



Ogutu (Suing as a personal representative of the Estate of Vitalis Ogutu Aroka-Deceased) v Homabay County Government (Environment and Land Miscellaneous Application E016 of 2022) [2023] KEELC 18238 (KLR) (6 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18238 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2022
GMA ONGONDO, J
JUNE 6, 2023

BETWEEN

FELIX WAWILI OGUTU APPLICANT
SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF VITALIS
OGUTU AROKA-DECEASED

AND

HOMABAY COUNTY GOVERNMENT RESPONDENT

RULING

1. By a notice of motion dated November 24, 2022 initiated pursuant to sections 1,1A, 3A and 18 18 (1) (b) of the *Civil Procedure Act* chapter 21 Laws of Kenya (The application herein), the applicant through the firm of Moriasi Osoro and Company Advocates, is seeking the following orders;
 - a. That all the proceedings in the lower court in this file be expunged as the case starts afresh.
 - b. That the Honourable court be pleased to order recall of constitutional petition case number 3 of 2018 to the high court for hearing and disposal.
 - c. That the Honourable court be pleased to order to be expunged from record all proceedings that have been recorded in this petition and order the petition to be heard de novo.
 - d. That costs of this petition be in the cause.
2. The application is premised upon grounds 1 to 5 set out on the face of the same as well as a supporting affidavit of ten paragraphs sworn on November 25, 2022 by the applicant's counsel, Japhet Osoro Kaosa. Briefly, the applicant's lamentation is that Homa Bay Chief Magistrate's Court case number 3 of 2018 was initially lodged at Kisii as HC Petition No. 42 of 2011. The value of the subject matter



in the petition is Kshs. 20,293, 000/= which is beyond the pecuniary jurisdiction of the magistrate's court. That this is an old matter which need to be heard without delay.

3. The respondent through the firm of Aluoch Odera and Nyauke Advocates opposed the application by the grounds of opposition dated December 16, 2023 thus;
 - a. The application is an abuse of the court process.
 - b. The applicant does not have the legal capacity to make such application.
 - c. The application is thus defective.
4. The application was heard by way of written submissions pursuant to this court's orders of March 7, 2023.
5. Consequently, learned counsel for the applicant filed submissions dated March 16, 2023 and stated that the magistrate's court has no pecuniary jurisdiction to hear the matter. That after the original petitioner died, the current applicant obtained Ad Litem in Homa Bay CM's Court Succession Cause No. E8 of 2020 to proceed with the matter. Counsel implored the court to dismiss the grounds of opposition and stated that they are a distraction and only meant to delay the proceedings of the case thus, the prayers in the application be granted.
6. The respondent filed no submissions in this application.
7. I have carefully considered the application, grounds of opposition and the applicant's submissions in entirety. Therefore, twin issues arise for determination namely;
 - a. The Chief Magistrate's court pecuniary jurisdiction over this matter in dispute and
 - b. Legal capacity of the applicant in the matter.
8. In respect of the first issue, the applicant stated at ground 3 of the application that the total value of the subject property land reference number Kanyamwa/Kayambo/Kwamo/136 is Kshs.20,293,000/= which is way beyond the jurisdiction of the chief magistrate's court. The same is shown in the inspection and valuation report dated 7th July 2010 marked as "P.W.O 1" as per paragraphs 7 of the applicant's supporting affidavit and annexed to the said affidavit.
9. It is trite law that jurisdiction of a court flows from either *the Constitution* or statute or both; see *Samuel Kamau Macharia and 2 others-vs-Kenya Commercial Bank Ltd and 2 others* (2012) eKLR.
10. It must be borne in mind that pursuant to section 7 of the *Magistrates' Court Act*, 2015 and section 26 (4) of the *Environment and Land Court Act*, 2015 (2011), Homa Bay Chief Magistrate's court has jurisdiction to hear and determine such matters; see also *Joseph Madegwa-vs-Gaylord Avedi* (2015) eKLR.
11. Besides, the said court is devoid of pecuniary jurisdiction over the matter in light of the value of the subject property as revealed at paragraph 8 herein above. Moreover, under section 13 (1) and (3) of the *Environment and Land Court Act*, 2015 (2011), this court is seized of the original and appellate jurisdiction over the matter pursuant to article 162 (2) (b) of *the Constitution* of Kenya, 2010 and the decision in the case of *Republic-vs-Karisa Chengo and 2 others* (2017) eKLR.
12. As regards the second issue, the respondent alleged that the applicant lacks legal capacity to initiate this application. However, the applicant stated at paragraph 4 of his affidavit in support of the application that he obtained a limited grant Ad Litem in respect of the estate of the deceased original petitioner in



Homa Bay Chief Magistrate's court Succession Cause number E8 of 2020 to proceed with the petition. The said grant is indicated in the attachment to the applicant's submissions.

13. Also, this court is guided by the definition of the term "legal representative" under section 2 of the *Civil Procedure Act* chapter 21 Laws of Kenya. Further, I subscribe to the decision in the case of *Trouistik Union International and another-vs-Jane Mbeyu and another* (1993) eKLR, where the Court of Appeal held that the estate of the deceased person is vested in the legal representative. So, in view of the grant Ad Litem issued to the applicant as stated in paragraph 12 above, he has the legal capacity to commence this application.
14. In the result, this application is meritorious. The same, be and is hereby allowed in terms of prayers 2, 3 and 4 on its face and as captured in paragraph 1(b), (c) and (d) hereinabove.
15. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 6TH DAY JUNE 2023.

G. M. A ONG'ONDO

JUDGE

PRESENT

- a. Mr. B Ochieng instructed by Mr J Osoro learned counsel for the applicant
- b. Mr. S.Nyauke, learned counsel for the respondent
- c. Okello, court assistant

