



**Lyambila & 3 others v Lyambila (Environment & Land Case E003 of 2021)
[2023] KEELC 21215 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E003 OF 2021**

EC CHERONO, J

NOVEMBER 2, 2023

**IN THE MATTER OF ORDER 37 RULE 1 & 2 OF THE CIVIL
PROCEDURE RULE**

AND

**IN THE MATTER OF THE ESTATE OF BENARD LYMBILA
NDURUCHI(DECEASED)**

AND

**IN THE MATTER OF THE LAND PARCEL NO.
BUNGOMA/KAMAKOIWA/275 (NOW 4224 AND 4225)**

BETWEEN

GEOFFEREY WANJALA LYAMBILA 1ST APPLICANT

OLIVER BAHATI LYAMBILA 2ND APPLICANT

PATRICK WANYAMA LYAMBILA 3RD APPLICANT

OLIVER BAHATI LYAMBILA 4TH APPLICANT

AND

AGNES NAKHUMICHA LYAMBILA RESPONDENT

JUDGMENT

1. The Plaintiff, commenced this suit vide Originating Summons dated 29th April, 2021 and filed in Court on 5th May 2021 seeking the following Orders;
 - a. A declaration be made that the applicants are the beneficiaries and heirs of the estate of Bernard Lyumbila Nduruchi (deceased).



- b. A declaration be made that the respondent holds land parcel No. Bungoma/Kamakoiwa/4224 in trust of the applicants as per certificates of confirmation of grant issued on 24/9/1999.
 - c. A declaration be made that the applicants are full adults of sound mind capable to hold their respective portions of land as per the certificate of confirmation of grant issued on 24/6/1999.
 - d. A declaration be made that the existing trust in the name of the Respondent specifically to be the applicants be and is hereby dissolved.
 - e. An order be made directing Respondent to transfer 4 acres of land comprised of L.R. No. Bungoma/Kamakoiwa/4224 to each applicant and specifically where each applicant has put up his homestead.
 - f. In alternative to prayer 5 above an order be made directing the Respondent to transfer equivalent portion of land comprised Bungoma/Kamakoiwa/4224 less 0.04 Ha of land which the Respondent transferred to Mwanzi K.A.G. Church now registered as Bungoma/Kamakoiwa/4225 and each share of each beneficiary as per the certificate of confirmation of grant issued on 24/6/1999 be affected in a ration to be determined by Bungoma County surveyor and specifically each applicant to remain where he has put up his homestead.
 - g. If the Respondent defaults to comply with prayers 5 or 6 above, an order be made authorizing the Deputy Registrar of this Court to sign all relevant documents to enable the applicants get their respective title deed.
 - h. Any other relief this court may deem just and fit to grant.
 - i. That costs be borne by the Respondent.
2. The suit is supported by the affidavits of the plaintiff's herein sworn on an 29th April,2021. The supporting affidavits are further supported by several annexures thereto which include a copy of a green card, certificate of confirmation of grant, sub-division green card and a certificate of official search.
 3. By way of a response, the defendant filed a Replying affidavit on 29th March,2022 denying the plaintiff's claim.
 4. The matter was referred for mediation where parties failed to reach an agreement. I must state that the other beneficiaries of the estate save for the plaintiff agreed on a mode of distribution at the mediation stage.
 5. The matter was thereafter set down for hearing with the plaintiff calling four witnesses and the respondent calling two witnesses.

Applicant's Case And Submissions.

6. PW1: Geoffery Wafula Lyambila testified that he is one of the sons of the deceased. It was his testimony that the deceased had 13 children i.e. eight sons and 5 daughters. He adopted his supporting affidavit dated 29th April,2021 as his evidence in chief and his list of documents dated 1st July,2022 and produced into evidence PExhibit 1-4. It was his testimony that the defendant was named the administrator of the estate of Bernard Lyambila Nduruchi in Bungoma Succession Cause No.23 of 1998. That the deceased was the proprietor of Bungoma/Kamakoiwa/275 which was divided in the succession cause to each of his beneficiaries with the defendant being named as a trustee for the beneficiaries. He testified that in the certificate for confirmation of grant together with his co-applicants, they were allocated 4acres of land each and that the said grant was never revoked and his claim was as per the grant. It was his testimony that the defendant was to hold the suit land in trust for the children of the deceased but



- had the same registered absolutely in her name. The witness averred that the defendant thereafter subdivided the land into two parcels i.e. Bungoma/Kamakoiwa/4224 and 4225. He stated that he was aware that Mwanzo K.A.G Church was allocated a portion of the suit land and that a title deed has already been taken out in its name i.e Bungoma/ Kamakoiwa/4225.
7. It was his testimony during cross examination that he was not aware that the suit land was to be auctioned due to a debt owed to the Settlement Trustee Fund and that his elder sister had settled the debt on condition that she would be granted 15 Acres of the suit land. It was further his contention that he did not know about ELC Case no. E008 of 2021 and that the alleged ongoing Succession Cause No. 144 of 2017, was formerly Succession Cause No. 23 of 1998.
 8. In re-examination he confirmed that he was aware that his sister settled the debt. It was further his testimony that he did not take part in the resurveying process as ordered in Succession Cause No. 144 of 2017 as he was not asked to.
 9. PW2: Samuel Wafula Lyambila adopted his witness statement dated 1st July,2022 as his evidence in chief. In cross-examination he testified that he was a son to the deceased and as such he was entitled to a share of his estate as per the certificate for confirmation of grant in High Court Succession Cause No. 23 of 1998.It was his testimony that he did not now why the succession cause had been transferred to the lower Court. It was Further his testimony that he was not aware that his sister Jackline settled the STF debt and also stopped the suit land from being auctioned by AFC. The witness testified that he was aware of a proposal before the Court in Succession Cause 144 of 2017 on division of the suit land. It was his testimony that they filed the current suit to enforce the certificate for confirmation of grant issued in HC Succession Cause No. 23 of 1998.
 10. PW3 Patrick Wanyama Lyambila and PW4 Oliver Bahati Lyambila adopted their witness statements dated 1st July,2022 as their evidence in chief and reiterated the evidence as stated by heir co-applicants.
 11. The plaintiffs submitted that they were cestui que trust, heirs and devisees of the estate of the deceased and that they qualified to bring the current suit under the provisions of Order 37 Rule 1. They submitted that this court was clothed with jurisdiction to determine the issues herein since the succession court became functus officio upon issuance of the certificate for confirmation of grant. They placed reliance in the case of Johnson Gathanga Mwaniki vs. Ester Watheri Mwaniki & 3 others and Catherine Gachiku Kihara (Suing as the Administrator of the Estate of Anthony Kihara Gicheru vs. Hannah Wambui Kihara(2018) eKLR.
 12. It was the plaintiff's submission that in the event that the approximate area of the suit land was less than as was indicated in certificate for grant, the court can grant as prayed by the plaintiff in proportionate rations to be determined by the Bungoma County Surveyor. The plaintiff further submitted that the defendant did not satisfactorily prove that the succession cause was active as required under Section 107(1) of the *Evidence Act*. Lastly, they submitted that they have proved their case on a balance of probabilities and their case should be allowed as prayed.

Respondents Case And Submissions

13. DW1: Agnes Nakumicha Lyambila adopted her witness statement dated 12/4/2022 and List of Documents of an even date thus producing into evidence DExhibit no.1-4. It was her evidence that during the filing of HC Succession Cause no.23 of 1998 the suit land was presumed to be 37 Acres but after a survey was done it revealed that the property was 29 Acres. It was her testimony that after this information came to light they decided to rectify the error by re-opening the case thus Succession Cause 144 of 2021. In cross examination she testified that in the certificate of grant was issued in 1999 for the estate of her deceased husband and she was to hold the suit land in trust for her children. It



was her testimony that her first and second born daughters did not object to the confirmation of the grant as it was issued.

14. The respondent further testified that the deceased had signed transfer forms in favour of Mwanzo K.A.G Church prior to his death and that the resurvey of the remainder of the land was done in the presence of the applicants. She testified that she had proposed to give all her children including the plaintiff's 1 ½ Acres.
15. DW2 Jacklyne Lyambila adopted her joint statement dated 12/4/2022. It was her testimony that her mother The Defendant Herein filed for rectification of grant in succession case no.144 of 2017-Bungoma and ELC 08 of 2021 which sought injunctive orders against persons who were claiming to have bought the suit land. She testified that in the certificate of grant the land was noted to be 37 Acres while it was actually 30.4Acres including the one occupied by K.A.G Church as confirmed by the county surveyor. It was her testimony that after excising the K.A.G portion the remaining plot was 29.4 Acres. In cross-examination the witness testified that she was aware of the succession proceedings in HC Succession Cause 23 of 1998 and that she had no objection to being allocated 1 Acre as per the confirmed certificate of grant. It was her evidence that the suit land is being held in trust by the respondent for the other beneficiaries. It was her contention that the defendant cannot share to the plaintiff the 4acres sought since the land is smaller.
16. The defendant submitted that the current suit was an abuse of the court process on the basis of duplicity and multiplicity of suits over the same parties, land and issues. The defendant contended that there was a pending Succession Cause No. 144 of 2021 (formerly HC Succession Cause no.23 of 1998). The defendant argued that the succession cause was back in court for rectification since the distribution of the estate in was erroneously stated as 37 Acres while it was 30.4 Acres and that the administrator sought to have all the beneficiaries of the estate benefit in equal measure.
17. The defendant further contended that the issues in question before the court were succession matters that are the purview of the Succession Court which in this case is the Chief Magistrate court hearing Succession Cause no. 144 of 2021. Counsel relied on the provisions of Section 47 and 73 of the [Law of Succession Act](#), Cap 160.
18. It was the defendant submission that the matter before this court was Sub-judice as described in Section 6 of the [Civil Procedure Act](#), Cap 21 and that it would be in the best interest of justice if the court disregarded the current suit to avoid the issuance of conflicting orders by the various courts which is undesirable. The defendant further contended that ELC Case no. E008 of 2021 as instituted is to protect the estate of the deceased from invaders who claim to have purchased the portions of land from the plaintiff's herein. The defendants therefore urged the Court to dismiss the case with costs.

Analysis And Determination

19. From the foregoing, two issues commend for determination as follows: -
 - a. whether this court has jurisdiction to hear the matter
 - b. whether the plaintiff is entitled to the orders sought.
20. On the first issue, the Court's mind is drawn to the question of whether this Court has the jurisdiction over the issues it is called upon to determine. Since a Court must always satisfy itself of the jurisdiction in a mater, I will do so herein.
21. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal



way for decision.”. Black’s Law Dictionary, 9th Edition, defines jurisdiction as the Court’s power to entertain, hear and determine a dispute before it.

22. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

23. It is a well settled principle in law that jurisdiction is so central in judicial proceedings such that a Court acting without jurisdiction is acting in vain and all it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

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...

24. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR stated as follows: -

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... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*.

25. The jurisdiction of this court to hear and determine disputes relating to the environment, use and occupation of and title to land lies with Article 162 of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*.

26. Article 162 provides as follows: -

162. System of courts

- i. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- ii. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - i. employment and labour relations; and
 - ii. the environment and the use and occupation of, and title to, land.
 - iii. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).



27. Section 13 of the Land and Environment Court Act which provides as follows:
- i. 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.
 - ii. In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes?
 - i. (a)relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - ii. relating to compulsory acquisition of land;
 - iii. relating to land administration and management;
 - iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - v. any other dispute relating to environment and land.
28. It is also trite that the probate court’s jurisdiction in intestate or testamentary succession to the estates of deceased persons is derived from Section 2 of the *Law of Succession Act*.
29. Section 2(2) of the *Law of Succession Act*:
- “The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless, the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”
30. The practice directions on proceedings in the environment and land courts, and on proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other courts has provided a clear delineation on the jurisdiction of the ELC and probate courts as follows;
- “All cases touching on inheritance, succession and distribution of land under the *Law of Succession Act*, Cap. 160 Laws of Kenya shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction”.
31. In the case of Estate of M’Murianki M’Mugwika (Deceased)[2019]eKLR, the court held that;
- “The *law of Succession Act* and the rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate identification of survivors and beneficiaries and distribution of the assets”.
32. The distinct and separate legal regimes of these two courts has led to the ELC court declining to enter into the realm of succession disputes and vice versa. The Court in the case of Nashon Onyango Otieno v George Onyango Otieno [2021] eKLR held that a case by case analysis of the facts of each case has to be considered in determining which court has jurisdiction and the predominance principle as



elucidated in the case of *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR has to be applied. The court in this case stated as follows on the issue of concurrent jurisdiction of the high court and courts of equal status;

“...When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test...”

33. To determine whether this matter falls under the jurisdiction of this court, one must therefore examine the contents of the *Plaint* and the orders sought therein.

34. In the case of *Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru, ELC (2013) eKLR* where it was held;

“In matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of *the Constitution* and the High Court as the Succession Court under Section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.” (Emphasis added).

35. The *Law of Succession Act* at section 47 provides for jurisdiction of High Court in respect of matters falling under that Act as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice

36. The jurisdiction of the High Court includes the power under section 76 of the *Law of Succession Act* to revoke or annul a grant and provides as follows:

“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—

1. that the proceedings to obtain the grant were defective in substance;
2. 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;
3. 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;
4. 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”

37. From the facts before this Court, it is evident that at the time of distribution of the estate of Benard Lymbila Nduruchi (deceased); Bungoma/Kamakoiwa/275 was estimated to be 37 Acres. It has been alleged and proven through documentation i.e a report by the County Surveyor that the Parcel Bungoma/Kamakoiwa/275 measures approximately 30.4 Acres and that the same has since been subdivided into two portions i.e. Bungoma/Kamakoiwa/4224 measuring approximately 29.4 Acres while Bungoma/Kamakoiwa/4225 measures approximately 1 Acre. It is also clear from the evidence that parcel Bungoma/Kamakoiwa/4225 is currently registered in the name of Mwanzo K.A.G Church, an entity that purchased the parcel of land from the deceased prior to his death leaving 29.4 Acres as the available land for distribution.
38. Further, from the evidence placed before this Court, it is clear that the succession cause was reopened and the same is still on-going in the Chief Magistrates Court, to wit; CM Succession Cause No. 144 of 2017(Formerly HC Succession Cause No. 23 of 1998). The plaintiffs do not dispute that the actual acreage of the estate is not equivalent to the acreage distributed in the succession cause and in the current case pray for allocation of their share of the estate as was ordered in the certificate of grant or in a ration similar to it in reference to the new acreage. As earlier mentioned, it is the concern of the Succession Court to determine the extent of the deceased’s estate, his bona fide beneficiaries and distribution of the estate.
39. It is my considered view that the plaintiff’s in this suit raise matters camouflaged in what may on the surface appear as questions for determination by the ELC Court but on a closer scrutiny reveal otherwise- that the substance of the case is actually one that will determine how the estate of a deceased person should be surveyed, subdivided and distributed. This therefore means the property in question is still on the distribution table and it lies within the mandate of the succession court. Therefore, the dispute in question is not within the domain of this court as per Section 13 of the Land and Environment Court Act.
40. It therefore follows that the beneficiaries of the deceased ought to ventilate their concerns in the Succession Court which is clothed with the jurisdiction to determine the above questions and to further deal with the estate as set out in Section 76 of the [Law of Succession Act](#).
41. In view of the constitutional and legal delineation between the ELC and probate court, the prayers sought by the Plaintiff’s for distributing the estate of a deceased person in an Environment and Land Court are strange and legally untenable. It is my considered view that the matter before this Honourable Court is premature and the plaintiffs should therefore exhaust their remedies as heirs to the estate in the Succession Court.
42. Further, the case heavily relied on by the plaintiffs in their submissions i.e Johnson Githanga Mwaniki vs. Esther Watheri Mwaniki & 3 others is distinct from the current case. In that case, the orders sought by the plaintiff were for cancellation of title, dissolution of a trust and punitive costs. The prayers as sought do not touch on the issue of inheritance, succession and distribution of land therefore in my view when subjected to the pre-dominant purpose test, the pleadings in that case call upon the court to deal with issues of ownership of land squarely fall within the mandate of the Environment and Land Court.



43. The upshot of my findings is that a claim for distribution of an estate of a deceased is obviously a claim that falls within the jurisdiction of the Succession Court and for which this court is expressly excluded from entertaining. I am therefore persuaded that the proper forum for the plaintiffs to agitate for their rights is the Succession Court; this Court is ill-equipped to determine such rights and cannot even purport to do so in the context of an Environment and Land Case. I am of the view that this matter turns on this point and there is no need to look into the other issues.
44. In view of the foregoing, the plaintiff's case is hereby struck out and this being a family dispute, each party shall bear their own costs.
45. It is so ordered.

DELIVERED, DATED AND SIGNED AT BUNGOMA THIS 2ND DAY OF NOVEMBER, 2023.

HON.E.C CHERONO

ELC JUDGE

In the presence of

Mr Wamalwa R for the plaintiffs/Applicants

Defendants/Advocate-absent

Okwaro C/A

