



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
MISC APPLN NO. 10 OF 2015
IN THE MATTER OF THE ESTATE OF: NYAITATI MASERO (DECEASED)
BETWEEN
ROBERT NYAITATI MASERO.....PETITIONER / DEFENDANT
VERSUS
ROMAN GABERI KERARIO.....OBJECTOR/PLAINTIFF
RULING

1. At the conclusion of the hearing of the Summons for revocation of the grant dated 05/05/2010, which proceeded by way of oral evidence, the Petitioner/Defendant raised an issue which appears to be in the nature of a preliminary objection pointing to the Objector's *locus standi* and moreso to the jurisdiction of this Court. It was submitted and re-emphasized during the highlighting of the written submissions that the matter before Court was purely a succession cause and that the Objector's claim, if any, does not fall within the confines of the Law of Succession. Counsel for the Objector opted not to tender a response to that submission.

2. I have carefully gone through the record and noted that the Petitioner did not formally raise the above issue earlier. Had the Petitioner opted to do so, the same would have been up for determination that early. Be that as it may and although the Objector did not tender any response on the issue, this Court is however called upon by the Constitution and the law to first satisfy itself that it has the jurisdiction over the dispute before it deals with the matter further. That was the finding in the *locus classicus* case of **The Owners of Motor Vessel "LILIAN "S" -vs- Caltex Oil Kenya Ltd (1989) 1 KLR 1** where Nyarangi, JA. stated at page 14 that: -

“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 and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction:-

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings

that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”

3. On a careful analysis of the dispute at hand, it is clear that the Objector's claim is on the ownership of part of the property known as BUKIRA/BWISABOKA/653. The strength of the Objector's case is that the portion he is claiming was initially owned and occupied by his late father one **Kerario Chacha** and that the portion was erroneously consolidated with that of the Petitioner's father, the deceased herein during the demarcation exercise and a single title deed issued in the deceased's name. The Objector contends that those events are well known and accepted by the Petitioner who even took steps towards transferring the Objector's late father's share to the Objector but reneged mid-way. Several exhibits were produced to that effect.

4. The Objector conceded not to be a child, a dependant or even a creditor to the deceased. His claim is clear and straight forward that he is entitled to the portion which was owned by his late father as he, together with his siblings, were born and raised on the said portion of land and that there is even a clear boundary between that portion and the other portion occupied by the Petitioner and his siblings.

5. This Court, being a High Court, is a creature of **Article 165 of the Constitution** and which Article also defines its jurisdiction. Under **Article 165(5)** the Constitution excludes the High Court from exercising jurisdiction over matters falling within the jurisdiction of the courts contemplated in **Article 162(2)**. **Article 162(2)** of the **Constitution** provides that the mandate to deal with disputes relating to the use, occupation and title to land is a legal preserve of the Court contemplated under that Article. That Court is now the Environment and Land Court.

6. By applying the foregoing to this matter, it becomes clear that the dispute between the parties herein falls within the preserve of the Environment and Land Court and is not among those disputes contemplated under the Law of Succession to be handled by the High Court. While I remain alive to the truism that the matter was fully heard and witnesses testified before my brother **Mrima, J.** and that it will now take more time for its final determination, there remains only one way forward once a Court determines that it is not seized of jurisdiction and that is to accordingly down its tools. This Court therefore so does.

7. By taking into account all the issues in this matter and with a view to allow the real dispute between the parties herein to be determined, this Court hereby makes the following orders:

a) The determination of the Summons for Revocation of the grant dated 05/05/2010 and filed on 24/05/2010 is hereby stayed pending further action by the Objector herein before an appropriate forum.

b) In the event that the Objector herein does not take any steps as above contemplated within 90 days of this ruling, the order of stay in (a) above shall automatically lapse and the Petitioner shall be at liberty to move this Court for a determination on the Summons for Revocation dated 05/05/2010 and/or take steps it deems appropriate.

c) For purposes of maintaining law and order the parties shall continue to occupy their respective portions until further orders of this Court.

d) Parties be at liberty to collect their exhibits from this Court.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of November, 2016

H.A.OMONDI

JUDGE