



**In re Estate of Erastus Njuguna Kamau (Deceased) (Succession Cause 11 of 2019) [2023] KEHC 17495 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17495 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 11 OF 2019  
TA ODERA, J  
MAY 10, 2023  
IN THE MATTER OF THE ESTATE OF THE LATE ERASTUS  
NJUGUNA KAMAU (DECEASED)**

**IN THE MATTER OF  
MWANIKI NJUGUNA ..... APPLICANT**

**RULING**

1. This is a ruling on the preliminary objection dated 10.10.22 filed by Susan Wairimu Mwangi the administrator of the estate of the deceased through M/s Akango and co advocates in response to the application dated 28.9.22 filed by Mwaniki Njuguna a beneficiary of the deceased herein .  
The preliminary objection is based on the grounds that;
  - a. A succession court is not clothed with Jurisdiction to decide questions of ownership of registered titles in the names of third parties in a succession cause.
  - b. It is only the land and environment court that can adjudicate and order cancellation or otherwise of a registered title to land.
  - c. The application is therefore a gross abuse of the process of the court.
2. On 28.9.22, Mwaniki Njuguna a beneficiary to the Estate of deceased filed application dated 28.9.22 seeking;-
  - i. ....spent.
  - ii. ....spent.
  - iii. That pending hearing and determination of the succession proceedings herein or until further orders are issued there be placed inhibition or restriction resting on any leasing ,charging ,



transferring or any other dealings with the parcel of land known as Nakuru/Municipality/Block 4/130.

- iv. Costs of the application be provided for.
3. The application is based on the grounds that;
    - a. The said land a property of deceased and was partly distributed to 3 beneficiaries of the deceased in equal shares on 2.6.22.
    - b. Further that the land has been fraudulently transferred to Danson Gatemei Mungai and Daniel Macua who are strangers to the estate and there is a risk of the same been wasted by them.
    - c. Also that he seeks restriction and restraining orders this court pending the determination at the environment and land relations court.
  4. The matter came up for directions on 6.3.23 when this court directed that the preliminary objection be heard first and it proceeds by way of written submissions.
  5. The administrator submitted that the preliminary objection challenges the Jurisdiction of this court to hear and determine matters raised in summons for confirmation of grant dated 28.9.22. She cited the case *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where it was held;

“I think that it 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority.”

6. Also *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* eKLR ( 2012). 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 ..... 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.
7. Counsel further submitted that issues relating to use, occupation and title to land and environment are squarely in the jurisdiction of the Environment and Court (Hereinafter referred to as ELC) as was held in the case of *Re Estate of Mbai Wainaina (deceased)* Nairobi Succession Cause no 864 of 1996 (2015)eKLR. “The mandate of the probate court under the [Law of Succession Act](#) is limited. It does not extend to determine issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such orders but rather that the provision 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”.

In *Re Estate of Alice Mumbua Mutua (Deceased)* [2017], where it was held;

“The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

8. Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the *Probate and Administration Rules*. Such have to be resolved through the structures created by the *Civil Procedure Act* and *Rules*, which have elaborate rules on suits by and against executors and administrators.
9. The *Probate and Administration Rules* recognize that, and that should explain the provision in Rule 41(3), which provides as follows;

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the *Civil Procedure Rules* ...”
10. 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.”
11. Counsel urged this court to dismiss/ strike out the application dated 28.9.22 with costs for being incompetent.
12. Danson Gathemei Mungai the interested party herein is represented herein by M/s Waiganjo & Co. advocates. On 16.3.23 he filed submissions dated 15.3.23. He supported the preliminary objection. He cited the celebrated case of *Lilian “S” (Supra)*, and the case of *Phoenix of EA Assurance company Limited v M.Thiga T/A newspaper Service* (2019) eKLR as follows where it was held that the court cannot confer jurisdiction on itself.



13. It was also submitted that the interested party herein is jointly registered as the owner of the property Nakuru/Municipality/Block 4/130 with another and has a lease certificate. Further that it was allocated to them and so they cannot be deemed to be intermeddling with the estate of the deceased. Also that the rightful court to determine questions of ownership and which is clothed with jurisdiction to hear and determine questions of ownership and who is the rightful owner of the property is the Environment and Land Court under Article 162 (2) (b) of the constitution and section 13 of the Environment and Land Court Act. Further that the instant application seeks to bar a valid title holder from using and or enjoying possession of the same without right of the said person being ascertained. The interested party cited the case of *BMM v MK* (2016) eKLR. Where it was held that jurisdiction to proclaim ownership rights of properties belongs either to the Civil of land and Environment court and not family court. Also that a similar finding was made in the case of *Alexander Mbaka v Royford Muriuki Rauni & 7 others and Re estate of Kinogu Mukiria (deceased)* 2022 eKLR.
14. Counsel also submitted that the mere fact that the grant was confirmed giving the applicant property does not mean that the property belongs to him. Also that it has been demonstrated that one of the beneficiaries Wachira Njuguna has filed Nakuru ELC no E009 of 2023 *Wachira Njuguna v Danson Gathemei Mungai & 3 others* challenging title by the interested parties and that the beneficiaries are thus forum shopping.
15. Wachira Njuguna the applicant/respondent in the preliminary objection submitted that the land number Nakuru/Municipality/Block 4/130 which is currently registered in the names of the interested party and another was listed as forming part of the estate of deceased in the affidavit in support of petition for letters of administration and that the applicant is residing thereon. It was submitted that the applicant disputes the said title issued to the interested parties.
16. It was also submitted that the administrator is not concerned with the intermeddling and has declined to protect the estate in the Environment and Land Relations Court case and has abandoned the beneficiaries.
17. The interested party also told this court that the application is not meant to determine ownership but preservation of the estate of deceased.
18. He also submitted that section 45 of the law of Succession Act provides for intermeddling with the estate of deceased and that the issue of intermeddling was dealt with in several cases i.e. in the matters of *the estate of Veronica Wakagoto (Deceased) Nairobi* HC Succession cause no 1974 of 2008 where hon Justice Musyoka held that where property of a deceased is dealt with without authority then the same amounts to intermeddling which is a criminal offence. Also the case of *John Marete Kirema and another v Gladys Karimi Muthamia and 3 others* (2013)eKLR where intermeddling was defined.
19. It was also submitted that the purported registration of the property in the names of the interested parties was fraudulent and void *ab initio*. It was also submitted that section 47 and 73 of the probate and Administration Rules gives this court Jurisdiction to issue such orders and decrees as may be expedient and necessary in the best interest of the estate.
20. It was also submitted that inhibitory orders sought are against any dealing on the title and are not infinite and would not prejudice any party. Also that this court has not been furnished with any order from the ELC court which would cause any confusion in either court and that the orders are sought in the best interest of the estate.
21. Further that the said orders are premised on Section 68 of the Land Registration Act which grants the court the discretion to inhibit dealings on land on a particular time. Also that the said provision is not a preserve of ELC. Counsel urged that court to disallow the preliminary objection.



22. Have carefully considered the preliminary objection and the submissions by all the parties herein. The issue arising for determination is whether a family court has jurisdiction to hear and determine a dispute between the estate deceased and a third party.
23. It is not disputed that it is trite law that jurisdiction is everything and without it the court must pen down as submitted by the administrator and the interested party herein.
24. The administrator submitted that this family court lacks Jurisdiction to hear and determine the application dated 28.9.22 as it is the ELC court which has the jurisdiction to hear and determine land disputes under Article 162 (2) provides that the Environment and land court is the one which has such jurisdiction. This was supported by the interested party. The respondent/applicant submitted this court has powers issue inhibition order under Section 68 of the [land registration Act](#).
25. The respondent/applicant submitted that the interested party and his co-owner intermeddled with the estate of the deceased that is land known as Nakuru/Municipality/Block 4/130 under section 45 of the [law of succession Act](#) by having the same registered in their names despite the same having been distributed to the estate of deceased . This was denied by the interested party who said they have a leasehold in respect of the property and that it does not belong to deceased but them. Section 45 (1) of the [Law of Succession Act](#) provides that;
- “ Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
26. The respondent/applicant says that the said property belongs to the deceased and has been distributed to the beneficiaries of the estate of deceased while the interested party on the other side also claims the same land and there is evidence that there exists land case no E009 of 2023 *Wachira Njuguna v Danson Gathemei Mungai & 3 others* in the Environment and Land Court Nakuru and it was admitted that a similar application was filed therein.
27. Article 162 of the [constitution](#) of Kenya provides that;

- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (b) the environment and the use and occupation of, and title to, land.”

Article 165 (5) of the [Constitution](#) provides;

- “(5) The High Court shall not have jurisdiction in respect of matters—
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

Article 162 (2) of the [constitution](#) clothes the Environment and Land Relations Court with the Jurisdiction to hear and determine land disputes. Article 165 (5) of the [Constitution](#) prohibits that High court from usurping jurisdiction of courts of equal status.

Section 13 of the [environment and land relations Act](#) provides:-

“Jurisdiction of the Court



- (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.

Section 68 (1) of the *land registration Act* provides that;

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

Section 2 of the same act defines a court as "Court" means the Environment and Land Court established by the *Environment and Land Court Act*, 2011 (no 19 of 2011,) and other courts having jurisdiction on matters relating to land; Prayer 2 of the application dated 28.9.22 seeks inhibition orders. A reading of section 68 (1) of the *Land Registration Act* and section 2 of the same Act is clear that it is only ELC court which has jurisdiction to issue inhibition orders.

28. I have seen the cited cases and particularly the case of *Re Estate of Mbai Wainaina (deceased)* Nairobi Succession Cause no 864 of 1996 (2015)eKLR and I agree with the reasoning of Justice Musyoka that family courts have no jurisdiction to deal with land disputes between the estate of a deceased and a 3<sup>rd</sup> party as such jurisdiction lies with the Environment and Land Relations Court under Article 162 (2) of the *Constitution*.
29. In the upshot the preliminary objection dated 10/10/2022 is merited and uphold it with costs to the interested party.

**T. A. ODERA - JUDGE**

**10.5.2023**

**RULING DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;**

**Kairu Maina for the Applicant.**

**Akango for the Administrator & h/b for Mss Wangari for Interested party.**

**Mwangi for Wachira Njuguna a beneficiary.**

**Court Assistant; Bor.**

**T. A. ODERA - JUDGE**

**10.5.2023**

