



Patrick J, Ngei Macharia ((Suing as the Administrator of the Estate of Machari Ikua (deceased)) v Macharia & another (Environment & Land Case E79 of 2021) [2022] KEELC 4938 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E79 OF 2021
JM MUTUNGI, J
SEPTEMBER 27, 2022**

BETWEEN

**PATRICK J, NGEI MACHARIA PLAINTIFF
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF MACHARI IKUA
(DECEASED)**

AND

**MARTHA MACHARIA 1ST DEFENDANT
DISTRICT LAND REGISTRAR NAKURU 2ND DEFENDANT**

RULING

1. The plaintiff instituted the present suit vide a plaint dated October 19, 2021 filed in court on October 25, 2021. *Inter alia* the plaint sought an order of permanent injunction against the 1st defendant restraining her from in any manner interfering and/or dealing with land parcel Kiambugo/ Kiambugo Block 2/94 (Mwariki) (“the suit property”) in any manner. The plaintiff additionally sought a declaration that the estate of Macharia Ikua (deceased) was the sole bonafide owner of the suit property; and an order cancelling and/or revoking the title deed for the suit property issued to the 1st defendant on December 17, 1997.
2. Simultaneously with the plaint the plaintiff filed a notice of motion application (the subject of this ruling) seeking the following orders: -
 1. Spent
 2. Spent
3. That the defendant, their agents, servants, employees and anyone claiming under them be hereby restrained from developing, constructing, subdividing, wasting, alienating, selling, transferring,



- disposing, charging and/or in any other way dealing with parcel of land number LR Kiambogo/ Kiambogo Block 2/94 (Mwariki) or any of its resultant subdivisions pending the hearing and determination of this suit.
4. That the 2nd defendant be ordered to issue the plaintiff with an official search and a certified copy of the Land Register/Green Card for parcel of land LR Kiambogo/Kiambogo Block 2/94 (Mwariki).
 5. That the 2nd defendant be ordered to release to the applicant and also produce in court the entire contents of the binder and/or parcel file for Land Registration No LR Kiambogo/ Kiambogo Block2/94 (Mwariki).
 6. That the Honorable court be pleased to issue any further orders to protect and preserve land parcel No LR Kiambogo/Kiambogo Block2/94 (Mwariki) which parcel forms part of the assets of the estate of Macharia Ikuu (Deceased).
 7. That costs be provided for.
3. The application was supported on the grounds set out on the body of the application and the affidavit sworn in support by the plaintiff/applicant. In support of the application the applicant averred that land parcel Kiambogo/Kiambogo Block 2/94 (Mwariki) belonged to Macharia Ikuu (deceased) and that he the plaintiff had in his possession the original title issued on October 11, 1989 in the name of the deceased. The applicant asserted that at the time of the deceased death on September 21, 1998 the suit property was still registered in his name. The applicant asserted that the 1st defendant unlawfully and fraudulently obtained title to the suit property on December 17, 1997. The applicant further averred that in November 2020 unknown persons descended on the suit property claiming they had the owner's instructions to subdivide the land. The applicant stated that they later came to learn the strangers had been sent by the 1st defendant who claimed to be the owner of the suit land by virtue of the title she had fraudulently procured in her name on December 17, 1997. The applicant further stated the 2nd defendant frustrated their efforts to obtain an official search and/or abstract of title (green card) which insinuated the 1st and 2nd defendants could have been acting in collusion and that necessitated the filing of the suit and the instant application.
4. The 1st defendant in response to the plaintiff's suit and the application filed a notice of preliminary objection dated November 15, 2021 setting out the following grounds: -
1. That suit is herein offends mandatory provisions of the [Law of succession Act](#), and amounts to intermeddling with the estate of the deceased (Ikuu Macharia).
 2. The plaintiff's application and suit are fundamentally flawed and incompetent for want of locus standi.
 3. That the instant suit riles against the rule in *sub judice* Nakuru Succession cause No 146 of 2002 in the estate of the late Ikuu Macharia.
 4. Jurisdiction is contested.
5. The 1st defendant further filed a replying affidavit sworn on May 15, 2022 in opposition to the plaintiff's application. In the replying affidavit the 1st defendant reiterated the grounds set out to support the preliminary objection and further asserted that she was the absolute registered owner of the suit property the same having been gifted to her by her late father during his lifetime. The 1st defendant maintained that the suit property did not constitute part of the deceased estate as alleged by the plaintiff applicant. The 1st defendant further asserted that the plaintiff's suit was subjudice Nakuru



HC Succession cause No 146 of 2002 where the suit property is listed as forming part of the assets of the estate of the late Ikua Macharia and hence the suit contravenes the provisions of the [Law of succession Act](#), Cap 160 Laws of Kenya.

