



**In re Estate of Robert Moffat Macharia (Deceased) (Succession Cause
727 of 1991) [2023] KEHC 18584 (KLR) (Family) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 727 OF 1991
MA ODERO, J
JUNE 2, 2023**

BETWEEN

FREDRICK NJUGUNA MACHARIA APPLICANT

AND

JOSEPH KANURI MWAURA 1ST RESPONDENT

BONIFACE NJENGA KURIA 2ND RESPONDENT

AND

JANE NJERI SIMON 1ST INTENDED RESPONDENT

ANTHONY MUIRURI 2ND INTENDED RESPONDENT

CATHERINE NYAMBURA GITAU 3RD INTENDED RESPONDENT

PHILOMENA WAIRIMU GITAU 4TH INTENDED RESPONDENT

JOHN KINGORI MWANGI 5TH INTENDED RESPONDENT

SEBASTIAN GITHIU NJUGUNA 6TH INTENDED RESPONDENT

KIHUMBU THAIRU 7TH INTENDED RESPONDENT

RULING

1. Before this Court is the Notice of Preliminary Objection dated 7th November, 2022 filed by the 1st and 2nd Respondents Joseph Kanuri Mwaura and Boniface Njenga Kuria as well as Preliminary Objection dated 4th October, 2022 filed by the 7th intended Respondent John King'ori Mwangi



2. The matter was canvassed by way of written submissions. The 1st and 2nd Respondents filed written submissions dated 6th December, 2022 whilst the Applicant relied upon his written submissions also dated 6th December, 2022.

Background

3. The succession cause relates to the estate of the late Robert Moffat Macharia (hereinafter ‘the deceased’) who died intestate on 29th May 1990.
4. Following the demise of the Deceased his widow and son Florence Macharia and Frederick Njuguna Macharia were appointed as co-Administrators of the estate vide a grant of letters of Administration issued on 20th September, 1991. The Grant was duly confirmed on 7th May, 1992. Thereafter One of the Administrators Florence Macharia (the widow) passed away on 29th September, 2019 leaving the Applicant as the sole Administrator of the Estate.
5. The 1st and 2nd Respondents allege that sometime in the year 2002 the two Administrators of the estate approached them and offered to sell to them LR No. Nyandarua/Muruaki/526 an asset belonging to the estate in order to enable the Administrators clear some debts owed to KRA and NSSF by the estate in order to prevent auction of the estate properties.
6. That the Administrators promised to transfer to the 1st and 2nd Respondents the property known as LR No. Nyandarua/Muruaki/526 (hereinafter the ‘suit property’) if the Respondent assisted them to clear some of these outstanding debts.
7. The 1st and 2nd Respondents claim that following an agreement between themselves and the two Administrators they paid to KRA on behalf of the estate the sum of Kshs.506,656/= and also cleared other debts due to the estate amounting to Kshs.200,000/=.
8. The Respondents allege that they entered into an Agreement for sale with the Administrators to purchase the suit property for a sum of Kshs.800,000/=. That the Applicant herein expressly authorized his late mother, who was the Co-Administrator of the estate to execute the sale documents. Thereafter Title in LR No. Nyandarua/Muruaki/526 was transferred into the joint names of the 1st and 2nd Respondents.
9. The Applicant then filed the Notice of Motion dated 9th September, 2002 seeking the following orders:-

- “1. Spent
2. Spent
3. That the Honourable Court be pleased to join Jane Njeri Simon, Anthony Muiruri Gitau, Catherine Nyambura Gitau, Philomena Wairimu Gitau, John Kingori Mwangi, Sebastian Githiu Njuguna and Kihumbu Thairu in these proceedings as the 3rd to 9th Respondents.
4. Spent
5. That pending the hearing and determination of this application, this Honourable Court be pleased to issue a temporary injunction barring the Respondents and their agents, servants or employees from subdividing, transferring, selling, developing, or in any other way intermeddling with the properties of the estate of the late Robert Moffat Macharia as contained



in the grant of letters of representation these being; LR No.6727/33, LR No.6727/34; LR No.6727/27, Plot No. 74 Kimiriri Market, LR No.209/8336/238, Nairobi/block 104/178, Nyandarua/muruaki/526 or any of its divisions or subdivisions by whichever way mutated.

