



REPUBLIC OF KENYA



**In re Estate of Njogu Kiigi (Deceased) (Succession Cause 18 of 1992)
[2024] KEHC 202 (KLR) (Family) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 18 OF 1992
PM NYAUNDI, J
JANUARY 19, 2024
IN THE MATTER OF THE ESTATE OF NJOGU KIIGI (DECEASED)**

BETWEEN

**WAIRIMU NJOGU 1ST APPLICANT
EUNICE WANJIKU NJOROGE 2ND APPLICANT
JEDIDAH NGINA KIBUNA 3RD APPLICANT**

AND

**RUTH WAGITU NJOGU 1ST RESPONDENT
EVANS NDUNGU KIIGI 2ND RESPONDENT
NELSON KAMAU NJOGU 3RD RESPONDENT
GODFREY KIARA NJOGU 4TH RESPONDENT
SAMUEL NJIIRI NJOGU 5TH RESPONDENT
ANNE WANGUI NJOGU 6TH RESPONDENT
EDITH WAMBUI NJOGU 7TH RESPONDENT
MARTHA NJERI NDUNGU 8TH RESPONDENT**

AND

ALEX NJOGU INTERESTED PARTY



RULING

1. This ruling pertains to Chamber Summons Application dated 21st June 2023 presented by the 8th Respondent. The Application is presented under section 1A, 1B and 3A of the Civil Procedure Act, Order Rules 10 (1), (2) and 14 of the Civil Procedure Rules seeking the following orders -
 - a. That the Applicant herein namely Martha Njeri Ndungu be struck out from the 1st to 4th Respondent's' (the Respondents) Application dated 20th September 2022
 - b. That the Applicant's property namely Kiambu/ Municipality Block 5 (kiamumbi) 1217 (herein after the Property) be removed and/ struck out from the Respondents' Application dated 20th September 2022
 - c. That costs of this Application be awarded to the Applicant.
2. The Application is supported by the Annexed affidavit of the Applicant sworn on 21st day of June 2023. The Respondent's oppose the Application and Affidavit is sworn by the 3rd Respondent on 18th July 2023.
3. The substance of the Application is that the Applicant is wrongly joined into this matter as the property in contention is registered in her name and not that of the deceased and therefore it does not comprise the Estate of the Deceased.
4. The Respondent's oppose the application principally on account of the fact that the land was originally registered in the name of the deceased and that the acquisition by the Applicant is irregular and should be voided/ annulled.
5. The Court directed that the Application be canvassed via written submissions. Both parties complied. The Applicant's submissions are dated 27th November 2023 and those of the Respondent are dated 13th October 2023.
6. The Applicant identifies the following as the issues for determination, Whether
 - a. The 8th Respondent/ Applicant's name be struck out of the Application dated 20th September 2022
 - b. The Application dated 20th March 20222 (*sic*) contains a cause of action against the Applicant
 - c. Who bears the costs of this Application?
7. On the 1st issue, the Applicant submits that the Application is merited. It is submitted that the Court has the mandate to strike out a party who has been improperly joined and reliance is placed on Article 159 (2) of the Constitution, Order 1 Rule 10(2) and Rule 73 of the Civil Procedure Rules. The Applicant cites the decision in D T Dobie and Company (K) Ltd v Joseph Mbaria Muchina & Anor (1982) KLR
8. It is the Applicant's case that the subject parcel of land was transferred to her, and she is a bona fide purchaser for value and relies on the decision in Weston Gitonga & 10 Others v Peter Rugu Gikanga & Anor [2017] eKLR to contend that her title is indefeasible.
9. On the final issue it is submitted that the Respondent should bear the costs of the Application.
10. The Respondents identify the following as the issues for determination



- a) Whether the Applicant has been improperly joined as a party to this suit by the Respondents?
 - b) Whether the Applicant's property Kiambu Kiambu/ Municipality Block 5 (kiamumbi) 1217 has been improperly listed as the Deceased property and was never in the deceased name and never belonged to the deceased nor was it part of the deceased estate.
11. It is submitted that the joinder of the 8th Respondent will enable the Court to determine all the questions involved in the suit and relies on the decision in *Parment Ole Kiseet v Sylvia Moi & 3 others, Ndegwa Kabogo (Interested Party)* [2021] eKLR
 12. The Respondents challenge the validity of the title of the 8th Respondent and relies on the decisions in *Re Estate of David William Kigumi Kimemia (Deceased)* [2020] eKLR to show that the title can be challenged on the basis that consent of the other beneficiaries was not obtained prior to the transfer.
 13. The Applicant argues that since the parcel of land in question can be traced back to the deceased the law enables the beneficiaries to follow the property into the hands of the Applicant and references the decision in *Ibrahim v Hassan & Charles Kimenyi Macharia, interested party* [2019] eKLR
 14. On this account the Respondent's urge that the Application, be dismissed.

Analysis and Determination

15. I have carefully considered the pleadings herein, the rival submissions and the applicable law and discern the following as the issue for determination
 - a) Whether this Court being a probate Court has the jurisdiction to determine the dispute between the Applicant and the Respondent in Application dated 22nd September 2022.
16. The Applicant's in Application dated 22nd September 2022 have a claim that is adverse to that of the 8th Respondent regarding ownership of Land Parcel Kiambu/ Municipality Block 5 (kiamumbi) 1217. The Applicant has been joined into those proceedings for the Court to pronounce on the validity of her title. The question as to whether the Court has jurisdiction is therefore one that must be resolved.
17. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR the Supreme Court held 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 other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



18. Article 162(2) of the *Constitution of Kenya* provides for the establishment of specialised courts to hear and determine disputes relating to environment and land. Parliament has since enacted the *Environment and Land Act*, No. 19 Of 2011 which operationalises the Environment and Land Court.
19. In *Republic v Karisa Chengo & 2 others* [2017] eKLR, the supreme Court stated as follows-

We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should by the same token be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.
20. It is now well settled that the probate court’s jurisdiction does not extend to determining disputes over ownership of land. This was reiterated in the case of *re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR, where the Court held: -

“[14] 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 of ownership of the property of 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.”
21. Applying the above principles to the instant case, where the issue is whether the Applicant have a valid sale agreement with the Deceased with regard to the subject parcel, it is evident that on account of Article 165(5) of the *Constitution*, this dispute can only be determined before the Environment and Land Court this court lacks jurisdiction.
22. As was stated by Nyarangi J in the *Owner of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* case (*supra*), Jurisdiction is everything and without it a court must lay down its tools.
23. It may be that the Respondents are able to mount a successful challenge to the Applicant’s title to the subject property, the Probate Court is not the arena for that contest however, we are not vested with the requisite tools.
24. For the Foregoing reasons the Application dated 12th June 2023 is allowed in its entirety and the following orders made-
 - a) The 8th Respondent namely Martha Njeri Ndungu is removed from the Application dated 20th September 2022.
 - b) Property Ref. no Kiambu/ Municipality Block 5 (kiamumbu) 1217 is excluded from Application dated 20th September 2022.
 - c) The Applicant will have costs of the Application assessed at Kshs 25000 payable within 30 days from the date hereof.
 - d) The Summons for revocation dated 20th September 2022 to proceed to hearing
 - e) Parties to exchange witness statements and list and bundle of documents within 45 days.



- f) Mention before the Deputy Registrar, Family Division on 28th March 2024 to confirm compliance and take further directions.

It is so ordered.

SIGNED, DATED and DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY, 2024.

P. NYAUNDI

JUDGE

In the presence of:

Ms. Butala Advocates for the Applicant

Ms. Watetu for 2nd, 3rd and 4th Respondents Advocates for the Respondent

Sylvia Court Assistant

