



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 378 OF 2009**

**IN THE ESTATE OF TERESA WANGUI MURUGA alias WANGUI MURUGA (Deceased)**

**EPHANTUS WANJOHI MURUGA.....PETITIONER**

**VERSUS**

**WARUGURU MURUGA.....PROTESTOR**

**RULING**

**Brief Facts**

1. This is a ruling on the jurisdiction of this court in hearing and determining the protest of L.R. No. Othaya/Kiahagu/2126 filed on 06/07/2020 which raises issues of ownership. The crux of the matter is whether the High Court has jurisdiction to determine the ownership of land in the context of the protest or whether the Environment and Land Court (ELC) ought to determine such an issue before the matter can proceed for hearing on the protest. The land parcel in contention is Land Parcel Title No. OTHAYA/KIAHAGU/2126 listed by the petitioner as part of the deceased's assets. The protestor on the other hand states that the said suit property belongs to her absolutely and does not form part of the deceased's estate.

2. Parties hereby put in written submissions in support of their arguments.

**Petitioner's Submissions.**

3. According to the petitioner, the assets of the deceased's estate are:-

- a) 1.76 out of L.R. NO. OTHAYA/KIAHAGU/2126
- b) 42 acres out of L.R.NO. OTHAYA/KIAHAGU/651.

4. The deceased in this case and the protestor were co-wives and through Nyeri High Court Succession Cause No. 651 of 2001 in the estate of Gatheo Muruga their late husband, they became proprietors in common in equal shares of Title Number Othaya/Kiahagu/653. Subdivision of the parcel was later carried out as shown by the copy of official search for L.R. 2126 which resulted in two parcels of land including Othaya/Kiahagu/2126.

5. The petitioner contends that the honourable court has jurisdiction pursuant to **section 47 and 72(2) of the Law of Succession Act** to determine any application and any dispute under the Act and to be satisfied as to the respective identities and shares of all persons entitled. Further the court has jurisdiction under Rules 41(2) and (5) and 73 of the Probate and Administration Rules and not Rule 41(3) as submitted by the protestor because the suit property is still registered in the name of the deceased and the petitioner is only claiming his mother's half share.

6. The petitioner further contends that there is no dispute as to the proprietor of the suit property and therefore no dispute to be deferred and determined by the Environment and Land Court. This is so because the certificate of search from the land's office and the certified copy of register show that the deceased is a co-proprietor of half of Title number Othaya/Kiahagu/2126. Pursuant to **section 35(2) and (3) of the Land Registration Act**, the certificate of search and the certified copy of the register are *prima facie* evidence and conclusive evidence of the registered owners of the parcel of land and therefore the court herein has jurisdiction to proceed to determine who is entitled to the portion registered in the name of the deceased herein.

**Protestor's Submissions.**

7. According to the protestor, the bone of contention is the ownership of Title No. Othaya/Kiahagu/2126 which she submits belongs to her

absolutely. She further contends that the court herein does not have jurisdiction pursuant to **Article 165(5)(b) of the Constitution**. Case law relied on is **Mariam Mathias Mwasi vs Rama Adam [2020] eKLR** where the court found that the high court has no jurisdiction to determine land disputes. The Law of Succession Act is also clear in **Rule 41(3) of the Probate and Administration Rules** that the issue of ownership ought to be determined before a grant is confirmed. The court with the requisite jurisdiction is the Environment and Land Court as envisaged in the **Constitution in Article 162 (2)(b) and section 13 of the Environment and Land Court**.

8. The protestor proposes that since the court herein does not have jurisdiction over the dispute arising from Title No. Othaya/Kiahagu/2126, the asset ought to be struck out of the list of assets and the court proceeds to determine the mode of distribution over Title No. Othaya/Kiahagu/651.

#### **Issues for determination**

9. The only issue for determination is whether this court has jurisdiction to hear and determine the issues raised in the protest.

#### **The Law**

10. The locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows:-

**"I think that 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 downs its stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

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11. Evidently, if this court lacks jurisdiction, the matter will be at an end as this court will have to down its tools and take no further step.

12. A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011** stated thus:-

**"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 in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011. 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."**

13. **Article 165(3) of the Constitution** confers the High Court with jurisdiction and provides:-

**(3) Subject to clause (5), the High Court shall have-**

**a) Unlimited original jurisdiction in criminal and civil matters;**

14. It is instructive to note that the jurisdiction is subject to **Article 165(5) of the Constitution** which provides:-

**(5) The High Court shall not have jurisdiction in respect of matters:-**

**a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**

**b) Falling within the jurisdiction of the courts contemplated in Article 162(2).**

15. Pursuant to **Article 162(2) of the Constitution**, the **Environment and Land Court Act 2011** was enacted and in **Section 13** it confers the Environment and Land Court with jurisdiction as follows:-

(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 environment planning and protection, climate issues, land use plannings, 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, chooses in action or other instruments granting any enforceable interests in land; and
- e) Any other dispute relating to environment and land.

16. The Law of Succession Act in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-

**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.**

17. Rule 41(3) of the Probate and Administration Rules provides that:-

**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 of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.**

18. In the case of Priscilla Ndubi and Zipporah Mutiga vs Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, held:-

**“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are *prima facie* valid should be determined before confirmation.”**

19. This court has stated the law on jurisdiction. However the facts of this case are an integral part in determining jurisdiction of this court in this matter. I have perused this file and noted that the grant that triggered the current controversy was confirmed on 12<sup>th</sup> May 2005 in Nyeri Succession Cause No. 651 of 2001 in the estate of Gatheo Muruga. The said Gatheo Muruga was the husband of the protester herein Waruguru Muruga and the deceased Wangui Muruga. The property L.R Othaya/Kiahagu/653 was distributed to the widows with each getting half-share.

20. The said Wangui Muruga died on 11/02/1981 and this cause No. 378 of 2009 was filed by her son Ephantus Wanjohi Muruga. He was appointed administrator of the estate and filed summons for confirmation of grant in which he listed L.R Othaya/Kiahagu/651 now registered in the name of his step-mother Waruguru Muruga as the sole asset for distribution herein.

21. In the summons for confirmation of grant dated 09/11/2018 the petitioner/administrator proposed that L.R Othaya/Kiahagu/651 should be shared equally between him and his sister Virginia Wanjiku Kingo’ri with him getting 4.02 acres and Virginia 2.00 acres.

22. The protestor herein Waruguru Muruga in her protest dated 04/07/2020 opposed the mode of distribution of the petitioner alleging that her share of the land now L.R. Othaya/Kiahagu/2126 wholly belongs to her and should not form part of the deceased’s estate. She annexed copy of title deed showing that the said land measures 1.43ha and that it is a result of sub-division of L.R. Othaya/Kiahagu/653.

23. Perusal of the protest and the summons for confirmation bring out the issue for determination as to whether L.R Othaya /Kiahagu/2126 forms part of the deceased estate. For the court to determine the said issue which falls under the Succession Act, it will have to refer to both this case and Succession Cause No. 651 of 2001 in which the court distributed the mother parcel L.R. No. Othaya/Kiahagu/653.

24. It is further alleged that there was tampering with records at Nyeri Lands Office with documents which changed or misconceived the contents of the grant thereby altering the shares of the respective parties in Succession cause No. 653 of 2001.

25. I have perused the submissions of the parties. This court was addressed by the counsels for the parties Mr.Wahome Gikonyo for the petitioner and Mr.Waweru Macharia for the protestor verbally before it directed that the counsels file submissions on jurisdiction. At that time the two counsels both agreed on the fact that this court had jurisdiction to determine the matter. However, it appears that there was a change of mind by the protestor’s counsel reflected in his submissions dated 2<sup>nd</sup> June 2021. However, the court will give consideration to the submissions of the parties.

26. In arguing that this court has jurisdiction, the petitioner relies on Article 165 of the Constitution and on Sections 47 & 72(2) of the Succession Act Rule 73 of the Probate & Administration Rule. The protestor's counsel relies on Article 162(2) (b) and on Section 13 of the Land and Environment Act in his argument that this court lacks jurisdiction.

27. I have carefully considered the provisions relied on by the parties and their respective arguments. I have also relied on the background facts leading to the filing of the protest that all emanate from the contents and the implementation of the grant as well as the allegations of tampering with records in the Lands office. From the material before me, I am of the considered view, the issues in the protest herein are deeply rooted in the grant in Succession Cause No. 651 of 2001 which only a Succession court possesses the jurisdiction to hear and determine. The Environment and Land Court has jurisdiction to determine ownership of land but where such ownership results in the implementation or interpretation of a grant and which have now spilled in a subsequent succession cause which involves a sub-division parcel of the mother land in the grant, such issue cannot be determined in the ELC court, in my view.

28. In conclusion, I find that this court is possessed of the requisite jurisdiction to determine the protest without first referring the issue of ownership of L.R Othaya/Kiahagu/2126 to the ELC Court.

29. It is hereby directed that the protest dated 4/07/2020 be fixed for hearing.

30. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 22<sup>ND</sup> DAY OF JULY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 22<sup>nd</sup> day of July, 2021**