



**Waruhiu v Waruhiu & 2 others (Environment & Land Case
E002 of 2023) [2023] KEELC 21336 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E002 OF 2023
SM KIBUNJA, J
NOVEMBER 8, 2023**

BETWEEN

SUSAN WAMBUI WARUHIU PLAINTIFF

AND

DANIEL WAINAINA WARUHIU 1ST DEFENDANT

DORIS WANJIRU KINUTHIA 2ND DEFENDANT

CAROLINE NJERI WARUHIU 3RD DEFENDANT

RULING

1. The plaintiff commenced this suit through the plaint dated the 16th January 2023 seeking for inter alia permanent injunction restraining defendants from “harassing, evicting, repossessing, securing, leasing or otherwise disposing of any interest in house without land on plot number 11 and 376 section XV111 – Mwembe Tayari to third parties or in any other way dealing adversely interfering with the plaintiff’s enjoyment of the suit premises.” That filed contemporaneously with the said plaint is the notice of motion under certificate of urgency of even date seeking for similar order pending the hearing and determination of this suit.
2. The defendants’ responded to the application through inter alia, the Preliminary Objection dated 25th January 2023 raising two grounds, firstly that the application is fatally defective as it is contrary to the *Law of Succession Act* and therefore the court has no jurisdiction. Secondly, that the application is premature since the property is still under the deceased’s name and the same is yet to be transferred to the plaintiff’s and the defendants’ names and as such the same is still a probate matter.
3. The court gave directions on filing and exchanging submissions on the preliminary objection. The learned counsel for the defendants and plaintiff filed their submissions dated the 28th February 2023 and 5th September 2023 respectively, which the court has considered.



4. The following are the issues for the court's determinations:
 - a. Whether the defendants' preliminary objection has raised any pure point of law which if upheld would determine the application and or the suit herein.
 - b. Whether the court is with jurisdiction in this matter.
 - c. Who pays the costs in the preliminary objection.

5. The court has carefully considered the grounds on the preliminary objection raised by the defendants, submissions by the learned counsel, superior courts decisions thereon, pleadings and come to the following determinations:
 - a. The defendants among others submitted that the property subject matter in this suit is the house without land on plot number 11 and 376 section XV111 Mwembe Tayari which was still a bone of contention between the same parties herein in Succession Cause No. E082 of 2021. That after the parties failed to come up with an out of court settlement on the matter, the Succession Court rendered its decision distributing the suit property and others amongst all beneficiaries equally. That a certificate of confirmation of grant dated the 15th December 2022 was then issued. That the plaintiff herein then filed this suit over a matter already decided by the Succession Court instead of preferring an appeal. That this suit is therefore res judicata and or subjudice. That the plaintiff should have filed her application before the family court in Succession Cause No. E082 of 2021 where she was one of the parties instead of coming to file a new matter in this court. That the application should be dismissed with costs.
 - b. On her part the plaintiff submitted that this court has jurisdiction to hear and determine this suit, as the plaintiff is simply seeking to enforce her proprietary rights to the suit property which has already been distributed by the Succession Court. That the plaintiff is not challenging the distribution of the suit property, but rather the notice to vacate issued by the defendants. Counsel urged the court to find that the plaintiff's suit is purely for orders to stop the defendants from evicting her or dealing with the property in a way that will adversely affect the plaintiff's proprietary rights. That the issue before the court arose after the confirmation of the grant and cannot be referred back to the Succession Court.
 - c. The ground upon which the defendants have raised the preliminary objection is on jurisdiction. A preliminary objection should be on a pure point of law that if upheld, can dispose of a suit and or application at its onset. Therefore, when a preliminary objection on the ground of jurisdiction has been raised like in this matter, the court ought to consider it first before hearing any other interlocutory application before it. This was well articulated in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR that,

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The plaintiff has relied on the case of *The Estate of Alice Mumbua Mutua (deceased)* [2017] eKLR, where Musyoka J held that disputes that arise after confirmation of grant ought to be determined outside the probate suit, as the probate court would be functus officio as far as the property in question is concerned. The court was of the view that once the probate court makes an order of distribution of the estate, the court becomes functus officio in so far as the property in question is concerned. I have perused the said authority and note that the issue before the court was a dispute between a buyer and a seller of land and the question was whether the buyer should have possession or occupation of the same. In the said case, the administrator of the estate of the deceased had entered into an agreement of sale of land with a third party. The court held that;

“It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. 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.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the *Probate and Administration Rules*. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.”

It is my understanding of the above decision, that the court was of the view that where the dispute is between the administrators of the estate and third parties who are neither survivors of the deceased nor beneficiaries, the best forum would be outside the probate court.

- d. In the present suit, the dispute is between the plaintiff and defendants who are siblings and children of the late Margaret Nduta Kangere. The parties



herein, jointly are the administrators of the estate of their late mother and were issued with a Certificate of Confirmation of a Grant on 15th December 2022 in Mombasa High Court Succession Cause No. E082 OF 2021 (In the Matter of the Estate of Margaret Nduta Kangere (deceased)). The plaintiff claims that on 10 January 2023 her siblings, defendants, through their counsel issued her with a seven-day notice to vacate Plot No. 11 and 376 Section XVIII Mwembe Tayari. She argues that pursuant to the certificate of grant she is entitled to a quarter of her undivided share of the suit property and should not be evicted from the suit property. She maintains that in a meeting held on 30th November 2022, they agreed as the administrators of the estate that she can continue living on the suit property until the same is sold to a third party. The dispute herein has arisen in the process of distribution of the estate of a deceased, following the issuance of a certificate of confirmation of a grant by a probate court. The certificate of confirmation essentially laid down the schedule of properties owned by the estate of the deceased, the beneficiaries to whom they are distributed to and the shares to each beneficiary. The property which is in question is a house without land on Plot No. 11 and 376 Section XVII Mwembe Tayari which is to be shared equally amongst the four beneficiaries i.e. the plaintiff and the 3 defendants.

- e. From the pleadings, it is clear that the dispute is amongst the survivors and persons beneficially interested in the estate of the deceased, subject matter of Mombasa Succession Cause No. E082 of 2022. The parties herein are the personal representatives of the estate of their late mother. As stated in *Re Estate of Alice Mumbua Mutua (deceased) supra*,

“The provisions of The *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependents.”

From the above findings of the court, I am in agreement that the probate court is clothed with the jurisdiction to solve disputes between personal representatives of the deceased and the survivors, beneficiaries and dependents of the deceased.

- f. The suit land still belongs to the estate of the deceased, and the beneficiaries are yet to effect the distribution so as to acquire individualized and proper title to the properties given to each one of them, including over the suit property. The question to be answered in the present suit is still who is entitled to what interest out of the suit property. The plaintiff argues that she is entitled to stay in the suit property, which she claims the defendants want to disinherit her by evicting her from the suit land. The question therefore is not to whom the title belongs to, which would be a question rightfully before this court. It would appear to this court that the plaintiff is aggrieved by the confirmation process, which in this case involves her being evicted from the suit property, to which she claims she is entitled as a beneficiary to the estate of the deceased. Her remedy does not lie before this court, but probably through an appeal against the orders made by the Succession court on distribution or going back to the Succession court for review of the said orders or other desired directions



in accordance with the law. I say so because the court that confirmed the grant became functus officio as far as confirmation of the grant is concerned. This was held In *re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR, that

“I have very closely perused through the provisions of the *Law of Succession Act*, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the *Law of Succession Act*, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the *Law of Succession Act*, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the *Law of Succession Act*. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.”

- g. From the above analysis, this court finds that it is not clothed with the jurisdiction to hear and determine the plaintiff's application and the suit it is predicated upon. The court's jurisdiction on matters land is limited to determining the question of use and occupation of, and title to, land in terms of Article 162 (2) of *the Constitution* and section 13 of the *Environment and Land Court Act* No. 19 of 2011. The invitation by the plaintiff for this court to get involved in the matter where the High Court sitting as a Succession or Family court has already issued an edict within its jurisdiction is not well meant as it is likely to result to conflicting decisions and thereby expose the integrity of the court to ridicule.
- h. That having found merit in the defendants preliminary objection, and in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that costs follow the events unless where the court has directed differently for good cause, the plaintiff will pay the defendants costs.
- i. This court finds the defendant's notice of preliminary objection dated 25th January 2023 merited and orders as follows:
 - a. That the Defendant's preliminary objection on jurisdiction is hereby upheld.
 - b. That the plaintiff's suit commenced through the plaint dated the 16th January 2023 and the notice of motion of even date are hereby struck out with costs to the defendants.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF NOVEMBER 2023.



S. M. KIBUNJA, J.
ELC MOMBASA

