



**Mwaura & another (Suing as Administrators of the Estate of the Late George Mwaura Mbugua – Deceased) v Mbugua (Miscellaneous Application E013 of 2023) [2024] KEELC 3886 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 3886 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
MISCELLANEOUS APPLICATION E013 OF 2023**

**LN GACHERU, J  
FEBRUARY 8, 2024**

**BETWEEN**

**ANN NYAMBURA MWAURA ..... 1<sup>ST</sup> APPLICANT  
ROBERT MURIGI MWAURA ..... 2<sup>ND</sup> APPLICANT  
SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE GEORGE  
MWAURA MBUGUA – DECEASED**

**AND**

**JAMES NGANGA MBUGUA ..... RESPONDENT**

**RULING**

1. The matter for determination is a Notice of Motion Application dated 4<sup>th</sup> June 2023, which is brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the [Civil Procedure Act](#), wherein the Applicants have sought for these orders -
  - i. That in compliance with the judgment of the Chief Magistrate’s Court at Murang’a (Hon. C. Wachira, C.M.) dated 7<sup>th</sup> November 2019, the Respondent be compelled to surrender Titles Nos. LOC.17/Kamahuha/2616 and LOC.17/Kamahuha/2617, to the Land Registrar.
  - ii. That the Registry Index Map (RIM) with regards to the subject property be amended to reflect the orders of the Chief Magistrate’s Court that cancelled Titles Nos. LOC.17/Kamahuha/2616 and LOC.17/Kamahuha/2617.
  - iii. That the Respondent be compelled to surrender the original title for parcel No. LOC.17/Kamahuha/1318, to the Court pending subdivision of the subject land and subsequent distribution to the beneficiaries as reflected in the Certificate of Confirmation of Grant dated 3<sup>rd</sup> May 2023, issued to the Applicants in Nairobi.



- iv. That the subdivision of the subject property be conducted without any further delay by the County Surveyor who shall be escorted to the property by the police for security reasons.
- V. That costs be in the cause.”
2. The Application is supported by the grounds stated on the face of it, and on the Supporting Affidavit of Ann Nyambura Mwaura, sworn on 4<sup>th</sup> June 2023, and the annexures thereto.
  3. The Applicants averred that they are children and Administrators of the estate of the late George Mwaura Mbugua, and they annexed a bundle of documents which contained a Certified Copy of Certificate of Grant dated 3<sup>rd</sup> May 2023, wherein the Applicants were appointed as administrators of the aforesaid estate.
  4. The Applicants also averred that their late father George Mwaura Mbugua, and the Respondent herein are brothers and beneficiaries of the estate of their late father Kabugua Mwendia, (i.e., the Applicants’ paternal grandfather).
  5. The Applicants further contended that upon the death of their paternal grandfather, the Respondent herein transferred land parcel number LOC.17/Kamahuha/1318, to himself.
  6. The Applicants deposed that the Respondent unilaterally, un-procedurally, illegally and/or without legal justification caused the subdivision of land parcel No. LOC.17/Kamahuha/1318, resulting in the creation of two new titles namely, LOC.17/Kamahuha/2616, and LOC.17/Kamahuha/2617.
  7. Further, that upon the discovery of the foregoing illegal transfer, and sub-division of LOC.17/Kamahuha/1318, by the Respondent, their father instituted Civil Case No. 183 of 2012, at Murang’a Law Courts, challenging the aforesaid transfer and subdivision.
  8. The Applicants also contended that the Court in Civil Case No. 183 of 2012, entered Judgment dated 7<sup>th</sup> November 2019, and determined that the transfer and subdivision of LOC.17/Kamahuha/1318, by the Respondent herein had the effect of disinheriting their father and nullified the same.
  9. It was their further contention that the said Court in its Judgment also held that the subdivision of the suit property by the Respondent in exclusion of their father was unlawful and the title No. LOC.17/Kamahuha/2616 and LOC.17/Kamahuha/2617 were unlawfully created.
  10. The Applicants further averred that the Court also cancelled title numbers LOC.17/Kamahuha/2616 and LOC.17/Kamahuha/2617, and ordered that the suit property reverts to its original number, that is LOC.17/Kamahuha/1318.
  11. The Applicants also averred that the Respondent herein has not challenged or appealed against the decision of the Court in in Civil Case No. 183 of 2012; therefore, the said decision remains in force.
  12. The Applicants further contended that the Court in Civil Case No. 183 of 2012, found and held that the Applicants’ father was entitled to an equal share of the subject property.
  13. They contended that they are successors in-title to their deceased father, and have since obtained Grant of Letters of Administration and a Certificate of Confirmation of Grant dated 3<sup>rd</sup> May 2023, in respect of the estate of the deceased.
  14. They also deposed that as successors-in-title to the deceased, they are entitled to the share which the deceased was lawfully entitled to inherit i.e., an equal share of LOC.17/Kamahuha/1318, alongside the Respondent herein.



