



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1067 OF 1991**

**IN THE MATTER OF THE ESTATE OF KAPOYA MOSIRO (DECEASED)**

**KARIRA JOB KAHIGA .....1<sup>ST</sup> INTERESTED PARTY/APPLICANT**

**JAMES KANG'ETHE KIHANYA....2<sup>ND</sup> INTERESTED PARTY/APPLICANT**

**SAMUEL MUCAI NG'ETHE .....3<sup>RD</sup> INTERESTED PARTY/APPLICANT**

**VERSUS**

**SIMON MUTUNKEI KAPOYA .....1<sup>ST</sup> EXECUTOR/RESPONDENT**

**RUTH WANJIRU KAPOYA .....2<sup>ND</sup> EXECUTOR/RESPONDENT**

**RULING**

1. Before this Court for determination is the Preliminary Objection dated **15<sup>th</sup> September 2021** filed by **SIMON MUTUNKEI KAPOYA** and **RUTH WANJIRU KAPOYA**, the Executors opposing an undated summons for Revocation of Grant filed by **KIRIRA JOB KAHAGI, JAMES KANG'ETHE KIHANYA** and **SAMUEL MUCAI NG'ETHE** (hereinafter referred to as the **Interested parties**). The said Preliminary Objection was premised upon the following grounds: -

**“1. THAT the Honourable Family Division lacks jurisdiction to entertain, hear and determine the summons as the applicants’ claims are grounded solely on certain alleged contractual land purchases by the claimants from the deceased. This is purely on Environmental and Land Court which was specifically set up to hear and determine inter alia “Public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; any other dispute relating to land.**

**2. THAT the claimants are not family members of the deceased to whom the estate relates and they have no capacity in law to impunge or challenge the Grant and Certificate of Confirmation with Will Annexed within the Probate and Administration process of dispute resolution.**

**3. THAT the 1<sup>st</sup> Interested Party has since the filing of summons died and there has been no application for substitution has been served on the Respondents advocates on record.**

**4. THAT summons and supporting affidavit are undated and offend the provision of the Oaths and Statutory Declaration Act Cap 15, Laws of Kenya.”**

2. The Interested Parties opposed the Preliminary Objection through their reply dated **30<sup>th</sup> September 2013**. The matter was canvassed by way of written submissions. The Executors filed their written submissions dated **29<sup>th</sup> October 2021** whilst the Interested Parties relied upon their written submissions dated **10<sup>th</sup> November 2021**.

**BACKGROUND**

3. This Succession Cause relates to the estate of **KAPOYA OLE MOSIRO** (hereafter the **Deceased**) who died on **15<sup>th</sup> May 1991**. The Deceased was survived by **three wives** namely:-

**(i) Grace Nasieku Kapoya (Deceased)**

**(ii) Kireru Kapoya**

**(iii) Ruth Wanjiku Kapoya**

4. The Deceased left a written Will dated **10<sup>th</sup> March 1991** in which he appointed two of his wives **Grace Nasieku** and **Ruth Kapoya** as Executors. Grant of Probate with written Will was issued to the two Executors on **2<sup>nd</sup> December 1991** which Grant was duly confirmed on **8<sup>th</sup> October 1999**. Thereafter the 2<sup>nd</sup> wife **Kireru Kapoya** sought revocation of Grant on grounds that the Will was a forgery. Vide a judgment delivered on **23<sup>rd</sup> March 1999**. **Justice E M Githinji** (as he then was) upheld the Will as valid. An appeal against this decision was dismissed by the Court of Appeal on **6<sup>th</sup> August 2019**.

5. Following the demise of one of the Executors **Grace Nasieku Kapoya** her son **Simon Mutunkei Kapoya** was appointed as Executor in her place.

6. The Interested Parties then filed a summons for Revocation of Grant claiming to have purchased the parcel of land Known as **NGONG/NGONG/11077**, which forms part of the estate of the Deceased. The Interested Parties allege that they purchased the suit land from the Deceased during his lifetime. That the **1<sup>st</sup> Interested Party** purchased **10 acres** from the Deceased in **March 1986**, the **2<sup>nd</sup> Interested Party** purchased **3 acres** from the Deceased on **6<sup>th</sup> August 1987** whilst the **3<sup>rd</sup> Interested Party** purchased **3 ½ acres** of land on **5<sup>th</sup> April 1987** from the Deceased. The Interested Parties therefore claim **16 ½ acres** out of the **60 acres**, which made up the suit land. They argue that the Deceased unfortunately passed away before transferring the said parcels of land to them. Thus, the Interested Parties claim to be *bona fide* purchases of part of the estate of the Deceased. Their plea is that this court direct the Executors to give them each their portion of land.

7. The Executors filed this Notice of Preliminary objection arguing that the Interested Parties not being survivors of the Deceased nor beneficiaries to his estate cannot seek to revoke the Grant properly issued to the Executors. That any claim which the Interested Parties may have to the suit land can only be properly ventilated in the **Environment and Land Court** and not before this court which is sitting as a **Probate Court**.

#### **ANALYSIS AND DETERMINATION**

8. I have carefully considered the Notice of Preliminary Objection dated **15<sup>th</sup> September 2021**, the response filed by the Interested Parties as well as the written submission filed by both parties.

9. The Executors claim that the summons for Revocation of Grant filed by the Interested Parties as well as the Supporting Affidavit annexed thereto are fatally defective as the same are undated thereby offending the provisions of the **Oaths and Statutory Declarations Act Cap 15 Laws of Kenya**.

10. I have examined both the summons and Supporting Affidavit. Both are signed, commissioned and are clearly dated **20<sup>th</sup> January 2020**. This Objection is therefore clearly misleading and I dismiss the same. I find that the documents do comply with the **Oaths and Statutory Declarations Act**.

11. The Executors have challenged the jurisdiction of this court to hear and determine the claim by the Interested Parties to the suit land. It is trite law that a court may not proceed to hear a suit over which it lacks jurisdiction. In **OWNERS OF MOTOR VESSEL ‘LILLIAN S’ – VS - CALTEX OIL (K) LTD [1989] KLR** it was held as follows:-

**“Jurisdiction is everything without it 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)

10. It is correct that this court is sitting as a Probate Court with the jurisdiction to oversee the distribution of the estate of the Deceased to the genuine heirs and beneficiaries. In **RE ESTATE OF G.K.K. (Deceased) 2017 eKLR** it was held that -

**“The primary function of a probate court is distribution of the estate of the dead person.”**

11. The Interested Parties stake their claim to the suit land as Purchasers. 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’).

12. **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 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]

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

(Own emphasis)

13. Therefore, the correct and proper forum before which the Interested Parties ought to ventilate their claim to the suit land is the ELC. The Grant herein was confirmed way back on 8<sup>th</sup> October 1999 Distribution is already under way. This a very old matter. It would be counterproductive and a waste of judicial time to proceed with the summons for revocation of Grant without evidence of any order/Decree from the ELC legitimizing the claim of the Interested Parties to the suit land.

14. In RE ESTATE OF STONE KATHUBI MUIINDE (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 properly 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 that court can give effect to it.” (own emphasis)

15. I therefore find merit in this Preliminary Objection. The dispute between the parties is a dispute relating to **ownership** of land in question. This court sitting as a Probate Court does not have jurisdiction to determine disputes relating to ownership of land. The Interested Parties are at liberty to file suit in the **ELC** where they will be at liberty to ventilate any claim they allege to have to the suit land.

16. For the above reasons, the summons for revocation of Grant is a non-starter. The Interested Parties are not survivors of the Deceased nor are they beneficiaries to his estate. Despite their claim of having purchased the land no *prima facie* evidence of any purchase is annexed, e.g., Sale Agreement, proof of payment etc. Accordingly, I find that the Interested Parties have no *locus standi* in this Succession Cause.

17. Finally, I do allow this Notice of Preliminary Objection and find that this court has no jurisdiction over the claim raised by the Interested Parties to the suit land. If and when the Interested Parties obtain an Order/Decree from the **ELC Court** then the matter may be revisited.

18. Each party to bear its own costs.

Dated in **Nairobi** this **11<sup>th</sup>** day of **February 2022**.

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**MAUREEN A. ODERO**

**JUDGE**