



REPUBLIC OF KENYA



**Kenduiywa & another v County Surveyor, Trans Nzoia; Kenduiywa & 4 others (Defendant)
(Environment & Land Case 30 of 2021) [2023] KEELC 16171 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 30 OF 2021**

**FO NYAGAKA, J
MARCH 8, 2023**

BETWEEN

MATHEW KENDUIYWA 1ST PLAINTIFF

SUSAN JEBET 2ND PLAINTIFF

AND

COUNTY SURVEYOR, TRANS NZOIA DEFENDANT

AND

HELLEN CHEMELI KENDUIYWA DEFENDANT

JULIAN CHEPTOO KENDUIYWA DEFENDANT

MARK KENDUIYWA DEFENDANT

LILIAN CHEPKOECH KENDUIYWA DEFENDANT

RUTH JEBET KIPTO DEFENDANT

RULING

1. This matter came up for mention on 20/02/2023 for further directions. On that date, in the presence of all counsel for the parties the court directed that the County Surveyor in-charge of Trans Nzoia County does visit the site, at the cost of the respective parties, and either in the presence or with their respective private surveyors, or not, depending on each party's wish. The County Surveyor was to re-survey and assess the situation on the ground and file a report to court over the same. The parties surveyors if any, would be at liberty to file their reports either separately or jointly with the County in-charge Surveyor.
2. When the Interested Parties Advocates proceeded to extract the orders of the court, it became apparent that they had to include the respective title numbers of the parcels of land in question. The Registry



would not approve the order without a specific direction from the court that the title numbers be included in the order.

3. When this matter was mentioned before the court on 07/03/2023, the Interested Parties' counsel moved the court to specifically include the title numbers. The Advocate for the plaintiffs vehemently opposed the prayer. He argued inclusion of title Nos. Sinyerere/Sitatunga Block 3/Taito/305 and 312 belonged to the plaintiffs and they had sought an injunction against the defendants regarding them, besides a declaration that they belonged to the plaintiffs. They argued that the surveyor was only supposed to go to the site using only the Certificate of Confirmation of Grant and confirm that the parties were each occupying their respective ratios of acreage on the ground and that if any of the parties were not occupying their respective ratios he/she would report so. He then argued that the titles issued pursuant to the Certificate of Confirmation of Grant in the succession cause that gave to the issuance thereof were not in tandem with the Grant. He further argued that if the title numbers were introduced in the order, it would get the court to the original complaint of the plaintiffs that it was validating an error which gave rise to the titles in issue or impugned. Lastly, he argued that the total acreage of all titles was less than as it appeared on the Certificate of Confirmation of Grant.
4. Learned counsel for 1st defendant argued that this court did not have jurisdiction to implement the succession proceedings. Hence it would not be in order or lawful for it to order the surveyor to go to the site to implement the Certificate of Confirmation of Grant. He also argued that since title deeds had been issued, as a result of the implementation of the Certificate of Confirmation of Grant, it meant that the matter was beyond the succession court and squarely lay on this court to handle.
5. He then proposed that to break the impasse the court needed to direct the surveyor to go to the site and carry out the exercise, using the Certificate of Confirmation of Grant for ascertaining the acreages of the shares due to each of the beneficiaries, the partitioning plan that arose from the acreage indicated on the Certificate of Confirmation of Grant, then the Registry Index Map (RIM) amended due to the partitioning arising from the Certificate of Confirmation of Grant, the title deeds that arose from the partitioning and RIM and then compare them with the actual positions and sizes of the parcels on the ground and report on the respective issues that arise as a result of this exercise.
6. Following submissions by the learned state counsel for the 1st defendant the learned counsel for both the plaintiff and the other defendants seemed to be swayed by it and associated themselves with the submissions. It is upon these submissions and contending positions that this court makes the following determination.
7. The background of this matter is that the plaintiffs and all defendants except the first one are family members, being the children of the late Barngetyuny Kendiuywa. Following the death of their father the children participated in succession proceedings in Kitale High Court Succession Cause No. 85 of 2004. At the end of the proceedings, a Certificate of Confirmation of Grant was issued in which one of the properties of the estate of the deceased was land parcel No. Sinyerere/Sitatunga Block 3/Taito/95 measuring approximately 87.5 acres (34.40 Ha).
8. It would appear that after the grant was issued, in which all the beneficiaries were allocated 9.7 acres except Susan Chebet Lagat who was entitled to 5.7 acres to hold it in trust for some respective minors named in the Grant, the surveyor went to the ground and surveyed it. Then the court was moved on 16/9/2019 over the report from the County Surveyor dated 25/9/2019. The court then directed that the report be implemented as it was made on that material date. It is upon the implementation of the surveyor's report that issues arose which formed the basis of the cause of action herein.
9. Having considered the arguments herein, and the issues that outstand and are for consideration herein, I am of the humble view that, first this court has no jurisdiction to deal with succession matters.



