



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. E110 OF 2021

MARY WANJIKU KIARIE 1ST PLAINTIFF

BENSON KOMU KIARIE 2ND PLAINTIFF

(Both suing on behalf of the Estate of John Kiarie Komu (Deceased))

VERSUS

CHRISTOPHER NJOROGE KOMU 1ST DEFENDANT

LAND REGISTRAR, NAIROBI 2ND DEFENDANT

THE ATTORNEY GENERAL..... 3RD DEFENDANT

RULING

1. Vide a Notice of Motion dated 22nd of March 2021, the Plaintiffs/ Applicants sought the following orders :-

a) That the 1st Defendant/Respondent by himself, agents or employees be restrained from entering, occupying, trespassing, plundering, wasting, cutting down trees, vegetation, alienating, disposing, allocating, advertising or in any other way from intermeddling with that parcel of land known as Dagoretti/Kangemi/1386, 1395, 1392 and 1393 pending the hearing and determination of this suit.

2. The Application is supported by the affidavit of Mary Wanjiku Kiarie, the 1st Plaintiff herein, sworn on her behalf and on behalf of the 2nd Plaintiff. The 1st Plaintiff deponed that she is a daughter in law to the deceased, Komu Kiarie, and the widow of the late John Kiarie Komu. She deponed that the late Komu Kiarie passed away on 24th May 1980 and left behind a polygamous family consisting of:

a. First wife Wanjiru, whose children are: Joseph Muchai, Isaac Kiarie, Christopher Njoroje and Komu Kuria.

b. Second wife Njeri, whose children are: Paul Kiarie and Komu Kiarie among others.

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c. Third wife Wanjira, whose children are John Kiarie and Wilson Muchai.

3. The 1st Plaintiff deponed that the deceased, Komu Kiarie, was the proprietor of the parcel of land known as DAGORETTI/KANGEMI/ PLOT NO. 175; that a succession petition was filed for the estate of her father-in-law in Nairobi Succession Cause No. 1418 of 1992; that the 1st Defendant, Christopher Njoroje, a son of the eldest wife, Wanjiru, was appointed as an administrator of the Estate and that after deliberations, it was agreed that the property of the deceased would be shared equally among the three widows who would consequently divide their share among the children.

4. According to the Plaintiffs, the mode of distribution of the Estate of the deceased was agreed upon, summons for confirmation of grant were pursued and a certificate of confirmation was issued wherein the portions of land were directly devolved to the various appointed members of each family; that her late husband –John Komu Kiarie, was given his individual share and that he was entrusted with his brother's share, Wilson Muchai, who had disappeared and whose whereabouts remain unknown. According to the Plaintiffs, Muchai's share of 1.5 acres (the suit property) was entrusted to John Komu Kiarie as they were both beneficiaries from the house of Wanjira.

5. The 1st Plaintiff deponed that contrary to the certificate of confirmation of grant, the 1st Defendant abused his position as an administrator and transferred to himself the portion of 1.5 acres which was to be held in trust by the house of Wanjira, represented by the late John Kiarie Komu and that the 1st Defendant has intermeddled in the suit property, by cutting down trees and vegetation and caused waste on the same.
6. It was deponed that the 1st Defendant further fraudulently sub-divided the disputed 1.5 acres into Dagoretti/Kangemi/1386, 1395, 1392 & 1393 and that the 1st Defendant intends to dispose of the sub-divided properties as evidenced from an online advertisement dated 11th May 2020 in which one of the portions is up for sale.
7. The 1st Plaintiff deponed that the afore stated advert prompted her together with her son, the 2nd Plaintiff, to petition the court for an *ad litem* grant with respect to her husband's estate to secure it from wastage and other unlawful acts by strangers or fraudulent misappropriation by the 1st Defendant/Respondent. The Plaintiffs urged the court to restrain the 1st Defendant from intermeddling with the suit property.
8. In response to the Application, the 1st Defendant/ Respondent filed a Replying Affidavit dated 15th April 2021 in which he deponed that the 1st Plaintiff is not a beneficiary to the estate of the late Kome Kiarie; that it has not been determined whether she is a beneficiary of the Estate of John Kiarie as the same has not been determined through the process set out in the Law of Succession Act and that when Wilson Muchai disappeared, the family agreed to place his shares in the name of John Kiare Komu in trust and that if Mr. Muchai was not traced, his share was to revert to the whole family.
9. The 1st Defendant deponed that the registration of the 1.5 acres in his favor is lawful as the title must first be held by him as the administrator of the Estate of Kiare Komu after which he would transfer the same to the beneficiaries and that as Muchai has disappeared and John Kiarie deceased, the title has remained with him.
10. It was deponed by the 1st Defendant that the 1.5 acres is intact and has not been subdivided, as evidenced in the search certificates furnished by the Plaintiffs; that the annexed copy of the subdivision of the mother title shows that parcel numbers 1392 and 1386 were intact and that the advertisement in issue did not include a title number or any indication that it was a part of the 1.5 acres.
11. The 1st Defendant contended that the interim grant of 3rd February 2021 gave the Plaintiffs/ Applicants a limited mandate which did not extend to filing this suit; that the 1.5 acres did not belong to the applicants and that the applicants had not demonstrated that they held a right superior to the other members of the estate of the late Komu Kiarie. It was deponed that this application is an abuse of the court process because it raises issues that should have been canvassed in the succession cause.
12. The 2nd Plaintiff, Benson Kiarie Komu, filed a supplementary affidavit dated 22nd June 2021 in which he deponed that he is a beneficiary of the estate of the late Komu Kiarie on account of being the son of the late John Kiarie Komu and that they were granted an *ad litem* grant to represent the interests of the estate of the late John Kiarie in the matter of the estate of the late Komu Kiarie in Nairobi Succession Cause No. 1418 of 1992, where the court confirmed the grant.
13. The 2nd Plaintiff deponed that no rectification was instituted prior to the 1st Defendant's unlawfully allocating and registering the 1.5 acres in his favor and obtaining title deeds in his name; that the 1st Defendant's actions in allocating himself the 1.5 acres was an abuse of his position as an administrator and that the 1st Defendant has failed to complete the devolution of the estate of Komu Kiarie, twenty (28) years later, making it imperative to safeguard the Plaintiffs' interests in the trusteeship of the 1.5 acres from alienation and disposal, pending the legal determination of the status of Mr. Muchai.
14. The parties canvassed their arguments by way of written submissions. The Plaintiffs' counsel submitted that an injunction should be issued against the 1st Defendant because he subdivided and transferred the suit property without the legal mandate and without the consent of the other beneficiaries.
15. It was submitted that the 1st Defendant had failed to ascertain the whereabouts of Muchai in more than 25 years; that the confirmation of grant dated 25th March 1999 stated that the 1.5 acres was to be held in trust by John Kiarie, which has never been altered and that the certificate of confirmation did not give the right of ownership of the suit property to the 1st Defendant.
16. It was submitted that the estate of John Kiarie did not consent to the withdrawal of Muchai's share from their custody, which process was fraudulent and unlawful, as it was done without the court's consent and that the 1.5-acre suit property was subdivided into Dagoretti/Kangemi/1386, 1395, 1392 and 1393, which are currently registered in the 1st Defendant's name without provision of trusteeship in favor of Mr. Muchai.
17. The 1st Defendant's advocate argued that though the injunction orders sought are for Dagoretti/Kangemi/1386, 1395, 1392 and 1393, the Plaintiffs have not presented evidence of the existence of parcel numbers Dagoretti/Kangemi/1395 and 1393; that the two parcels do not exist and that the certificates of search presented are for Dagoretti/Kangemi/1392 and 1386, which are registered in the 1st Defendant's name as administrator of the estate of Komu Kiarie (deceased) and are therefore intact.
18. It was submitted that this matter falls within the jurisdiction of the Family Division of the High Court and not the Lands Court; that **Section 2(1)** and the preamble to the **Law of Succession Act** provide that all matters relating to the administration of the estate of deceased persons are to be undertaken within the Succession Act and that the land in this dispute is part of the estate of the late Komu Kiarie.
19. It was submitted by the 1st Defendant's advocate that the Plaintiffs do not have locus in purporting to lay claim to the 1.5 acres as they are not the administrators of Muchai's estate, who has not been proved dead; that the Plaintiffs' have no legal capacity to bring this suit and

that the Plaintiffs' capacity is limited to representing the estate of the late John Kiarie in the distribution of the estate of Komu Kiarie in Succession Cause. No. 1418 of 1992.

Analysis and Determination

20. The issues for determination in this application are as follows:

a. *Whether this court has jurisdiction to hear and determine this suit.*

b. *Whether the Plaintiffs have locus standi to bring this suit.*

c. *Whether orders for temporary injunction should issue against the 1st Defendant pending the hearing and determination of this suit.*

21. The 1st Defendant has challenged the jurisdiction of this court to hear and determine this dispute in his Replying Affidavit and written submissions. According to the 1st Defendant, the subject matter herein delves into matters of succession law, which should be adjudicated by the Family division of the High Court and not the Environment and Land Court.

22. In their Complaint, the Plaintiffs have averred that they are the administrators ad litem of the Estate of the late John Kiarie Komu; that the suit relates to the Estate of the late Kiarie Komu who died on 24th May, 1980 and that the said Kiarie was survived by three widows, namely Wanjiru, Njeri and Wanjira.

23. It is not in dispute that Komu Kiarie, was the proprietor of the parcel of land known as DAGORETTI/KANGEMI/PLOT NO. 175 and that a succession petition was filed for the estate of the said Komu Kiarie in Nairobi Succession Cause No. 1418 of 1992. The 1st Defendant, Christopher Njoroge, a son of the eldest wife of the late Komu, was appointed as an administrator of the Estate.

24. It is the Plaintiffs' case that the mode of distribution of the Estate of the deceased was agreed upon, summons for confirmation of grant were pursued and a certificate of confirmation was issued wherein the portions of land were directly devolved to the various appointed members of each family.

25. The 1st Plaintiff deposed that John Komu Kiarie (also deceased), was given his individual share and that the said John was entrusted with his brother's share, Wilson Muchai, who had disappeared and whose whereabouts remain unknown. According to the Plaintiffs, Muchai's share of 1.5 acres (the suit property) was entrusted to John Komu Kiarie as they were both beneficiaries from the house of Wanjira.

26. The 1st Defendant's position is that the share of Wilson Muchai, whose whereabouts is unknown, is still intact, and that the said share was registered in his name as the administrator of the Estate of Komu. It is the 1st Defendant's case that to the extent that the said Wilson Muchai has not been traced, the suit property remains the property of the Estate of Komu Kiarie, and that the same ought to be distributed to all the beneficiaries.

27. It is not disputed that the issue of the suit property herein arose after the court in Nairobi Succession Cause No. 1418 of 1992 issued a certificate of confirmation in respect of the Estate of the late Komu Kiarie. The 1st Defendant was in that suit appointed an administrator of the said estate and the suit property was part of the assets of the estate.

28. The suit property herein was allocated by the court to Wilson Muchai, who has been missing for several years. According to the certificate of confirmation in Nairobi Succession Cause number 1418 of 1992, John Kiarie was to hold 1.5 acres in trust for his brother Wilson Muchai. Although the Plaintiffs' case is that the suit property should be inherited by John Komu Kiarie (also deceased), the 1st Defendant's position is that the said land is part of the Estate of the late Komu Kiarie and should be inherited by all the beneficiaries of the late Komu Kiarie. According to the 1st Defendant, the suit property is currently registered in his favour as the administrator of Komu Kiarie.

29. On the issue of the jurisdiction of this court, the Supreme Court of Kenya in **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 others [2012] eKLR** remarked 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 any other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon by law.”

30. The jurisdiction of the Environment and Land Court is provided for under **Article 162 (2) of the Constitution** where it is provided that

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— environment and the use and occupation of, and title to, land”.

31. The jurisdiction of the court is further stipulated under **Section 13 of the Environment and Land Court Act** where in **subsection (1) and (2)**, it provides that:

“(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, the court will have powers to hear and determine the following 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.”

32. The Law of Succession Act at Section 47 provides for the jurisdiction of the 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.”

33. The jurisdiction of the High Court includes the power under Section 76 of the Law of Succession Act to revoke or annul a grant. The said section 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-

- a. that the proceedings to obtain the grant were defective in substance;*
- b. 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;*
- c. 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;*
- d. 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.”*

34. Section 2(1) and the preamble to the Law of Succession Act provide that the Act shall constitute the laws 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 the Act and to the administration of estates of those persons.

35. The jurisdiction of the Environment and Land Court vis a vis succession matters was considered in Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru (2013) eKLR where it was held:

“...I appreciate that this is a matter where all the issues raised can only be effectively handled by the Family Division of the High Court. I also note that there is a pending succession cause being Nairobi Succession cause number 166 of 2012...Further the suit property is one of the properties listed as being part of the deceased’s estate in the said suit...”

36. In Isaac Kinyua & 3 Others v Hellen Kaigongi [2018] eKLR Mbugua J held as follows:

“Succession matters do not fall under the ambit of the jurisdiction of the ELC court. If this court was to grant stay orders in respect of the succession cause, it would in essence amount to straying in a field where the court has no jurisdiction.”

37. In that same case, the court adopted the decision in Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR where it was held that:

“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.”

38. A similar finding was reached by the court in *Beatrice Atieno Ongadi v National Land Commission & 5 others [2021] eKLR* which opined that:

“Disputes arising from the legality of succession proceedings of the Estate of a deceased person do not fall within the realm of this court... If upon the conclusion of the succession dispute, it is found that the Appellant and/or the other beneficiaries of the Estate of the Deceased held titles to the parcels of the land from the Estate of the Deceased but the same were fraudulently transferred from them without their consent and/or knowledge, then they would have a valid claim before this court...”

39. A perusal of the Plaintiff in this suit reveals that the Plaintiffs’ claim relates to the estate of Komu Kiarie (deceased) and an alleged fraud perpetuated by the administrator of the estate, the 1st Defendant, who has failed to diligently proceed with the administration of the suit property.

40. The search certificates presented by the Plaintiffs for parcel numbers Dagoretti/Kangemi/1392 and 1386 indicate that these properties are held by the 1st Defendant in his capacity as the administrator of the estate of Komu Kiarie (deceased), and not as the owner of the said properties. These properties have not been finally divested to any beneficiary of the estate, meaning that the succession matter in respect to those properties has not been concluded.

41. That being the case, it is the finding of this court that the issue of who should inherit the land that was allocated to Wilson Muchai by the succession court in Nairobi Succession Cause No. 1418 of 1992 can only be handled by that court, and not the Environment and Land Court. The issues raised in the current suit squarely relates to the administration of the estate of the deceased, which is the subject of Succession Cause No. 1418 of 1992.

42. As the issues herein fall under the jurisdiction of the **Law of Succession Act**, which this court has no mandate to adjudicate over, and as they relate to the succession dispute which is pending in the High Court, it is my finding that this court does not have jurisdiction to hear and determine not only the application, but also the suit.

43. For those reasons, the Plaintiffs’ Application dated 22nd March, 2021 and the suit are dismissed with costs.

Dated, signed and delivered virtually in Machakos this 4th day of November, 2021.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Karoki for the Plaintiff/Applicant

Mr. Kingara for the 1st Defendant/Respondent

Court Assistant – John Okumu