



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 53 OF 2018

(Formerly HCC No. 16 of 2009 (OS))

IN THE MATTER OF THE ESTATE OF SAMSON WEKESA - (DECEASED)

AND

IN THE MATTER OF THE GRANT OF LETTERS OF ADMINISTRATION ISSUED TO CHRISTOPHER WEKESA MUKWA

IN BUNGOMA HC P & A CAUSE NO 21 OF 2000

AND

IN THE MATTER OF AN APPLICATION BY GRACE MWIBANDA

BETWEEN

GRACE MWIBANDA PLAINTIFF

VERSUS

CHRISTOPHER WEKESA MUKWA DEFENDANT

R U L I N G

This case is part – heard. The trial commenced before **A. OMOLLO J** way back on 31st July 2013 when **GRACE MWIBANDA** (the plaintiff herein) testified. It then came up before me on 3rd June 2021 when **BRYAN WAFULA KUBWA (PW 2)** testified and the plaintiff closed her case.

At that point **MR OCHARO** (now **JUSTICE OCHARO**) acting for the defendant informed the Court that he was of the view that this Court has no jurisdiction in the matter. Since an issue touching on jurisdiction can be raised at any time, although ideally it should be raised and determined at the earliest opportunity, I directed that **MR OCHARO** should file his Preliminary Objection together with submissions within 14 days after which **MR MURUNGA** Counsel for the plaintiff would have 14 days to file his submissions. That was done and this ruling is in respect of the said Preliminary Objection dated 15th June 2021. In order to appreciate that Preliminary Objection, it is important that I give the genesis of this dispute.

Briefly, the plaintiff herein was among the beneficiaries in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 21 of 2000** which was in respect to the Estate of one **SAMSON WEKESA**. The Grant of representation was issued to **CHRISTOPHER WEKESA KUBWA** (the defendant herein and was confirmed by **A. MBOGHOLI MSAGHA J** (as he then was) on 10th July 2008. The plaintiff was awarded 12½ acres out of the land parcel **NO BOKOLI/KITUNI/350**. However, she has complained that the defendant as Administrator of the Estate only registered in her name the title **NO BOKOLI/KITUNI/1553** measuring 10½ acres as per the confirmed grant. She therefore moved to this Court by her Originating Summons dated 17th February 2009 and premised under the then **Order XXXVI Rule 1(a) (b) (e) (f) and (g)** of the **Civil Procedure Rules** (now **Order 37**) and **Section 83** of the **Law of Succession Act** seeking the main order that the defendant do transfer approximately 2 acres in his portion to her in tandem with the Certificate of Confirmation of Grant.

The defendant in opposing the Originating Summons filed a replying affidavit dated 13th May 2009 in which he averred, inter alia, that the plaintiff was involved throughout in the surveying process. That she was to benefit from the house of her husband and if the application is granted, he will be seriously prejudiced since he has not retained any extra share.

The defendant’s Preliminary Objection reads: -

“That this Court lacks the necessary jurisdiction to entertain and make a determination in the matter.”

In his submissions, Counsel for the defendant identified the following issues for determination: -

“(i) When, how and where should the provisions of Order XXXVI Rule 1 of the old Civil Procedure Rules) now Order 37, come into play in a matter related to an Estate of a deceased person.

(ii) is an Environment and Land Court seized with the jurisdiction to entertain a matter that is clearly succession in nature.

(iii) How would have the plaintiff presented her dispute for determination.

(iv) What should be the fate of the plaintiff’s Originating Summons.”

Having identified those issues, Counsel cited various authorities and submitted that the reliefs sought by the plaintiff can only be granted by the Probate Court.

MR MURUNGA for the plaintiff took the view that the Preliminary Objection does not meet the test set out in the case of **MUKISA BISCUIT MANUFACTURING COMPANY LTD .V. WEST END DISTRIBUTORS LTD 1969 E.A 696**.

Counsel also submitted, citing various cases, that the plaintiff’s Originating Summons falls under the provisions of **Order 37 Rule 1 (a) (c)** and **(g)** of the **Civil Procedure Rules** and therefore this Court, and not the High Court, is seized of the requisite jurisdiction.

I have considered the Preliminary Objection and the submissions by Counsel.

There is no doubt that the Preliminary Objection raises the issue of jurisdiction and therefore meets the threshold set out in the case of **MUKISA BISCUIT MANUFACTURING CO LTD** (supra).

In questioning this Court’s jurisdiction to determine this dispute, Counsel for the defendant cited **Rule 41 (3)** of the **Probate and Administration Rules** as authority for the proposition that the proceedings herein could **“only be undertaken prior to the confirmation of the grant.”** **Rule 41 (3)** of the **Probate and Administration Rules** provides that: -

41(3) “Where a question arises as to the identity, share or Estate of any person claiming to be a beneficiary interested in, or of any condition or qualification attaching to, such share or Estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or Estate or the property comprising it to abide the determination of the in proceedings under Order XXXVI Rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to Section 71 (2) of the Act, proceed to confirm the grant.” Emphasis added.

Counsel then cites the case of **IN THE MATTER OF ESTATE OF JULIUS NDUBI JAVAN (DECEASED) 2018 eKLR** and submits that these proceedings ought to have been preceded by an order of the Probate Court setting aside the share in dispute to await the determination of ownership thereof. Counsel further submits that the plaintiff should have approached the Probate Court as an Applicant and anchored her claim on the provisions of the Law of Succession Act. For that proposition, Counsel cited the decision of the Court of Appeal in **RAMADHANI MUSUMBA CHEMIETI .V. JAMIN WASIKE CHEMIETI C.A CIVIL APPEAL No 234 of 2011**.

On his part however, **MR MURUNGA** for the plaintiff citing **Order 37 Rule 1** of the **Civil Procedure Rules** submitted that the plaintiff’s claim falls within **Order 37 Rule 1 (a) (e)** and **(g)** since the Certificate of Confirmation was not challenged. Counsel further cited the case of **ESTATE OF JUMA SHITSESWA LILANI (DECEASED) 2021 eKLR** for the proposition that an issue relating to transmission of the property herein is not within the jurisdiction of the Probate Court.

A proper reading of **Rule 41 (3)** of the **Probate and Administration Rules** makes it clear that the only time when the Probate Court can set aside any particular share or Estate to be determined in Proceedings under **Order 37** of the **Civil Procedure Rules** is **“where a question arises as to the identity share of Estate of any person prior to confirming the grant.”** The cases cited by Counsel for the defendant do not aid his case at all. In those cases, it is clear that there were disputes with regard to the Estate properties some of which had been transferred to third parties. The Court of Appeal directed that the application for Confirmation be remitted to the High Court for hearing. In this case now before me, there is no evidence to suggest that any dispute arose with regard to the property of the deceased or the respective shares of the beneficiaries of his Estate. There was therefore no reason for **A MBOGHOLI MSAGHA J** (as he then was) to invoke the provisions of **Rule 41 (3)** of the **Probate and Administration Rules** because no issue arose **“as to the identity, share or estate of any person.”** Counsel for the defendant cannot therefore be correct when he submits as he has done in paragraph 17 of his submissions that: -

“The character of the matter before this Honourable Court is without doubt a challenge on how the Certificate of Confirmation was effected. That this challenge ought to have been presented before the Probate Court as an appropriate forum, we humbly urge you to be persuaded by the following decisions:”

The plaintiff’s Originating Summons is not **“a challenge on how the Certificate of Confirmation was effected.”** Far from it. If anything, what the plaintiff seeks is for the defendant to execute his responsibility as Administrator and distribute the Estate as per the confirmed grant. That cannot, by any strength of imagination, be categorized as a challenge to the Certificate of Confirmation. The plaintiff was satisfied with the Grant as confirmed and has no reason to challenge it and therefore has no reason to go back to the Probate Court. I therefore agree with **MUSYOKA J** when he stated in **RE ESTATE OF JUMA SHITSESWE LILANI (DECEASED 2021 eKLR** that: -

“The Court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned and cannot revisit the matter unless upon review.”

Since the main dispute between the parties is still alive and pending determination by this Court, I must act with restraint and refrain from touching on the core of the litigation. That will have to await the main trial where evidence shall be adduced by the protagonists. There is no doubt in my mind however that **Order 37 Rule 1** of the **Civil Procedure Rules** allows the plaintiff to approach this Court to determine any of the following questions: -

a. any question affecting the rights or interest of the person claiming to be creditor, devisee legatee, heir or cestui que trust

b. –

c. –

d. –

e. Directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as executors, administrators or trustees.

f. –

g. The determination of any question arising directly out of the administration of the Estate or trust.”

It is also common ground that the dispute herein involves land which, under **Section 13** of the **Environment and Land Act** and **Section 150** of the **Land Act** is the preserve of this Court.

The up – shot of all the above is that the Preliminary Objection dated 15th June 2021 is devoid of merit. It is accordingly dismissed. As the parties are family, there shall be no orders as to costs.

BOAZ N. OLAO.

J U D G E

28TH JULY 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

BOAZ N. OLAO.

J U D G E

28TH JULY 2021.