



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 36 OF 2019

EDWARD OBINO KENYARIRI.....PLAINTIFF

VERSUS

MAKORI SAMARERE.....DEFENDANT

AND

JAMES MOGAKA MAKORI.....1ST INTERESTED PARTY

HENRY MORARA MAKORI.....2ND INTERESTED PARTY

VINCENT MOSONGO KENYARIRI.....3RD INTERESTED PARTY

JAMES BICHAGE KENYARIRI.....4TH INTERESTED PARTY

CHRISTOPHER ORINA KENYARIRI.....5TH INTERESTED PARTY

RULING

INTRODUCTION

1. What is before me for determination is the 1st, 2nd, 3rd, and 5th Intended Interested Parties' Notice of Preliminary Objection filed on 4th February 2020. Their Preliminary Objection is grounded on 3 issues namely THAT:

1. The Honourable Land Court has no jurisdiction to entertain the matter because the issues raised relate to administration of the estate of Kenyariri Kenyariri. It is a family matter and the Land Court cannot have jurisdiction over it.
2. The Plaintiff has no *Locus standi* to commence or defend the suit on behalf of the estate of Kenyariri Kenyariri without authority of the administrators of the estate of Kenyariri Kenyariri who were appointed by the Family Court
3. The suit is *Res judicata* and an affront of Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya.

BACKGROUND

2. I will first give a brief background of the case before tackling the issues at hand.

The Plaintiff is the eldest son of the second wife of one Kenyariri Kenyariri (deceased) who jointly owned land parcel number NyaribariChache/900 with the Defendant together with Ochi Gekonge (deceased). By virtue of the Judgment of the Court of Appeal in Kisumu Civil Appeal No. 5 'A' of 2013 dated 15th January 2020, the Defendant and the administrator of the estate of Kenyariri Kenyariri were required to secure the services of a Government Surveyor to determine the boundaries of the land belonging to the said three registered owners.

3. It is the Plaintiff's case that the Defendant, in total disregard of the said Judgment of the court purported to sub-divide the land and distributed the late Kenyariri Kenyariri's share among the beneficiaries of his estate before an administrator was appointed and in disregard to the portions occupied by the said beneficiaries on the ground. The Plaintiff therefore prays that the sub-division be cancelled so that the title reverts to the name of Kenyariri Kenyariri (deceased) until such time as an administrator is appointed.

4. The Defendant filed a Defence dated 28th November 2019 denying the Plaintiff's claim and stated that in his capacity as one of the administrators of the estate of the late Kenyariri Kenyariri, he had effected the sub-division of the suit property in conformity with the Court of Appeal Order and issued titles to the beneficiaries of the estate of Kenyariri Kenyariri. It is his contention that the Plaintiff is the only one who is uncooperative.

5. The Plaintiff filed this suit through the firm of Nyariki and Company Advocates. The Defence was filed through the firm of Ongegu and Company Advocates. On 30th January 2020, the Defendant appointed the firm of B. Rogito & Company Advocates to act for him in place of Ongegu and Co Advocates. The firm of Kenyariri and Associates filed a Notice of Change of Advocates dated 4th February 2020 in which they indicated that they were coming on record in place of Ongegu and Co Advocate who previously acted for the defendant. On the other hand, Josiah Abobo and Company Advocates were appointed to act as additional advocates for the Plaintiff on 24th January 2020.

6. On 4th February 2020 the 1st, 2nd, 3rd and 5th Interested Parties filed the Notice of Preliminary Objection which is the subject of this Ruling.

The parties were directed to dispose of the Preliminary Objection by way of written submissions and they complied accordingly.

ISSUES FOR DETERMINATION

7. The single issue that emerges for determination is:

Whether the Preliminary Objection raised by the 1st, 2nd, 3rd and 5th Interested parties has merit, and whether it should be allowed.

ANALYSIS AND DETERMINATION

8. Whether the Preliminary Objection raised by the 1st, 2nd, 3rd and 5th Interested parties has merit, and should whether it be allowed

Learned Counsel for the 1st, 2nd, 3rd and 5th Interested parties has submitted that the question of jurisdiction ought to be given primacy as held in **Motor Vessel M.V. Lillian S. v Caltex Oil (K) Limited (1989)KLR1** where the Court of Appeal stated that:

“...jurisdiction is everything, without which the court can do nothing else and must down its tools...”

9. They have argued that Article 162 (2) & (3) of the Constitution of Kenya 2010 establishes the Environment and Land Court (ELC) and Section 150 of the Land Act gives jurisdiction to the ELC. They submitted that the jurisdiction given to the ELC does not include succession issues.

10. It is their submission that in this instance the ELC can only strike out the current suit as having been wrongly filed and call for the Plaintiff to approach the court that has jurisdiction.

11. The 2nd limb of their argument is that in the unlikely event the court finds that it has jurisdiction then the attention of the court must turn towards the issues of *Locus standi* and *Res judicata* as raised in the Preliminary Objection.

12. They have argued that under Section 82 of the Law of Succession Act CAP 160 Laws of Kenya, the only persons empowered to move a court of law on matters of deceased persons are the personal representatives (administrators or executors). They submit that the 2 Administrators of the estate of Kenyariri Kenyariri have not authorized the Plaintiff to commence this suit and thus the Plaintiff has no *Locus standi*.

13. They further submit that this suit is *Res judicata* as the issues were put to rest by the Hon. Court of Appeal sitting at Kisumu vide Consent Order dated 15th November 2016.

14. They urge the Honourable Court to strike out ELC No. 36 of 2019 and award costs to the 1st, 2nd, 3rd and 5th Interested Parties.

The 4th Interested party agrees that the grounds upon which the Preliminary Objection is premised are:

1. Jurisdiction

2. *Locus standi*

3. *Res judicata*

15. It is his submission that Article 162 (2) of the Constitution of Kenya as well as sections 2, 4(3), 13(1) and (2) of the Environment and Land Court Act, 2011 gives this Honourable Court jurisdiction to hear a dispute relating to land.

16. He argues that the real issue in the instant suit is whether the joint tenancy between the parties was severed and if so how it was done and on what terms. It is his contention that the issues to be dealt with revolve around land and as such this Honourable Court has jurisdiction to

resolve the dispute.

17. The 4th Interested party's arguments in relation to *Locus Standi* and *Res judicata* in my opinion delve into issues that are not pertinent to the crux of the Preliminary Objection and I will therefore turn my attention to the issue of jurisdiction before I can tackle any other matter. Indeed jurisdiction is everything.

18. The 4th Interested party concluded by praying that the Preliminary Objection raised on 4th February 2020 be dismissed with cost to the 4th Interested Party.

19. The Plaintiff's submissions touched on a plethora of issues but for purposes of the Preliminary Objection, I will first and foremost zero in on the arguments raised in relation to jurisdiction. They argued that the Preliminary Objection before the court is premature, incompetent, obnoxious, untenable and is otherwise an abuse of the due process of the court as it is not premised on any known provisions of the law.

20. On jurisdiction, the Plaintiff argued that the court is seized with the requisite jurisdiction to entertain this suit as provided in the Environment and Land Court Act and the Constitution of Kenya.

21. The Plaintiff submits that they commenced this suit in their personal capacity and not in a representative capacity as beneficiaries of the estate of Kenyariri Kenyariri (deceased) and further that the Defendant herein is sued in his personal capacity and not as an administrator.

22. It is their submission that the matter for determination before this court is whether the Defendant lawfully caused sub-division of original land parcel **NYARIBARI CHACHE/KEMBU/900** and not the distribution of an estate.

23. They have argued that the Defendant having disowned the Defence filed by the firm of Ongegu & Associates and having denied instructing the firm of Kenyariri to represent him then the suit is not defended but admitted and the consent order filed by the firm of Abobo and Rogito ought to be adopted as a judgment of this court.

24. The Plaintiff submitted that the suit is purely a land matter between two persons with the capacity to sue and be sued and further that there is nothing in it that belongs to the family division.

ANALYSIS AND DETERMINATION

25. To avoid getting side-tracked, I will first determine the most crucial issue raised in the preliminary objection dated 4th February 2020 which is whether this Honourable Court has jurisdiction to entertain this suit. That, jurisdiction is everything is a well settled principle in law and once it is raised as an issue it ought to be dealt with first.

26. In the celebrated case of **Mukhisa Biscuits Manufacturing Co. Ltd – VS- West end Distributors Ltd (1969) E.A. 696**, Sir Charles Newbold defined a preliminary objection as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct...”

27. In the case of **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of **Law, JA.** in the **Mukisa Biscuits case (supra)** went on to say that: -

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

28. 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.”

29. The jurisdictional point raised by the 1st 2nd 3rd and 5th Interested parties herein clearly meets the criteria as it is a pure point of law. The relation between all the parties herein and the suit property cannot be gainsaid. The disputed property is the same one being dealt with by the High Court in is KISII HC SUCCESSION CAUSE NO. 3 OF 2018 where the grant issued to the administrators of the estate of Kenyariri Kenyariri (deceased) is being challenged.

30. It is clear from the provisions of Article 162 (2) (b) of the Constitution and sections 4 and 26 of the Environment and Land Court Act that this court has unlimited and original jurisdiction to deal with disputes relating to the environment and the use and occupation of, and title to land in the whole country.

31. However in the present case I find that the Succession dispute is at the epicenter of the present suit and it would be unscrupulous for both the ELC and the High Court to deal with an issue relating to the same parties and the subject matter. The succession cause has to be determined conclusively before any suit relating to land can be instituted before this court.

32. The **Supreme Court of Kenya** in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

33. Since it has not been demonstrated that the succession dispute has conclusively been determined by the High Court, I find it premature to deal with the issues raised in this suit as this court does not have jurisdiction to delve into the matters of distribution of an estate which squarely fall within the jurisdiction of the High Court. In the circumstances, I have no choice but to down my tools and take no further step. I find it prudent to advise the parties herein to present their dispute in the appropriate forum.

34. For the avoidance of doubt the Preliminary Objection is allowed on the first ground which in essence states that this court lacks jurisdiction to handle this matter.

35. Having concluded that this court lacks jurisdiction, the other issues raised by the parties herein are rendered moot and I need not delve into them.

36. Upshot is that the Plaintiff’s suit herein is struck out. As this matter largely involves members of the same family, each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered, at Kisii this 9th day of February, 2021.

J. M. ONYANGO

JUDGE