



NO. 17/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELC CASE NO. 276 OF 2010

BEATRICE MBWESE MUTISO..... PLAINTIFF

VERSUS

MARTHA WANGENE MUTISO DEFENDANT

R U L I N G

1. By plaint dated 16th December 2010, the Plaintiff seeks judgment against Defendant for:-
 - a. An order for declaration that the Plaintiff is the rightful owner of land parcels known as **Mavoko Town Block 2/83 and 2/117** inter alia. She pleads that the Defendant is a co-wife/widow and by dint of **Succession No. 38/00**, they were both appointed the joint administrators of their deceased husband.
 2. She goes ahead to plead that the 2 parcels above mentioned comprises the estate of their deceased husband and that same has not been distributed and they are subject of the succession proceedings aforesaid.
 3. However, the Plaintiff claims to have funded the purchase of the 2 parcels of land and thus though in deceased names, they belong to her.
 4. The Defendant filed defence dated 24th January 2011 and pleaded inter alia, that the 2 subject matters are part of deceased estate subject of **Succession No. 38/00** pending determination and distribution and thus denies the jurisdiction of ELC Court in entertaining the claim herein as pleaded.
 5. On 8th October 2013, the Defendant filed a preliminary point of law in line with the defence aforesaid and paraded 4 grounds of objection.
 6. Principally the objection is hinged on the ELC jurisdiction in view of the facts that the subjects belong to the deceased estate and are subject of the **Succession No. 38/00** which is yet to distribute the same.
 7. The Defendant submits that there is succession case before family division of the High Court relating to the estate of Plaintiff's deceased estate and the prayers sought in the plaint are on how the estate of deceased should be distributed, which matter can be dealt with by the family division of the High Court. Therefore, entertaining this suit by ELC would amount to subjudice contrary to **Section 6 of Civil Procedure Act Cap 21**.
 8. The Defendant contends that the succession cause seeks to devolve the property of deceased person in the duly appointed personal representatives and further stipulates how the estate of the deceased may be distributed by such a personal representatives to the beneficiaries of the estate.
 9. The Defendant argues that the claim of ownership of the property subject matter by the Plaintiff

- can be dealt with in the Succession Cause at the time of distribution of the estate.
10. The Defendant thus submits that the suit is improperly before ELC Court as the court has no jurisdiction.

The Defendant cited the authority of **Jane Muthoni versus Joseph Njuguna Murena (2014) eKLR** which held that:

“The filing of the instant suit and application before this court amount to seeking to have the same matter litigated in 2 different courts with jurisdiction. The court will not permit that as to do so could lead to judicial confusion as there is possibility there could emerge conflicting decisions. The parties in the matter have in fact acknowledged that in a succession matter which entirely belongs to the Family Division Court and they ought therefore to ventilate all their concerns before that court.”

11. The Plaintiff’s case is pleaded that she solely raised all monies that was paid to acquire the subject matter that were registered in deceased husband names though the deceased did not make any contribution for the acquisition of the properties. She thus claims to be the rightful owner of the subject matter and the suit here before ELC court.
12. She claims that ELC Court has jurisdiction as the claim is based on ownership of the subject matter which is in the realm of the ELC jurisdiction and thus properly before ELC. The Plaintiff submits that the **Succession Act Cap 160** does not provide the court with powers to determine the ownership of property.
13. She cites the authorities of **NAI HC Succession 1016/013** in the matter of estate of **Njoroje Njuguna** deceased which cited that the right forum is ELC and also cites **ELC No. 207/013 NAI, Simon Kamau Muhindi versus Monica W. Ngugi and Another** which held that;

“Injunction orders cannot be sought in succession proceedings.”

She concludes by arguing that Plaintiff’s claim cannot be made in Succession Court.

The issues for determination are:

1. Whether the suit herein is res subjudice?
 2. Whether the ELC Court can entertain the suit herein?
 3. What are the orders as to costs?
14. The parties in the pleadings agree that the subject matters are in the names of the deceased husband of both parties. The parties are joint administrators of their deceased husband’s estate herein and they are awaiting distribution of the estate of their husband which comprises the 2 parcels of land subject herein.
 15. There is nothing in the **Succession Act Cap 160** which prevents the Plaintiff from proving in the Succession Act that the subject matters were bought by her and registered in deceased husband’s names and thus not available for distribution to any other person other than her. She would prove that the deceased was holding the 2 parcels of land in trust for her and thus same ought to revert back to her.
 16. I agree with the Authority of **Jane Muthoni versus Joseph Njuguna Murema (2014) eKLR** that filing of the instant suit before this court amounts to having same matter litigated in 2 different courts with jurisdiction. The court will not permit that to avoid confusion as there is possibility of conflicting decisions.
 17. The parties ought to ventilate all their concerns before the court handling Succession No. 38/00.

The court thus upholds the Preliminary Objection and strikes out the suit herein.

18. On costs, the court observes that the parties are co-wives/widows and thus directs that each to bear their costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 14TH day of NOVEMBER, 2014.

CHARLES KARIUKI

JUDGE