



Kibuthi v Haji (Sued on her own behalf and as administrator of the Estate of Marnier Pierre Andre Roger [Deceased]) (Environment & Land Case E007 of 2022) [2022] KEELC 14593 (KLR) (1 July 2022) (Ruling)

Neutral citation: [2022] KEELC 14593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E007 OF 2022**

**AE DENA, J
JULY 1, 2022**

BETWEEN

MARION KAMENE KIBUTHI PLAINTIFF

AND

FATUMA MOHAMED HAJI DEFENDANT

**SUED ON HER OWN BEHALF AND AS ADMINISTRATOR OF THE ESTATE
OF MARNIER PIERRE ANDRE ROGER [DECEASED]**

RULING

Background

1. The plaintiff Marion Kamene Kibuthi filed this suit *vide* a plaint dated February 23, 2022. She pleads that she is the widow to the deceased, Marnier Pierre Andre Roger having gotten married to him under Kamba customary law in the year 2005. She avers that she cohabited with the deceased in Diani and Ukunda and it is during that time that the deceased purchased the suit properties herein Kwale/ Galu/ Kinondo/591 and 592 (hereinafter the suit property). That they constructed their matrimonial home on one property and a spirulina plant on the other where they started running a family business. It is the Plaintiff's case that they were joined in the business venture by one Peter Musau Kituku. That the Plaintiff travelled upcountry sometime in the year 2009 and on coming back she found the defendant living with the deceased. She states that even though the relationship between her and the deceased was strained, the deceased was still her husband at the time of his death and she is entitled to the suit properties.
2. The plaintiff states that she learnt of the transfer of the suit properties to the defendant after the deceased demise. The defendant had also applied for letters of administration to the estate of the deceased at the Kadhis Court in Kwale and embarked on selling the deceased's property without the Plaintiff's consent. It is averred that the properties were initially registered in the names of the deceased



and one Alex Muthami Ndungi. The Plaintiff pleaded particulars of fraud in the transfer of the suit properties from the deceased to the Defendant. She states that the defendant further demolished the houses on the suit properties and carried away materials to an unknown place. She prays or the following;

- a. A declaration that the Plaintiff owns plot no Kwale/ Galu/Kinondo/591 and plot no Kwale/ Galu Kinondo 592.
 - b. An order for the defendant to transfer plot no Kwale/ Galu Kinondo/591 and plot no Kwale/ Galu Kinondo 592 to the Plaintiff
 - c. Costs and interest
3. Together with the plaint the plaintiff filed notice of motion application dated February 23, 2022 for temporary orders of injunction restraining the defendant from disposing of, transferring, interfering or in any way dealing with the suit property.

The Preliminary Objection

4. The defendant Fatuma Haji has raised a preliminary objection dated March 7, 2022, over the plaintiffs notice of motion and the entire suit. The preliminary objection was canvassed by way of written submissions. The Defendant's submissions were filed on March 18, 2022 and the plaintiff on March 31, 2022.

Defendants submissions

5. In summary Mr. Nyariki counsel for the defendant contends that this court lacks jurisdiction to hear and determine this matter by dint of section 2[3] of the *Law of Succession Act* cap 160 Laws of Kenya, Section 13 of the *Environment and Land Court Act* and section 5 of the *Kadbi's Court Act* Cap 11 Laws of Kenya. The defendant contends that the provisions of section 13 [1] and [2] of the Environment and Land Court do not extend to the plaintiffs claim for a finding that she is the legal wife to the deceased and to declare her the owner of the suit properties claim. That the court with competent jurisdiction is that dealing with probate and administration matters.
5. The defendant averred that at the time of his death the deceased Marnier Andre Pierre Roger practised the Islam religion and was buried in accordance with the requirements of the Islam religion. Referring to Section 2[3] of the *Succession Act* whose import is to oust the jurisdiction of this court where the deceased is Muslim, counsel urged that the deceased estate is governed by Islamic law. Counsel relied on Marsabit HC Misc Succ Cause no E002/2021 *Denge Wario Guracha versus Habiba Wario Guracha & 2 others*. The Defendant states that the present suit is a succession cause and the same ought to be struck out with costs to the defendant.

Plaintiffs submissions

6. The plaintiffs' submissions were filed before this court on March 31, 2022. Ms. Umara submitted that whereas it is true that the issues raised in the instant suit are partly probate, the majority of the claim is on land ownership and the procedure used to acquire the deceased's land by the Defendant. That for those reasons this court has to preserve the property to avoid the same being alienated.
7. With regard to the conversion of the deceased to Islam counsel points that there was no evidence placed before this court in support of this allegation. Citing Article 170[5] of *the Constitution* 2010, it is submitted that the plaintiff not being a Muslim cannot be subjected to Islamic law in resolution of this dispute.



8. It is further submitted that in order to properly deal with the preliminary objection, the court has to probe into issues of facts such as the religion professed by the deceased at the time of his death this the objection did not meet the test laid out in *Mukisa Biscuit Manufacturing Ltd vs. West End Distributors Ltd* Civil Appeal No. 9 of 1969 EA. Counsel also emphasized that the notion that the court is to proceed and determine a preliminary objection without interrogating certain facts like how the defendant got registered as the owner of this suit parcel is unfair. To buttress this point, the court was referred to the case of *Samuel Waweru v Geoffrey Muboro Mwangi* Nakuru HCCC No 489/2013 where the court held that a preliminary objection denies a party the chance to respond to issues raised by way of facts.
9. The plaintiff further urges this court to preserve the suit property first before other issues are dealt with as the plaintiff was in the process of filing an application to stop the defendant from intermeddling with the deceased's estate. That Article 162[2] of *the Constitution* creates the ELC Court which has jurisdiction to handle unprocedural acquisition of land and the preliminary objection should not curtail such powers. This court is urged to dismiss the preliminary objection and to allow the case proceed on merit.

Analysis And Determination

10. From the foregoing the main issue for determination is whether on the grounds set out in the notice of preliminary objection this court has jurisdiction to hear this case.
11. The preliminary objection questions this court's jurisdiction to handle the instant suit. It is well settled that jurisdiction is the base of every matter brought before court, without it the court has no business proceeding with the matter see *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1
12. The defendant contends that the provisions of section 13 [1] and [2] of the *Environment and Land Court Act* do not extend to the plaintiffs claim for a finding that she is the legal wife to the deceased and to declare her the owner of the suit properties claim. That the court with competent jurisdiction is that dealing with probate and administration matters. The law invoked is section 2[3] of the *Law of Succession Act* cap 160 Laws of Kenya, Section 13 of the *Environment and Land Court Act* and section 5 of the *Kadhi's Court Act* Cap 11 Laws of Kenya. I will therefore analyse these grounds and by a process of elimination determine which one will stand the test.
13. However, before I go into the above analysis it has been urged by the plaintiff that the preliminary objection does not meet the threshold as set in the case of *Mukisa Biscuit Manufacturing Co. Ltd - vs- West End Distributors Ltd* (1969) EA 696 for reasons that the court has to delve into the facts and evidence to determine the issues of the faith professed by the deceased as well as how the defendant became owner of the suit properties herein. It is now trite following the holding in the *Mukisa Biscuit Manufacturing Co. Ltd* case that:

“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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”



In *John Musakali vs. Speaker County of Bungoma & 4 others* (2015) eKLR Mwita J elaborated the legal position thus:-

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

14. For the court and any court to determine which faith the deceased professed I respectfully agree with the plaintiff that the court shall have to ascertain the facts which are highly contested. This can only be by the evidence led at the full hearing on merits. This also applies to the issue of ownership where fraud is being alleged. I agree to this extend the preliminary objection is not a pure point of law. I will then proceed to considering the other grounds; -

Section 13 of the *Environment and Land Court Act*

15. Article 162 (2) (b) of *the Constitution* provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts. The jurisdiction of the said courts is found in section 13 of the *Environment and Land Court Act* of 2012 which provides that the court shall hear disputes relating to:

- a. environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. compulsory acquisition of land;
- c. land administration and management;
- d. 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.

16. The plaintiff seeks for orders that she be declared the owner of the suit properties as well as order for the defendant to transfer the same to the Plaintiff. She also questions the transfer of the properties into the defendant’s name. From the pleadings ownership of the suit property stands out to be the predominant reason why the parties are before this court which is within the provisions of section 13 of the *Environment and Land Court Act*. Indeed, from the facts placed before this court and pleadings it is clear there are issues of probate raised by both parties on succession of the deceased estate. It is not unique that this court finds itself handling a dispute where there is a contest on whether the matters before it are within its jurisdiction or that of the probate and administration or as the defendants state are succession matters. In the case of *Salome Wambui Njau (suing as administratrix of the Estate of Peter Kiguru Njuguna (Deceased) -vs- Caroline Wangui Kiguru*, ELC (2013) eKLR the court 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.”



17. This court is also persuaded by the dictum of Gikonyo J *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR where it was stated;

“...I am aware that this Court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does. It is the court which is constitutionally mandated to determine such matters.” ...thus, where issues on ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed.”

18. In *Pricilla Ndubi and Zipporah Mutiga -vs- Gerishon Gatobu*, Meru Succession Cause No. 720 of 2013 it was held; -

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on ownership of the property in the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why Rule 41(3) of the *Probate and Administration Rules* was enacted so that claims which are *prima facie* valid should be determined before confirmation.”

19. Further from my understanding, the plaintiff in addition to the reliefs sought in the plaint seeks to preserve the suit property under the provisions of Order 40 of the *Civil Procedure Rules 2010*. This is pending the resolution of matters probate which counsel for the plaintiff states that they are in the process of filing to stop the defendant from intermeddling. The Environment and Land Court has in numerous cases issued injunctions restraining parties intermeddling with suit property which is subject of a probate and administration dispute. See *Clara Jerono vs Emmanuel Kipleking Mutai & 2 Others* (2017) eKLR and *Stephen Mwibia Maragara vs Mwangi Kamurara (suing as the legal representative of the estate of Mwangi Kamurara Matbingi)* (2019) eKLR.

20. Clearly from all the foregoing decisions this court is best placed to handle the issues of ownership before the property can be distributed by the appropriate court. Further in so far as concerns the preservation of land, the mandate to issue orders in preservation of the same has been bestowed upon this court by *the Constitution*.

Section 2[3] of the *Law of Succession Act* cap 160 Laws of Kenya,

Section 2 of the *Law of Succession Act* provides for the application of the Act

- (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.
- (2) 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.
- (3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.



- (4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the January 1, 1991.

It is defence Counsels contention that the effect of the above provisions is to oust the jurisdiction of this court since the estate is in respect of a deceased who is muslim.

Section 5 of the *Kadhi's Court Act* Cap 11 Laws of Kenya.

21. It is urged that this dispute if at all should be before the Kadhis court. Article 169 of *the Constitution*, creates the Kadhi's court as a subordinate court in Kenya. Article 170 (5), further confers jurisdiction on the Kadhi's court in the following terms:

The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts."

Section 5 of the *Kadhi's Court Act, cap 11 Laws of Kenya*, reiterates the jurisdiction of the Kadhi's Court as follows:

"A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it."

22. The law is clear on which parties shall be subjected to proceedings before the Kadhis court, it is parties who profess Islamic faith and submit to the jurisdiction of the Kadhi's Court. In the instant suit the plaintiff professes Christianity while the defendant is of Muslim faith. The plaintiff cannot be subjected to subscribe to a religion that she is not affiliated to or comfortable in professing. In *Saifudean Mohamedali Noorbhai v. Shehnaz Abdebusein Adamji* the Court of appeal stated; -

"Kenyan courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi's court."

23. The upshot of the foregoing is that the preliminary objection is dismissed. Costs shall follow the event.

DELIVERED AND DATED AT KWALE THIS 1ST DAY OF JULY 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Mutheka holding brief for Mutugi for the Plaintiffs

Ms Nyariki for Defendants

Mr. Denis Mwakina- Court Assistant.

