



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC APPEAL CASE NO. 30 OF 2019

(FORMERLY NAIROBI ELC APPEAL NO. 81 OF 2009)

BEATRICE ATIENO ONGADI.....APPELLANT

-VERSUS-

NATIONAL LAND COMMISSION.....1ST RESPONDENT

PETER ODHIAMBO ONGADI.....2ND RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY.....3RD RESPONDENT

JOHN KENNEDY ONGADI.....4TH RESPONDENT

COGETRA COMPANY LIMITED.....5TH RESPONDENT

OPUNDO OGAOLA.....6TH RESPONDENT

RULING

A. INTRODUCTION AND BACKGROUND

1. The 3rd Respondent through the firm of Owiti, Otieno and Ragot Advocates, filed a Notice of Preliminary Objection dated 18th December 2019 on even date in response to the Appellant's Notice of Motion Application dated 24th October 2019 and amended on 11th November 2019. The main orders sought in the application include:-

a) **THAT** pending the hearing and determination of the appeal/reference inter partes or until further orders, this Honourable court be pleased to issue an order of interim injunction stopping all compensation payments for award dated 17th October 2019 (and any other dates) and any other awards made by the 1st respondent or otherwise in respect of land reference numbers Homa-Bay/Kamagambo/Kabuoro/5953,5954,5955,5957,5959,5960 and 5961.

2. The preliminary objection is anchored on eight (8) grounds set out on it's face and compressed thus:-

i. *The whole appeal as filed by the Appellant discloses that the Appellant's claim against the Respondents is one of a succession dispute/claim against the 2nd Respondent for failure to make a material disclosure of obtaining letters of administration in the estate of her deceased father Eliashib Wilfred Ongandi Odero in Succession Cause No. 383 of 2007 filed in the Principal's Magistrate Court at Migori.*

ii. *The Appellant is aggrieved that the 2nd Respondent obtained letters of administration without informing her and used the same to transfer and subdivide some portions of her late father's original parcel of land known as KAMAGAMBO/KABUORO/3243 into various resultant parcels of land which are the subject of the instant application.*

iii. *This being a Succession dispute, this court as constituted and as contemplated under the provisions of Article 162 (2) of the Constitution of Kenya and as read with the provisions of Section 13 of the Environment & Land Act, 2011 and sections 128 and 150 of the Land Act 2012 does not have jurisdiction to hear and determine the nature of this dispute.*

iv. *The Appellant's entire appeal as framed does not disclose any cause of action against the 3rd Respondent at all, there is no legal*

justification for maintaining the 3rd Respondent as a party to this appeal at all, the suit is an abuse of the court process, hence it be struck off with costs.

v. The Appellant failed to issue the mandatory statutory notice of intention to file the instant appeal against the 3rd Respondent in accordance with the provisions of Section 67 of the Roads Act, 2007 as read with the express provisions of sections 110, 112, 115 and 127 of the Land Act 2012 and Article 159 (2) (c) of the Constitution of Kenya 2010 which divest this Honourable Court of jurisdiction to hear and determine this dispute, if at all.

3. Messrs Arika and company Advocates, messrs Omonde Kisera and Company Advocates, Messrs PR Ojala and Company Advocates and Messrs Oduk and Company Advocates, are on record for the appellant, the 2nd respondent, the 4th respondent and the 5th respondents respectively. There is no appearance for the 1st and 6th respondents.

4. Originally, the instant appeal by way of a memorandum of appeal /reference dated 24th October 2019 against the 1st ,2nd , and 3rd respondents was lodged at the Environment and Land Court, Milimani in Nairobi. On 28th October 2019, Okongo J transferred the appeal to this court for hearing and determination upon grant of prayer 2 namely as interim injunction but limited only to Land reference numbers Homa-Bay/Kamagambo/5953,5954 and 5957.

5. By the appellant's notice of motion dated 8th November 2019 and further to court orders of 11th November 2019, the 4th ,5th and 6th respondents were added to the amended memorandum of appeal and the amended application. On 27th November 2019 and 18th December 2019, this court encouraged the parties to embrace alternative dispute resolution method(s) for possible settlement of their dispute as stipulated under **Article 159 (2) (c) of the Constitution of Kenya,2010.**

6. On 18th December 2019, the court ordered that the Preliminary Objection be canvassed by way of written submissions. The 6th Respondent was the only party absent. The court directed that he be served with the Preliminary Objection in line with Articles 48, 50 (1) as read with section 25 (c) of the Constitution (supra) and the Court of Appeal decision in **Ogada =vs= Mollin (2009) KLR 620.**

7. The matter came up for further directions on 22nd January 2021. Promptly, Mr. Ragot learned counsel for the 3rd Respondent requested for time to file a response to the Applicant's submissions duly filed on 5th January 2020. Mr. Arika learned counsel for the Appellant prayed for time to file and serve supplementary submissions, too. Counsel for the 5th Respondent informed the court that he did not wish to file and serve any further submissions in regard to the Preliminary Objection.

8. Being aggrieved and dissatisfied with 1st respondent's compensation and simultaneous with this application, the appellant filed the amended memorandum of appeal/reference as noted in paragraph 5 hereinabove against the 1st respondent's granted awards. The same was commenced under section 128 of the Land Act, 2012; sections 1A,1B,3A of Civil Procedure Act Chapter 21 of the Laws of Kenya; Article 40 of the Constitution and the High Court's residual jurisdiction under Article 165 (3) of the Constitution.

9. The gist of the amended memorandum of Appeal is based on grounds, inter alia;-

i. That there is a dispute arising out of compensation award granted by the 1st respondent in respect of the Government's intent to acquire parcels of land for the 3rd respondent for the construction of Ahero-Kisii –Isebania A1 Road Project in Kisumu, Homa-Bay Kisii and Migori counties.

ii. That the appellant is aggrieved by the respondents' joint and/or individual failures, omission and/or commissions and apparent lack of conduct of due diligence on authentication of the subject land properties earmarked for acquisition for ownership purposes in determining property interest and compensation in compliance with section 112 of the Land Act, 2012 and Article 40 (3) of the Constitution of Kenya,2010, among other relevant provisions of the law.

iii. That the appellant is aggrieved by the 1st and 2nd respondents' mischievous, malicious and fraudulent collusion in the Kenya Gazette Notice No. 10624 published on 27th October 2017 was meant to mislead the public as the subject properties which are purportedly being sub-divided from LR. No. Kamagambo/Kabuoro/5557 (originally excised from LR No. Kamagambo/Kabuoro/3243, are under succession process for the appellant's late father in the estate of ELIASHIB WILFRED ONGADI ODERO (Deceased) under Succession cause No. 383 of 2007 in the Principal Magistrate's Court at Migori. In this regard, the appellant reserves that right as appropriate to take our further legal proceedings under the law in the succession court against PETER ODHIAMBO ONGADI, the 2nd respondent herein, who is the Administrator of the Estate

iv. THAT no genuine and lawful reason can be provided whatsoever to justify the 1st respondent's failure to provide for and call upon the appellant, her mother and siblings in the aforesaid succession cause as the right persons interested in the land to deliver their written claims compensation the appellant, contrary to their stat

10. Wherefore, the appellant proposed that this court allow the amended appeal and enter judgment in her favour against the respondents jointly and severally for orders that :-

a. The written awards dated 17th October 2019 (and any other dates) made by the 1st respondent and all process and actions flowing and subsequent to the award in respect of land reference numbers Homa-Bay/Kamagambo/Kabuoro/5953,5954,5955,5957,5959,5960 and 5961,be set aside.all payments be stopped,and the entire compensation inquiry exercise thereto be carried out a fresh forthwith.

- b. The appellant, her mother and siblings as a family to be called upon by the 1st respondent to deliver their respective written claims(s) of compensation to the National Land Commission, the 1st respondent herein for fair and just determination.
- c. Incidental and/or consequential to orders (1) and (2) above, the 1st respondent be restrained from recording any agreement, making any compensation payment, and taking possession of the subject properties in account of the award.
- d. This Honourable court be pleased to make such further orders as it may deem necessary, fit and just to grant, and as the needs of justice may so dictate.
- e. The costs of this appeal/reference be awarded to the appellant.

B. APPELLANT'S STATEMENT OF GROUNDS OF OPPOSITION TO THE 3RD RESPONDENT'S PRELIMINARY OBJECTION

11. On 5th January 2021, the Appellant filed statement of grounds of opposition to the 3rd Respondent's Preliminary Objection dated 18th December 2019. Concisely and precisely, the grounds include:-

- i. *The Preliminary Objection is tantamount to an abuse of the court process.*
- ii. *The Appeal as filed, demonstrates how the Appellant is aggrieved by the Respondent's joint and/or individual failures, omissions and/or commission and apparent lack of conduct of due diligence on authentication of the subject land and compensation in compliance with Section 112 of the Land Act, 2012 and Article 40(3) of the Constitution of Kenya 2010.*
- iii. *The 3rd Respondent's failure to file a Replying Affidavit as requested and duly granted order to do so by the Court on 27th November 2019, is guilty of lack of candor and non - disclosure of material facts and therefore not entitled to the reliefs sought in the Notice of Preliminary Objection. As such, the Notice of Preliminary Objection as filed is merely speculative, misconceived, misplaced, misinformed and unfounded in law and cannot stop this Honourable court's jurisdiction in hearing and determining disputes related to land acquisition compensation Appeal/Reference preferred pursuant to section 128 of the Land Act, 2012 and the High Court's residual jurisdiction under Article 165 (3) of the Constitution.*
- iv. *The Appellant contends that the 3rd Respondent's failure to plead in the instant appeal other than the statements raised in the bar through its Advocates' Notice of Preliminary Objection does not meet the threshold of a preliminary objection as set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors (1969) E.A. 696.***
- v. *Given that Section 128 of the Land Act provides that any dispute arising out of any matter provided for under that Act may be referred to this court for determination which matter includes dispute on Compulsory Acquisition of land, the 3rd Respondent's Notice of Preliminary Objection herein is pegged on Section 67 of the Kenya Roads Act, 2007; which applies to ordinary Civil Claims has no merit whatsoever in this case and cannot be relied upon for the purpose of defeating the mandatory provisions of Article 40 of the Constitution.*
- vi. *All the questions and issues raised by the 3rd Respondent in the Notice of Preliminary Objection can be best dealt with conclusively at the hearing and final determination of the instant appeal.*

12. So, the appellant prays that this Honourable court dismisses the preliminary objection herein with costs to the appellant/applicant and allow the appellant/applicant's amended notice of motion application dated 11th November 2019 and amended memorandum of appeal dated 8/11/2019 be heard and decided on merit.

C. THE APPELLANT'S SUBMISSIONS

13. In his submissions dated 5th January 2021, counsel for the Appellant framed the following issues for determination; -

- a) *Whether the Preliminary Objection meets the threshold and essence of a preliminary objection as set out in the case of Mukisa Biscuits (supra)*
- b) *Whether Section 67 of the Kenya Roads Act, 2007 applies to appeals relating to Reference to the Environment and Land Court under Section 128 of the Land Act No. 6 of 2012.*

14. On the first issue, the Appellant submitted that the 3rd Respondent has not made out a case for the orders sought in the Preliminary Objection as the same has not met the threshold and essence of a preliminary objection as well settled in the case of **Mukisa Biscuits (supra)**. The Appellant submitted that the 3rd Respondent has neither pleaded nor raised any issues out of pleadings capable of being argued as a preliminary point of law within the realm of the aforesaid case.

15. The Appellant argued that a Preliminary Objection cannot be raised if any facts have to be ascertained. That in the instance case, pertinent facts have to be ascertained considering the following aspects:-

- a. *The 3rd Respondent deliberately failed to file a Replying Affidavit as requested and as per duly granted order by the court on*

27th November 2019.

b. The 1st Respondent herein has also not filed a Replying Affidavit or any opposition to the amended Appeal or Application filed hereto.

16. On the second issue, learned counsel made reference to inter alia, grounds of appeal and section **67 (supra)**. Counsel also relied on the cases of *Kellico Limited Vs. National Land Commission & 3 Others* [2016] eKLR *Benson Ruiyi Njane Vs. Kenya Rural Roads Authority & 4 Others* Petition No. 7 of 2016 - Mombasa, *Anthony Ngili Munguti & 12 Others -Vs- Kenta National Highways Authority & Anor* 2017 eKLR *Machakos and Republic -Vs- Kenya National Highways Authority* JR Misc. Civil Application No. 348 of 2016 Nairobi.

D. THE 3RD RESPONDENT'S SUBMISSIONS

17. In support of its Preliminary Objection to the instant Appeal, learned counsel for the 3rd respondent filed submissions dated 10th March 2020 on 11th March 2020. The 3rd Respondent submitted in detail that:-

i. *That the nature of the Appellant's complaint in the instant Appeal is premised on the fact that she is a sister to the 2nd Respondent who according to her; secretly took out Grant of Letters of Administration over the estate of her deceased father, Eliashib Wilfred Ongadi Odero vide Migori PMC Succession Cause No. 383 of 2007 without informing her and other family members.*

ii. *That the 2nd Respondent proceeded to subdivide and transfer some portions of her father's original parcels of land known as Kamagambo/Kabuoro/3243 into various resultant parcels of land, which she has identified as Kamagambo/Kabuoro 5953, 5954, 5955, 5956, 5957, 5958, 5959, 5960 and 5961 and sold the said resultant parcels of land to the 4th, 5th and 6th Respondents.*

iii. *Evidently, the Appellant seems not to be having a problem with the fact that the 1st and 3rd Respondents seek to compulsorily acquire her deceased father's lands aforesaid for the construction of the Ahero -Kisii and Kisii - Isebania A1 Road Project. The Appellant alleges that the 1st and 3rd Respondents failed to carry out their due diligence to determine the legitimate owners of the said parcels of land before proceeding with the compensation process.*

iv. *That the Appellant appears to have deliberately failed to observe that the 4th, 5th and 6th Respondents are the true registered owners of the said parcels of land by dint of the provisions of sections 24 and 25 of the Land Registration Act, CAP 300 Laws of Kenya.*

v. *Further the 3rd Respondent reproduced verbatim Section 26(1) of the aforementioned Act which states:*

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person names as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except....”

vi. *There is no legal cause of action against the 1st and 3rd Respondents who have opted to publish the names of the 4th, 5th and 6th Respondents against the proposed compensatory awards as the registered owners of the said parcels of land.*

vii. *The only dispute in this purported proceeding is whether the Appellant is entitled to set aside the alleged secret Grant of Letters of Administration granted to her brother the 2nd Respondent herein over the estate of her deceased father and if so, she would be entitled to set aside the deceased's father purported subdivisions.*

viii. *This matter exclusively falls under the jurisdiction of the succession court where the Grant of Letters of Administration complained about by the Appellant have been granted without notice to her. The claim falls under Section 67 of the Law of Succession Act Cap 160 Laws of Kenya upon application by the dependant or beneficiary to set aside such grant of letters administration and any subsequent transfers by any person who had unlawfully obtained such a grant of letters of administration without notice or involvement of the other beneficiaries.*

ix. *That this matter being a succession, the jurisdiction of the court to hear such disputes as set out in Sections 67 and 76 of the Law of Succession of Act (cap 160 Laws of Kenya). The statute is categorical that the court with jurisdiction to determine succession disputes is defined under sections 3, 47 and 48 which designates the High Court, or such subordinate courts acting on behalf of the High Court but not the Environment and Land Court.*

18. The 3rd Respondent filed a response to the Appellant's submissions on 1st February 2021. The 3rd Respondent submitted that the submission of the Appellant on the issue of whether the instant Preliminary Objection meets the threshold of a proper Preliminary Objection on the grounds that the 3rd Respondent did not file its Replying Affidavit, is erroneous and appears to constitute a misconception. The 3rd Respondent sought reliance on Order 51 Rule 14 of the Civil Procedure Rules, 2010.

19. On ground 7 of the Notice of Preliminary Objection which is premised on **Section 67 (supra)**, the 3rd Respondent submitted that the same has not been argued by the Appellant in the submissions. The Appellant only addressed the issue on whether a suit of this nature can be filed without issuing the requisite thirty (30) days' notice. The 3rd Respondents contends that it has not addressed the court at all on this issue owing to the conflicting and controversial judicial decisions on the same.

20. The 3rd Respondent further submitted that the issues raised in Grounds 1,2,3,4, 5 and 6 in its Grounds of Opposition, remain unchallenged by the Appellant. Therefore, it would be fair and just to understand that the Appellant did not have an answer to those issues of jurisdiction raised thereon.

21. The 3rd Respondent also noted that the 5th Respondent raised the issue of jurisdiction in paragraph 11(c) of its Replying Affidavit in which it stated:-

“...if it is a dispute concerning the Appellant’s late father estate, a remedy lies in the estate and that is not in this matter, or forum/this court does not have jurisdiction to deal with succession issues/disputes.”

22. The 3rd Respondent prayed that the court upholds the Preliminary Objection and dismiss the Appellant’s appeal with costs.

E. THE 1ST RESPONDENT CASE

23. The 1st Respondent was duly served with the appeal together with the Application dated 8th November, 2018 on 14th November 2019. There is an Affidavit of Service on record sworn by Edward Mwenda Kathanzu on 20th November 2019 to confirm this position.

24. Notably, the 1st Respondent attended court on 18th December 2019 through its representative one, Mr. Henry Ondara.

F. THE 2ND RESPONDENT’S CASE

25. The 2nd Respondent filed a Notice of Appointment of Advocates through the firm of Omonde Kisera & Co. Advocates on 27th November 2018 as noted in paragraph 3 hereinabove.

26. The 2nd Respondent duly served has never filed any response to the Appellant’s amended Application or at ll.

G. THE 4TH RESPONDNET’S CASE

27. In response to the Appellant’s Amended Application, the 4th Respondent filed a Replying Affidavit thereto.

28. In summary, the 4th Respondent deponed in the replying affidavit that: -

- a. *He was not a party to the original suit filed in Nairobi being the reference number 81 of 2019.*
- b. *He is the sole registered owner of land parcels No. KAMAGAMBO/KABUORO/ 5955 and 5961 which do not form part of the estate of the ELIASHIB WILFRED ONGADI ODERO (deceased) as the entire estate of the deceased has been distributed.*
- c. *The aforementioned parcels of land were not subject of dispute in the Award letter dated 17th October 2019 which resulted to current appeal.*
- d. *This court lacks jurisdiction to hear succession matters and the application lacks merit and should be dismissed with costs.*

H. THE 5TH RESPONDENT’S CASE

29. The 5th Respondent filed a Replying Affidavit to the Amended Application filed by the Appellant sworn and dated 13th December 2019 and filed on 16th December 2019. The Replying Affidavit was deponed by Elizabeth Okello, the Director of the 5th Respondent.

