



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 91 OF 1996**

**IN THE MATTER OF THE ESTATE OF BENSON MAIRURA OMBUNA (DECEASED)**

**-AND-**

**1. BIRITA KWAMBOKA MOGENI**

**2. JANE NYANCHERA OMBUNA**

**3. ANNE NYANCHAMA OMBUNA**

**4. CAREN NYAMOITA NYAIRO**

**5. VERONICAH NYABOKE MAIRURA.....APPLICANTS**

**- VERSUS -**

**EVANS HEDSON OMBUNA ..... RESPONDENT**

**RULING**

1. The late **Benson Mairura Ombuna**, (the deceased), died on the 11<sup>th</sup> September 1995 and according to the chief's letter dated 18<sup>th</sup> March 1996, the beneficiaries of his vast estate comprising both immovable and movable property included his two wives, **Margaret Kwamboka** and **Alice Bosibori** and their respective sons, **Evans Hedson** and **Duke Mairura**.

The grant of letters of administration intestate was firstly issued on 7<sup>th</sup> May 1996, to Alice Bosibori and Evans Hedson. It was subsequently confirmed on 27<sup>th</sup> January 1998.

2. Unfortunately, Alice passed away on 8<sup>th</sup> January 2001 and her position as the second administrator of the estate of the deceased was taken over by her son Duke Mairura, pursuant to a court order made on 16<sup>th</sup> July 2004. A fresh certificate of confirmation of grant was issued on the same day. It showed that Duke Mairura was the first administrator while Evans Hedson, was the second administrator.

Unfortunately again, Duke Mairura passed away on 15<sup>th</sup> July 2009. Thereafter, the surviving administrator, Evans Hedson, filed an application dated 21<sup>st</sup> October 2009, for orders that he be deemed as the sole administrator of the estate of the deceased. This was followed by an application dated 13<sup>th</sup> November 2009 for revocation of grant.

3. The application for revocation of the grant was made by the daughters of the deceased from his second

house i.e Birita Kwamboka, Jane Nyanchera, Ann Nyanchama and Caren Nyamoita.

Both applications were resolved by a consent order entered in court by the parties on the 19<sup>th</sup> February 2010.

Consequently, a new grant was issued on the same date to Evans Hedson, Birita Kwamboka and Veronica Nyaboke, wife to the late Duke Mairura.

After a dispute over distribution of the estate, a certificate of confirmation of grant was issued on 4<sup>th</sup> May 2011.

It is instructive to note that the distribution was undertaken by the court after the parties failed to come up with a consensus over the same.

4. The distribution culminated in the finalization of this succession case.

However, six (6) years down the line, the present application dated 22<sup>nd</sup> August 2016, was filed by daughters of the deceased's second house together with the wife of their late brother Duke Mairura.

The application among other things, seeks an order to direct the Land Registrar and Land Surveyor Nyamira County, to visit land parcel No. MWONGORI/SETTLEMENT SCHEME/969, 970, 971 AND 972 for purposes of surveying the same and filing a report in court within sixty (60) days.

The applicants suspect that their part of the land does not measure nineteen (19) acres as intended meaning that there could either be a shortage or an excess of the land.

5. The respondent Evans Hedson, opposes the application on the basis of the grounds enumerated in his replying affidavit dated 23<sup>rd</sup> September 2016. Most importantly, he questions this court's jurisdiction to deal with the application.

Both parties filed their written submissions which they relied on to argue their respective cases.

From the submissions what presents itself as the basic point of determination is whether this court has the jurisdiction to deal with the matter at this stage.

6. The respondent contended that the grant was eventually confirmed thereby bringing to an end the succession cause. Therefore, the present claim by the applicants seeking to re-survey land which is registered falls within the provisions of the Land Registration Act, 2012, and in particular S.18 of the Act which ousts the jurisdiction of this court and places it on the Land Registrar and Land Surveyor. Further, by virtue of Article 162 of the Constitution, the claim cannot be entertained by this court but by the Environment and Land Court.

7. The applicants think otherwise and contend that this is a succession cause for which orders granted by the court have not been complied with by the respondent. They indicate that all that they want is for the respondent to strictly comply with the orders and/or directions given by the court. They however, do not deny that the succession cause was concluded.

In this court's mind, the question of jurisdiction is the determinant factor on whether or not the application will be allowed.

The leading decision on jurisdiction is the case of **The owners of the m/vessel "Lillian S" Vs. Caltex Oil (K) Ltd (1989)KLR 1.**

8. In that case the court remarked:-

***“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.***

***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 the proceedings pending other evidence.***

***A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.***

9. It cannot be gainstated that where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before any court judgment and/or ruling is given (see, **“Words and phrases legally defined Vol 3 pg 113).**

It is clear that this present application is premised essentially on S.18 of the Land Registration Act, 2012.

Subsection (2) of the provision is most relevant with regard to jurisdiction. It provides that:-

***“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”.***

10. The dispute here, concerns the acreages of the specified parcel or parcels of land. Invariably, this brings us to the issue of the boundaries created during the registration process which was prompted by the distribution of the estate property by the court which in effect finalized the succession dispute. It would appear that the parties were satisfied with the distribution and that is why they did not challenge it by way of an appeal to a higher court or by way of an application for the revocation of the grant.

The spirited attempt by some of the parties to bring back the succession cause to this court is misconceived for reasons that the emerging issue on boundaries and/or acreages is a new matter independent of the succession cause and that the estate is already distributed and spent.

11. If anything, the new dispute ought to have been referred to the Environment and Land Court whose jurisdiction is set out in S.13 of the Environment and Land Court Act No. 19 of 2011. It is that court and not this court which has the power to hear and determine the current dispute in so far as it relates to land (see, **Article 162(2)(b) of the Constitution** and the decision in the case of **Karisa Chengo & Another Vs. Kitsao (2015)e KLR** and the most recent decision in the case of **Malindi Law Society Vs. The Hon. Attorney General & Others Malindi H/C Constitutional Petition No. 3 of 2016.**)

12. In the upshot, this court must and hereby does divest itself of the jurisdiction to hear and determine this application which therefore stands dismissed in its entirety.

The parties shall bear their own costs of the application.

Ordered accordingly.

**[Read and signed this 22<sup>nd</sup> day of November 2016].**

**J.R. Karanjah**

**Judge**

**In the presence of**

Mr. Ombati for Applicants

Mr. Nyambati for Respondent

Njoroge/Limo CC