



REPUBLIC OF KENYA



Maina v Njoki (Civil Appeal E021 of 2021) [2024] KEHC 3747 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E021 OF 2021**

MA ODERO, J

APRIL 18, 2024

BETWEEN

CYRUS KIAMA MAINA APPELLANT

AND

TERESIA NJOKI RESPONDENT

JUDGMENT

1. Before this court is an appeal challenging the Ruling delivered by Hon. A. M. Mwangi Principal Magistrate on 7th July, 2021 which relates to the estate of Simon Maina Karia (hereinafter ‘the deceased’). Following the demise of the Deceased one Cyrus Kiama Maina (a nephew of the Deceased) was appointed as the Administrator of the Deceased’s estate.
2. The Protestor Teresia Njoki (a sister to the Deceased) opposed the confirmation of the Grant on grounds that the Deceased was not the sole owner of the property known as Ruguru/Karuthi/565. The protestor asserted that the Deceased held the said parcel of land in trust for herself and the entire family.
3. The Appeal was opposed.

Background

4. This appeal relates to Karatina PMCC Succession Cause No. 225 of 2017. The memorandum of Appeal dated 28th July, 2021 sought the following orders:-
 - (a) That the appeal be allowed and the ruling of the lower court be set aside with costs and substituted with an order that the Respondent is only entitled to 1½ acres out of parcel No. Ruguru/Karuthi/565.



5. On 7th July, 2021 the trial court delivered a Ruling in which she held that the Succession Court had the requisite jurisdiction to determine the question of whether or not the estate property was held by the Deceased in trust for other parties.
6. Being aggrieved by that decision the Administrator/Appellant filed this appeal which is premised upon the following grounds

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 - “(a) That the learned trial magistrate erred in law and in fact in adjudicating on a TRUST which the succession court lacks jurisdiction to adjudicate upon thereby arriving at a wrong decision.
 - (b) That the learned trial magistrate erred in law and in fact in failing to note that TRUST is a title ownership issue that the probate court has no jurisdiction over the thereby arriving at the wrong conclusion.
 - (c) That even if there were jurisdiction, which there was not, the trial magistrate erred in law and fact in holding that the Respondent in this appeal had adduced evidence to demonstrate any trust while no such evidence was adduced thereby falling into error.
 - (d) The learned magistrate clearly misapprehended the evidence, the law and the applicable authorities and gave a judgment against the might of evidence”
7. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 17th October, 2023, whilst the Respondent relied upon his submissions dated 3rd November, 2023.

Analysis and Determination

8. I have carefully considered this appeal as well as the written submissions filed by the parties.
9. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Limited & Others*[1968] E. A 123, the court of Appeal held that;-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge’s findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally
10. The issue for determination here is whether the decision of the trial court that the question of existence of a trust could be heard and determined by the Succession Court was a correct finding which ought to be allowed to stand.



11. Indeed the issue raises a question of jurisdiction. It is trite that jurisdiction is everything. In *Owners Of The Motor Vessel 'lillian S' -vs- Caltex Oil (kenya) Ltd* Civil Appeal No. 509 1989 the court of Appeal held that:-

“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” [own emphasis]
12. Jurisdiction relates to the mandate and/or authority of a court to hear and determine the matter before it. It is derived from *the constitution* of Kenya and from statute.
13. The question which arose before the learned trial magistrate was whether the court sitting as a Succession Court had the jurisdiction to determine whether or not the land in question was held on trust for other family members.
14. According to the Protestor Teresia Njoki the Deceased was only registered as proprietor of the land because during the period in question (the 1950's) women could not own land. The protestor faults the administrator for failing to include her as one of the beneficiaries of the estate.
15. The learned trial magistrate relied upon Section 47 and 48 of the *law of succession Act* and held that the Succession Court had the jurisdiction to determine the question of whether or not the land was held on trust.
16. The Appellant submitted that the learned trial magistrate had no jurisdiction to determine the question of whether or not a trust existed over the suit land. That said issue ought to have been referred to the Employment and Land Court for determination.
17. On her part the Respondent (protestor) submitted that a probate court had requisite jurisdiction to determine ALL matters which arise before it.
18. The key issue in this matter is the question of 'ownership' of the land in question. The Appellant contends that the land belonged entirely to the Deceased whilst the protestor insists that the Deceased merely held the land in trust for other family members. This in my view is a critical question that required determination before the estate could be distributed.
19. The court in Karatina was sitting as a Succession Court with the mandate to oversee and supervise the distribution of the estate to the genuine heirs. Any dispute or claim to an asset of the estate by a third party can in law only be determined by the courts having jurisdiction to handle land matters.
20. It is manifest that the real dispute here is whether the suit property in question belonged to the Deceased or whether the protestor could validly claim ownership of the same by way of a trust.
21. Matters relating to the ownership use and occupation of land have now under Article 162 of *the Constitution* of Kenya 2010 been mandated to be determined by a specialized court being the Environment and Land Court ('ELC').
22. Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of that court as follows:-

Jurisdiction of the Court

23. 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.

24. 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. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]
25. Therefore, the correct and proper forum before which the Objector ought to ventilate his claim to the suit property is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of ‘ownership’ of the suit property.
26. In Re Estate of Stone Kathubi Muinde (deceased)[2016] ECLR Hon. Justice William Musyoka held that:-
- “Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil procedure Act* and the Civil procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.” (own emphasis)
27. Similarly in the case of In re Estate of Julius Wachira (Deceased) [2022] eCLR Lady Justice Maureen Odero in quoting a decision by Justice William Musyoka stated,
- “The applicants (the Respondent herein) claim existence of a trust in their favour. It could very well be that such a trust does not exist. However, it is not for this court to declare it. None has been demonstrated by way of declaration by a court of competent jurisdiction. Ideally, the applicants ought to have moved a civil or land court to make a declaration of trust in their favour which they would then seek to enforce against the estate. In the absence of a declaration by a court, there is no basis upon which I can declare such a trust in a revocation of grant application”.
- A careful reading of the said decision reveals that at no time did the Hon. Judge declare that no trust existed in favour of the Respondents. The Judge merely indicated that the Probate



Court could not declare the existence of such a trust – that only a court of competent jurisdiction could make such a declaration. Which is this court of competent jurisdiction? Article 162 of *the Constitution* of Kenya 2010 and Section 13 (2) (d) of the *Environment and Land Court Act* give exclusive jurisdiction to the Environment and Land Court to determine questions of ownership, use and occupation of land. As such, the Probate Court has no jurisdiction in Succession Cause to make a pronouncement regarding the ownership of the suit land as rightly held by Justice Musyoka.” [Own emphasis]

28. Finally in the case of *Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, the court held as follows on the issue of trusts:-

“ 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. 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.” [Own emphasis]

29. Although the trial court relied on statute in coming to her decision I find that she erred in failing to appreciate the fact that *the Constitution* has established specialized courts to determine questions of ownership of land. As such the Succession Court had no jurisdiction to make that finding.

30. In this regard the court is guided by the authority in *Spinners & Spinners Limited v Spinners & Spinners Limited*, [2017] eKLR in which Prof. Ngugi (J) observed;

“ Kenyans desired specialized courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162 (2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162 (2) Equal Status Courts.”

31. Accordingly this appeal partially succeeds and I make the following orders:-

- (1) This appeal partially succeeds.
- (2) The decision of the Hon. trial Magistrate is hereby set aside. Only in respect to the distribution of the Property known as Ruguru/Karuthi/565.



3. The question of whether or not a trust exists over Ruguru/Karuthi/565 is to be decided by the Environment and Land Court.
- (4) This being a family matter each side will bear their own costs.

Dated in Nyeri this 18th day of April, 2024.

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MAUREEN A. ODERO

JUDGE

