



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. E18 OF 2021

DAVID NGUGI KAMAU & 8 OTHERS.....PLAINTIFFS

-VERSUS-

WAITHIRA MOHOYO & 4 OTHERS.....DEFENDANTS

R U L I N G

1. The defendants gave notice of Preliminary Objection dated 22<sup>nd</sup> March 2021 on the following grounds:

1. The Court has no jurisdiction to entertain succession issues.
2. The whole suit is Res Judicata before another of competent jurisdiction (sic).

2. The court directed the Preliminary objection to be argued by way of written submissions. It is the Defendants' case that the genesis of this suit is Succession Cause No.76 of 2015 and that by the wording of their Plaint, any rights the Plaintiffs are pursuing have been conferred by the provisions of the Law of Succession Act. That the issues raised by the plaintiffs in the suit whether a continuing or implied trust was created arising from the said Succession Cause as relates to the mode of distribution of the deceased estate could only be determined by the Succession Court.

3. The defendants second argument is that the present suit is *res judicata* since all the issues being raised in this suit have been dealt with by a court of competent jurisdiction. They refer to the Plaintiff's application dated 22<sup>nd</sup> November 2019, in the succession cause, which they aver mirrors prayer (b) of the Plaint. They further contend that the said application was heard on merit and the court delivered a ruling on 2<sup>nd</sup> September 2020. The defendants refer to paragraphs 22 and 23 of the said ruling and contend that the court cannot go back to determine the distribution of the estate of the deceased as sought in the Plaint. They therefore argue that the issue was already determined and the Plaintiffs having not appealed the decision, the instant suit more or less is an invitation for this court to sit on appeal in a matter already determined by a court of concurrent jurisdiction.

4. The defendants place reliance on the case of *Quick Enterprises Ltd. V Kenya Railways Corporation* cited in *Njowabu Kenya Limited v Jinit Mohanlal Shah [2020] eKLR*, where it was held that a preliminary objection should be one capable of disposing a matter preliminarily without considering the facts and pleadings. They pray that the suit be dismissed with costs to the Defendants.

5. The Plaintiffs' submissions are dated 8<sup>th</sup> July 2021. They submit that the Defendants' Preliminary Objection does not meet the threshold of a proper Preliminary Objection as established in the case of *Mukisa Biscuits Manufacturing Co. Ltd. V West End Distributors Ltd [1969] EA 696*. They submit that pleadings herein raise contentious issues which can only be determined upon parties adducing evidence at the trial.

6. The plaintiffs argue that the issues raised herein do not concern succession issues and that the suit does not concern the estate of the deceased. They submit that the suit properties are currently owned by several persons including the 1<sup>st</sup> jointly with the 4<sup>th</sup> Defendant; the 2<sup>nd</sup> Defendant jointly with the 3<sup>rd</sup> Defendant; and the 4<sup>th</sup> Defendant on his own.

7. They contend further that the trust implied in the Plaint is not a Continuing Trust but is an Implied Trust arising from the conduct of the 1<sup>st</sup> Defendant towards the Plaintiffs, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and her dealings with the suit property after it was lawfully transferred to her in the Succession Cause.

8. On the issue of the suit being *res judicata*, the Plaintiffs cite the provisions of Section 7 of the Civil Procedure Act and the cases of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR* and *Christopher Orina Kenyariri t/a Kenyariri*

**& Associates Advocates v Salama Beach Hotel Limited & 3 Others [2017] eKLR**, in which the court set out the elements to be satisfied for the bar of *res judicata* to be upheld.

9. The plaintiffs argue that the suit is not *res judicata* because, first, the issue in the application dated 22<sup>nd</sup> November 2019 in the Succession Cause was revocation while the issue in the present suit is the mode of subdivision of the suit property post transmission to the 1<sup>st</sup> Defendant and the fraudulent manner of subdivision.

10. Secondly, because the parties to the application were substantially different from the parties herein. The application only had the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as Respondents. Thirdly, the capacity under which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were sued in the application was different from the capacity under which they are sued in the present suit. In the earlier suit the 1<sup>st</sup> and 2<sup>nd</sup> defendants were sued as joint administrators of the estate of the deceased whereas in the present suit they are sued in their personal capacities and as registered proprietors of specific parcels of land arising from the subdivisions of Mau Narok/Saipei Block 3/413 (Mutukanio). Lastly, the plaintiffs contend that the succession having been heard and finally determined any dispute post transmission of the property is not a matter to be determined by the succession court but by any other competent court.

11. In their rejoinder, the Defendants reiterate that the Plaintiffs are seeking orders that will determine how the suit property should be surveyed, subdivided, and distributed, which lies within the mandate of the succession court.

12. The defendants argue further that this court cannot effectively adjudicate the present dispute without going into the proceedings in the succession matter. They also argue that whatever transactions have taken place on parcel 413 are a direct outcome of the Succession Cause which was determined with finality. That any challenge to the 1<sup>st</sup> Defendant's ownership is a direct challenge to the outcome of the decision in the Succession cause and therefore *res judicata*. The defendants rely on the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 Others [2017] eKLR**.

13. From the foregoing, the two issues for determination are first, whether this court has jurisdiction to hear the matter, and secondly, whether the suit is *res judicata*.

14. The jurisdiction of this court is set out under Section 13 of the Land and Environment Court Act which provides as follows:

**(1) 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.**

15. To determine whether this matter falls under the jurisdiction of this court, one must examine the contents of the Plaintiff and the orders sought therein. The Defendants contend that as per the averments in the Plaintiff, the Plaintiff's rights flow from the provisions of the Law of Succession Act. The defendants fault paragraph 7, 18 (iii) and 19 of the Plaintiff where the Plaintiffs allege there was a continuing, and/or implied trust created arising from the determination in Succession Cause No. 76 of 2015. The Defendants additionally point out Paragraph 11, 12 and 20 of the Plaintiff which they state raises issues on the mode of distribution which were issues that fell to be determined in the succession cause.

16. A reading of the impugned paragraphs and indeed the entire Plaintiff reveals that the 1<sup>st</sup> Defendants, and the 2<sup>nd</sup> defendant were the joint Administrators of the Deceased's estate while the plaintiffs and all the other Defendant, save for the 5<sup>th</sup> Defendant were all beneficiaries of the Deceased's estate. The plaintiff further shows that the Plaintiffs are seeking a determination of their respective interests in the suit property and the manner of distribution and subdivision respecting their entitlements from the suit property.

17. A review of decisions from the Succession Courts indicate that the Succession Court only deals with the administration of the estate of the deceased and does not extend to determination of disputes with third parties or other rights, even though such rights may arise from the deceased's estate. 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.

18. Also, in the case of *in Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR* the Court held that when disputes arise after the confirmation of the grant, the same ought to be determined outside the probate court. The court in the case stated as follows: -

**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. 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. The interventions by that court are limited to what I have stated above.**

19. In the present case, the dispute in question relates to the ownership of land, which is within the domain of the Environment and Land Court. Even though the origin may have been a succession case, issues that arise post transmission respecting any property subject of the succession within the purview of Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act. The certificate of confirmation of grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendants in regard to the deceased estate on 12<sup>th</sup> May 2016 and exhibited by the defendants shows that the 1<sup>st</sup> defendant, Waithira Mohonyo was awarded land parcel Mau Narok/Siapei Block 3/413 as a whole share. The plaintiffs claim that this was family land and that the 1<sup>st</sup> defendant was so registered to hold as a trustee for herself and for the benefit of the plaintiffs and the other defendants. The plaintiffs are dissatisfied with the manner their mother distributed the land and/or the manner of subdivision after the succession matter was concluded. In her ruling on the application in the succession court dated 22<sup>nd</sup> November 2019 that had sought revocation of the grant, Lady Justice Matheka appreciated the issues raised in the application were post transmission and could not be handled within the cause. The judge under paragraph 27 of the ruling stated as follows:-

**“ 27. This court finished its work in accordance with the parties wishes, as the estate transmitted to the 1<sup>st</sup> respondent and a title deed was issued in her name. This dispute, post transmission, does not bring the matter within the purview of section 76 of the Law of Succession Act or, the provisions of rule 73 of the P& A rules”**

20. Quite evidently the issues raised in the present suit are whether an implied or continuing trust was established when the 1<sup>st</sup> defendant was registered as the sole owner of the suit property following the succession cause. This is a post transmission issue and cannot fall for determination by the succession court. It is this Court which has the jurisdiction to deal with the matter.

21. On the second issue, the Defendants contend that the issues raised in the Plaint have been heard and determined, particularly vide the Application dated 22<sup>nd</sup> November 2019. The Supreme Court in the case of *Kenya Commercial Bank Limited -v- Muiri Cofee Estate Limited & another [2016] eKLR* set out what a court ought to consider when the issue of *res judicata* is raised. It held that a court ought to look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case, and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction.

22. In applying the said principles to the present case, I must examine the Plaint in the present case *vis a vis* the Application dated 22<sup>nd</sup> November 2019 and the ruling dated 2<sup>nd</sup> September 2020.

23. The Application dated 22<sup>nd</sup> November 2019 sought the revocation of the Grant in Succession Cause No.76 of 2015 while the suit herein seeks *inter alia* an injunction against dealing with the suit property, cancellation of registration of land and resurvey of land. While the grounds in both the application and the present suit may be somewhat similar, the matters in issue and the claims are distinct.

24. The Defendants have argued that the parties in both cases are the same and that there is a similarity of Applicants in the Application dated 22<sup>nd</sup> November 2019 and the Plaintiffs in the present suit save for the arrangement of names. Conversely, the Plaintiffs argue that only two of the Respondents in the Succession Cause are named as Defendants in the present case.

25. While this does not bar the court from finding a case for *res judicata* as between the similar parties i.e., the 1<sup>st</sup> to 8<sup>th</sup> Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the capacities of the parties in either suit are distinct.

26. On examining the Succession Court's ruling of 2<sup>nd</sup> September 2020, it is clear that the court was called upon to determine whether the Applicants had made out a case for revocation of grant, which it found in the negative. (See Paragraph 27). The court found that the issues raised were post transmission and did not fall within the purview of the Succession Court. In my view, the dispute of ownership/distribution of the property as between the plaintiffs and the defendants was unresolved. Differently put, the ownership dispute cannot be said to have

been determined with finality in the succession cause. All the parties did in the succession cause was to agree that their mother, the 1<sup>st</sup> defendant be registered as the sole owner of the suit property. Was such registration to be as a trustee as alleged by the plaintiffs or as an absolute owner? Did the plaintiffs have any interest in the property transmitted to the 1<sup>st</sup> defendant and in case they did what was the nature of the interest? The succession court having concluded its brief of having the property transmitted as agreed by the parties in the succession Court did not have any further mandate to deal with post transmission disputes between the parties.

27. The upshot is that the Preliminary Objection dated 22<sup>nd</sup> March 2021 is dismissed. Costs shall be in the cause.

28. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021**

**J M MUTUNGI**

**JUDGE**