



**Kageche v Kamande & 2 others; Wanjohi (Proposed Interested Party) (Succession Cause 11 of 2020) [2024] KEHC 5637 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 11 OF 2020**

**A MSHILA, J**

**MAY 17, 2024**

**BETWEEN**

**BETH WANJIKU KAGECHE ..... ADMINISTRATOR**

**AND**

**ALICE WANGUI KAMANDE ..... 1<sup>ST</sup> OBJECTOR**

**PAULINE WANJIKU KAGECHE ..... 2<sup>ND</sup> OBJECTOR**

**LAWRENCE REGERU KAGECHE ..... 3<sup>RD</sup> OBJECTOR**

**AND**

**MICHAEL MWANGI WANJOHI ..... PROPOSED INTERESTED PARTY**

**RULING**

1. Before court is the Summons dated 25<sup>th</sup> October, 2021 and brought under Rule 73 of the Probate and Administration Rules and all other enabling provisions of the law. The Proposed Interested Party sought for orders:-
  - a. Spent
  - b. That the applicant herein Michael Mwangi Wanjohi be and is hereby enjoined in this matter as an Interested Party.
  - c. Spent
  - d. That an order be and is hereby issued directing for the removal of the property known as LR. NO. Ondiri Farm Scheme/2 from the estate of Stephen Kageche Regeru herein or in any matter relating to the administration of the said estate.



2. The application is based on the grounds that the proposed interested party is the registered owner of land Parcel No. Ondiri Farm Scheme/2 since 25/9/1997.
3. Michael Mwangi Wanjohideposed in his affidavit that he is the registered owner of LR. No. Ondiri Farm Scheme/2 since 1997. He sold the said property to one Edward Kangethe Njuguna who when he tried to develop the said property he was confronted by goons. The said buyer sued the Applicant in Kikuyu ELC NO. 72 OF 2021 where conservatory orders were issued against him. Upon perusal of the lower court record, together with his counsel, they discovered that LR No. Ondiri Farm Scheme/2 was listed as part of the estate of Lawrence Regeru Wambaa in Nairobi P&A Succession Cause No. 2051 of 2007. He stated that since 1997 nobody has ever laid claim on the said parcel of land as such he urged the court to allow his application. In his further affidavit, Michael Mwangi attached an official search for LR No. Ondiri Farm Scheme/2 indicating that he is the registered proprietor.
4. Alice Wangui Kamandeswore the Replying Affidavit dated 21<sup>st</sup> April, 2022 on her own behalf and on behalf of her Co-Objectors. She deposed that the Applicant is determined to defraud the estate as the deceased purchased the suit land from Ondiri Settlement Scheme but delayed in obtaining titles. She disputed the search showing that the Applicant was registered the owner in 1997 as a search conducted in 2012 indicated that the title was still in the name of the Government of Kenya awaiting transfer to the estate of Lawrence Regeru Wambaa. The documents relied upon by the Applicant were said to be fake and fraudulent. The Applicant was said not to be a beneficiary as such lacks capacity to be enjoined. The removal of Ondiri Farm Scheme/2 was said to amount to rectification of grant in Succession Cause No. 2051 of 2007-Nairobi as such the court lacks jurisdiction.
5. The parties were directed to canvass the application by filing and exchanging written submission. Hereunder are the parties rival submissions.

#### **Applicant's Submissions**

6. The Applicant submits that the title being in his name could not have freely been disposed by the deceased during his lifetime. The competing interest in regard to ownership cannot be dealt with by this court as the court lacks jurisdiction as the same should be dealt with by the ELC court.

#### **Objectors' Submissions**

7. The Objectors submit that the instant application is premature as the summons for Revocation of Grant are pending. The prayer for joinder was said to lack merit as the Applicant is not a beneficiary hence lacks capacity to be enjoined. The Applicant was urged to present his grievances in Thika ELC No. E027 of 2022. The court was said to lack jurisdiction to remove the suit property from the listed assets of the estate as the same amounts to rectification of the grant in Succession Cause No. 2051 of 2007-Nairobi. It was submitted that the issues raised relating to title should be dealt with by the ELC Court.

#### **Issues for Determination.**

8. Having considered the Summons, the replying affidavit and the parties' rival submissions, the main issues arising for determination are:-



## a. whether this court has jurisdiction to grant the prayers sought?

### Analysis

9. In the celebrated case of Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1 Justice Nyarangi of the Court of Appeal held as follows in regard to jurisdiction;-

“I think that 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 its stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

10. Similarly, in the Supreme Court of Kenya case of Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011 it was stated thus:-

“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 the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 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.”

