



Mutua & another v Mwangangi (Environment & Land Case E003 of 2022 & E005 of 2021 (Consolidated)) [2023] KEELC 16222 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E003 OF 2022 & E005 OF 2021 (CONSOLIDATED)**

LG KIMANI, J

MARCH 9, 2023

BETWEEN

CHRISTOPHER NGUMBAU MUTUA 1ST PLAINTIFF

**AGNES MWENDE MUTUA (SUING AS THE ADMINISTRATOR AD
ADMINISTRATIX OF THE ESTATE OF THE LATE EVANS KITEMANGE**

MBUTU (DECEASED) 2ND PLAINTIFF

AND

CHRISTINA MUTWA MWANGANGI DEFENDANT

RULING

1. The Notice of Preliminary Objection dated 21st April 2022 by the Defendant states that;

Notice is hereby given that the defendant will before the hearing o this suit raise a preliminary objection on a point of law being that the subject matter herein is Land Title No. Mwingi/mbondoni/1638 which is also the subject matter pending for hearing and determination before the High Court at Machakos being Succession Cause 23 of 2012 between the plaintiffs' late mother (Loise Kithumba Mutua) and the Defendant.

And the Defendant prays that the Plaintiffs' suit be struck out and dismissed with costs for want of jurisdiction.

2. The Plaintiffs filed a suit by way of Plaint dated 22nd March 2022 and Amended on 4th May 2022 claiming that the late Evans Kitemange Mbutu (Deceased) is the registered absolute proprietor of all that parcel of land known as Title No. Mwingi/Mbondoni/1638 (the suit land) while the Plaintiffs and the defendants' families live on different designated parts of the suit land since they belong to two of his sons who are also deceased.



3. It is the Plaintiff's contention that the Defendant has misled the Court that the suit land was the property of her late husband, one Mwangangi Kitemange Mbutu while having full knowledge that the same was family land registered in the name of her father in law, one Evans Kitemange Mbutu and that her husband was only one of the beneficiaries of his estate. The Defendant is now registered as the owner of the suit property and the Plaintiffs claim fraud over this registration. They pray for a declaratory order that the late Evans Kitemange Mbutu (Deceased) is the absolute proprietor of the suit property, general damages for trespass, an order for revocation of the title and an order for eviction of the Defendant from their portion and costs of the suit.
4. The Preliminary Objection was canvassed by way of written submissions.

The Defendant's submissions

5. Counsel for the defendant relied on Section 6 of the *Civil Procedure Act*, stating that it is not in dispute that the suit land is the subject of Machakos High Court Succession Cause No.23 of 2012 in which the Plaintiff's mother (Loise Kitumba Mbutu (Deceased) has filed a summons for annulment of grant issued to the Defendant by the Mwingi Resident Magistrate. The succession cause is said to be pending before the court. Counsel further submitted that the parties to the succession cause and the present suit are the same being family members.
6. He stated that the suit herein is more of a succession matter filed by the Plaintiff against the Defendant over their grandfather's estate and is not an Environment and Land Case.
7. The Defendant's Counsel submitted that if the P.O is upheld it will render further proceedings unnecessary. He stated that there are no factual details that require extra proof or authentication as to ascertain whether it is an objection based on a pure point of law on jurisdiction. This is as was set out in the case of *Mukisa Biscuit Manufacturers Co. Ltd vs West End Distributors* (1969) E.A 696 stating that without jurisdiction, further proceedings before this court are impossible.