30. In sum the 5th respondent’s director deponed therein that;-

- i. *The 5th Respondent is the legitimate and registered owner of the two parcels of land in dispute that is KAMAGAMBO/KABUORO 5959 and 5960 having bought them from one John Kennedy Ongadi the 4th Respondent herein. The 5th Respondent attached duly executed agreements dated 28th February 2014 and 12th January 2012 marked EO-2A and 2B respectively.*
- ii. *Upon the execution of the sale agreement, due diligence was done, registration and titling issued in favour of the 5th Respondent as per the annexed title deeds marked EO-3A and 3B.*
- iii. *The 5th Respondent is the legitimate and registered owner of the parcels of land Kamagambo/ Kabuoro/5959 and 5960.*
- iv. *The 1st Respondent’s intention to acquire the land was gazetted in a gazette notice number 10624 dated 27th October 2017 in which the gazette noticed acknowledged the 5th respondent is the owner of the properties.*
- v. *The appeal is incompetent as section 128 of the Land Act relates only to the court seized upon a valid and acceptable reference*

(not appeal) having been preferred.

vi. *The Appellant has not formulated and/or filed any issue or disputes that the court with jurisdiction under Section 128 of the Land Act can determine.*

vii. *The Appeal arises from a dispute concerning the Appellant's late father's estate and not under the Act. A remedy only lies in the estate of the deceased which this court does not have jurisdiction to deal with succession issues/disputes.*

viii. *The Appellant has not disclosed or established any superior title to the 5th defendant's title.*

ix. *The Appellant has failed to disclose or establish any dealings or relationship to the ownership of the two properties Kamagambo/Kabuoro 5959 and 5960.*

31. The 5th Respondent filed its submissions dated 25th March 2020 in agreement with the submissions made by the 3rd Respondent. The 5th Respondent submitted, inter alia:-

i. *The Environmental and Land Court has no jurisdiction to deal with issues of inheritance or Succession either under the Land Act Section 128, the Constitution Article 162 or the Environment and Land Court Act, Section 13.*

ii. *The Appellant has not spelt out a specific dispute if any, that the 1st and 3rd Respondent determined or failed to determine either for or against her. The Appellant is neither a proprietor of the suit parcels of land nor a claimant whose interests have been violated.*

iii. *That the reference to court for the determination of any interest in law or the extent and nature thereof, or the persons liable to be compensated is a function of the commission i.e. the 1st Respondent and not the Appellant herein. The Appellant's recourse can only be an appeal against such determination which is non-existent.*

iv. *As no dispute was placed before the 1st Respondent and as the 1st Respondent never referred to any dispute to the court there was no determination of any dispute as envisaged under Section 127 of the Land Act that can form an appeal or reference.*

v. *Even if the Appellant has an arguable point, the interest at stake would not revert back to her but rather to the estate of Eliashib Wilfred Ongandi Odero and she has not demonstrated that:-*

a. *She is the administrator or executor of that estate.*

b. *She would have a superior take or interest over the 5th Respondents' properties in the estate vis a vis other beneficiary and especially the 4th Respondent who sold his beneficial interest to the 5th Respondent.*

c. *The estate would not sufficiently bequeath to her a rightful share not necessarily hinged on the share that would have been due to the 4th Respondent a beneficiary who sold to the 5th Respondent.*

vi. *The Appellant thus has no locus standi to bring this action. The 5th Respondent urged the court to find that the whole appeal/reference is misplaced and the court has no jurisdiction to deal with it as brought.*

I. THE 6TH RESPONDENT'S CASE

32. Despite service by way of registered post, the 6th Respondent has never entered appearance nor file any documents in relation to this matter.

J. ISSUES FOR DETERMIANTION

33. I have anxiously considered the entire preliminary objection, the rival submissions, and the amended appeal in it's entirety. Twin issues arise therefrom for determination namely:-

a. *Whether the Preliminary Objection is completely filed before this court.*

b. *Whether the Preliminary Objection has merit and should be allowed.*

K. DISCUSSION AND DISPOSITION

34. In respect of the 1st issue, the Appellant contends that the Preliminary Objection as filed by the 3rd Respondent is premature and bad in law. That the 3rd Respondent failed to file a Replying Affidavit or any opposition to the amended Appeal or amended Application thereto.

35. The 3rd Respondent asserted that Order 51 Rule 14 of the Rules provides the different ways in which a Respondent can respond to the Applicant's Application. *Order 51 Rule 14 provides:*

*“Any Respondent who wishes to oppose any application may file **any one or a combination** of the following documents: - (emphasis mine).*

(a) *A notice of a preliminary objection and/or;*

(b) *A replying affidavit and/or;*

(c) *A statement of grounds of opposition. “*

36. The mandatory requirement in this provision is the filing of a document in opposition to the application. The election as to which document to file in opposition to the application, lies with the Respondent. The Civil Procedure Rules gives the Respondents a wide berth on which documents to file to oppose an Application.

37. The threshold which a Notice of Preliminary Objection should is well settled; see case of *Mukisa Biscuits Manufacturing Co. Ltd -Vs- West End Distributors (1969) EA 696*. (supra).

38. On what constitutes a Preliminary Objection, in the case of *Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 Others SCK Petition No. 12013[2014] eKLR*, the Supreme Court of Kenya echoed the *Mukisa case (supra)* where it was held:

“...a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose off the suit.”

39. In *Mukisa case (supra)* Law JA further stated as follows :-

“...examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound to a contract giving rise to this suit to refer the dispute to arbitration.”

40. Clearly, the basis of the Preliminary Objection filed by the 3rd Respondent is on the issue of the court's jurisdiction to competently handle the present dispute. It is a threshold question best handled at this stage of the suit.

41. In the case of *Kakuta Maimai Hamisi=vs= Peris Pesi Tobiko and 20 others (2013) eKLR*, the court of Appeal held that a preliminary objection is a threshold question and best taken at inception. That the same calls for definitive, determinative and prompt pronouncement.

42. To that extent, the preliminary objection in opposition to the appellant's application is competently filed before this court. The first issue is resolved thereby.

43. In regard to the second issue, a Preliminary Objection should raise points of law which do not require further proof by way of evidence. The assumption is that all the facts have been pleaded correctly by the other party hence the points of law can be clearly deduced from the pleadings.

44. In *Oraro =vs= Mbaja (2005) KLR 141*, Ojwang J (as he then was) observed that a preliminary objection must be on a point of law which must not be blurred by the factual details liable to be contested. I endorse this stand point accordingly.

45. Ground 1 of the preliminary objection states:-

“...the Appellant's claim against the Respondents is in the nature of a succession dispute between herself and the 2nd Respondent for having taken out letters of administration over the estate of he deceased father, Eliashib Wilfred Ongandi Odero vide Migori PMC Succession Cause No. 383 of 2007 without informing her and other family members, and used the same to subdivided and transfer some portions of her father's original parcel of land known as Kamagambo/Kabuoro/3243 into various resultant parcels of land which are subject of the instant application...” (Emphasis laid)

46. A reading of the Appellant's Application at paragraph 6 of the Supplementary Supporting Affidavit to the Amended Notice of Motion erroneously indicated as paragraph 15, the Appellant deposed:-

“THAT I verily believe there is real danger that my Appeal will not be advanced fully if the amended Notice of Motion Application is not allowed as requested in this Application are ALL aforesaid parcels of land fall within the estate of my late father ELIASHIB WILFRED ONGADI ODERO (DECEASED) under Succession Cause No. 383 of 2007 in the Principal Magistrate Court at Migori published in Gazette Notice 11223 (annexed to my Supporting Affidavit sworn on 24th October 2019 and marked “BAO-5”) wherein I am a beneficiary.” (Emphasis added)

47. The resultant parcels of land in dispute that are land reference numbers Kamagambo/Kabuoro 5953,5954, 5955, 5956, 5957, 5958, 5959, 5960 and 5961. They are all subdivisions of the original parcel of land known as L.R. No.Kamagambo/Kabuoro/3243 belonging to the Estate of the late ELIASHIB WILFRED ONGADI ODERO (DECEASED).