6. The 2nd defendant filed a replying affidavit through the Land Registrar and deponed that they did not have the parcel file for the property and that the only documents in their possession was the green card and the members register. The 2nd defendant stated the plaintiff was required to follow the laid down procedure if he wanted to be furnished with a certified copy of the green card which in any case had been filed in court.
7. The court on October 14, 2021 made an order that suit property be preserved and directed that the parties maintain the status quo that was prevailing as of that date pending the hearing and determination of the application by the plaintiff. On February 3, 2022 the court directed that the plaintiff's application and the preliminary objection taken by the 1st defendant be canvassed simultaneously and invited the parties to file written submissions thereof. The plaintiff filed his submission on March 21, 2022 and supplementary submissions and further affidavit on June 21, 2022 following the filing of the 1st defendant's replying affidavit and submissions on May 30, 2022. The attorney general on behalf of the 2nd defendant elected not to file any submissions in regard to the plaintiff's application and/or the preliminary objection.
8. The plaintiff in response to the preliminary objection that he lacked the locus standi to institute the suit, submitted that he had obtained an adlitem grant pursuant to section 54 of the [Law of succession Act](#) which enabled him to institute the suit on behalf of the deceased estate. It was his position that the suit was not subjudice within the meaning of section 6 of the [Civil Procedure Act](#). He submitted that the present suit was distinct and different from Nakuru High Court Succ Cause No 146 of 2002. He argued that the succession cause concerned the distribution of the deceased estate to the rightful beneficiaries.
9. The succession court has no jurisdiction to determine ownership of land where there is a dispute as to ownership. The succession court ordinarily is concerned with dealing with the assets that belonged to the deceased and where as in the present case there is a dispute as to whether a property forms part of the deceased estate, the succession court would have no jurisdiction to determine on the ownership of such land. The succession court would only be concerned with determining who the beneficiaries of the deceased are and the distribution of the assets of the estate deceased. The Environment and Land Court under article 162 (2) (b) of [the constitution](#) and section 13 of the [Environment and Land Court Act](#), 2011 is vested with the exclusive jurisdiction to determine disputes relating to ownership and use of land. Article 162 (2) (b) of [the constitution](#) provides as follows: -
 - 162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (b) the environment and the use and occupation of, and title to, land.
10. Section 13 (1) and (2) of the [Environment and Land Act](#) provides as follows: -
 13. Jurisdiction of the court
 - (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.

11. In the present matter the plaintiff /applicant contends that the suit property belonged to the deceased and disputes that the deceased had gifted and transferred the same to the 1st defendant before the date of his death. Thus, it is clear that the dispute touches on the ownership of the land. The High Court by dint of article 165 (5) (b) of *the constitution* is divested of jurisdiction to hear and determine any matters whose jurisdiction fall within the jurisdiction of the courts contemplated under article 162 (2) of *the constitution*. Thus even though there is a pending succession matter relating to the deceased estate vide Nakuru HC Succ Cause No 146 of 2002 (estate of the late Ikua Macharia) the High Court would have no jurisdiction to determine the ownership dispute relating to the suit property. The High court would have to await the determination of the ownership dispute of the property before it can deal with the property as comprising part of the deceased estate. Whether or not the property forms part of the deceased estate, will have to await determination of the ownership of the property and such determination will only be made after hearing the suit on merits.
12. The applicants obtained an *adlitem* grant dated December 28, 2020 in regard to the estate of the deceased limited to the purposes of filing suit on behalf of the estate. The *adlitem* grant gave the applicant the requisite authority to bring the instant suit on behalf of the deceased estate. The plaintiff thus had the necessary locus to institute the present suit. I have determined that the High Court has no jurisdiction to hear and determine the dispute as relates to the ownership of the suit property and consequently, the suit filed before this court cannot be subjudice Nakuru HC succession cause No. 146 of 2002. That in my view disposes the preliminary objection and I hold the preliminary objection lacks merit and is accordingly dismissed.
13. As relates to the application for injunction it is noteworthy that the suit property LR Kiambogo/ Kiambogo Block 2/94 (Mwariki) is registered in the 1st defendant's name. The plaintiff is contesting the manner that the 1st defendant was registered and obtained title. He contends the 1st defendant obtained title to the land fraudulently and argues the land forms part of the estate of Macharia Ikua (deceased) and that he is a beneficiary of the estate. He prays for the cancellation of the title issued to and held by the 1st defendant and the land to be reverted to the name of the deceased. In essence the ownership of the suit property is in issue. It is my view that it is necessary to preserve the subject property until the suit is heard and determined. The order that would commend itself to the court is one that requires that the status quo as appertains to the property is maintained until the suit is heard and determined. I therefore issue an order requiring the 1st defendant to ensure that the prevailing and obtaining status quo of the suit property as at the date of this ruling is maintained. The 1st defendant will specifically not sell, transfer, charge or subdivide the suit property pending the hearing and determination of the suit.



14. The plaintiff/applicant under prayers (4) and (5) of the notice of motion sought to have the 2nd defendant ordered to issue to the plaintiff a certification of official search and to produce records. The record shows the 2nd defendant filed a duly certified abstract of title (green card) on December 22, 2021. A search certificate would be a replica of the abstract of title and it would be superfluous to give an order for the same to be issued. As relates to prayer (5) the plaintiff has the option of serving upon the 2nd defendant a notice to produce during the trial any specific documents that he considers to be in the custody and possession of the 2nd defendant. The 2nd defendant is a party to the proceedings and would be expected to tender in evidence such documents as may be in his custody and/or possession and would be of assistance to the court in reaching a just determination.
15. I order that each party shall bear their own costs of the application.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF SEPTEMBER 2022.

J M MUTUNGI

JUDGE

