



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mugo Wamaru (Deceased) (Succession Cause
701 of 2002) [2023] KEHC 2043 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 701 OF 2002
LM NJUGUNA, J
MARCH 8, 2023**

IN THE MATTER OF

AMOS NDEGE PETITIONER

RULING

1. The applicant herein moved this court vide an undated application wherein he sought for orders that:
 - i. An order be issued to the District Land Registrar Kerugoya directing him/her to dispense with the request to produce the original title deed in Land Parcel No Ngariama/Mirichi/325.
 - ii. Costs of the application be provided for.
2. The applicant's case is that he is the administrator of the deceased's estate herein. That the grant in this matter was confirmed on January 23, 2017 and when he visited Kerugoya Land Registry to initiate the transfer process, he was informed that he should replace the old title deed. He stated that it has proved difficult to execute the confirmed grant as he has tried to trace the said title deed to no avail. This court was therefore urged to allow the application herein as prayed.
3. I have considered the application herein together with the affidavit filed in support thereof and I form the view that this court has been called upon to determine whether the orders sought herein can issue.
4. Section 73 of *Probate and Administration Rules* provides that: -

' 73 Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'
5. In the case of *Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) vs Caroline Wangui Kiguru, Nairobi ELC suit NO (2013) eKLR*, the court was of the view that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the *Constitution* and the High Court as the Succession Court under section 47 of



- the [Law of Succession Act](#) would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.
6. But in reference to the observation under section 73 of Probate and Administration Rules, and the holding in the above case, can this court issue the orders herein given that the process of succession is complete and the only process remaining is that of transmission? The applicant has stated that upon visiting Kerugoya Land Registry to initiate the transfer process, he was told that he should replace the old title deed before he can execute the confirmed grant but according to him, he has tried to trace the title deed to no avail.
 7. Section 31 of the [Land Registration Act](#), 2012 ('the Act') Act provides that unless the Land Registrar dispenses with the production of a certificate of title or a certificate of lease, the same must be produced during the registration of any dealing with the land or lease to which it relates.
 8. In the same breadth, Section 33 of the [Land Act](#) provides the procedure for replacement of lost or destroyed certificates of title and registers of land. It provides that, in case of loss or destruction of a certificate of title or certificate of lease, an application for replacement is to be made to the Land Registrar by the proprietor of the land or lease accompanied by evidence of such loss or destruction. If the Land Registrar is satisfied with the evidence of such loss or destruction, he shall issue a replacement thereof after expiry of 60 days of publication of the application in the Gazette and in any two local newspapers of nationwide circulation.
 9. It is trite that, there is no provision in either the [Land Registration Act](#) or the [Land Act](#) that allow this court to intervene in the exercise by the Land Registrar of his powers under those two Acts.
 10. Section 86 of the [Land Registration Act](#) donates authority to the court under article 162 of the [Constitution](#) to review the exercise by the Land Registrar of the powers conferred upon him under the Act. Section 86(1) of the Act gives the court power to review decisions made by the Land Registrar in exercise of any power or in the performance of any duty conferred or imposed on the Land Registrar by the Act on an application made by an aggrieved party.
 11. Section 31(1) of the Act allows the Land Registrar to dispense with the production of a certificate of title to land or lease during the registration of any dealing with the land or lease. The application for such dispensation should be made to the Land Registrar who shall determine whether to allow it or not. The court can intervene in the matter under Section 86(1) of the Act in case a party is aggrieved by the decision of the Land Registrar on the issue as already explained above.
 12. In the instant case, it is outright that the applicant has not followed the procedure prescribed above, given that there is no evidence before me that an application for dispensation with the production of the certificate of title of the land herein had been made to the Land Registrar.
 13. As I have stated earlier, section 33 of the Act provides for the procedure for applying for replacement of a lost or destroyed certificate of title or lease. The Act has not given the court any power to direct the Land Registrar to dispense with procedure set out in the said section which is to be followed before a lost or destroyed title can be replaced. In my view, the said procedure is intended to protect the land registration system and sanctity of title. It is intended to prevent fraud and other illegal dealings with land.
 14. The above notwithstanding, does this court have jurisdiction to grant the orders sought herein?
 15. It is important to note that, with the enactment of the [Environment and Land Court Act](#) of 2012, the jurisdiction to determine disputes relating to ownership and use of land is bestowed on the Environment and Land Court. It is my considered view, as such, that the issue arising out of the instant



application is not within the jurisdiction of this Honourable Court. [See the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren Vs Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No 19 of 2018*- paragraph 40).

'This is for the reason that 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 a jurisdiction which it does not possess, its decision amounts to nothing as jurisdiction must be acquired before a case can be heard.'

[See the case of *Owners of the Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd [1989] eKLR*].

16. Similarly, in the case of *Samuel Kamau Macharia & another Vs Kenya Commercial Bank Limited & 2 others [2012] eKLR*, where the Supreme Court held as hereunder;

'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.'

[Also see Articles 165 (5) and 162 (2) of the *Constitution*; and Section 13 of the *Environment and Land Court Act*].

17. From the reading of the above Article, it is clear that the *Constitution* intended to create special courts with special jurisdiction in land matters. That jurisdiction is not therefore donated to the High Court and as such, this court humbly down its tools. The application is hereby struck out.
18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Petitioner/Applicant

