



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO.79 OF 2016

**IN THE MATTER OF THE ESTATE OF NGUGI NJOROGE alias GEORGE NJOROGE NGUGI
(DECEASED)**

JOSEPH KOORI NGUGI.....1ST APPLICANT

KINUTHIA NJOROGE JOHN alias

KINUTHIA MIRAMBO.....2ND APPLICANT

-VERSUS-

STEPHEN NDICHU J. MUKIMA.....RESPONDENT

RULING

1. In this Succession Cause, two Summons for revocation have been filed. The first one is dated 23/09/2014 and filed in Court on 24/09/2014 (“1st Summons for Revocation”). It was filed by Joseph Koori Ngugi (hereinafter “1st Applicant”) who is a son of the Deceased. The main claim in this 1st Applicant is that the grant of probate issued to Stephen Ndichu Mukima (hereinafter, “Respondent”) on 15/08/2013 and confirmed on 16/09/2014 should be revoked because it was issued based on a will which the 1st Applicant claims is forged.

2. The second Application is dated 30/03/2017 and was filed in Court on the same day (“2nd Summons for Revocation”). It is by Kinuthia Njoroge John Alias Kinuthia Mirambo (hereinafter, “2nd Applicant”). The 2nd Applicant is a brother to the Deceased. The main claim in his Summons is that the main asset in the estate of the Deceased, to wit, land parcel no. Karai/Karai/36 was registered in the name of the Deceased fraudulently and that the 2nd Applicant has equitable interests in the nature of a trust in half the parcel of land.

3. The 1st Applicant filed a Preliminary Objection to the 2nd Summons for Revocation. The Preliminary Objection is couched in the following terms:

a. “The 2nd Applicant’s claim herein as deduced from the gist of the said Summons for Revocation of Grant by the 2nd Applicant and the Supporting Affidavit thereof is a claim challenging title in the name of the Deceased herein and a claim based on trust whereas this Honourable Court lacks jurisdiction to entertain or hear and determine such claims. It is only the Environment and Land Court that is seized with jurisdiction to entertain such a claim.

b. The 2nd Applicant, Kinuthia Njoroge John alias Kinuthia Mirambo has no locus standi to file the Summons for Revocation of Grant dated 30th March, 2017 as he is not a duly appointed legal representative of either his late father or mother on whose behalf and interest he purports to make

the alleged claim based on trust.

c. The 2nd Applicant, Kinuthia Njoroge John alias Kinuthia Mirambo, further lacks locus standi to file Summons for Revocation of Grant dated 30th March, 2017 as he is neither a beneficiary of nor a creditor to the estate of the Deceased herein and the said Summons is thus scandalous, frivolous and vexatious and only meant to embarrass and delay the hearing of this matter and by extent (sic) the administration of the estate herein to its rightful beneficiaries time being of essence.”

4. When the parties appeared before me on 22/06/2017, I directed that the Preliminary Objection should be heard first since it has potential to dispose of the 2nd Application in its entirety. I also directed the parties to file their Written Submissions and orally highlight if necessary. All parties filed their Written Submissions. When the matter was listed on 21/09/2017, none of the parties found it necessary to orally highlight.

5. The 1st Applicant and the Respondent are in favour of the Preliminary Objection while the 2nd Applicant has vehemently opposed it.

6. In their submissions in support of the Preliminary Objection, the 1st Applicant and Respondent have only submitted on the first issue raised in the Notice of Preliminary Objection. I take it that they re-considered their position on the other two points. I think they were wise to do so because it is not entirely clear that those two other points are purely questions of law in the mode of ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*** that can be determined preliminarily at this point.

7. On the question of jurisdiction, the 1st Applicant has submitted quite straightforwardly that the gist of the 2nd Summons for Revocation is a claim based on trust by the 2nd Applicant against the estate of the Deceased. The 1st Applicant says that this is a specific claim to part of the estate being all that parcel of land known as land parcel no. Karai/Karai/36.