15. It was contended that their family and the Respondent's family have been and continue to be characterized by tension and consistent disputes and unless this Court grants the Applicants the Orders sought herein, the Respondent will not cooperate in the subdivision of the suit property.
16. The Application is resisted by Respondent, through a Replying Affidavit dated 10<sup>th</sup> July 2023, wherein, he averred that this Court lacks jurisdiction to entertain and decide on issues of Probate and Administration of Estates, as is sought by the Applicants in the subject Notice of Motion Application.
17. The Respondent further averred that the instant Notice of Motion Application is premature and lacks legal basis as it failed to follow the applicable procedure; which, the Respondent averred, entails the filing of Summons for Amendment and Rectification of the Grant that disinherited the Applicants.
18. The Respondent further averred that this Court lacks the requisite jurisdiction to make an order concerning questions of distribution of estates without a Grant of Letters of Administration or an Amended Grant of Letters of Administration being filed before the Court by the Applicants.
19. He further averred that the net effect of the Judgment dated 7<sup>th</sup> November 2019, in Civil Case No. 183 of 2012, was to revert the suit land to the estate of KABUGUA MWENDIA; and, on that basis, the Applicants were obliged to invoke the Probate Court to rectify the Grant which they held so as to comply with the Judgment dated 7<sup>th</sup> November 2019.
20. He also contended that he does not have in his custody the title deed for LOC.17/Kamahuha/1318, for the reason that the said parcel of land was transferred and subdivided in the 1980s; and that, the Land Registry/Chief Lands Registrar is the custodian of titles to land, and not the Respondent herein; accordingly, he submitted that the Applicants ought to direct their request for surrender of the title for parcel number LOC.17/Kamahuha/1318, to the relevant Lands Registry.
21. The Applicants filed a further Affidavit on 2<sup>nd</sup> August 2023, wherein they reiterated that the Application stems from the findings of the Magistrates Court, wherein the said Court had directed that the suit property be transferred to the Defendant therein to hold it in trust, pending the subdivision and transfer of the portion of land to the respective owners.
22. The Application was canvassed by way of written submissions. The Applicants filed theirs through E.E Otieno Law & CO Advocates, and urged the court to allow their Application. The Respondent filed his submissions through KCN Advocates LLP, and urged the court to dismiss the instant Application, with costs.
23. Further, on 4<sup>th</sup> October 2023, the Applicants filed Rejoinder Submissions to the Respondent's Submissions. The Applicants reiterated their submissions that the suit property is registered in the name of the Respondent, and not in the name of Kabugua Mwendia, as contended by the Respondent in his submissions, and that the certificates of official search placed before the Court show that the Respondent is the registered owner. The Applicants further submitted that the certificates of official search before the Court reveal that the suit property was transferred to the Respondent on 22<sup>nd</sup> December 1986, and the title thereof was issued to him on 3<sup>rd</sup> August 1987.
24. The Applicants also submitted that there is no question that the Respondent is a party to the instant suit and not the estate of Kabugua Mwendia, as the suit property is registered in the Respondent's name. Further, it was submitted that the Respondent in the instant suit was the Defendant in Murang'a Civil Case No. 183 of 2012, and, as a participant in those proceedings, the Respondent never once pleaded that he was wrongly sued with regard to the suit property. Further, the Applicants submitted that it is disingenuous for the Respondent to now claim that he is not a proper party to the subject suit.



25. The Applicants submitted that the Respondent has interfered with the suit property by subdividing the said land and obtaining titles thereof, although the same were cancelled by Court. The Applicants ultimately submitted that it would not have been possible for the Respondent to subdivide and transfer the suit property if it were registered in the name of Kabugua Mwendia, as claimed by the him. It was further submitted that the Respondent herein was and is able to interfere with the suit land because he is the registered owner of the same.
26. On the issue of jurisdiction, it was the Applicants' submission that, as the Respondent denies ownership/title to the suit property, and the fact that the Applicant's brothers are buried on the suit land, both factors put the subject suit within the jurisdiction of this Court, as spelt out under Article 162 (2) (b) of *the Constitution* of Kenya, and in the relevant legislation.
27. The Applicants submitted that they have the right to seek from this Court, and the Court has the requisite authority to grant an Order to compel the Respondent to subdivide the suit land and to transfer to the Applicants the share belonging to their deceased father; and, in the event the Respondent is unwilling or hesitant to do so, the Deputy Registrar of this Court, pursuant to a direction issuing from the Court, can supervise the said process of sub-division and transfer.
28. The Applicants also submitted that because of the Respondent's intransigence and obstruction, they have been denied the fruits of the Judgment in Murang'a Civil Case No. 183 of 2012, wherein, they were successful against the Respondent. Further, that the Respondent has never challenged the outcome in the aforesaid suit and that the Applicants are not invoking the appellate jurisdiction of this Court, in the subject suit. They submitted that what they are seeking in this cause is to realize the fruits of the Judgment in Murang'a Civil Case No. 183 of 2012. It was their claim that they have been denied by the Respondent, the fruits of the aforesaid Judgment for more than 3 years, as Judgment was rendered on 7<sup>th</sup> November 2019.
29. This court has carefully considered the instant Notice of Motion Application, the annexures thereto and the rival written submissions and finds the issues for determination are as follows; -
  - i. Does this Court have jurisdiction in this matter?
  - ii. Who is the registered owner of the suit property?
  - iii. Are the Applicants entitled to the orders sought?

**i. Does this Court have jurisdiction in this matter?**

30. It is trite that jurisdiction is everything, and without it, the court cannot proceed any further with the matter. This was the holding in the celebrated case of *The Owners of Moto Vessel "Lillian S". V Caltex Oil Kenya Ltd* [1989] KLR 1, where the Court held that it cannot take any further step the moment it holds that it lacks jurisdiction. Similarly, in the case of *Boniface Waweru v Mary Njeri & Another* H.C. Misc. Appl. No. 639 of 2005, the Court held as follows:

“Jurisdiction is the first test in the legal authority of a court or tribunal, and its absence disqualifies the court or tribunal from determining the question”.

31. The jurisdiction of the Environment & Land Court (ELC), is provided for under Article 162(2)(b) and (3) of *the Constitution* of Kenya, and Section 13 of the *Environment and Land Court Act*.

This Article 162 (2)(b) of *the Constitution*, provides as follows:



- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to-
- (a) .....
  - (b) the environment and use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)".
32. Further, Section 13(2) of the Environment and Land Court (ELC) Act, gives the Court power to hear and determine disputes relating to inter alia, environment, land use planning, title, boundary disputes, management, choses in action or other instruments granting enforceable interests in land among other related issues.
33. Again, Section 13 (1) of the ELC Act, provides that:
- “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.
- Section 13 (2) of the ELC Act provides:
- “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.”
34. In the case of *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another* [2016] eKLR, the court reasoned as follows:
- “When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the courts utilize the Pre-dominant Purpose test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land...
- In my view, the following factors are significant in determining the nature of the contract:
- ...the gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land...”
35. In the instant case, ownership of the suit property is contested by the parties. The Applicants have annexed as part of their documents on record being Certificates of title showing that the Respondent



herein is the registered owner of the suit property. The Respondent submitted that the suit land belongs to the estate of the late Kabugua Mwendia. Therefore, the question of ownership of the suit property is clearly a matter in contention between the parties in the instant Application. It is the finding and holding of the court that the Court has the requisite jurisdiction to hear and determine the suit on the basis of the contested ownership over the suit property.

36. An additional factor that puts the instant Misc Application squarely within the jurisdiction of this Court is that the suit property is currently occupied by the Respondent. The applicants, for their part, have in their hands a judgment from the Chief Magistrate's Court in Murang'a Civil Case No. 183 of 2012, proclaiming the Applicants' right to occupy and assume ownership of a portion of the suit property. Therefore, occupation of the suit property is another point of contention between the parties.

Having found and held that the Court has jurisdiction to hear and determine the matter, the next issue for consideration is:

#### **ii. Who is the registered owner of the suit property?**

37. The Respondent disclaims ownership over the suit property. The Respondent submitted that the suit land belongs to the estate of the late Kabugua Mwendia, who is deceased and was s father to the Respondent and the late George Mwaura Mbugua.
38. The Applicants have annexed Certificates of Official Search in respect to the suit property whereby, the Respondent is listed as the proprietor thereof. The aforesaid Certificates of Official Search filed by the Applicants have not been controverted by the Respondent, save for the submissions made by the Respondent to the effect that the suit land belongs to the estate of the late Kabugua Mwendia, pursuant to the Judgment of the Chief Magistrate's Court in Murang'a Civil Case No. 183 of 2012.
39. It is the finding and holding of this Court that the Applicants have established, that the suit property is registered in the name of the Respondent herein and not the late Kabugua Mwendia, as alleged by them.

#### **IV. Whether the Applicants are entitled to the orders sought?**

40. The applicants contended that their share of the suit property has never devolved to them since 7<sup>th</sup> November 2019, when Judgment was entered in their favour. The main issue in the instant suit revolves around whether the Respondent herein, by his conduct, has impeded or is impeding the enforcement of the Judgment delivered on 7<sup>th</sup> November 2019, in Murang'a Civil Case No. 183 of 2012.
41. The Respondent opposed the instant Application by alleging that the Court has no jurisdiction to hear and determines this matter. A jurisdictional challenge was mounted by the Respondent, upon which the Court has found and held that it has jurisdiction to hear and determines this matter. The Respondent did affirm the validity of the Judgment delivered on 7<sup>th</sup> November 2019 in Murang'a Civil Case No. 183 of 2012, and acknowledged in his pleadings that there is no Appeal subsisting in respect of the foregoing Judgment. For the avoidance of doubt, the Respondent also affirmed the Orders issued out in the aforesaid Judgment, which judgement directed that the resultant subdivision of Loc 17/ Kamahuha/1318, being Loc 17/ Kamahuha/ 2616 &2617, be cancelled and the land to revert to the original number, which was registered in the name of the Respondent herein. The said court had also held that the deceased was entitled to equal share of the suit land.



42. It is trite that Court decisions are not rendered in vain, and must be obeyed unless set aside and/ or varied. In the case of Republic Vs County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi [2018]eKLR, the court held as follows:-

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

43. Having considered the totality of the available evidence and submissions tendered in the instant suit, this Court is persuaded that the Applicants have demonstrated, on a balance of probabilities, that the Respondent herein has not been cooperative to the partitioning of the suit land into two equal portions as directed by the Court in its Judgment delivered on 7<sup>th</sup> November 2019 in Murang’a Civil Case No. 183 of 2012.

44. Therefore, it is the finding and holding of this Court that the Applicants, having proved their case on a balance of probabilities that they are entitled to the orders sought in the instant suit.

45. The upshot of the foregoing is that the Court finds and holds that the instant Notice of Motion Application dated 4<sup>th</sup> June 2023, is merited and the said application is allowed in terms of prayers No. 2, 3, 4, & 5, with costs to the Applicants herein, since they are the successful litigants.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 8TH DAY OF FEBRUARY 2024.**

**L. Gacheru**

**Judge**

**Delivered online in the presence of:**

Mr. Otieno for the Applicants

Respondent - Absent

Joel Njonjo – Court Assistant

**L. Gacheru**

**Judge**

**8/02/2024**

