



**Said v Timothy John Leslie Bryson as Administrator of the Estate of John Edward Leslie Bryson; Land Registrar Mombasa (Interested Party) (Environment and Land Miscellaneous Application E031 of 2023) [2024] KEELC 3664 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3664 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E031 OF 2023**

**LL NAIKUNI, J**

**MAY 2, 2024**

**BETWEEN**

**HUSSEIN ABDALLA SAID ..... APPLICANT**

**AND**

**TIMOTHY JOHN LESLIE BRYSON AS ADMINISTRATOR OF THE ESTATE OF JOHN EDWARD LESLIE BRYSON ..... RESPONDENT**

**AND**

**LAND REGISTRAR MOMBASA ..... INTERESTED PARTY**

**RULING**

**I. Introduction**

1. Before the Honourable Court for its determination is a Notice of Motion application dated 6<sup>th</sup> June, 2023 filed by the Applicant, Hussein Abdalla Said. It was brought under the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap. 21, Section 102 of the *Land Act*, 2012, Section 52 of the *Advocates Act* and Order 51 Rule 1 of the Civil Procedure Rules, 2010,
2. Upon of service having been effected only onto the offices of the Honourable Attorney General acting on behalf of the Interested Party, based on the affidavit of service on record by one Onsomu Bosire Zablon a Court Process Server sworn and dated 25<sup>th</sup> September, 2023 but none to the Respondent, no responses was elicited from both the Respondent and the Interested Party. Nonetheless, the Honourable Court has decided to deal with the matter and render a Ruling on its own merit for whatever its worth whatsoever.

**II. The Applicant’s case**

3. The Applicant sought for the following the prayers: -



- a. Spent.
  - b. That this Honourable Court do set aside the Charging Order issued on 28<sup>th</sup> April, 1955 in favour of James Christie and John Edward Leslie Bryson over the parcel of land known as Portion 160A Malindi and registered at the Land Titles Registry at Mombasa in Volume: LT 38 Folio: 213 File 3598.
  - c. That the Land Registrar Mombasa do remove and cancel the Charging Order from the Register relating to portion 160A Malindi and being Volume: LT 38 Folio: 213 File 3598 Mombasa.
4. The application was premised on the grounds, testimonial fact and averments made out under the 10 Paragraphed Supporting Affidavit of HUSSEIN ABDALLA SAID sworn and dated 6<sup>th</sup> June, 2023 and three (3) annexures marked as “HAS – 1 to 3” annexed thereto. He deponed that:
- a. He was the Applicant herein and hence with full knowledge of the facts in issue in this suit and therefore competent to make this affidavit.
  - b. He made this affidavit in support of the application herein seeking to have the entry relating to the Charging Order registered against the land known as Plot Numbers 160A Malindi cancelled from the Register (Hereinafter referred to as “The Suit Land”).
  - c. He was the beneficial proprietor of the suit land as the beneficial owner and the registered at the Land Titles Registry at Mombasa in Volume LT 38 Folio 213 File 3598 having inherited the same from the registered proprietor Salim bin Mohammed bin Ghulum (Deceased). He annexed as true copies of the Certificate of Postal Search issued to him by the Land Registry and an Order from the Malindi Khadhi’s Court vesting the suit property to him marked as “HAS – 1”).
  - d. The copies of the Certificate of Postal Searches revealed that the suit property was encumbered by a Charging Order which was issued on 28<sup>th</sup> April, 1955 in favour of the late John Edward Leslie Bryson (deceased) and James Christie to secure a debt of a sum of Kenya Shillings Seven Thousand Three Twenty Seven Hundred and fifty cents (Kshs. 7, 327.50/=) due from the registered proprietor Masood bin Said Hemed El – Busaidy (deceased) as Executor of the estate of Salim Bin Mohammed bin Ghulum (deceased).
  - e. The Respondent was the Administrator of the Estate of the late James Edward Leslie Bryson (deceased). He annexed a copy of the Certificate of the Confirmation of Grant of probate dated 16<sup>th</sup> November, 1989 marked as “HAS – 2”).
  - f. He had made numerous attempts at trying to trace the whereabouts of the Respondent whom the Deponent was made to understand that he had also since passed away and there was no one who had taken over the role of the personal representative of the late John Edward Leslie Bryson or James Christie. He annexed several letter written to the Respondent marked as “HAS – 3” but without obtaining any replies.
  - g. He was willing to settle the sum of Kenya Shillings Seven Thousand Three Twenty Seven Hundred and fifty cents (Kshs. 7, 327.50/=) so as to obtain a Discharge but he was unable to do so the Respondent could not be traced. Therefore, he was willing to deposit the said amount with the Honourable Court so as to obtain an order to Discharge the said property.
  - h. He was advised by his Advocates that the claim by the Respondent for payment of legal fees having passed 12 years could no longer be enforced under the provisions of Limitation of



Actions Act, Cap. 22 of the Laws of Kenya and therefore the claim had abated and the Charging Order ought to be cancelled.

- i. There were squatters who had started encroaching onto the suit land and he risked losing the suit land to them as he could not take any legal action to stop them from the illegal encroachment. He needed to protect the suit land are trying to encroach on the suit property as he was not yet the legal and registered proprietor of the land.
  - j. The removal and cancellation of the Charging Order and needs the cancellation of the Charging Order would enable him proceed on with the requisite steps of obtaining and safeguarding his proprietary rights over the land.
  - k. It would be in the interest of Justice that the orders sought from the application were granted.
5. On 26<sup>th</sup> September, 2023 when the Applicant and the Interested party appeared before Court, directions were made as follows:-
- a). The Respondent being the duly appointed Executors of the Creditors be served accordingly and there be proof of service under Order 5 Rule 15 of the Civil Procedure Rules, 2010.
  - b). The Respondents and the Interested parties within stipulated time to file and serve replies.
  - c). The Honourable Court to provide direction with regard to the following:
    - i). The Jurisdiction of the Court to handle the subject matter;
    - ii). The ownership of the property;
    - iii). The issue of the transmission of the estate of the deceased;
    - iv). The joinder of parties and service;&
    - v). The issue of the Limitation of Actions as provided for by the provisions of the Limitation of Acts Act. Cap, 22.
6. From the record, by the time of penning down this Ruling/Directions most of the orders made herein particularly the service of the Respondent and filing of any replies had been accomplished as per the Court's direction.

### **III. Analysis and Determination**

7. I have keenly considered the application dated 6<sup>th</sup> June, 2023 by the Applicant, the provisions of the Constitution of Kenya, 2010 and the statutes and in order to arrive at an informed, just and fair decision, the Honourable Court has framed the following three (3) salient issues for determination. These are:-
- a. Whether this Honourable Court has jurisdiction to hear and determine this application dated 6<sup>th</sup> June, 2023 by the Applicant.
  - b. Whether the application dated 6<sup>th</sup> June, 2023 has merit and whether the parties are entitled to the reliefs sought
  - c. Who will bear the Costs of the application.
- ISSUE No. a). Whether this Honourable Court has jurisdiction to hear and determine this application dated 6<sup>th</sup> June, 2023 by the Applicant.



8. Under this Sub – heading, the main issue to deal with is the Jurisdiction of this Honourable Court to entertain this matter. From the onset, the age of this issues is critical. The cause of action took place in the year 1955 which is seven decades ago. During the proceedings of this matter informed the parties that from its nature, it was matter that required to be handled with extreme care, prudence, caution and circumspect whatsoever. The Court was compelled to cite the principles elucidated by the famous Greek Philosopher Socrates regarding a Judge. That a Judge at all times should have the following qualities:-

“ Four things belong to a Judge; to listen Courteously; to answer Wisely; to Consider Soberly and to decided Impartially”

9. The issue of the Jurisdiction of Court is so fundamental and as guided by the guided by “the locus classicus’ case on the question of jurisdiction the now celebrated case of:- “The Owners of Motor vessel Lillian ‘S’ -Versus - Caltex Kenya Limited. [1989] KLR 1” where the Court, Nyarangi JA held:-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”

10. I wish address the pertinent legal issue of the jurisdiction of the Environment & Land Court indepth later on. In Kenya, Where does the jurisdiction of the Environment and Land Court has been created by law. It flows from either the Constitution and the legislation. The Supreme Court of Kenya in the case of “Samuel Kamau Macharia – Versus - KCB & 2 Others, Civil Application No. 2 of 2011 it noted:-

“ 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”

The Environment and Land Court is a statutory creation by the Constitution of Kenya under the provision of Article 162 (2) (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the Environment & Land Court Act No. 19 of 2011, the jurisdiction of the court is defined as “.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

11. The ELC Court is donated by Article 162 (2) (b) which provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Further the Court’s jurisdiction is also set out in Section 3 & 13(2) of the Environment& Land Court Act, 2011 which states:-

- (2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes?
- a. relating to environmental planning and protection, trade, 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.
12. Further, still on the same point, in the case of “County Government of Migori – Versus - I N B Management IT Consultant Limited ( 2019) eKLR” whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

“10- The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-“Hon (Lady ) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.....”

13. Additionally, I wish to cite the case of:- “Mary Musuki Mudachi & another – Versus - Anthony Muteke Mudachi & 2 others; Elijah K. Kimanzi & 6 others (Interested Parties) [2021] eKLR” that:-

“While I fully concur and associate myself with the ration made out under Pheonex of EA Assurance Limited case (Supra) my interpretation of the ratio on jurisdiction was where a case for instance of the Commercial or running down or Succession or employment and labour related and so forth was instituted before the Environment and Land Court or the vice versa then clearly that stated case becomes a nullity of jurisdiction and it’s the one that cannot be salvaged by neither consent of parties, the Oxygen principles or the Overring Objectives or the prepositions found under Article 159 of *the Constitution* of Kenya. The instant case is extremely distinguishable from what was envisaged under that decision of the Court of Appeal. For these very reason, therefore, it is completely wrong for the Defendants to emphatically state that the Environment and Land Court at Mombasa has no jurisdiction to hear and determine this case. The court is clothed with the legal jurisdiction to hear and determine the case.”

14. From the records in the instant case, the issue being sought by the Applicant are specifically to have:-
- a. This Honourable Court set aside the Charging Order issued on 28<sup>th</sup> April, 1955 in favour of James Christie and John Edward Leslie Bryson over the parcel of land known as Portion 160A Malindi and registered at the Land Titles Registry at Mombasa in Volume: LT 38 Folio: 213 File 3598.
  - b. The Land Registrar Mombasa do remove and cancel the Charging Order from the Register relating to portion 160A Malindi and being Volume: LT 38 Folio: 213 File 3598 Mombasa.



15. Although, the land has been mentioned from the reliefs sought but critically speaking the main cause of action is the discharge of the Charging Orders registered against the suit land emanating from a debt. Charging Orders in Kenya are provided for under the provision of Section 52 *Advocates Act* whereby the court has powers to order a lien/charge on properties belonging to a client to secure the costs of an advocate but this order is subject to any effluxion of time or an innocent purchaser for value without notice.
16. Based on the documentary evidence adduced though through affidavits, are Certificate of Postal search, an order from the Khadi's Court at Malindi by Hon. Sheikh Twalib B. Mohamed, a copy of Certificate of Confirmation of Grant to Timothy John Leslie Bryson dated 16<sup>th</sup> November, 1989, some unsigned letters ostensibly send to the Respondent and finally numerous email communications between Mr. Idris Ahmed, the Counsel for the Applicant and Mr. Kamami Njoroge, the Counsel who can be deemed to represent the Respondent. Though an Email dated 21<sup>st</sup> September, 2022. Mr. Ahamed Advocate while writing to the Mr. Kamami Advocates, he states:-
- “The claim by late Bryson being more than sixty seven (67) years since the Charging Order has well exceeded the limitation period and as such has abated by operation of law. However, as a matter of abundant of caution, we kindly request that the executor of the estate of the late John Edward Leslie Bryson do confirm that the estate does not have any claim against the estates of Salim bin Mohammed bin Ghulum (deceased) and Massod bin Said (deceased)”
17. As a response to this, and which is very relevant in determination Mr. Kamami Advocate claims that the Respondent has no interest in the estate of the Applicant. In essence the Advocate washes the hands of the Respondent onto the matter. By and large, there is no doubt that there exists an encumbrance over the suit land in form of a Charging Order which was clearly registered under the suit property. The Respondent who is the duly appointed legal executor of the estate of the Creditors, through his advocate has no interest in pursuing the outstanding sum of Kenya Shillings Seven Thousand Three Twenty Seven Hundred and Fifty cents (Kshs. 7,327.50/=). Thus, in the given circumstances, this Court decipheres that the main borne of contention here is first and foremost the settlement of an outstanding debt owed and the discharge of the Charging Order by the Respondent before this Court may indulge on other matters of the ownership of the suit land as provided for under the provision of Section 3 and 13 (1) and (2) of the Environment & Land Court Act, No, 19 of 2011.
18. In saying this, I have heavily borrowed from the Court of Appeal case of “CA. No.83 of 2016 (Mombasa) Co-operative Bank – Versus - Patrick Njuguna Kangethe – (2017) eKLR on mixed grill cases of commercial nature. The Court stated:-
- “Where there are conflict of interest pertaining to issues of bank mortgages and realization of securities, charges or any matters to do with accounting the principle applicable is on Pre – dominant purpose test to determine whether jurisdiction falls within the ambit of ELC or High Court. If the transaction is pre – dominantly related to land, it will fall under the ambit of EC; it is predominantly for the provision of goods, services and construction works then it falls under the ambit of the High Court to hear and determine.....”.
19. Clearly, in view of the foregoing, therefore, it is my view that without appearing to be splitting hairs, the cause of action from the subject matter emanating from the application dated 6<sup>th</sup> June, 2023 by the Applicant does not fall within the ambit of the ELC court to hear and make a determination. As



far as am concerned, I strongly believe , and rightfully so unless otherwise stated, that the appropriate Court with jurisdiction in the given circumstances is the High Court Commercial division.

ISSUE No. b). Whether the application dated 6<sup>th</sup> June, 2023 has merit and whether the parties are entitled to the reliefs sought

20. Based on the affirmed pronouncement by this Honourable Court made above, certainly, there will be nothing more useful to add under this Sub title. In the fullness of time, it goes without saying that the Notice of Motion application dated 6<sup>th</sup> June, 2023 by the applicant must fail.

ISSUE No. c). Who will bear the Costs of this Application.

21. It is trite law that the issue of Costs is at the discretion of the Court. Costs is the award that a party is granted at the conclusion of a legal action or legal proceeding in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 provides for that costs follow the event By the event it means the result of the legal action.
22. However, from the Instant case, although the Applicant has not been successful in prosecuting its application, taking that none of the parties filed any responses to it, there will be no orders to costs.

#### IV. Conclusion & findings

23. Consequently, having conducted an indepth analysis to the framed issues herein, on Preponderance of Probability and the balance of convenience, with regard to the application dated 6<sup>th</sup> June, 2023 by the Applicant, the Honourable Court makes the following specific orders. These are:
- a. That this Honourable Court lacks jurisdiction to entertain this matter under the provision of Article 162 (2) (b) of the Constitution of Kenya, 2010, Sections 3 and 13 of Environment and land Court Act, No. 19 of 2011 and Sections 1010 of the land Registration Act, No. 3 of 2012 and Section 150 of the Land Act, No. 6 of 2012 to hear and determine the subject matter founded from the Notice of Motion application dated 6th June, 2023 by the Applicant herein.
  - b. That the Notice of Motion application dated 6th June, 2023 be and is hereby dismissed for lack of merit.
  - c. That the appropriate Court to hear and determine the matter is the High Court Commercial Division.
  - d. That there will be no orders as to costs.

It Is So Ordered Accordingly

**RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF MAY, 2024.**

.....  
**HON. JUSTICE L.L. NAIKUNI**  
**ENVIRONMENT & LAND COURT AT**  
**MOMBASA**

**Ruling delivered in the presence of**

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Idris Ahamed Advocate for the Applicant.



- c. No appearance for the Respondent
- d. Mr. Kemei Advocate for the Interested Party.