8. The 1st Applicant further argues that land parcel no. Karai/Karai/36 is registered in the name of the Deceased as an absolute proprietor. The 2nd Applicant claims that he lays claim to half of the portion of land parcel no. Karai/Karai/36 on behalf of his mother's household. In essence, says, the 1st Applicant, the 2nd Summons for Revocation challenges the title and ownership of land parcel no. Karai/Karai/36 by claiming that this was trust property held by the Deceased for the benefit of the 2nd Applicant and others. It follows, the 1st Applicant argues, that the 2nd Summons for Revocation invites the Court to make a determination as to ownership of the land parcel no. Karai/Karai/36. To do so, this would necessitate the Court to determine whether the actual or real owner of the land parcel no. Karai/Karai/36 was not the Deceased or another person.

9. The 1st Applicant argues that such a determination is within the exclusive province of the Environment and Land Court by virtue of Articles 162(2) and 165(5) of the Constitution. Hence, this is an appropriate controversy that should be referred to the ELC for resolution. If a Court has no jurisdiction, it must down its tools and take no further step, the 1st Applicant reminded the Court – citing the famous passage by Nyarangi, J.A. in ***The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) Ltd [1989] KLR 1.***

10. In urging his position that a question of determination of trust is not a matter for a succession Court but a question that must be determined in another suit filed in a Court with appropriate jurisdiction, the 1st Applicant relied on the following persuasive authorities: ***In the Matter of the Estate of James Njenga Njuguna (Succession Cause No. 2785 of 1998); Monica Wangari & 4 Others v Eunice Wanjiru & Another [2016] eKLR; and In Re the Estate of Tapnyobi Chemurer Leldayet (Deceased) [2011] eKLR.***

11. In similar vein, the Respondent argues that since the 2nd Applicant is not claiming the land parcel no. Karai/Karai/36 as a beneficiary but as beneficial owner under an alleged trust, the correct forum for the determination of that suit is the ELC Court.

12. On his part, the 2nd Applicant insists that the Court is seized of jurisdiction to determine the 2nd

Summons for Revocation. The 2nd Applicant primarily relies on the text of sections 47 and 76 of the Law of Succession Act as well as Rules 44 and 73 of the Probate and Administration Rules. I find it necessary to only quote section 47 whence the 2nd Applicant has pivoted his arguments. It provides as follows:

The High Court shall have jurisdiction to entertain any application and determine any application in any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.

13. The 2nd Applicant argues that the 2nd Summons for Revocation is properly filed in this succession cause because it is filed by a person who has an interest in the estate of the Deceased. The 2nd Applicant is one such person and is therefore entitled to approach the Court for the revocation of a grant issued in the succession cause. This is because, the 2nd Applicant argues, the 2nd Summons for Revocation seeks to “show to the Honourable Court that the stated land parcel no. Karai/Karai/36 did not fully belong to the estate of the Deceased herein hence part thereof was not available for distribution as confirmed to the 1st Applicant.” The 2nd Applicant insists that the Court has jurisdiction to assess the aspect of “material concealment claimed in tandem with section 76 [of the Act].”

14. The 2nd Applicant pointedly argues that section 13 of the Environment and Land Court Act which spells out the jurisdiction of the ELC does not give the ELC jurisdiction on succession matters.

15. The 2nd Applicant relied on a number of decisions of the High Court and Equal Status Courts where he says, faced with similar situations, the Courts found that the High Court sitting as a Succession Court had jurisdiction. In particular, the 2nd Applicant has cited **PLR v JNR & Another [2013] eKLR** where Waithaka J. of ELC stated thus:

Consequently, this property being the estate of the Deceased is governed by the Law of Succession Act. Section 2(1) of the Law of Succession Act provides that provisions therein applied to all cases of intestate or testamentary succession to the estates of Deceased persons and to the administration of estates of Deceased persons and to the administration of estates of those persons. An estate means the free property of a deceased person that is the property of which that person was legally competent free to dispose during his lifetime, and in respect of which interest has not been terminated by his death....The property and issues to be determined [in this case] fall under the realm of the Law of Succession Act. The Environment and Land Court is a special Court established under Article 162(2)(b) of the Constitution and it is meant to deal with matters concerning the environment and the use and occupation of and title to land. However, matters of ownership and entitlement to a deceased person’s property, including land are governed by the Law of Succession Act and are to be determined by the Family Court....

16. The 2nd Applicant also cited **Salome Wambui v Caroline Wangui Kiguru [2013] eKLR** .

17. I propose to address a singular issue: Does this Court have jurisdiction to hear and finally determine the issues addressed in the 2nd Summons for Revocation in light of Article 162(2)(b) and 165 of the Constitution and section 13 of the Environment and Land Court Act?

