



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 3120'B' OF 2002**

**IN THE MATTER OF THE ESTATE OF LAWRENCE GITHINJI WANG'ONDU (DECEASED)**

**RULING**

1. When the matter came up for hearing on 8<sup>th</sup> March 2017, it transpired that what was for hearing was ELC No. 461 of 2008, which had been consolidated with this succession cause. I noted that the said suit related to matters that fall under Article 162(2) of the Constitution, and I ruled that I needed to peruse the court file before giving directions on the way forward.

2. I have perused my record. The suit in ELC No. 461 of 2008 had been commenced by a person who alleged to have had transacted with the deceased over a property which forms part of the estate of the deceased. The suit is against the administrators of the estate of the deceased, who are also surviving sons of the deceased. The orders sought are for an injunction to restrain trespass, a mandatory injunction to compel transfer of the property to the alleged purchaser, general damages for loss of user, among others.

3. Ideally, the prayers sought are not on the matters that a probate court would delve into. The function of the probate court is to identify the assets that make up an estate of a deceased person and the persons who are entitled to a share therein, and to determine how to distribute such assets amongst the beneficiaries. The probate court does not afford purchasers a platform to recover property, and other remedies concomitant to that. That lies elsewhere. The best the probate court can do is to note the interests being claimed by such claimants in estate property, and to set aside such property to allow the claimant pursue their remedies elsewhere.

4. Kenya is now under a new constitutional dispensation. Article 162(2) establishes the Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of and title to land. The High Court has no jurisdiction over matters that ought to be heard and determined by the Environment and Land Court. Article 165(5) of the Constitution provides that the High Court has no jurisdiction in respect of matters that fall within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution.

5. According to the plaint filled in ELC No. 461 of 2008, the plaintiff seeks to restrain trespass, an order to compel transfer of property and damages for loss of use. At the heart of the matter is the unspoken prayer for a declaration that the plaintiff had validly acquired the subject property from either the deceased or the estate. The issues raised in ELC No. 461 of 2008 relate to title to land, and use and occupation thereof, which then squarely brings the matter under Article 162(2) of the Constitution. No doubt, this court has no jurisdiction under Article 165(5) of the Constitution to determine the said dispute. The matter ought to be heard and determined exclusively by the Environment and Land Court.

6. The directions regarding disposal of the matters raised in ELC No. 461 of 2008 and related matters are –

**(a) That the court file herein relating to ELC No. 461 of 2008 shall be removed and transferred to the Environment and Land Court for disposal thereof;**

**(b) That in the meantime, Nairobi/Block 79/36 shall be removed from the schedule of the assets distributed in the certificate of confirmation of grant on record herein; and**

**(c) That upon determination of ELC No. 461 of 2008 the parties hereto shall be at liberty to move this court appropriately for the disposal of Nairobi/Block 79/36 in accord with the final**

**determination by the Environment and Land Court.**

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>TH</sup> DAY OF SEPTEMBER, 2017.**

**W. MUSYOKA**

**JUDGE**