11. Article 165(3) of *the Constitution* confers the High Court with jurisdiction where it provides that:-

- (3) Subject to clause (5), the High Court shall have-
- a) Unlimited original jurisdiction in criminal and civil matters;

12. Further the said jurisdiction is subject to Article 165(5) of *the Constitution* which provides that:-

- (5) The High Court shall not have jurisdiction in respect of matters:-



- a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - b) Falling within the jurisdiction of the courts contemplated in Article 162(2).
13. Pursuant to Article 162(2) of *the Constitution*, the *Environment and Land Court Act* 2011 was enacted and in Section 13 it confers the Environment and Land Court with jurisdiction as follows:-
- (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 environment 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, chooses in action or other instruments granting any enforceable interests in land; and
  - e) Any other dispute relating to environment and land.
14. In the case of Priscilla Ndubi and Zipporah Mutiga vs Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013 held:-
- “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.”
15. The proposed Interested Party/Applicant avers that he is the registered owner of on 25/9/1997 as such the same should be enjoined in these proceedings and the subject suit property removed from the Estate of Stephen Kagechu Regeru.
16. The Applicant avers that the ownership dispute is pending determination in the case being Thika ELC NO. E027 of 2022 as consolidated with ELC NO. E020 of 2022 where the 1<sup>st</sup> Respondent is the Plaintiff therein and the Applicant herein is the 2<sup>nd</sup> Defendant.
17. The 1<sup>st</sup> Respondent however, refutes these claims by the Applicant. She argues that a search conducted in the year 2012 indicates that the land belongs to the Government of Kenya awaiting transfer to Lawrence Regeru Wambaa as such the Applicant cannot be the registered owner as evidenced by the green card annexed which was said to be fake and fraudulent.
18. The 1<sup>st</sup> Respondent further argues that this court lacks jurisdiction to determine the question of title and ownership of the suit property which vests in the ELC Court.
19. A perusal of this file shows that the proposed interested party is the registered owner since 1997 as such he wants this court to remove LR. No. Ondiri Farm Scheme/2 from the estate of Stephen Kagechu Regeru.



20. It is also noteworthy that according to the Confirmation of Grant in NBI P&A Cause No. 2051 of 2007 In The Matter of The Estate of Lawrence Regeru Wambaa (Deceased) the deceased herein being a beneficiary therein was granted the subject suit property.
21. Further to the foregoing, the 1<sup>st</sup> Respondent has produced a search conducted in 2012 where it is indicated that the land is still registered under the Government of Kenya.
22. As it is now, the issue of ownership is not clear. There exists a confirmation of grant where the deceased herein was issued with the suit property. The Applicant herein also possesses a search and /or title indicating that he is the owner of the suit property.
23. In any case there exists Thika ELC No. E027 of 2022 as consolidated with ELC No. E020 of 2022 where the 1<sup>st</sup> Respondent is the Plaintiff therein and the Applicant herein is the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Respondent herein sought that LR. No. Ondiri Farm Scheme/2 be registered in her favour and she be issued with the title deed. The said matter is still pending in court.
24. In the circumstances and bearing in mind the above, this court being a probate court is therefore, not clothed with the requisite jurisdiction to deal with the issue of who owns LR. No. Ondiri Farm Scheme/2.
25. This court has no jurisdiction to determine any disputes that center on ownership, occupation and use of land. It is also trite law that the probate court only deals with distribution of ascertained assets belonging to the deceased's estate and that any prima facie claims must be first determined before this court sitting as a probate court can be seized of the matter. Therefore this dispute is better placed for hearing and determination on the issue of ownership in the Environment Land Court.
26. The applicable law is found at Article 162(2) provides that:-
- “Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
- (a) ...
- (b) the environment and the use and occupation of, and title to, land.”
27. Article 165 of *the Constitution* sets out the jurisdiction of the High Court.
- Article 165(5) states as follows:
- “The High Court shall not have jurisdiction in respect of matters-
- (a) ...
- (b) falling within the jurisdiction of the courts contemplated in Article 162(2).”
28. In the case *In re Estate of Boniface Njeru Ngemi (Deceased) (2020) eKLR* where Onyiego J. quoted the case of *In re estate of Solomon Mwangi Waweru (deceased) (2018) eKLR* where faced with a similar situation the court had this to say:-
- “Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court.



29. The court went further to state thus;

“It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.

30. In the upshot therefore, the two prayers sought by the proposed Interested Party are found to be premature at this stage as there is a matter pending at the Environment Land Court which is the court clothed with the requisite jurisdiction to deal with the issue of land ownership.

### **Determination**

19. For the foregoing reasons this court finds that it is not the proper forum as it has no jurisdiction to entertain and determine any disputes that center on ownership, occupation and use of land.

20. The orders being sought by the Applicant are best pursued before the Environment and Land Court as such parties are directed to channel their dispute in the right forum.

21. The application is found to be premature and incompetent and is hereby struck out

22. The costs shall be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 17<sup>TH</sup> DAY OF MAY, 2024.**

**A. MSHILA**

**JUDGE**

**In the presence of ;**

Mourice – Court Assistant

Miss Maina – for the Petitioner

Siagi – for the Applicant

