



REPUBLIC OF KENYA



**Njiru & 3 others v Nyaga (Civil Appeal 21 of 2018)
[2023] KEHC 19531 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 21 OF 2018
LM NJUGUNA, J
JULY 3, 2023**

BETWEEN

**RAHAB MUTHONI NJIRU 1ST APPELLANT
LLOYD NJIRU NYAGA 2ND APPELLANT
ALPHA NJIRU ISAAC 3RD APPELLANT
JOHN NYAGA ISAAC 4TH APPELLANT**

AND

EVANSON KARIUKI NYAGA RESPONDENT

RULING

1. Before this court is the summons dated November 16, 2022 and filed in court on even date which seeks for the orders:
 - i. That the Deputy Registrar of this Honourable Court be ordered to sign all transfer documents in relation to Land Parcel Number Gaturi/Nembure/2283, which is being transferred to the appellants.
 - ii. The Land Registrar Embu be ordered to do away with the production of the original title deed, pass port, identity card, KRA Pin of the respondent and the presence of the respondent during transfer at the Land Control Board.
2. The said summons is based on the grounds on its face and it's supported by the affidavit annexed to the application.
3. In a nutshell, it is the applicants' claim that the respondent has without any justifiable cause ignored to perform his duties as the administrator of the estate of the deceased herein and distribute the estate to the beneficiaries. That the implementation of the grant remains incomplete for the reason that the



respondent, who is the administrator herein is unwilling to complete the administration of the estate. That this being an old matter, it is only fair that the same be finalized. This court was therefore urged to grant the orders sought herein in the interest of justice.

4. The application is opposed by the respondent vide his replying affidavit sworn on 28.02. 2023 wherein he deposed that he has not been approached by the applicants to sign the said documents or to surrender the original title deed or any other document and therefore, the application herein was not necessary. That the 1st prayer in the application goes against the very judgment which stipulated that Land Parcel No Gaturi/Nembure/2283 be distributed equally amongst the daughters of the second house yet the 1st applicant comes from the first house. That the fact that it was ordered that the said property reverts to the original owner, this court ought to interpret the said order. In essence, the respondent did not address the issues raised in the application.
5. Directions were taken that the application be canvassed by way of written submissions and only the applicants complied with the said directions.
6. The applicants submitted that a certificate of confirmed grant dated November 04, 2021 was issued to them and no appeal or review has been preferred against the same. Reliance was placed on Section 83 (a) – (i) of the LSA on the duties of a personal representative of a deceased person's estate. That the respondent has without any justifiable reason refused to perform the above stated crucial duty and/or refused to completely administer the estate of the deceased person herein and further distribute it to the rightful beneficiaries. Further reliance was placed on the cases of In re Estate of Daudi Owino Olak (Deceased) [2022] eKLR and In re Estate of Juluius Mimano (Deceased) [2019] eKLR. It was further argued that in as much as award of costs remains the discretion of the court, the applicants urged this court to condemn the respondent to bear the costs of the application herein. It was therefore prayed that the orders sought herein be granted to ensure that the estate is finally distributed to the deserving beneficiaries.
7. I have perused the application herein, the responses thereto and the submissions by the parties and I form the view that this court has been called upon to determine whether the application herein has merits.
8. As I have already noted, the application herein seeks to compel the Deputy Registrar to execute all the relevant documents on behalf of the respondent and further, the Land Registrar Embu be ordered to do away with the production of the original title deed, passport, identity card, KRA Pin of the respondent and the presence of the respondent at the Land Control Board.
9. It is trite that, the duties of personal representatives are fiduciary in nature Section 83 of the Law of Succession Act provides that the same includes the duty (subject to section 55) to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be [section 83 (f)]; within six months from the date of confirmation of the grant, or such shorter period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration; [section 83 (g)]; and to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration [section 83 (i)].
10. In my own view, the respondent is not sincere in his deposition that he has not been approached by the applicants with a view of signing the said documents or to surrender the original title deed or any



other document as he alleges. I say so for the reason that the respondent previously, had proposed a mode of distribution which was grounded on the fact that he had rescued the suit land/ estate from the auctioneer's hammer and was therefore entitled to a bigger share of the estate and even made an attempt to appeal against the judgment by Mshila J.

11. The court *in Re Estate of Wilfred Munene Ngumi (deceased)* [2020] eKLR while allowing an application for the Deputy Registrar of the court to execute completion documents held as follows:

“...It is evident from the Applicant's affidavit in support of the application and oral arguments by her Advocate, Mr Kahiga, that the Respondents have refused to sign the necessary documents to facilitate execution of the court's judgment/decree. To prevent abuse of the court process, by the above legal provisions, this court has inherent powers to prevent such abuse. I therefore find and hold that the petitioner's summons dated September 23, 2019 and filed on September 25, 2019 to be merited...”

12. Further, this court vide Section 47 and Rule 73 of the *Probate and Administration rules* makes provision that nothing 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 this court. The respondent herein has been difficult and has refused to ensure that the rightful beneficiaries inherit what is rightfully theirs.

13. I am persuaded by the above provisions of law and it is trite that court orders are never to be made in vain. The *Law of Succession Act* thus places a duty on personal representatives to complete the administration of the estate. Section 83(i) of the *Law of Succession Act* provides;

“To complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate.....”

14. Having in mind that this court is mandated to ensure that the estate of a deceased person is distributed to all the rightful beneficiaries, it is my considered view that the Deputy Registrar of this court ought to sign the said documents to ensure that the beneficiaries herein inherit what is rightfully theirs.

15. On whether this court should order that the production of the original title deed, passport, Identity card, KRA Pin of the respondent be done away with, 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.”

16. But in reference to the observation under section 73 of Probate and Administration rules, can this court issue the orders herein given that the process of succession is complete and now what remains is transmission?

17. 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.



18. I hold the view that this matter touches the court as provided for under article 162 for the reason that, 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.
19. Section 33 of the Act on the other hand deals with 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 Kenya Gazette and in any two local newspapers of nationwide circulation.
20. There is no provision in either section 31 or 33 of the Act allowing the court to intervene in the exercise by the Land Registrar of his powers under those sections of the Act.
21. 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.
22. 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.
23. The perusal of the record before me shows that there is no evidence that an application for dispensation with the production of the certificate of title of the land herein had been made to the Land Registrar.
24. 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 power to direct the Land Registrar to dispense with any of the steps set out in the said section which are to be followed before a lost or destroyed title is replaced. In my view, the said steps are intended to protect the land registration system and sanctity of title. They are intended to prevent fraud and other illegal dealings with land.
25. In reference to the matter herein, the question that this court asks itself is whether this court is possessed with the jurisdiction to give such kind of orders?
26. 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 issues arising out of the instant application are 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).
27. 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].

28. 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*].

29. From a reading of the above Sections/Articles, 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.
30. From the above therefore, it is this court's finding that:
- i. Prayer 1 on the Summons General dated November 16, 2021 is hereby allowed;
 - ii. Prayer 2 of the said application is declined.
31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2023.

L NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondents

