Objectors are not claiming any interest as dependants or direct beneficiaries of the Deceased. Their claim is that the title to the parcels of land is held in trust for them. Indeed this is a claim for proprietary rights.”***

Accordingly, they submitted that the court lacks jurisdiction to determine a claim based on trust in which title is challenged. They argued that the Law of Succession Act does not confer this Court powers to determine the question of ownership of land or make a declaration on whether or not a trust exists. They argued that Succession Courts do not have jurisdiction to handle disputes by third parties who have a claim in the Estate. The Applicant supported their argument with the case of **IN THE MATTER OF PETER IGAMBA NJOROGI, SUCCESSION CAUSE NO. 432 OF 2009 (UNREPORTED) QUOTED IN SUCCESSION CAUSE 488 OF 2010 IN RE ESTATE OF THE LATE JONATHAN KINYUA WAITITU (DECEASED) [2017] EKLR** where it was held:

***“.....I do not think that these Succession proceedings are the appropriate way to challenge the title of the Deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The Objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession Court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties. In this case, the Objectors ought to institute separate proceedings to articulate or vindicate their claims/rights..I therefore do hold that this Court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof.”***

They also relied on **H.C SUCCESSION CAUSE NO. 864 OF 1996 [2015] eKLR** where the Court held it had no jurisdiction to resolve the proprietary interest based on an alleged trust and the appropriate forum was the Land and Environment Court. It was thus held,

***“The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trust. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”***

Further, they also relied on **SUCCESSION CAUSE 488 OF 2010 IN RE ESTATE OF THE LATE JONATHAN KINYUA WAITITU (DECEASED) [2017] e KLR** where it was held that the Succession Courts do not have jurisdiction to dig deeper into the issues of ownership or title to land.

It was also submitted that **RULE 42 (2) OF THE PROBATE AND ADMINISTRATION RULES**, empowers the Court before confirmation of a grant to remove property which is in contest from the schedule of assets and have the same determined separately. If the contested property is found to be part of the Estate of the Deceased, the same is restored back to the schedule of assets of the deceased's estate available for distribution. This position was supported by the case of **IN RE ESTATE OF FRANCIS PETER NJUGUNA [2016] ECLR**.

Relying on the case law and statutory provisions as submitted, the Protestor argued that this court lacked jurisdiction to adjudicate a claim on customary trust as alleged by the Petitioner and the same ought to be determined by the Environment and Lands Court and the Application for Summons for confirmation should thus be struck out.

### **RESPONDENT'S SUBMISSIONS**

The Respondent's submissions were filed on 5<sup>th</sup> June 2017. He submitted that that this Court has jurisdiction to determine the matter because the law governing distribution of Assets of the Deceased person who died intestate is the Law of Succession Act and thus the Family Court is mandated to hear and determine any suit in this regards. Further, he stated that it was their view that anyone claiming jurisdiction should do so at the earliest time possible. In this regard, he submitted that the Applicants acted in bad faith and the course was an attempt to frustrate the course of justice. He argued that the Preliminary Objection is hinged on mischief to delay the proceedings. He relied on the case of **M.V LILIAN [1989] KLR** where Nyarangi JA held:

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it.....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 the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.”***

He further argued that the matter was not about ownership of the land; as it is registered under the Deceased name as evidenced by the searches produced before this Hon. Court. The distribution of the deceased's estate is cured by the Law of Succession and he is not contesting that the Deceased indeed owned the parcels of land but that he held the property in trust for other members of their grandfather's family. The Respondent was not challenging the title of the Deceased but invoking the law so that he can be granted his half of his share under the Law of Succession.

He relied on **Section 2(1) of the Law of Succession Act** to support their argument that the Deceased died intestate and thus the Court is clothed with jurisdiction to hear and determine the matter.

He also invoked **Section 3 of the Judicature Act, Cap 8** which provides that customary laws form part of Kenyan Law as long as it is not repugnant to justice and morality. He submitted that the Deceased held the properties in his name in accordance with Kikuyu customs as he was the elder brother. It was thus his position that he was not claiming the parcel of land being L.R NO NGENDA/GITHAGE/233 and L.R

NO. NGENDA/GITHAGE/T.56 on matters of trust but on matters of succession. Further, he submitted that he was not a 3<sup>rd</sup> party because he was not claiming the Estate through other means but only through inheritance. He relied on **Section 29(b) of the Law of Succession Act** to support his argument that he was a dependant of the Deceased as it was according to kikuyu customs that the eldest son was the caretaker of the rest of the children. In view of the above, it was his case that the Court has jurisdiction to hear and determine the matter as the his claim was on succession which is not an issue that can be determined by the Environment and Land Court. He prayed that the Preliminary Objection be found unmeritorious and a waste of the Court's time and could thus not be entertained.

### **DETERMINATION**

From the foregoing, the Issue for determination before this Court is whether the Court has jurisdiction to hear and determine whether there is an issue of customary trust in Land that is the subject of distribution of the deceased's estate in the instant case.

*The Law of Succession Act, Cap 160 gives the Succession Courts wide jurisdiction in dealing with issues of testamentary and administration of Estate of Deceased persons and other related matter as expressed by its preamble as read with Section 3(1) of the Act. From what has been deposed in the Applications and submissions, the Petitioner/Respondent sought to bequeath to himself half of the properties of the Deceased and claimed that Land Parcel No. Ngenda/Gathage 233 and Plot No. Ngenda/Gathage/T.56 were to be divided equally between the Deceased and himself but they were registered in the name of the Deceased to hold in trust of the family since he was the eldest son.*

**Section 29 of the Law of Succession Act, provides:**

***For the purposes of this Part, “dependant” means -***

***(a) ...***

***(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***

***(c) ...***

*Accordingly, the Petitioner/Respondent brother of the deceased is not beneficiary of his estate and he has not proved he was a dependant is under the Act. Moreover, nowhere in his pleadings has he submitted that he was being taken care of by the Deceased. His only claim is that part of the properties registered under the name of the Deceased were held in trust for him. It is on that basis he proposed that he be given half of the properties of the Deceased and the other half be shared between the children of the Deceased. This proposal is not supported by **the Law of Succession Act**, as **Sections 38 of the Act** out rightly provides for equal distribution of the net intestate estate of the Deceased properties between the children of the Deceased. This then means that the issue of customary trust raised by the Protest ought to be heard and determined in another forum so as to inform on whether the net estate of the deceased available for distribution to the beneficiaries includes the 2 suit properties or half of the said suit properties. The determination can only be within the purview of the Environment and Land Court to decide whether the said trust does exist by looking into the substantive claims by the claimants.*

In the case of **PETER MOTURI OGUTU V ELMELDA BASWETI MATONDA & 3 OTHERS [2013] eKLR**, It was stated that,

***“where a claim of trust has been raised, the Plaintiff had to establish the existence of a trust on which his case could be hinged or mounted.”***

In the Court of Appeal cases of **MUTHUITA .V. MUTHUITA (1982-88) 1 KAR 42 AT 44 &**

NJENGA CHOGERA .VS. MARIA WANJIRA KIMANI & OTHERS [2005] ECLR, it was held that,

***“customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.”***

From the above does the Succession Court have jurisdiction determine the question of the existence of a customary trust? Interests in land arising from customary law trusts are now expressly recognized under the provisions of **Section 28 (b)** of the **Land Registration Act, No.3 of 2012** and the same can only be determined by the Environment and Lands Court.

Although **Article 165(3)(a) Constitution, 2010** grants the High Court unlimited original jurisdiction in criminal and civil matters, the same is subject to **sub-article (5) of the same Article** which provides:

***(5) The High Court shall not have jurisdiction in respect of matters:***

***(a) .....***

***(b) Falling within the jurisdiction of the courts contemplated in Article 162 (2)...***

The Courts contemplated in **Article 162(2)** include courts with the status of the High Court to hear and determine matter relating to the environment and the use and occupation of, and title to, land. Pursuant to **the Environment and Land Court Act, No. 19 of 2011 Section 3 of the Act (supra)** Establishes the **Environment and Lands Court** and **Section 13** give the Court jurisdiction and power to hear and determine disputes—

***(a) ...***

***(b) ...***

***(c) ...***

***(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***

***(e) any other dispute relating to environment and land.***

**In light of the above and the sentiments in the locus classicus case of *Owners of the Motor vessels “Lillian S” -Vs- Caltex Oil (K) Ltd. Civil Appeal No. 540 of 1989* where it was held that,**

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

This Court's jurisdiction is to enforce Law of Succession Act Cap 160 on administration of testate and intestate estates of deceased persons. In this regard hear and determine issues of issuance of grants, summons for confirmation of grants where lists of beneficiaries, lists of assets and modes of proposed distribution of estates are agreed and consented to by all beneficiaries. Where there is contest , hear and determine the Protests and revocation of grants application.

Where there is dispute of what constitutes the net estate of the deceased available for distribution arising from contest as to deceased's title and ownership, then the distribution of the said asset is hived off and confirmation of rant of the undisputed assets may be granted to allow beneficiaries beneficial interest over the said part of the estate. If the contested asset(s) is /are the only ones available for distribution as in the instant case , then the confirmation proceedings grind to a halt pending outcome of the ownership and

title of the said properties by Environment and Lands Court.

Therefore, it is this Court's position that although the Notice of Preliminary Objection was raised during the hearing of the summons for confirmation and protest and was indeed delayed, the issue of jurisdiction goes to the root of the matter before Court and ought to be determined first. This Court concurs with the Applicant's position that the mandate of the probate court under the Law of Succession Act is limited to Succession proceedings only and not determination of title or ownership of land. This was held in **H.C SUCCESSION CAUSE NO. 864 OF 1996[2015] EKL**R AND **SUCCESSION CAUSE 488 OF 2010 IN RE ESTATE OF THE LATE JONATHAN KINYUA WAITITU (DECEASED) [2017] EKL**R (*supra*).

**DISPOSITION**

1. The Preliminary Objection is upheld and the Summons for Confirmation and Protest proceedings stayed pending determination of the ownership and title of the suit properties; ***Ngenda/Gathage 233 and Plot No. Ngenda/Gathage/T.56 by the Environment and Lands Division of the High Court.***
2. The Application is hereby allowed and costs of the Application shall be in the main cause.

**DELIVERED DATED & SIGNED AND IN OPEN COURT AT NAIROBI THIS 4TH DAY OF AUGUST 2017.**

**MARGARET W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

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