6. That this Honourable Court be pleased to convict the Respondents jointly and severally for intermeddling with the Estate of the Late Robert Moffat Macharia and thereafter commit them to prison for a period of one year or pay a fine of Kshs.1,000,000/= (Kenya Shillings one million) dated 23rd August, 2021”.
10. The 1st and 2nd Respondents opposed the application through their Replying Affidavit dated 7th November, 2022. They argued that it was pretentious of the Applicant having sanctioned the sale of the suit properties to themselves to now turn around and accuse them of intermeddling in the estate.
11. The 1st Respondent further alleges that LR 6727/34, LR 6727/27 Plot No.74 Kimiriri Market, LR No.209/8336/238 and Nairobi/block/104/178 were all jointly owned by the Deceased and his late wife Florence Macharia.
12. The 1st Respondent avers that he entered into a sale Agreement with the widow FLOrence Macharia to purchase LR No.6727/70 which was a result of the amalgamation and subdivision of LR No.6727/33, LR No.6727/34 and LR No.6727/27. The 1st Respondent states that he later sold this LR No.6727/70 to one John King’ori Muange the 7th Respondent in this matter.
13. Together with their Replying Affidavit the Respondent also filed the Notice of Preliminary Objection dated 7th November, 2022 which was premised on the following grounds:-
 - “ 1. That the application is defective, bad in law and an abuse of the Honourable court’s process because of the following reasons;
 - a. The 1st and 2nd Respondents have been irregularly enjoined in a subsisting succession suit where they were not parties.
 - b. Prayers 4 and 6 of the application touching on land matters are not based on substantive suit and cannot be granted.
 2. That this Honourable Court lacks jurisdiction to hear and determine the matter in respect of prayers 4 to 6 of the application. August, 2021”.
14. As stated earlier the 7th Respondent also filed a Notice of Preliminary Objection dated 4th October, 2022 whilst the 3rd, 4th and 5th Respondents also filed the Notice of Preliminary Objection dated 4th October, 2022 Since the Preliminary Objections all raised the same grounds i.e. lack of jurisdiction by this court to determine the question of “ownership” of the parcels of land in question, I will proceed to deal only with the Notice of Preliminary Objection dated 7th November 2022.

Analysis and Determination

15. The only issue for determination is whether the Preliminary Objections filed by the Respondents have merit.



16. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA where the court states as follows:-
- “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 the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. “.....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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion”.
17. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* (2015) eKLR, the Supreme Court of Kenya stated as follows:-
- “A preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as they are prima facie presented in the pleadings on record”.
18. Therefore, in order for a preliminary objection to succeed the following tests must be satisfied.
- (i) The Preliminary Objection should raise a pure point of law.
 - (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
 - (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.
19. Therefore, a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
20. The Respondents challenge the jurisdiction of the court to entertain the application filed by the Applicant. They submit that the dispute between the Applicant and the Respondents is a dispute between beneficiaries to the estate and third parties who are not beneficiaries to the estate but who claim proprietary rights over estate property on account of being purchasers.
21. It is trite law that a question of jurisdiction does indeed qualify as a preliminary point. As such I find that the Respondents have raised a genuine preliminary objection.
22. Where a suit is filed in a court which lacks the requisite jurisdiction to hear and determine the matter then that suit would be deemed to be null and void. “In *Owners Of Motor Vessel “lillian S” – Vs- Caltex Oil (K) LTD* [1989] KLR the court of Appeal held that jurisdiction is everything without which a court of law has no power to make one more step. Where a court of law 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 the moment it holds the opinion that it is without jurisdiction”. [own emphasis]
23. The Applicant seeks interlocutory orders to restrain the Respondent from dealing in any way with LR No.6727/33, LR 6727/34, LR No.6727/27, PLOT No.76 Kimiriri Market, LR No.209/8336/238, Nairobi/block 104/17 and Nyandarua/muruaki/526. The Applicant claims that all the above properties are assets which comprise the estate of the Deceased.



