



**Waititu alias Ferista Wanjiku v Lutatwa (Environment & Land Case E015 of 2022) [2023] KEELC 18852 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18852 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E015 OF 2022**

**JG KEMEI, J  
JULY 13, 2023**

**BETWEEN**

**FELISTAS WANJIKU WAITITU ALIAS FERISTA WANJIKU ..... PLAINTIFF**

**AND**

**MARY MURONJI LUTATWA ..... DEFENDANT**

**RULING**

1. The Defendant/Respondent filed a Notice of a Preliminary Objection dated 18/5/2022 on the grounds that:-
  - a. The suit herein is frivolous, malicious and scandalous and an abuse of Court process.
  - b. The suit herein is an abuse of Cap 64 of the Laws of Kenya (Succession Act).
  - c. This Honourable Court has no jurisdiction at this time to entertain matters of the Estate of Leonard Waititu Kahi (Deceased).
  - d. There is still a pending suit before this Court ELC 64 of 2021 where the parties herein are the same and the subject matter is suit property Ruiru Kiu Block 13/447.
  - e. The Succession Cause 780 of 2019, Estate of Leonard Waititu Kahi is still pending Confirmation of Grants where the Respondent is the Petitioner, the Plaintiff herein having failed to honor the orders of Citation.
2. On 24/10/2022 the Court directed the Preliminary Objection to be canvassed by way of written submissions to be filed within 30 days respectively by both parties.



## The Written Submissions

3. The Plaintiff/Applicant submitted that the suit land was owned by the Plaintiff and her husband through joint tenancy. That if joint tenancy is upheld by the Court then the land should pass to the Plaintiff through the doctrine of survivorship upon the death of her husband. That the doctrine of survivorship removes jointly held property from the Law of Succession hence the suit land does not form part of the estate of the deceased estate, and does not pass to the beneficiaries of the estate of the deceased.

4. Further that the Succession Court's primary mandate is the distribution of the estate of the deceased. That where complex land issues are subject of a case they are best referred to the Environment and Land Court for determination then referred to the Succession Court to determine distribution of the asset. See the case of *Estate of Samuel M'Twaruchiu M'Narimu (Deceased)* [2019]eKLR where the Court held as follows:-

“Any person wishing to assert that the two registered parcels of land belonged to the Deceased would have to institute appropriate proceedings (complete with pleadings) in an appropriate civil court. A succession court's jurisdiction is limited to establishing who are entitled to a deceased person's undisputed free assets and their respective shares therein. A succession court does not have the tools to investigate titles to land and adjudicate upon complex competing interests in such titles, not without proper and appropriate pleadings and other safeguards available in a fully-fledged civil proceeding.”

5. The Court was also referred to the case of *Re Estate of Julius Ndubi Javan* (2018)eKLR where the Court relied on the decision in the case of *Re Estate of Stone Kathuli Muinde (Deceased)* [2016]eKLR where the Court held thus:-

“... If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the Probate Court in the Succession Cause so that that Court can give effect to it.”

6. The Court was urged that it has jurisdiction to hear the matter as to who between the parties is the registered owner of the land.

7. It was further submitted that the ELC 64 of 2021 was withdrawn.

8. The Respondent did not file any Written Submissions despite the directions from the Court.

9. The key issue for determination is whether the Court has jurisdiction to determine the case.

10. The jurisdiction of this Court is set out in Article 162(2)(b) read together with Section 13 of the *Environment and Land Court Act* as follows:-

“(1) 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.

(2) 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.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- (a) interim or permanent preservation orders including injunctions;
  - (b) prerogative orders;
  - (c) award of damages;
  - (d) compensation;
  - (e) specific performance;
  - (g) restitution;
  - (h) declaration; or
  - (i) costs.”

11. The issue before the Court is whether the suit land acquired by the Plaintiff jointly with her husband should be declared a joint property upon which on the death of her husband, the principle of survivorship is triggered.
12. It is the Respondent’s position that the Court has no jurisdiction to entertain the matter which is in the realm of Succession Law.
13. A Preliminary Objection is defined in *Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR. The issue of jurisdiction is definitely a matter that may be raised in a Preliminary Objection. The question is whether the objection is merited.
14. The Court notes that the Respondent has not enclosed a grant appointing her as the administrator of the estate. Further it is not known if the suit land is part of the assets of the estate of the deceased. Further the issue of whether property was jointly owned or held as tenants in common requires to be



determined by way of evidence. It was jointly owned then the principle of survivorship would kick in. Conversely if it was a tenancy in common then the issue of division of shares would arise.

15. In all the above the Court would have to call and examine evidence to reach a determination on the objection, hence ousting the objection from being a pure point of law.
16. Consequently, the Preliminary Objection is not merited. It is dismissed with costs to the Plaintiff.
17. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13<sup>TH</sup> DAY OF JULY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Plaintiff – Absent

Ms. Onyango HB Ms. Odhiambo for Defendant

Court Assistant – Phyllis

