



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 12 OF 2021**

**MADALINA WANGUI MACHIRA.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARY NGENDO MACAHARIA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SUSAN NJERI MACHARIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated **2<sup>nd</sup> February 2021** by the Plaintiff/ Applicant seeking for orders that;-

- 1. That the Honourable Court be pleased to issue an order to stay of proceedings concerning property Title No. Ruiru East/Juja East Block 2/9190, in the Succession Cause No. 544 of 2015 in the lower Court at Principal Magistrate Court at Thika until final determination of the matter by the High Court.***
- 2. That the Honourable Court do issues a restraining order to the Administrators of the estate of Samuel Macharia Njoroge, restraining them from interfering with the said property in any manner until final determination of the matter by the High Court.***
- 3. That costs of this Application and the suit be awarded to the Plaintiff/ Applicant in any event.***

The Application is premised on the grounds that the Plaintiff/ Applicant is the owner of the suit property, having bought the same from **Samuel Macharia Njoroge ( Deceased)** on **18<sup>th</sup> December 1994**. That the Plaintiff/Applicant was given all the pre requisite documents concerning the suit property by the vendor back in 1994. Further that they entered into a sale agreement of the suit property on **24<sup>th</sup> January 1994**. That the Plaintiff/ Applicant developed the suit property immediately after purchasing it and has been living in it since 1994 to date for a period of over 25 years. That the Defendants/ Respondents were aware of the above facts and still fraudulently included the suit property as part of the deceased Estate taking advantage of the Applicant' illiteracy and old age.

That the Plaintiff/ Applicant is in possession of the original Title deed of the suit property and all other completion documents and only failed to do registration of transfer due to illiteracy as she thought having all documents, the transfer was complete and it is only fair to the Applicant that the Court grants the prayers sought. That if the orders are not granted the Plaintiff/ Applicant will, be at risk of losing the ownership of the property and that she has lived on for over 25 years and therefore suffer irreparable harm.

In her Supporting Affidavit, **Madalina Wangui Wachira** averred that she entered into a sale agreement with **Samuel Macharia Njoroge** ( deceased) and upon full payment of the consideration, she was given all the documents pertaining to the suit property. That the Defendants/ Respondents despite being aware of her ownership still fraudulently included the suit property as part of the deceased Estate.

The Application is opposed and the Defendants/ Respondents and herself swore a Replying Affidavit on **15<sup>th</sup> April 2021**, sworn by **Mary Ngendo Macharia**, who averred that the **2<sup>nd</sup> Defendant/ Respondent** did not participate in the alleged transaction between the Plaintiff/ Applicant and **Samuel Macharia Njoroge (Deceased)** and neither are they alleged to have participated in the same and they are therefore wrongly sued. That the alleged agreement for sale does not constitute an agreement for sale of land. That the Late **Samuel Njoroge** was her husband and the **2<sup>nd</sup> Defendant's** father.

Further that her late husband had purchased **L.R Ruiru East/ Juja East Block 2/751**, jointly with his sister namely **Alice Wamaita**. That in Thika Succession Cause **No. 544 of 2015**, the **Estate of Samuel Macharia Njoroge ( Deceased)**, the Plaintiff had filed a Petition alleging to be the beneficiary of the estate of the deceased and left out most of the beneficiaries of the estate and had omitted all other assets of the estate and only included the suit property. That the property known as **Ruiru East/ Juja East Block 2/751**, was apparently subdivided after the death of her husband and without her knowledge. That the Mutation form was prepared on **8<sup>th</sup> June 1996** and lodged for registration and

registered on **1<sup>st</sup> April 1998**, whereas her husband a registered proprietor died on **15<sup>th</sup> September 1995**. Further that Title Deeds for the subdivisions were issued on **1<sup>st</sup> April 1998**, and subdivisions are Title Numbers **Ruiru East/ Juja East Block 2/9189** and **Ruiru East /Juja East Block 2/9190**. That the Deceased died before subdivision and could not have handed over all the completion documents. That the Plaintiff/ Applicant subdivided her husband's property when he was dead, collected the title deeds in his name and attempted to Administer his Estate and she has been keen to acquire the suit property fraudulently. That the Plaintiff/ Applicant had no agreement with the deceased nor did she have Land Control Board Consent for transfer of the land to her and therefore no enforceable right, and thus her Application has no merit.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the Application, the affidavits and the annexures thereto and the relevant provisions of law and finds that the issue for determination is whether the Notice of Motion Application dated **2<sup>nd</sup> February 2021 is merited**.

It is not in doubt that Jurisdiction is everything and without it, the Court has no option but to down its tools. The instant Application has raised to important issues that the Court must determine in order for it to determine whether the said Application is merited. The first issue being whether this Court has jurisdiction to grant the orders sought of staying proceedings in **Succession Cause No. 544 of 2015**, in the lower Court at Principal Magistrate Court at Thika.

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”.***

*From the above, it is therefore not in doubt that the Environment & Land Court's jurisdiction lies within the bounds of land use and occupation. It is further not in doubt that the Environment & Land Court being in the same status as an High Court exercises supervisory role over the Magistrates Court. This supervisory role however extends in so far as the said subordinate courts are dealing with matters that are within the ambits of the ELC Court and that is to mean land use and occupation.*

*In the instant Application, the Applicant is seeking for orders to have this Court stay proceedings in a Succession Court. The jurisdiction of the Environment & Land Court does not extend to a Succession matters and therefore to grant the orders sought even if the Court was going beyond its jurisdiction and dealing with issues within the jurisdiction of the ELC would be going beyond its jurisdiction and the same goes to the High Court. See the case of **In re Estate of Late M'kuura Mukindia (Deceased) [2021]eKLR***

***“ Even though the ELC Case in issue herein was filed at the Chief Magistrate's Court, the Chief Magistrate's Court entertains the matter in its capacity as an environment and land Court. The High Court however cannot assume jurisdiction over an environment and land matter let alone to make an order that is intended to directly affect an environment and land matter because that is the domain of a specialized Court, namely the Environment and Land Court which is of the same status as the High Court.”***

Further in the case of **Joseph Kaberia Kumari v Tony Mwenda Muthaura [2021] eKLR**

***“ 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.”***

Therefore, this Court finds and holds that it has **no** jurisdiction to grant the orders of Stay of proceedings in the Succession cause as sought and therefore the said prayer is not merited.

The Plaintiff/ Applicant has also sought for restraining orders against the Administrators of the estate of **Samuel Macharia Njoroge**. The Defendants/ Respondents have however averred that **they have not** been properly sued as they were not parties in the alleged Agreement between the Plaintiff/ Applicant and the Deceased nor is there a valid agreement between the parties. The Court notes that while the Defendants/Respondents have acknowledged that they are the Administrators of the Estate of **Samuel Macharia Njoroge**, a perusal of the Plaintiff indicates that the Defendants / Respondents have d been sued in their own personal capacity and not as Administrators. Even the jurat of the case indicates that the Defendants/ Respondents have been sued in their own personal capacities.

The Court notes that while the prayers as sought in the Plaintiff are against the Defendants/ Respondents in their personal capacities, the orders as sought in this Application are against Administrators of the Estate of **Samuel Macharia Njoroge**. It is important to note that the Defendants / Respondents acting in their own capacity and acting as Administrators of the Estate of the Deceased play two very distinct roles.

It is thus clear that the Administrators of the Estate of **Samuel Macharia Njoroge** are not parties to this suit and hence no orders can be

issued against the said Administrators in their absence. The prayers as framed by the Plaintiff/ Applicant cannot be granted for Rules of Natural Justice dictate that a party cannot be condemned unheard, hence again the said prayer is not merited.

Having found that the prayers as sought are not merited, it then automatically follows that the Notice of Motion Application herein is **not merited**.

The upshot of the foregoing is that the Court finds and holds that the Notice of Motion Application dated **2<sup>nd</sup> February 2021**, is not merited and the same is dismissed entirely with costs being in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**