



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 99 OF 2019

JOSEPH KABERIA KUMARI.....APPELLANT

VERSUS

TONY MWENDA MUTHAURA.....RESPONDENT

(Being an appeal against the Ruling of Hon. T.M MWANGI – SPM delivered on 4th July 2019 in MERU CM-ELC NO. 224 OF 2018)

JUDGMENT

1. The appellant filed a plaint before the trial court dated 10/9/2018 in which he sought the following orders against the respondent:-
 - a) *A declaration that the defendant holds L.R NO. NTIMA/IGOKI/4422 in trust for the plaintiff.*
 - b) *An order compelling the defendant to transfer L.R NO. NTIMA/IGOKI/4422 to the plaintiff and in default of doing so, the Executive Officer of the Honorable Court to be empowered to execute all the requisite transfer/documents on behalf of the defendant.*
 - c) *An order that the defendant do produce the original title deed to the Land Registrar, Meru Lands District and in default the same be dispensed with.*
 - d) *Mesne profits as accrued from the year 2007.*
 - e) *Any other or better order that the Honorable Court deems fit and just to issue.*
2. The appellant had pleaded that the respondent is the eldest son of Judith Makandi Muthaura (deceased) who was the caretaker of the plaintiff's property. The plaintiff bought the suit land in 1991 and made extensive developments but wanted to sell the same so as to purchase a property in Mlolongo. He therefore signed blank Divisional Land Control and transfer forms and left them with the caretaker (Judith) who was to scout for a prospective purchaser and sell the property on his behalf. Without his knowledge, the deceased fraudulently transferred the suit land to herself as a purported gift thus breaching the trust in which she held the property- (the particulars of the trust, the breach of trust and fraud were set out in paragraph 9 and 10 of the plaint).
3. The appellant further pleaded that after the demise of Judith, the suit land was registered in the name of the respondent as the administrator of the estate of the deceased. Efforts to have the suit land revert back to the appellant were futile necessitating the filing of the suit before the trial court.
4. The respondent filed his statement of defence dated 5/11/2018 denying all allegations raised in the plaint. He also filed a notice of preliminary objection dated the same day raising the following grounds;
 - (i) *That the suit herein is incompetent, bad in law and incurably defective in that pursuant to the provisions of the Civil Procedure Rules 2010 and the Law of Succession Act Cap 160 laws of Kenya, this court lacks the mandate and jurisdiction to determine questions arising from the deceased's estate.*
 - (ii) *That the suit herein, in form and substance, offends the mandatory provisions of the Civil Procedure Act and Rules 2010 and the Law of Succession Act Cap 160 laws of Kenya. Hence the same is untenable and liable to striking out in limine.*
 - (iii) *That the issues for determination in this suit are in respect of the representation, administration, inheritance and distribution of part of the estate of the deceased Judith Makandi Muthaura which were conclusively determined by the High Court vide Meru High Court Succession Cause no. 378 of 2008 whereby a certificate of confirmation of grant was issued setting out the beneficiary and the mode of distribution of the suit and herein NTIMA/IGOKI/4422 and no appeal, review or revocation has been preferred therein.*

(iv) *The plaintiff's suit through the back door is seeking to reopen a litigation that was put to rest procedurally, which if entertained, will in effect redistribute the deceased's estate contrary to the grant issued by the High Court of Kenya.*

(v) *That this honourable court has no jurisdiction to hear and determine the suit herein as currently framed and instituted.*

5. In a ruling dated 4.7.2019, the trial court allowed the Preliminary Objection and struck out the suit. Being aggrieved by the said ruling, the appellant filed his memorandum of appeal dated 02/08/2019 raising four (4) grounds as follows:-

i. *The learned trial magistrate erred in law and fact in dismissing the appellant's suit in its entirety by upholding the respondent's preliminary objection.*

ii. *The learned trial magistrate erred in law and fact and misdirected himself by disregarding the appellant's submissions on the notice of preliminary objection.*

iii. *The learned trial magistrate gravely erred in law by misdirecting himself in holding that the appellant's cause of action lay in Succession Cause NO. 378 of 2008 yet the appellant was not a beneficiary or dependant of the deceased.*

iv. *The learned trial magistrate erred in both law and fact in holding that the court lacked jurisdiction to hear and determine the suit on its merits.*

6. The appeal was canvassed by way of written submissions. The appellant vide submissions dated 24/02/2021 stated that the suit was in regard to title, ownership and trust which issues cannot be properly litigated in the probate court, as that court is not clothed with jurisdiction to determine such issues. That jurisdiction is conferred through the constitution or statute and it is clear the issues raised are within the scope and jurisdiction of the Environment and Land Court.

7. In support of his arguments, the appellant relied on the provisions of Article 162 (2) of the Constitution of Kenya 2010, as well as Section 13 (1) and (2) of the Environment and Land Court Act. The appellant also relied on the case of **Estate of M'Muriani M'Mugwika (Deceased)[2019]eKLR**, where the court held that;

“The law of Succession Act and the rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate identification of survivors and beneficiaries and distribution of the assets”.

8. The appellant further cited the case of **Joseph Koori Ngugi V Stephen Ndichu J. Mukima [2017]eKLR**, where it was held that;

“A claim for an equitable interest in land is a claim against the legal owner of land and hence a dispute over ownership of the land. I am persuaded that the drafters of the Kenyan Constitution intended such questions to be determined in the ELC. The text of the Constitution and section 13 of the ELC Act seems perfectly clear to me on that question”.

9. The Respondent vide submissions dated 29/03/2021 averred that the trial magistrate's decision was fair, just and well anchored in law considering the totality of the submissions, the prevailing points of law and the facts surrounding the case. It was submitted that this court lacks jurisdiction to hear and determine the matter as the cause of action lies in a succession court and not the Environment and Land Court.

10. That the succession court has already proclaimed itself as to the property of the deceased, thus rendering the subsequent matter res judicata and the appellant ought to have filed an objection or an appeal in the succession suit. This court cannot interfere in a matter that has already been adjudicated upon and the suit should be dismissed with costs to the respondent.

11. The respondent cited a decision of this court in **Isaac Kinyua & 3 others V Hellen Kaigongi [2018]eKLR**, where the court held that;

“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”.

12. The respondent also cited the case of **reEstate of Julius Ndubi Javan (Deceased) 2018 eKLR**, where the court 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 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.

13. On this question of jurisdiction, the respondent also relied on the cases of **Owners of the Motor Vessel M.V. Lillians vs Caltex Oil (Kenya) Limited (1989) KLR1, Karisa Chengo & 2 others V Republic [2015]eKLR, Muiri Coffee Estate Limited V Kenya Commercial Bank Limited & 3 others [2017]eKLR**.

14. On the issue of resjudicata, the respondent relied on the provisions of Section 7 of the Civil Procedure Act, Section 28 of the Environment and Land Court Act as well as the following cases; **IEBC V Maina Kiai & 5 Others [2017]eKLR, ANM V PMN**

Analysis and determination

15. Having considered all the issues raised herein, I find that the appeal turns on whether the trial court has jurisdiction to hear and determine the suit before it and by extent, whether the trial court erred in upholding the preliminary objection?

16. The circumstance in which a preliminary objection may be raised has been the subject of several judicial pronouncements and is well settled. The Court of Appeal in the case of Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, stated thus;

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

17. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

18. In Owners of the Motor Vehicle M.V. Lillians versus Caltex Oil (Kenya) Limited (1989) KLR1, the court had this to say on the issue of jurisdiction;

‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

19. On the source of jurisdiction, it was held in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR that -

“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 counsels 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 ... 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”.

20. The jurisdiction of this court to hear and determine disputes relating to the environment, use and occupation of and title to land is provided for under **Article 162(2) (b) of the Constitution of Kenya, 2010**. Further, **Section 13 of the Environment and Land Court Act** also provides that;

“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 under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine 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”.

21. The aforementioned provisions of law are replicated under section 9 (a) of the **Magistrates’ Courts Act, 2015**.

22. The question is, what happens when disputes relating to use, occupation and title to land arise in respect of the property of a deceased person. In Re Estate of Mbai Wainaina (Deceased) [2015] eKLR, the applicants in the summons for revocation of a grant were claiming that the deceased held the suit land in trust for them. Musyoka J held that;

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts (Emphasize added). It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary

interest on land based on the alleged trust. In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

23. Musyoka, J. in this regard still expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction in **Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** as follows:

“...The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators (emphasize added).

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3). Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned (emphasize added). The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court (emphasize added). The interventions by that court are limited to what I have stated above.”

24. What resonates from the Constitution, the relevant statutes and case law is that issues appertaining to use, occupation and title to land and environment are in the domain of an Environment and Land Court. Even when such issues arise in relation to the estate of a deceased person concerning third parties, they still remain in the domain of the aforementioned court and not the probate court.

25. At this juncture, I find it necessary to distinguish the facts at hand with those raised in **Isaac Kinyua & 3 others V Hellen Kaigongi [2018]eKLR** cited by the respondent. In the cited case, this court was being urged to grant a stay of proceedings in a succession case which was before a magistrate's court. Having regard to the provisions of Article 162 of the Constitution as well as the ELC Act, this court stated that it could not stray in the ambit of probate matters. In the same breadth, a Probate Court ought not to determine claims which are in the domain of the Environment and Land Court.

26. Going back to the determination of the trial court, I find that the said court properly evaluated the legal position appertaining to what amounts to a preliminary objection when the court stated that;

“A preliminary objection is one that raises a pure point of law. Argued on the assumption that facts pleaded by the parties are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

27. However, the finding thereof was not in tandem with the facts presented before the trial court. For what was pleaded in the plaint by the appellant was a claim of fraud and trust albeit against a deceased person, but the appellant identified the respondent as the administrator of the estate of Judith in paragraph 12 of the plaint. The trial court thus misapprehended the law and fact when it held that the appellant ought to have raised his claim in the succession case. It matters not whether the appellant was aware of the succession cause or not. The ultimate common denominator is on jurisdiction. Thus the contention that the trial court did not have jurisdiction because the dispute is a succession matter, was devoid of merit.

28. By virtue of the Constitution and the Magistrate's Court Act, the matter in dispute falls squarely within this court's jurisdiction as well as the trial court as the claim relates to ownership of the suit property.

29. In light of the foregoing analysis, I do find that the the trial court has jurisdiction to determine the suit, hence the preliminary objection before the said court was not merited. Accordingly, I find that this appeal is merited and the same is allowed in the following terms;

(1) The decision of the Honorable Magistrate delivered on 14/07/2019 in MERU CM-ELC NO. 224 OF 2018, is hereby set aside and the suit is reinstated.

(2) The lower court file is to be remitted back to the trial court for determination on merits.

(3) The appellant shall have costs of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 14TH DAY OF JULY, 2021 IN PRESENCE OF:

C/A: Kananu

Ms. Muriithi for appellant

Ashaba for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE