



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. E032 OF 2021

ISAAC MBINGI OKELLO.....PLAINTIFF

VERSUS

JOSEPHAT OUMA MBINGI.....1ST DEFENDANT

MARCETA WESONGA MUKETI.....2ND DEFENDANT

EMILY AKASIBA MBINGI.....3RD DEFENDANT

STANLEY OJIAMBA MBINGI.....4TH DEFENDANT

JOYCE NABWIRE ANJALA.....5TH DEFENDANT

ROSE ATOLA MAKOKHA.....6TH DEFENDANT

JOHNSTONE WANJALA ODUNGA.....7TH DEFENDANT

STEPHEN WABWIRE WANJALA.....8TH DEFENDANT

RULING

1. The plaintiff filed an application dated 17th June 2021 under Order 40 Rule 1 and 37 of the Civil Procedure Rules, Section 3A of Civil Procedure Act seeking for the following orders;

i. Spent.

ii. That an interim order do issue restraining the defendants by themselves, agents, assignees, kins, servants and/or heirs from charging, transferring, subdividing and or any way whatsoever interfering with LR. NO. BUKHAYO/BUGENGI/17215, 17216, 17217, 17218, 17219, 17220, 17221, 17222, 17223 and 17224 pending inter partes hearing or any further period to be granted by this Honourable Court.

iii. That costs of the application be provided for.

2. The application was supported by the affidavit of ISAAC MBINGI OKELLO and the following grounds inter alia that;

a. The Applicant shall suffer irredeemable loss after properties transferred to third parties.

b. The title deeds were obtained through fraud and non-disclosure of material facts.

c. The Respondents will not suffer any prejudice if the orders sought are granted.

d. The respondents are in the process of consolidating.

3. On the date the application was set for hearing on 22nd July 2021, the defendants filed a preliminary objection dated 5th July 2021 pleading that;

a. The entire suit together with the Notice of Motion application all dated 17th June 2021 as filed by the plaintiff discloses that the plaintiff's claim against the defendants is one of a succession dispute/claim against the defendants for failure to make a material disclosure of obtaining letters of administration in the estate of his deceased grandfather Yosam Wanzala Mbingi in Succession Cause No. 227 of 2018 filed in the Chief Magistrate's Court at Busia.

b. The plaintiff is aggrieved that the defendants obtained letters of administration without involving him and used the same to transmit and subdivide his late grandfather's original parcel of land known as LR. NO. BUKHAYO/BUGENGI/199 into various resultant parcels of land which are the subject of the instant application and suit.

c. This being a Succession dispute, this court as constituted and as contemplated under the provisions of Article 162(2)(b) of the Constitution of Kenya and as read with the provisions of Section 13 of the Environment and Land Court Act, 2011 and Sections 128 and 150 of the Land Act 2012 does not have jurisdiction to hear and determine the nature of this dispute.

d. This suit is an abuse of the court process hence it be struck off with costs.

4. The parties agreed to dispense with the hearing of the preliminary objection and the application together. The defendants filed their submissions on 23rd August 2021 and submitted that on a prima facie observation of the suit, the entire cause of action is premised on the distribution of the estate of the late Yosam Wanzala Mbingi vide a succession cause which was done by a court competent to handle it. The defendants submitted that the plaintiff is forum shopping and has brought the suit prematurely yet the remedy lies before the Succession Court. They further submitted the plaintiff has abused the process of this Honourable Court by wasting the court's time and further subjecting the defendants to unnecessary expenses. They relied on the case law and statutory provisions inter alia **Section 76 of Cap 160 which provides that, a grant of representation may at any time be revoked or annulled if the Court decides on application by any interested party that b) the grant was obtained fraudulently by making of a false statement or by concealment from the Court something that is material to the case.**

5. The plaintiff filed his submissions on 27th September 2021 and submitted that the order they are seeking are in respect of title which have already been issued and that the Probate and Administration Court cannot litigate parties who are not beneficiaries. He prayed that the preliminary objection be dismissed with costs. He relied on the decision of **In the Matter of the Estate of Njuguna Igwima P&A No. 1905 of 2012** which held that, **the mandate of the probate Court does not extend to determining issues of ownership of property and declaration of trust.... A party who wishes to have such matters resolved ought to file a suit to be determined by the ELC .**

6. In the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** A preliminary objection per Law J.A. was stated to be thus: -

“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.”

7. The P.O requires this court to determine whether or not it possesses the jurisdiction to determine the suit as filed by the plaintiff. It is now well known in law that jurisdiction is everything and where a court finds that it does not possess jurisdiction, it must down its tools immediately. The defendants have challenged the jurisdiction of this court by pleading that the plaintiff's suit is as a result of him being dissatisfied with the decision of the Probate and Administration Court. The plaintiff has prayed for a permanent injunction restraining the defendants by themselves, agents, assignees, kins, servants and/or heirs from charging, transferring, subdividing and or any way whatsoever interfering with LR. NO. BUKHAYO/BUGENGI/17215, 17216, 17217, 17218, 17219, 17220, 17221, 17222, 17223 and 17224 and cancellation of title deeds in respect of L.R. BUKHAYO/BUGENGI/17215-17224 and revert to BUKHAYO/BUGENGI/199.

8. The plaintiff has pleaded fraud and laid out the particulars as follows;

- i. Failure to disclose all beneficiaries to the estate of YOSAM WANZALA MBINGI in Busia H.C.C P&A NO.227 OF 2018.
- ii. Failing to acknowledge gifts already transmitted during the lifetime of YOSAM WANZALA MBINGI.
- iii. Presenting forged signatories to other beneficiaries.
- iv. Presenting fictitious documents to Land Control Board for sub-division.

9. A literal reading of the grounds in support of the application and the plaint, one immediately gets the impression that the plaintiff is claiming to be a beneficiary of the estate of YOSAM WANZALA MBINGI and that he was fraudulently left out of the succession proceedings by the 1st defendant. He also pleads that the 1st defendant ignored the mode of sharing done by their deceased grandfather during their lifetime. The plaintiff therefore wants this court to issue a permanent injunction and cancel the titles which had been issued as a result of an order obtained from a Probate Court. Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act all set out in detail the jurisdiction of the Environment and Land Court clearly. Disputes arising from the legality or otherwise of Succession proceedings of the Estate of a Deceased or whether all the beneficiaries gave their consent do not fall within the realm of this court. Notably, these are the frontline disputes in the instant matter. As correctly submitted by the Defendant, the remedy available where a grant was issued without material disclosure is set out in Section 76 of the Law of Succession Act.

10. The plaintiff submitted that they are seeking an order in respect of title which have been issued and distributed and are now in the hands of third parties who are not beneficiaries. The court in its decision in *Succession Cause 265/2004 Munyasya Muliliv vs Sammy Muteti Mulili* where the court cancelled titles after revoking the grant. The court in the above case relied on the decision of J. Musyoka in *Re Estate of Alice Mumbua Mutua (deceased) (2017) eKLR*, where the Judge considered when a case can be heard as a succession cause or when it can be heard in other courts with concurrent jurisdiction – like the ELC. The Judge said;

“The Law of Succession Act, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

11. Using the above quoted decision, the plaintiff in his pleadings has stated that the 1st defendant without notice to other beneficiaries filed and distributed the estate of YOSAM WANZALA MBINGI and transmitted to the 2nd to 8th defendants. The third parties are direct beneficiaries from the administrator of the deceased estate and the plaintiff is challenging the authority of the said administrator in registering, subdividing and transferring to the 2nd to 8th defendants. In my view, the cause of action rotates around the grant legality or otherwise of the grant issued to the 1st defendant because it is the authority he used to deal with the suit land.

12. Limiting myself to the pleadings of the plaintiff, this court has no jurisdiction to determine who is a beneficiary of the estate of YOSAM WANZALA MBINGI as that is a function that falls within the jurisdiction of the Probate and Administration Court. In order to determine this suit, this court would be called upon to determine who the beneficiaries are, were their consents regularly obtained and their shares in the property of the deceased. The manner in which the plaintiff has worded his pleadings makes the dispute therein more of an objection proceeding in a succession dispute than a land dispute. In my opinion and I so hold, this dispute would be better resolved before the court that handled the succession cause being BUSIA CMCC Succession Cause no. 227 of 2018 and confirmed the grant. It was pre-maturely filed in this court.

13. In light of the above, I find that the defendants preliminary objection as raised is merited and is allowed. The plaintiff’s application dated 17th June 2021 be and is hereby struck out with costs to the defendants. The suit is equally struck out but with no order as to costs since the defendants had not filed a defence.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 26TH DAY OF JANUARY, 2022

A. OMOLLO

JUDGE