18. I should begin by observing the two main authorities cited by the 2nd Applicant are distinguishable. In both those cases, the person approaching the ELC was a beneficiary who was seeking to enforce their rights as beneficiaries vide a suit filed at the ELC. Hence, the Courts were right to advise them to file their cases as succession causes. That is eminently not the case here. Here, the 2nd Applicant is challenging the title to one of the properties declared to be the Deceased’s property in the succession proceedings. Since the 2nd Applicant is, in essence, claiming equitable beneficial interests to the property both for himself and others, the question arises whether that claim is more appropriately filed in this cause or at the ELC.

19. Article 165(5) provides that the High Court shall **not** have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).

20. Article 162(2) of the Constitution provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the Environment and Land Court Act, No. 19 of 2011, which came into effect on 30th August 2011. The object of the Act is stated as follows:

An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers, and for connected purposes.

21. In Section 13, the ELC Act provides that:

13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2)

(b) of the Constitution, the Court shall have power to hear and determine disputes:

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

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.

22. These constitutional and statutory provisions are well known and the recent Supreme Court decision in ***R v Karisa Chengo (Supreme Ct Pet. No. 5 of 2015)*** amplifies them. While the provisions are clear that jurisdiction in land-related matters belong to the ELC, the provisions are less clear what “land-related” means. As I have remarked elsewhere, in all honesty, it would not be possible for such direction to come from the Constitution or statute; it would have to be supplied by the Courts in a case by case basis. Such is the task here.

23. The real question for consideration here is whether a claim for an equitable interest in the form of a trust in land is the kind of dispute that the framers of the Constitution and the Legislature intended that should be handled exclusively by the ELC or whether that question is the kind that should be handled by a Probate Court. To my mind, a person claiming to be a beneficiary of a trust in land, in essence makes a claim to the land in question. That claim, though equitable, may turn out to be a better claim than the legal title holder. There is no escaping that a claim for an equitable trust in land is a claim against the legal title holder which, at its root, is a claim against the legal holder of the title and hence, about the title to the land. Consequently, I agree with my brother Justice A.K. Ndung’u in the ***Monica Wangari Njiri Case*** when he states:

.....[E]ven if there was material establishing there was such a trust, I doubt that the resolution of

this issue would be a matter of the probate Court. 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 trusts. 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.

24. I am persuaded that this is the correct appreciation of the law and circumstances of this situation. I say so both for doctrinal and prudential reasons. Doctrinally, as alluded to above, a claim for an equitable interest in land is a claim against the legal owner of land and hence a dispute over ownership of the land. I am persuaded that the drafters of the Kenyan Constitution intended such questions to be determined in the ELC. The text of the Constitution and section 13 of the ELC Act seems perfectly clear to me on that question.

25. In addition, in my view, prudential reasons militate in favour of these kinds of disputes being heard at the ELC or at least in a separate suit. While I agree that the Law of Succession Act envisages a class of people beyond “traditional” beneficiaries to bring proceedings for revocation or annulment of a grant of representation in a probate cause, cases which present a straightforward challenge to the ownership of property by the Deceased present a separate question and not a probate matter. To attempt to resolve such issues of contested ownership in the context of a probate case could obfuscate the real issues and lead a Court to reach wrong or compromised conclusions. This is in part because probate proceedings are not designed for parties to be able to effectively litigate complex issues of ownership. In a separate suit, parties are better able to plead their case, go through discovery process and a fully-fledged hearing where evidence can be properly presented, contested, examined and veracity tested.

26. Consequently, for the reasons stated above, I find that the first Preliminary Objection raised in the Notice of Preliminary Objection dated 05/06/2017 has merit and it is hereby allowed. The Summons for Revocation dated 30/03/2017 and filed in Court on the same by Kinuthia Njoroge John Alias Kinuthia Mirambo is hereby struck out. The Applicant shall be at liberty to file an appropriate suit in the Thika Environment and Land Court.

27. Given the nature of this dispute, each party will bear its own costs.

28. Orders accordingly.

Dated and delivered at Kiambu this 14th day of December, 2017.

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JOEL NGUGI

JUDGE