



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC APPEAL NO. E001 OF 2021

ALICE YIAPENOI ENE MAGIROI MPAIMA.....APPELLANT/APPLICANT

VERSUS

LEMAISON SAMANTE.....RESPONDENT

RULING

A. INTRODUCTION

1. The Respondent herein filed a Notice of Preliminary Objection dated 5th February, 2021 in response to the Appellant's Appeal and Notice of Motion both dated 20th January, 2021 based on the following grounds: -

a) This Honourable court has no jurisdiction to entertain the said Notice of Motion and Appeal by virtue of the rule in *Troustik Union International vs Jenny Mbeyu*, Court of Appeal at Mombasa, Civil Appeal No. 145 of 1990 and (1993)KLR 230, in which it was held that no person can file a suit on behalf of an estate or participate in proceedings to enforce the rights of a deceased unless he/she holds a grant of representation issued by a court of law; that decision of a 5 Judge bench is binding on this Honourable Court and the appeal and the application are for striking out; the Appellant's late husband, John Mpaima Kedoki, is member No. 1685 in the Ntulele Land Adjudication Record of 1982;

b) Because of lack of a grant of representation, the possession and dealing with the suit property is an offence under Section 45 of the Law of Succession Act and as held in *Nabro Properties vs Sky Structures (2002) 2 KLR 299*, no party is allowed to base its claim on its own wrongs; for this and (1) above, the Appellant/ Applicant cannot establish a case for an interim relief of any kind;

c) By virtue of Section 115 of the former constitution, which vested the suit property, a part of Trust land in Narok County Government, pending the registration of adjudicated land under the Land Registration or the repealed Registered Land Act, every member of the Masai Community in Narok holds any portion of land as a trustee and cannot enforce it without making the Narok County Government, the successor of Narok County Council, a party; the said section vested the suit property a part of trust land in Narok County and the same remains trust land until a title deed is issued under the Land Registration Act or under the repealed Registered Land Act;

d) The suit property is part of the Ntulele Land Adjudication Section whose adjudication was completed in 1981 and is the subject matter of Narok ELC Misc. Application No. 13 of 2018: *Nepatao Ole Manangoi & Others vs The Attorney General & Others*; pending issuance of titles under the Land Registration Act, 2012, only the registered 2,222 members are entitled to possession of portions of that land and the Appellant is not one of them as of the time of the completion of the adjudication process;

e) In addition to (1) above, the Appellant is relying on an invalid claim to land based on disobedience, by the Narok Land Adjudication Officer, of Orders issued on 10th February, 2009 in Nairobi Civil Misc. Application No. 871 of 2005: *Nepatao Ole Manangoi & Others vs The Attorney General & Others*, forbidding the said Land Adjudication Officer from continuing with the adjudication of any portions of the suit property pending the hearing and determination of the suit which is still pending; as held by a 5 Judge bench in petition No. 518 of 2013: *Judicial Service Commission vs The Speaker of the National Assembly*, all actions done by a person who disobeys a court order are illegal, null and void; that Bench stated the law as follows:-

“94. The President's actions were predicated on actions taken by the National Assembly resulting in a petition to the President under Article 251(3). The validity and bona fides of this petition is in contention. If, as the Petitioner contends, it was invalid for having been the result of a process in Parliament that took place in violation of a court order, then the President's acts would have been based on an invalid act; and as the court observed in the case of *Clarke and Others vs Chadburn and Others [1985]1 ALL ER 211*, an act done in willful disobedience of a court order is both a contempt of court and an illegal and invalid act which cannot effect any change in the rights and liabilities of others. (See also the decision in *Commercial Bank of Africa Ltd vs Isaac Kamau Ndirangu (Civil Appeal No. 157 of 1995 [1990- 1994] EA, 69)*.

f) As held in Owners of the Motor Vessel Lillian S vs Caltex Oil Kenya Ltd (1989) KLR 1, where a court lacks jurisdiction, it must down its tools; this is a suitable case for this Honourable Court to down its tools.

2. On 18.02.2021, the court issued directions on the disposal of the Preliminary Objection dated 5th February, 2021 by way of written submissions.

3. I have read the Preliminary Objection and the annexures attached thereto and the rival submissions by both parties together with the authorities cited therein in support of respective claims and the relevant legal provisions and I have taken the same into account in arriving at my decision.

4. The main issue for determination before me is whether the Notice of Preliminary Objection dated 05/02/2021 is merited and I will proceed to discuss the same on account of;

i. Whether the Appellant has the locus standi and/or Capacity to institute the Appeal and the Application herein.

ii. Jurisdiction of the court to entertain the Appeal and Notice of Motion as filed

iii. Sub Judice with regard to Narok ELC Misc. Application No. 13 of 2018.

5. Preliminary Objection was described in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir **Charles Nebbold, JA** stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.

The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

6. From the foregoing, it is clear that the following ingredients must be present for a preliminary objection to succeed: It should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

7. The Respondent has sought the dismissal of the Appellant’s Memorandum of Appeal dated 08.01.2021 and Notice of Motion Application dated 20.01.2021 for want of Jurisdiction. It is the Respondent’s assertion that the Appellant does not have the necessary grant of representation and therefore does not have the capacity to institute the present Appeal and the Notice of Motion Application. Further, he also contends that the suit land is a trust land and therefore the court’s jurisdiction is limited unless certain requirements are complied with.

8. As was held in the celebrated case of **Owners of Motor Vessel “Lillian S”**, jurisdiction is everything and it goes to the root of the case; without jurisdiction, the court must down its tools.

9. Further, the Supreme Court of Kenya in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

“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... 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.”

LOCUS STANDI

10. I will now proceed to determine whether the Appellant has the Locus standi to institute the present Appeal and Application. **Section 45(1) of the Law of Succession Act** provides as follows: -

(1) 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.

11. On the issue of her capacity to institute the present Appeal and the Application herein; it is the Applicant's contention that she was registered as the owner of the suit land after the demise of her husband. And she is thus claiming on her own behalf. Therefore, no grant of representation is necessary in the circumstances as she is claiming her interests and not those of her deceased husband.

12. The Respondent on the other hand avers that the suit property was allocated to the Appellant's late husband, Mr. John L. Mpaima on 19/10/1992. Her husband died on 30/12/1992. The property was vested in the Appellant's name through a copy of a Chief's letter dated 15/02/1996. No grant has been made in respect to the estate of the deceased nor to the Appellant. The Appellant therefore has no right to agitate a cause of action vested in the deceased.

13. It is important to note that the Appellant has not demonstrated the circumstances under which she became the registered owner of the suit property despite confirming that the suit property belonged to her deceased husband and the same was allocated to him during the Adjudication process. It is trite law that any person seeking to deal with the property of a deceased person must first obtain a Grant of Representation. Therefore, the position held by the Appellant that Grant of Representation is not necessary in the present proceedings is misguided and bad in law.

14. It is common ground that the suit property belonged to one **JOHN L. MPAIMA**; the Appellant's husband, who is since deceased and as a result the property forms part of his estate. It is also common ground that the Appellant herein does not hold any Grant of Representation issued by a court of law.

15. From the above legal provision, it is clear that a grant of representation is a mandatory requirement where one seeks to deal/handle a property of a deceased person. I need to point out that a Chief's Letter cannot take the place a lawful Grant of Representation. The Appellant cannot claim that she became the registered owner the suit property on the strength of the Chief's letter dated 15.02.1996, the legal requirements as enshrined in the Law of Succession Act have to be complied with to the letter, this court cannot aid an illegality. The Appellant is neither a personal representative/ executor nor an administrator of the estate of her deceased husband.

16. In the circumstances thereof, I find that the Appellant/ Applicant HAS NO locus standi/ capacity to institute the present Appeal dated 08.01.2021 and the subsequent Application dated 20.01.2021. As a result, thereof, this court lacks jurisdiction to entertain the present Appeal and Application as filed.

17. Having held that the Appellant is not properly before this court for lack of capacity to institute the present proceedings; I do find that it will be an academic exercise to proceed to analyze the remaining Issues.

18. The upshot of the foregoing analysis is that the Respondent's **Preliminary Objection** dated 5th February, 2021 is merited. As a consequence, thereof, the Appellant's Memorandum of Appeal dated 08.01.2021 and the Notice of Motion dated 20.01.2021 are hereby Struck Out with costs to the Respondent and all the consequential orders attendant to are hereby vacated. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 30TH DAY OF NOVEMBER, 2021.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Ms. Nchie for the Appellant

Munyor for the Respondent

Tom Maurice - Court Assistant