48. The Appellant is aggrieved that the 2nd Respondent being the administrator of the Estate of the Deceased, fraudulently subdivided and transferred the original land. That therefore, the 2nd defendant has disinherited her of the estate together with her mother and other siblings.

49. In that obtaining scenario, it is my considered view that the main contention herein is the purported illegally obtained grant of Letters of Administration and the subsequent subdivision and transfer of the resultant parcels of land which formed part of the Estate of the late ELIASHIB WILFRED ONGADI ODERO (DECEASED). Therefore, the remedy is to be found in section 76 of the Law of Succession Act Chapter 160 Laws of Kenya.

50. It is cardinal to note that the High Court has unlimited original jurisdiction in criminal and civil matters under Article 165 (3) (a) of the Constitution of 2010, see also **Republic vs Karisa Chengo and others (2017) eKLR**.

51. The position held by the court in the case of **The Owners of the Motor Vessel Lilian 'S' -vs- Caltex Kenya Limited [1989] KLR1** cannot be overemphasized. It is trite law that jurisdiction is everything. If a court is not seized of jurisdiction, it cannot make one step and should down its tools. It is important that if the issue of jurisdiction is raised, the court must decide on it first as per Nyarangi J in **The Owners of the Motor Vessel case (supra)**.

52. The Supreme Court of Kenya in **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 others [2012] e KLR** at paragraph 68 remarked:-

‘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 any other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon by law.’

53. The Environmental Land Court is established under **Article 162 (2) (b) of the Constitution (supra)** which provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a)...

(b) the environment and the use and the occupation of, and title to, land.

54. Section 13(2) of the Environment and Land Court Act 2015 (2012) sets out in detail the jurisdiction of this court. Disputes arising from the legality of Succession proceedings of the Estate of a Deceased person do not fall within the realm of this court. Notably, these are the frontline disputes in the instant matter.

55. If upon the conclusion of the succession dispute, it is found that the Appellant and/or the other beneficiaries of the Estate of the Deceased held titles to the parcels of the land from the Estate of the Deceased but the same were fraudulently transferred from them without their consent and/or knowledge, then they would have a valid claim before this court. On that account, **Article 162 (2) (b) (supra)** would apply very handy.

56. Besides, the position from the pleadings is that the 2nd Respondent herein being the administrator of the Estate of the Deceased, fraudulently, obtained a grant, subdivided and sold the parcels of land from the same Estate without the knowledge of the rightful beneficiaries of the Estate. Therefore, the dispute cannot be entertained before this court. It lies within the courts responsible to hear and determine any dispute arising from Succession proceedings including the pending dispute namely Migori CM’s Court Succession cause No. 383 of 2007.

57. It is thus, my considered view that the 3rd Respondent’s Notice of Preliminary Objection dated and filed on 18th December 2019, partially succeeds. The same be and is hereby upheld accordingly.

58. Moreover, it is noted that the 2nd appellant and the respondent are parties in Migori CM’s Court Succession Cause No. 383 of 2007, involving the same subject matter in the instant appeal. So, proceeding with the trial of this appeal would run against section 6 of the Civil Procedure Act Chapter 21 Laws of Kenya and the interest of justice.

59. To that end, the entire appeal originated by way of a memorandum of appeal reference dated 24th October 2019 and amended on 11th November 2019 be and is hereby stayed by dint of **section 6 of the Civil Procedure Act Chapter 21 Laws of Kenya**.

60. The costs of the preliminary objection are within the discretion of the court and follow the event pursuant to the proviso to section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya. By nature, and circumstances of this appeal, I hereby make no order as to costs with regard to the preliminary objection.

Orders accordingly.

DELIVERED IN VIRTUAL SESSION, DATED AND SIGNED AT MIGORI THIS 10TH DAY MARCH

2021.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Arika learned counsel for the appellant

Mr. Jude Ragot learned counsel for 3rd respondent

Mr. E. Oduk learned counsel for 5th respondent

Court Assistant – Tom Maurice