Plaintiffs' Submissions

8. Counsel for the Plaintiffs submitted that Machakos Succession 23 of 2012 was a misguided application for revocation of grant issued to the Defendant by a Mwingi Court. They reiterated that the Land Title Mwingi/Mbondoni/1638 belonged to Evans Kitemange Mbutu (Deceased), but that the Defendant applied for grant in respect of her late husband's estate Mwangangi Kitemange (Deceased) in which she applied to be awarded the whole suit property.
9. They submitted that the application did not take off and was dismissed later on for want of prosecution. In essence the Plaintiffs claim that they are not interested in pursuing the application for annulment of grant issued to the defendant as presented in High Court succession cause No. 23 of 2012. They continue to state that they hold a limited grant of letters of administration to the estate to the estate of their grandfather. Further, the Plaintiffs' submission is that the suit herein is a land matter and falls completely under a different jurisdiction from succession issues.
10. On the validity of the preliminary objection, the Plaintiffs submitted that the issues of fact at this juncture remain in dispute and are unascertained and cannot form the basis of a preliminary objection. They rely on the case of *Oraro vs Mbajo* (2005) eKLR and *Attorney General & Another v Andres Maina Gitbinji & Another* (2016) eKLR. They submitted that it requires parties to adduce further evidence on the issue and that it is therefore not a pure point of law and the Notice of Preliminary objection should fail on this ground.



Analysis and Determination

11. The test of the true definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd* (1969) EA 696.

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

12. The law requires that a Preliminary Objection be brought only on a pure point of law and must not be blurred by contested factual issues that require proof. This position was taken in *Oraro v Mbaja* [2005] eKLR where the court stated;

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and 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. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message”

The Court went on to state that;

“As already remarked, 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. If the Applicant’s instant matter required the affidavit of Barak Eston Mbaja dated and filed on 7th October, 2004 to give it validity before the Court, then it could not be allowed to stand as a preliminary objection which must be on a pure point of law.”

13. The Defendant’s contention is that the dispute herein is a succession cause which falls outside of the jurisdiction of this court. In order for the court to determine whether or not this matter is the subject of the succession cause, it would be necessary to see the pleadings, proceedings and rulings filed in the succession cause in order to determine the current position of the said succession cause. In my view the said documents can only be introduced by way of an affidavit.
14. Perusal of the pleadings and documents filed shows that the suit land was originally LR. No. Mwingi/Mbondoni/1638 and was on 16.8.2004 registered in the name of Evans Kitemenge Mbutu. Vide Certificate of Confirmation of Grant issued in Mwingi PM Succession Cause No. 11 of 2005 on 20th September 2005 the said parcel was awarded to Christina Mutwa Mwangangi. Transfer of the land into the name of Christina Mwangangi was effected on 26th September 2007 and a title deed issued. On 30th September 2020 the land was divided into two portions LR. Mwingi/Mbondoni/2206 registered in the name of Christina Mwangangi and LR. Mwingi/Mbondoni/2207 registered in the name of Kimanzi Mwangangi and two tile deeds were issued.
15. It is stated that an application was filed in the High Court at Machakos being Succession Cause No. 23 of 2012 by Loice Kithumbi Mutua (deceased) who stated that she was a beneficiary of Evans Kitemenge Mbutu seeking annulment of the grant issued to the defendant herein in Mwingi Succession Cause



No. 11 of 2011. It is the succession cause in Machakos High Court that the Counsel for the defendant Christina Mutwa Mwangangi states is still pending and thus the present suit ought to be struck out for want of jurisdiction.

16. The plaintiffs state that the applicant in the succession cause in Machakos is the mother of the Plaintiffs herein, she is said to be now deceased and that the application for annulment of grant was dismissed for want of prosecution. These are issues of fact that are not admitted by the defendant and they determine the question of whether the succession cause in Machakos High court is still subsisting or not. In my view there are contested facts which require further evidence and for that reason the preliminary objection would not pass the test of raising only pure points of law without contested facts.
17. Counsel for the Defendant based the preliminary objection on section 6 of the [Civil Procedure Act](#) which provides for Stay of suit and states;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

18. As stated earlier Machakos High Court Succession Cause 23 of 2012 is an application for annulment of a grant of letters of administration. Annulment of grants is premised on section 76 [Laws of Succession Act](#) cap 160 and in my view the same does not involve distribution of assets of the deceased person. The said section states that;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion;

- a. that the proceedings to obtain the grant were defective in substance
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently
- d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. that the grant has become useless and inoperative through subsequent circumstances.”



19. In the present suit the Plaintiffs claim fraud in the registration of the defendant as owner of the suit land and pray for a declaratory order that the late Evans Kitemange Mbutu (Deceased) is the absolute proprietor of the suit land parcel number Mwingi/Mbondoni/1638. They also seek general damages for trespass, an order for revocation of the title and its subdivisions, an order of rectification of the land register and an order for eviction of the Defendant from their portion of the land.
20. In my view the matters in issue in the present suit are different from the ones in issue in the succession cause. The issues herein are not directly and substantially in issue in the Machakos High court succession cause No. 23 of 2012. This is notwithstanding the fact that it is confirmed that land parcel No. Mwingi/mbondoni/1638 claimed in this suit was also dealt with in the succession cause.
21. Further the Plaintiffs in this suit are not parties to the succession cause. The defendant states that the applicant in the succession cause is the mother to the plaintiffs herein and thus it can be stated that the Plaintiffs claim under her and can continue with the said suit in place of their mother. However, it is to be noted that the Plaintiffs in this suit bring this suit in their capacity as administrators of the estate of Evans Kitemange Mbutu (deceased). They do not sue in their capacity as the children of Loice Kithumbi Mutua. I therefore find that the parties to the succession cause and the ones in this suit are not the same, the plaintiffs herein do not claim under the applicant in the succession cause and they do not litigate under the same title.
22. It is also doubtful that the said succession cause is still pending since the applicant has been confirmed to be deceased. Court proceedings have not been availed in order to know if the cause is subsisting or was indeed dismissed for want of prosecution as claimed.
23. The view of the court is that this is a matter that falls within its jurisdiction under Article 162 (2) of the Constitution of Kenya 2010 for the reason that the Defendant was issued a title deed under the provisions of the Land Act No. 6 of 2012 after conclusion of the succession cause and subdivision of the same was carried out under the same act. Section 62 of the Land Act provides for the effect of transmission on death and states that;
 - (1) Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.
 - (2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.
24. Section 101 of the Land Act provides for the jurisdiction of the Environment and Land Court to determine disputes concerning land registered under the act and it states that;

“The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 and subordinate courts has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”
25. From the foregoing, I form the view that since title deeds were issued under the Land Act, this court has jurisdiction to hear and determine disputes arising out of that registration. Further, the very process of registration of land is carried out under the Land Registration Act No. 3 of 2011 which Act provides



that any disputes arising out of the process of registration of title are heard by the Environment and Land Court by virtue of Section 128. Further section 150 states that;

“The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

26. Courts have also found that issues of illegality and misrepresentation in obtaining title arising in a succession court ought to be dealt with by the Environment and Land Court. While addressing the issue of concurrent jurisdiction between the High Court and ELC, the High Court in *Raphael Muriithi Ngugi v Paul Thuo Kimani* [2017] eKLR the court stated as follows;

“This court lacks jurisdiction to address the illegality and or misrepresentation alleged by the applicant against the deceased with regard to the title of land registered as L. R. No. Loc.9/ Kiruri/3. This issue regarding title to land should be challenged in the Environment and Land Court created under Article 162(2)(b) of the Constitution of Kenya 2010 and section 13 of the Environment and Land Court, 2011 (Cap 12A of the Laws of Kenya).

21. The issue of trustees can only be addressed under Rule 41(3) of the Probate and Administration Rules, which provides:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the civil procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act proceeded to confirm the grant.”

As far as this court is concerned, land registered as L.R. No. Loc.9/Kiruri/3 is registered in the names of the deceased Jeremiah Kimani Wangire. The land therefore prima facie forms part of the deceased’s estate. Any challenges to that title ought to be directed to the Environment and Land Court”.

27. Following the above finding, it is my view that this court has jurisdiction to hear and determine the issues raised in this suit. That even though land parcel No. Mwingi/mbondoni/1638 was the subject of Mwingi succession cause No. 32 of 2007 and Machakos High Court succession cause No. 23 of 2012; the issues raised in this suit are not directly and substantially in issue in the said previously instituted succession causes. The preliminary objection dated 21.4.2022 thus fails and the same is dismissed with costs to the Plaintiffs.

DELIVERED, DATED AND SIGNED AT KITUI THIS 9TH DAY OF MARCH, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

Musyoki Court Assistant

Kariuki holding brief for Ngala for Defendant



A. Muinde for Plaintiff