24. I have perused the Certificate of confirmed Grant dated 25th May, 1993 and note that the above properties are all listed in the schedule as assets belonging to the estate of the Deceased.
25. On the other hand, the Respondents whilst conceding that the said properties did at one time belong to the estate of the Deceased insist that they lawfully purchased Nyandarua/Muruaki/526 and the Title thereto was duly transferred into their names Annexed to the Supporting Affidavit dated 7th November, 2022 is a copy of the Certificate of Title (Annexure JKM '6') indicating that title to the suit property is in fact registered in the names of Joseph Kanuri Mwaura and Boniface Njenga Kuria (the 1st and 2nd) Respondents herein.
26. The Respondents further allege that they lawfully purchased LR No.6727/70 for a consideration of Kshs.8,000,000/= and state that upon payment of the full purchase price the said property was transferred into their names.
27. The 1st Respondent further avers that he subsequently sold LR 6727/33 to one John King'ori Mwangi (the 7th Respondent) and had the Title transferred into the name of the buyer.
28. Once again, the Respondents have annexed to the supporting Affidavit a copy of the Title Deed (Annexure JKM-7) indicating that title in the said property was on 26th September 2018 transferred into the names of Joseph Kanuri Mwaura (the 7th Respondent herein).
29. Therefore, its is manifest that the properties in question cannot be said to belong to the estate of the Deceased as they have now been transferred to third parties.
30. The dispute between the Applicant and the Respondent relates to the question of "ownership" of the disputed parcels of land. This is a dispute pitting the Administrator of the estate against third parties who claim to have lawfully acquired Title to the said properties.
31. This court is sitting as a Probate Court whose mandate is to oversee and supervise the distribution of the estate to the genuine beneficiaries. As was observed by the court in *RE: Estate Of GKK (Deceased)* (2017) eKLR

"The primary functions of a probate court is distribution of the estate of a dead person"

32. As stated earlier this is a dispute pitting the Administrator of the Estate against third parties who claim to bonafide purchasers of estate assets.
34. Matters relating to the ownership use and occupation of land have now under Article 162 of the *Constitution* of Kenya 2010 been mandated to be determined by a specialized court being the Environment and Land Court ('ELC').
33. Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of that court as follows:-
 13. Jurisdiction of the Court
 - (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 under 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. [Rev.2012] No.19 of 2011 Environment and Land Court 9 [Issue 1]

34. Therefore, the correct and proper forum before which the Applicant ought to ventilate claim of the Estate to the suit land is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of ‘ownership’ of the suit land.

35. *In Re Estate Of Stone Kathubi Muinde (Deceased)* (2016) eKLR Hon. Justice William Musyoka held that:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit property brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that the court can give effect to it”. [own emphasis]

36. Therefore, the remedy for the Administrator lies in the Environment and Land Court. If and when the Applicant obtains judgment in his favour from the Environment and Land Court then he is at liberty to present the decree to this court for implementation.

37. For the above reasons I find no merit in the Notice of Motion dated 9th September, 2002 in so far as to seek orders in respect of LR 6727/33, LR 6727/34, LR 6727/27 and Nyandarua/Muruaki/526.

38. Having said that it is the duty of the probate court to ensure that there is no interference with assets which belong to the estate of the Deceased. I note that the Respondents have not laid any claim to Plot No.74 Kimiriri Market LR 209/8336/238, or to Nairobi/block 104/178. These are assets which in the confirmed Grant are indicated as belonging to the estate of the Deceased.

39. Section 47 of the *Law of Succession Act* provides:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”



40. Likewise the *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 the justice or to prevent abuse of the process of the court.”

41. In the circumstances the Notice of Preliminary Objection dated 7th November, 2022 is successful. I do hereby issue preservative orders restraining the Respondents herein or any other person from intermeddling with the following properties.

- (a) Plot No.74 Kimiriri Market
- (b) LR No.209/8336/238
- (c) Nairobi/Block 104/178 pending final distribution of the estate.

42. I direct that each party will bear its own costs.

DATED IN NAIROBI THIS 2ND DAY OF JUNE, 2023.

MAUREEN A. ODERO

JUDGE