It is trite law as was stated in the *Owners of the Motor Vessel "Lilians" -vs- Caltex Oil (Kenya) Ltd* [1989] eKLR, that jurisdiction is everything, and without it a court must down its tools and not make one step further in a matter. Similarly, the Supreme Court has held in *Samuel Kamau Macharia -vs- Kenya Commercial Bank* [2012] eKLR, that a court's jurisdiction flows either from the statute or the constitution and a court can only exercise it if conferred by the law; a court cannot arrogate itself of jurisdiction. It handles only Land and Environment matters.

10. In this matter, any issues that touch on succession issues of the estate of the late Barngetuny Kenduiywa do not lie for determination before me. Any party wishing to challenge how the estate of the late was distributed, including how the land parcel No. Sinyerere/Sitatunga Block 3/Taito/95 was allocated between the beneficiaries should move the High Court over it.
11. In the instant case, the claim is that after the succession matter was concluded, a mutation was drawn and titles issued therefrom. It is after the mutation(s) was/were implemented that the titles in question were issued. The further claim is that the defendants are being used by unknown person to alter the settlements on the ground. My view and directions of the court as at this stage are that the County Surveyor in-charge of Trans Nzoia County is supposed to visit the ground or site and verify whether indeed after the survey report issued pursuant to the orders of the court in Kitale High Court Succession Cause No. 85/2004 was implemented the parties were settled in accordance with the agreed shares of distribution in terms of the Certificate of Confirmation of Grant issued in the succession court. To the extent that the report was actually implemented and titles issued thereafter, it means that the issue no longer remained before the succession court but now translated to the issues contemplated in Section 13 of the Environment and Land Act, particularly regarding ownership of the parcels that were said to be in issue herein, and their positions and extent on the ground as compared to the acreages of title deeds issued. There is a thin line between implementing the directions of the succession court and the jurisdiction of this court over the parcel of land in question. For that reason, it is worth of note that in order for the surveyor to carry out the exercise this court directed him/her to carry out, he cannot avoid making use of the raw documents which emanated from the decision in the succession matter. For instance, he cannot ignore the issue of the Certificate of Confirmation of Grant, because it is the one that would give the exact acreages due to each beneficiary of the estate of the deceased some of whom have sued the others. From that perspective and on that basis then he will have to use the partition plan that was generated from and in relation to the respective shares captured in the Certificate of Confirmation of Grant. After that he will have to rely on the Amended Registry Index Map (RIM) that was made to reflect the beneficiaries' respective shares as captured in the partition plan. That has to be compared with the mutation forms that were used and registered to give rise to the respective tiles listed in this suit. In those circumstances a comprehensive report shall be given setting out all issues in controversy.
12. For that reason, it is hereby directed that the County Surveyor in-charge of Trans Nzoia County shall visit the site, and making use of the Certificate of Confirmation of Grant, the original partition plan that was made/drawn in line with the Certificate of Confirmation of Grant, the Amended RIM, the Mutation Forms used to generate the title deeds in issues herein, and the title deeds issued as a result of the implementation of the report arising from the issued Certificate of Confirmation of Grant make a detailed report relating to land parcel numbers, namely, Sinyerere/Sitatunga Block 3/Taito/303, 304, 305, 306, 307, 308, 309, 310, 311 and 312. The report of the surveyor should detail clearly how the shares shown on the Certificate of Confirmation of Grant in respect of the named beneficiaries of land parcel No. Sinyerere/Sitatunga Block 3/Taito/95 were implemented on the ground. It should show whether in the implementation, there were any discrepancies between the acreage assigned to each beneficiary named in the Certificate of Confirmation of Grant and the titles issued in respect of each, and if further subdivision was made in respect of any beneficiary's share while implementing the



Grant, the specific acreage and titles that would have been due and titles that were actually given to or in favour of the said beneficiary, and if they accorded with the beneficiary's acreage as per the share given in distribution as per the Certificate of Confirmation of Grant. To be clear, it has to show how the ten (10) title deeds listed herein accord with and are related to the beneficiaries shares as given in the Certificate of Confirmation of grant.

13. Further, the surveyor(s) should clearly report as to whether the acreages of the beneficiaries' shares on title deeds issued match with those in the Certificate of Confirmation of Grant and also then indicate their respective physical locations on the ground, and if they actually accord with the Amended RIM and indications of positions of the parcels on the ground as initially partitioned. If they do not he should report which one does not and where it should have been. Overall, he should also indicate if the parties' actual settlements on the ground accord with their respective settlements in both the partition plan and the RIM.
14. Lastly, if any of the parties wish to and do engage a private surveyor, it should be at their own cost, and the said surveyors must work with the County Surveyor's timetable and visit the ground together, and they too must confirm and use the same tools or documents as the County Surveyor shall use in the exercise. Each of the parties herein share the cost of survey of the County Surveyor in charge of the Trans Nzoia County for the conduct of the exercise. The Officer Commanding Station of Sibanga Police Station is directed to avail security during the exercise if need be.
15. This Ruling shall be available and be given to the Surveyor(s) for detailed directions on how the exercise shall be conducted and with precision.
16. The County Surveyor to avail tabulation of the costs of implementing the order for purposes of informing the parties their expected shares. Mention on 16/3/2023.
17. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE ON THIS 8TH DAY OF MARCH, 2023

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE

