



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 49 OF 2006**

**IN THE MATTER OF ESTATE OF KABATHA KATHEMBA**

**(DECEASED)**

**PATRICK KARIUKI KABATHA.....APPLICANT**

**VERSUS**

**ZAINABU WAMBETI RAMADHAN NJOKA .....RESPONDENT**

**RULING**

1. The applicant has moved the court by way of summons dated 20.03.2015 and wherein he seeks orders that the name of Zainabu Wambeti Ramadhan Njoka entered in the title Ngandori/Kibugu/T48 on 31/12/2012 and owned by the estate of Kabatha Kathemba also known as Kabatha John be removed and the same be replaced with the name of the administrator Patrick Kariuki Kabatha by the Land Registrar, Embu Land Registry and further for the costs to be in the cause.
2. The summons is premised on the grounds on its face and supported by the affidavit of the applicant. The applicant's case basically is that the grant of letters of administration was made to him and confirmed by this court and the same was rectified on 24.07.2014. That however, he discovered that the suit property herein Ngandori/Kibugu/T48 had been fraudulently transferred on 31.11.2012 to the respondent herein without the knowledge of the administrator and when the deceased was already dead having died on 13.09.1975 and thus the respondent intermeddled with the deceased's estate. As such, the land registrar ought to be ordered to rectify the register by removing the respondent's name as the registered owner and the title be issued in the name of the applicant.
3. The respondent opposed the said summons vide the replying affidavit sworn on 22.07.2015 and wherein she deposed that the applicant herein is a stranger to her and so is the deceased Kabatha Kathemba. Further that she bought the suit land from one Kabatha John and not Kabatha Kathemba and who are two different persons and that the grant was amended to deprive her of the lawfully acquired property.
4. With the leave of this court, the applicant filed a further affidavit and wherein he deposed that Kabatha Kathemba was also known as Kabatha John who was the applicant's father and that the suit land herein belonged to his said father having been given to him by the clan but the suit land was left out in the succession due to a dispute between him and his brothers. Further that the respondent acquired the suit land fraudulently and which fraud was discovered in 2013 as the said Kabatha John died in 1975 which was before she acquired the suit land and which fraud the applicant reported to the Land registrar Embu and who upon summoning the respondent, she failed to turn up.
5. The respondent filed her response to the further affidavit and wherein she deposed that it is only Kabatha Kathemba who can depose that he is the same person with Kabatha John and not the applicant and further that the amended certificate of confirmation of the grant was in relation to Kabatha Kathemba and not Kabatha John and the reasons as to why the suit land was not included is because it did not belong to the said Kabatha Kathemba. Otherwise the respondent denied the applicant's averments as per his further affidavit.
6. Directions were taken that the application be canvassed by way of written submissions and wherein each of the parties submitted in support of their respective cases.
7. However, the court directed that parties do call oral evidence in view of the allegations of fraud in the affidavits. In compliance thereof, the applicant called five (5) witnesses. The Land Registrar testified as PW1 and gave evidence that the suit land was registered in the names of the respondent on 31.12.2012 and that was after removal of the caution she had placed and thereafter the applicant visited his office claiming that the same was transferred to the respondent without his knowledge yet he was the administrator of the deceased's estate. The witness proceeded to produce exhibits before this court. In cross examination he testified that the suit land herein was registered in the names of Kabatha John and that registration cannot be irregular on the basis that there was no photograph of the person concerned and further that a dead person cannot transfer land.
8. PW2 (Patrick Kariuki Kabatha) testified that the deceased herein was his father who died in 1975 and was the registered owner of the suit

land herein (L.R. Ngandori/ Kibugu/ T.48 and that the said deceased was called Kabatha Kathemba alias Kabatha John and that they did not include the suit land as there was a dispute in relation to the same. In cross examination, he testified that the deceased's name was Kabatha Kathemba and not Kabatha John and that the names Kabatha John does not appear on the grant, the death certificate, tax certificate and the chief's letter but the green card has the name Kabatha John.

9. PW3 (Nephat Kivia Rugumo) testified that the deceased herein was also called Kabatha John and that he was the father to the applicant herein. PW4 (Rwembe Rugumo)'s evidence essentially corroborated the evidence by PW2 to the effect that the deceased was also known as John Kabatha and that the land was given to him by the clan.

10. PW5 (Josphat Mugo Nyaga) testified that he has been cultivating the suit land since 1990 when the deceased's wife gave possession to him and that he was called in relation to the sale of the said land and wherein he explained the ownership to the chief. In cross examination, she testified that the suit land belongs to Kabatha Kathemba who died in 1975.

11. I have considered the pleadings herein and the oral evidence tendered before this court. I have also considered the submissions filed by the parties herein. The applicant seeks for orders that the respondent's name entered in the title Ngandori/ Kibugu/T48 be removed and the same be replaced with the name of the applicant. The grounds in support of this prayer from the face of the pleadings and the evidence on record is that the respondent fraudulently caused the suit land to be registered in her name and as at the time of registration, the owner (deceased herein) was already deceased. What this court is essentially being asked to determine is the issue of ownership of the suit land. The dispute therefore revolves around ownership of the suit land.

12. The jurisdiction of this court is provided under section 47 of the *Law of Succession Act* which vests on the court wide discretion in granting orders for purposes of safeguarding the estate of a deceased person. It 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.”*

13. In Pricilla Ndubi and Zipporah Mutiga -vs- Gerishon Gatobu, Meru Succession Cause No. 720 of 2013 the court held that:

*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 on ownership of the property in 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. (Emphasis added)*

14. What this means is that this court does not have jurisdiction to determine issues to do with ownership of land. Disputes relating to ownership of land and matters relating to land can only be heard by the Environment and Land Court which is established as a specialized court under Article 162(2) of the Constitution and the Environment and Land Court Act, No. 19 of 2011. Section 13(2)(a) of the said Act specifically gives the said court the jurisdiction to determine issues to do with *environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources*. Section 13(2)(e) further gives the said court jurisdiction to determine any other dispute relating to environment and land.

15. In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR Musyoka J observed that:-

*“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.*

*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.”(emphasis provided)*

(See also In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR)

16. The Environment and land Court being a court established to deal with the issue as to ownership of the suit land, it therefore means that it is the only court which can determine the same. In fact, Article 165 of the Constitution which provides for the jurisdiction of the High Court is emphatic that jurisdiction of this court does not include the matters that have been isolated for the courts envisaged in Article 162(2). One of the said courts is the Environment and Land Court.

17. The Supreme Court in the case of Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & others (2012) eKLR 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 counsels 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....”*

18. In the celebrated case of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd [1989] eKLR the Court of Appeal pronounced itself as follows on jurisdiction:

*“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

19. It is on the premises of the above that I hold that this court does not have jurisdiction over the dispute herein. The parties ought to move the right court being the Environment and Land Court. The application is hereby dismissed with costs to the respondent.

20. It is so ordered.

**Delivered, dated and signed at Embu this 14<sup>th</sup> day of July, 2021.**

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent