



REPUBLIC OF KENYA



Mutua & another v Mutua & 3 others; Mutava (Proposed Interested Party) (Environment & Land Case E02 of 2021) [2022] KEELC 2779 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E02 OF 2021**

CG MBOGO, J

JULY 6, 2022

BETWEEN

MOSES WAMBUA MUTUA 1ST PLAINTIFF

**ROBERT NDOTHYA NDAKA (SUING ON HIS BEHALF AS A PURCHASER
AND ON BEHALF OF OTHER PURCHASERS WHO BOUGHT LAND FROM
JAMES KASYULA MUTUA (DECEASED)) 2ND PLAINTIFF**

AND

JOHN KIOKO MUTUA 1ST DEFENDANT

SERAH NZEMBI NZIOKA 2ND DEFENDANT

REGISTRAR OF COMPANIES 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

AND

ONESMUS MUTUKU MUTAVA PROPOSED INTERESTED PARTY

RULING

1. According to the plaint, the plaintiffs and defendants are siblings and their mother is deceased. It is averred that the defendants used their status as administrators to fraudulently change the directorship of Uathimo Farm Ltd which is the registered proprietor of LR 9731/2 Uathimo Farm (suit property). That after changing the directorship, they proceeded to re-sell plots excised from the suit property, which plots had already been sold during the life of James Kasyula Mutua (deceased). The plaintiffs seek the following prayers;



- a) That the defendants be permanently enjoined from re-selling, charging, re-parcelling, using as security LR 9731/2 and dealing with LR 9731/2 in any manner that is prejudicial to buyers of the land who bought plots from the late James Kasyula Mutua.
 - b) That the Court do cancel and or annul the change of directors of Uathimo Farm Ltd engineered by the defendants in the months of November and December 2020.
 - c) That the Court do issue a permanent injunction against the defendants dealing in any manner with LR 9731/2 that will occasion fraud to buyers of the plots who bought from James Kasyula Mutua.
2. The plaint was accompanied by an application dated 21st January, 2021 in which the plaintiffs seek interim reliefs of injunction.
 3. The 1st and 2nd defendants opposed the application and suit through their notice of preliminary objection (P.O) dated 04th February, 2021. It is grounded as follows;
 - a) This honorable Court lacks the jurisdiction to hear and determine the suit herein as the issues raised and relief sought, both in the Application and suit do not fall under the jurisdiction conferred to this honorable Court pursuant to Article 162(2) (b) & 3 of *the Constitution* as read together with section 13 of the *Environment and Land Court Act*, 2011.
 - b) The plaintiffs have no registrable interest in the property forming the subject of the suit i.e LR 9731/2 hence they lack the requisite locus standi to not only bring the interlocutory application but the suit in general hence the suit is fatally defective and ought to be struck out.
 - c) That whereas the plaintiffs claim is premised on an interest on the suit property pursuant to purported sale agreements entered between the 2nd plaintiff and other “purchasers” and the registered proprietor of the suit property herein, they have neither produced enforceable sale agreements under the mandatory provisions of section 3(3) of the *Law of Contract Act* or a valid contract as required under section 38(1) & (2) of the *Land Act* 2012.
 - d) The suit herein runs afoul of the doctrine of res sub-judice as the issues being raised herein have been previously raised by the 1st plaintiff in prior suits and are the subject of two (2) applications filed by the 1st plaintiff which are pending hearing and determination before Courts of competent jurisdiction namely;
 - i. Nairobi Succession Cause No. 704 of 2019: In the matter of James Kasyula Mutua (deceased)-Moses Wambua Mutua v John Kioko Mutua (subject of summons dated 20/22/2020).
 - ii. Machakos Succession Cause No. 575 of 2015: In the matter of Ruth Kalekye Mutua alias Ruth James Mutua (deceased)-Moses Wambua Mutua v John Kioko Mutua & Serah Nzembi Nzyoka (subject of summons dated 11/12/2020).
 - e) The suit and interlocutory application are a collateral attack on the proceedings in Nairobi Succession Cause No. 704 of 2019 and Machakos Succession Cause No. 575 of 2015 which are pending before Courts of equal status as this honorable Court and hence ought to be struck out to obviate the possibility of contradicting rulings and judgments by the respective Courts seized of the three matters and thereby protect the dignity of the Courts.



- f) The instant proceedings are tantamount to playing lottery with the judicial process and are therefore frivolous, vexatious and an egregious abuse of the process of this honorable Court and ought to be struck out with costs.
4. The plaintiffs opposed the Preliminary Objection (P.O) through a replying affidavit sworn by Moses Wambua Mutua on 25th February, 2021. In response to the issue of jurisdiction, he has referred this Court to an affidavit sworn by the 1st defendant in Machakos Succession Cause No. 575 of 2015. In the said affidavit at paragraph 19, the 1st defendant deposed that sometimes in 2005, Mr and Mrs Mutua began selling the sub-divided portion through a registered surveyor. Accordingly, Mr. Wambua deposed that questions pertaining to selling and purchasing of land are dealt with by the Environment and Land Court.
 5. He deposed that the list of purchasers has already been furnished to Court and individual sale agreement for Joab Kamau has been attached as a sample. That further documents evidencing sale of land shall be placed before Court during hearing of the main suit.
 6. It is also his deposition that the only matters before Family Court in Nairobi and Machakos are questions of administration of the estates whereby he has applied to be enjoined as an administrator in order to acquire locus. That the said locus will enable him to handle the assets of the 2 estates where the 1st and 2nd defendants are committing fraud in the name of executing administrative trustee duties.
 7. He deposed that the only reason for filing the current suit is to ensure that initial purchasers of plots in Uathimo Farm Ltd are heard. That the P.O is intended to misrepresent the essence of the suit and gag the purchasers who cannot take their grievances to the Family Court.
 8. Directions were given that the Preliminary Objection be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
 9. The 1st and 2nd defendants/applicants submitted that they submit that the following facts are uncontested/incontestable;
 - a) Uathimo Farm Limited, duly incorporated as a limited liability company (the company), is the registered proprietor of the suit property.
 - b) James Kasyula Mutua (deceased) and Ruth Kelekye Mutua (deceased), jointly referred to as 'Mr & Mrs Mutua' were the only named shareholders and listed directors of the company from its incorporation on 14th May, 1982 until their demise on 18th May, 2015 and 04th October, 2018 respectively.
 - c) The 1st plaintiff is a brother to both the 1st and 2nd defendants hence they are beneficiaries of the respective estates of Mr and Mrs Mutua while the 2nd plaintiff is an accountant previously engaged by the company.
 - d) The 1st and 2nd defendants are Administrators of the Estates of Mr and Mrs Mutua pursuant to respective certificates of confirmation of grant issued on 29th September, 2017 in Machakos Succession Cause No. 575 of 2015 (Estate of Ruth Kalekye Mutua alias Ruth James Mutua) and another one issued on 05th February, 2020 in Nairobi Succession Cause No. 704 of 2019 (Estate of James Kasyula Mutua). The succession causes are jointly referred to hereinafter as 'the succession proceedings'.
 - e) The respective shares of Mr and Mrs Mutua formed part of their Estates and were indeed the subject of the succession proceedings where the shares were allotted for distribution in equal



shares to the beneficiaries thereunder including the 1st plaintiff and the 1st and 2nd defendants. In an orchestrated attempt to scuttle the process of administration and eventual distribution of the assets forming the subject of the succession proceedings and in particular the interests flowing to the beneficiaries by virtue of shares in the company, the 1st plaintiff acting in concert with the 2nd plaintiff herein have filed various applications and suits seeking similar reliefs with the common thread being a manifestation of a desperate attempt to take over the operations of the company.

- f) In particular and prior to the institution of this suit, the 1st plaintiff filed an application, being summons for revocation of grant, in the succession proceedings as follows; In Nairobi Succession Cause No. 704 of 2019, the 1st plaintiff filed summons for revocation of grant together with an application seeking an order of caveat and or preservative orders over the suit property. The Court declined to issue the said relief via the order issued by Hon. Stella Mutua on 10th December, 2020. This prompted the 1st plaintiff to move to the Machakos High Court under certificate of urgency, in Succession Cause No. 575 of 2015, where he sought for, inter alia, an injunctive relief against the alienation of or any form of dealings in the suit property and for the reversal or cancellation of the change of directors in the company both couched in the same terms as prayers 2, 3 & 4 of the application herein. By an order issued by Hon. G.V Odunga on 15th December, 2021, the Court granted the injunctive relief which continues to remain in force.
10. They identified the following as the issues for determination;
- a) Whether the Court should admit this P.O.
 - b) Whether this Court has the jurisdiction to hear and determine this suit.
 - c) Whether the plaintiffs have the locus standi to institute and sustain both the interlocutory application and the suit.
 - d) Whether the interlocutory application and the suit herein are contrary to the principle of sub-judice.
11. On issue (a), they submitted that the threshold of a P.O is no longer restricted to the historical approach of pure points of law. They cited the decision of the Supreme Court of Kenya in *Kalpana H. Rawal & 2 others v Judicial Service Commission & 2 others* [2016] eKLR where it was held that;
- “I have already stated that Mr. Omtatah’s Preliminary Objection is not anchored on jurisdiction although it is labeled as such. Does that disqualify it as a Preliminary Objection? Mr. Pheroze says yes. It is important to note that although Preliminary Objections are, more often than not, based on lack of jurisdiction; it is not the only ground. It is for that reason that Law. JA in *Mukisa Biscuit Co.* gave jurisdiction and limitation of time only as examples of the grounds of raising a Preliminary Objection. The list should not therefore be regarded as closed. Depending on the facts and circumstances of a particular case, there may be other grounds for raising a Preliminary Objection. The instant case is a good example. It is a case that has arisen in the post 2010 Constitutional era and the unique and exceptional facts, which all parties have attested to, will require this Court to interpret *Mukisa Biscuit Co.* in light of the provisions of *the constitution*.”
12. They submitted that in addition to the Preliminary Objection raising the issue of jurisdiction; it has also raised substantial questions of law. They contend that the facts which they have relied on in support of the Preliminary Objection need not be investigated as they are not disputed.



13. On issue (b), they relied on the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others (2012] eKLR for the submission that a Court’s jurisdiction flows from either the Constitution or legislation or both. They submitted that a cursory glance at the plaint and application reveals that the issues raised do not fall within the jurisdiction of this Court as contained in Section 13 of the Environment and Land Court Act, No. 19 of 2011.
14. They cited the case of Co-operative Bank of Kenya v Patrick Kang’ethe Njuguna & 5 others [2017] eKLR for the submission that the Court of Appeal was emphatic that the exclusive jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, section 13 of the ELC Act and section 150 of the Land Act.
15. They submitted that the plaintiffs’ claim is premised on the alleged sale of plots comprising the suit property which is owned by a company that is not a party to these proceedings though couched as a claim for the irregular apportionment of the company shares by the administrators to the prejudice of all beneficiaries. They contend that these are issues which fall beyond the jurisdictional limits of this Court. They cited the case of PLR v JNR & another [2013] eKLR where the Court held that;
- “...in order to determine the suit, this Court would be required to determine questions of validity of the wills and whether the plaintiff is a beneficiary of the estate and therefore entitled to his estate. The property and issues to be determined in the suit fall under the realm of the law of succession Act. The Environment and Land Court is a special Court established under Article 162(2)(b) and section 4(1) of the Environment and Land Court Act No. 9 of 2011 and it is meant to deal with matters concerning the environment and the use and occupation of and title to land. However, matters of ownership and entitlement to a deceased’s person’s property, including land are governed by the law of Succession Act and are to be determined by the Family Court. Thus by virtue of section 2(1) of the said Act, this Court lacks jurisdiction to determine the same.”
16. On issue (c), they submitted that for the plaintiffs to have the right to institute or sustain a claim over the suit property, they should demonstrate having a registrable interest capable of being protected. They relied, inter alia, on the case of Law Society of Kenya v Commissioner of Lands & 2 others [2001] eKLR where the Court held that;
- “Locus Standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a Court of Law.”
17. They submitted that the plaintiffs’ respective shares are part of the estates of Mr and Mrs Mutua to be distributed to the beneficiaries in the succession proceedings. They contend that prior to the distribution of shares, the beneficiaries or any one of them can only institute a claim arising from the distribution of shares in the company through the duly appointed personal representative. They cited the case of Isaya Masira Momanyi v Daniel Omwoyo & another [2017] eKLR where the Court held that;
- “It is trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person...A party can thereof not commence a suit on behalf of the estate of a deceased without letters of administration and thereafter obtain the letters of administration subsequently. Where a suit is commenced without letters of administration



in respect of a deceased's estate, such a suit is null and void ab initio and cannot be cured by a party subsequently obtaining the letters of administration.”

18. Relying on section 3(3) of the [Law of Contract Act](#) and section 38 of the [Land Act](#), they submitted that the 2nd plaintiff purports to be suing on behalf of other purchasers who bought land from James Kasyula Mutua yet he has not produced any sale agreement between him or the other purchasers and the duly registered proprietor. They relied on the case of Daudi Ledama Morintat v Mary Christine Kiarie & 2 others [2017] eKLR where the Court held that;

“The said agreement having not been in writing contravened section 3(3) of the [Law of Contract Act](#) and cannot be relied upon to sustain the present suit by the plaintiff. The contract is unenforceable as it related to a disposition of an interest in land and such a contract has to have been in writing and signed by the parties to it and witnessed as required under section 3(3) of the [Law of Contract Act](#)...the plaintiffs suit against the defendants is not maintainable...possession by the plaintiff of the suit property was pursuant to the impugned agreement for sale and cannot give the plaintiff right of ownership and neither can it be relied upon to found a cause of action.”

19. On issue (d), they submitted that the suit herein raises the same issues and seeks similar interim reliefs as those in the succession proceedings filed in Nairobi and Machakos. They cited, inter alia, the case of Governors Balloon Safaris Ltd v Attorney General & 2 others [2014] eKLR where the Court held that;

“It does not require much intelligence to conclude that what in effect the applicant intends to achieve by these proceedings is to either stay or at worst to reverse the decision made by this Court without either an appeal or a review but by a collateral attack of the said proceedings in these proceedings. It has been held time and again that it is an abuse of the Court process to institute several proceedings in order to challenge the same action and the Court has inherent jurisdiction to prevent such abuse.”

20. In conclusion, they submitted that since the plaintiffs were aware of the previous proceedings they should pay the full costs of this suit.
21. The respondents submitted that their reason for coming to Court has been admitted on oath by the defendants. That if the Court declines to hear this suit, the 2nd plaintiff and all other initial purchasers of plots in Uathimo Farm will be locked from ventilating their rights.
22. They submitted that this Court ought to find that it has jurisdiction and Constitutional duty to hear the suit because no citizen should be left without opportunity to ventilate genuine concerns before Court.
23. It is also their submission that they are entitled to costs because the objection was brought to Court as a ruse and for no other purpose than to gag the initial purchasers.
24. Having looked at the Preliminary Objection, response and rival submissions, it is my considered view that the only issue for determination is whether the PO has merit.
25. It is clear that Uathimo Farm Ltd is the registered proprietor of the suit property and that the late Mr and Mrs Mutua were the only shareholders of the company. It is also not in dispute that succession proceedings have been undertaken with respect to both estates. According to the 1st and 2nd defendants, the respective shares of Mr and Mrs Mutua in the company were distributed in their respective causes and the suit by the plaintiffs is an attempt to scuttle the administrative process.



26. The 1st and 2nd defendants have questioned the plaintiffs' interest in the suit property and averred that purported sale agreements have not been exhibited. Be that as it may, this Court cannot ignore the depositions of the 1st defendant in his affidavit sworn on 09th February, 2021 and filed in Machakos Succession Cause No. 575 of 2015. The relevant paragraphs state as follows;

“ 19. That sometime in 2005, the late Directors Ruth Mutua and James Mutua began selling the sub-divided portion through a registered surveyor Josphat Mboko who also secured approval of the sub-division of the 605.7282 hectares and all money from the sale of some subdivided portions were paid into the Uathimo Farm Limited's bank account at Bank of India.

20. That the Uathimo Farm Limited had paid some money for survey, beacons, processing of titles for the subdivisions and for security due to frequent incursions by land grabbers, the entire process was not complete by the time the appointed registered surveyor Josphat Mboko passed away in 2008.

21. That following the death of the registered surveyor, Josphat Mboko, who also had the accounts for money paid from the land sales, the accounting for sales on the sub divisions was handed over to Uathimo Farm Limited's accountant called Robert Ndaka Ndothya who was supposed to keep an account of the said money received which was supposed to be paid directly in Uathimo Farm Limited's account at Bank of India.”

27. The above paragraphs are a testament that indeed, some portions of the suit property were sold by Mr and Mrs Mutua during their lifetime. The consequence of that is that there is a question of ownership of some portions of the suit property and it goes without saying that questions of ownership of land fall squarely within the jurisdiction of this Court. It is paramount that the issue is determined with finality by this Court before administration of the estates is completed. I agree with the plaintiffs that locking them out of this Court will be tantamount to gagging them because the family Court cannot deal with issues of ownership of land. Accordingly, it is my considered view that the challenge on jurisdiction is unmerited.

28. With regard to locus, there is a difference between suing the estate of a deceased person and suing on behalf of the estate of a deceased person. The necessity of personal representatives only become a requirement in the latter scenario. In our case, the plaintiffs are suing on their own behalf hence do not need any personal representatives.

29. As for the issue of sub-judice, this Court does not have the benefit of the proceedings before the family Courts in Nairobi and Machakos. I am however confident that the question of ownership of land cannot be before the two Courts because they do not have jurisdiction to deal with it. The question is however alive in this Court and that fact alone negates the issue of sub-judice.

30. The upshot is that the Preliminary Objection has no merit and is hereby dismissed with costs.

SIGNED AND DELIVERED AT NAROK VIA EMAIL ON THIS 6TH DAY OF JULY, 2022

C. MBOGO

JUDGE

6/7/2022

In the presence of:-



