



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 76 OF 2019

JOSIAH OUMA MBORI.....1ST APPLICANT

SAMUEL OUKO MBOR.....2ND APPLICANT

-VERSUS-

EDWARD ODHIAMBO ORIA (Being the legal representative of

the estate of the late CHRYSANTHUS ONYUKA).....RESPONDENT

RULING

Introduction

1. On **15th October 2019**, the Plaintiffs (Applicants herein) through Gordon Ogola and Kipkoech and company Advocates filed an Application by way of Notice of motion dated 8th October 2019 under certificate of urgency. This Court certified it urgent on **15th October 2019** and ordered that the same be heard inter-parties on **22nd October 2019**, when the matter came up for inter partes hearing, the Respondents raised a Preliminary Objection of even date.

2. Briefly, the Applicants contend that they purchased **L.R Kasipul/Kasimba/474** (hereinafter referred to as the “**suit property**”) from **Chrysanthus Onyuka** (hereinafter referred to as “**the Deceased**”). That since the death of the deceased, the suit property has never been formally transferred to them. That they recently learnt that the Respondent took out temporary letters of administration in respect of the estate of the deceased. They contend that the letters of administration is a scheme to illegally and unlawfully dispossess them of their title to the suit property. On that basis, they filed the Application seeking inter-alia, to inhibit the registration transfer, lease, charge or any other instrument in respect of the suit property pending the hearing and determination of the application.

3. On 22nd October 2019, the Respondent through Ojienda and Company Advocates filed a Notice of Preliminary Objection of even date. It sought to strike out the Application on the grounds herein below;

1. THAT this Honourable Court lacks jurisdiction to adjudicate on a succession matter which is subject to the Chief Magistrate Succession Cause No. 107 of 2019 at Oyugis Court.

2. That the Plaintiff ‘s Notice of Application is incompetent as the property in question is yet to be succeeded as no grant has been confirmed.

3. That the chief Magistrate Succession Cause No. 107 of 2019 is coming up for Ruling on the 6th November 2019.

4. During inter partes hearing, directions were taken and Counsel agreed to argue the Preliminary Objection by way of written submissions. Counsel for the respective parties complied accordingly.

B. The Applicants’ Submissions

5. By submissions dated 22nd November 2019, learned counsel for the Applicant submitted that this court derives its jurisdiction from the provisions of **Article 162(2)(b)** of the Constitution of Kenya 2010 and **section 13 of the Environment and Land Court Act 2015 (2011) (ELC Act)**. As such, it can hear and determine the instant Application. He submitted that the Applicants have express interest in the suit property enforceable by way of constructive trust. That the Applicants have been in notorious, exclusive, continuous/uninterrupted occupation of the suit property for a period of more than 12” years. Therefore, they have acquired it by way of adverse possession. That all matters of Constructive trust and Adverse Possession are within the exclusive preserve of the Jurisdiction of Environment and Land Court (ELC).

6. Counsel further submitted that by operation of **Sections 7 and 38 of the Limitations of Actions Act, (Cap 22)**, a person may bring an action to recover land upon lapse of 12 years from the date of accrual of such rights. That where a person claims to have become entitled to land by adverse possession, he may apply to High Court (read ELC **under Article 162 (2) (b) (supra)**) for an Order that he be registered as the proprietor of the land in question.

7. Counsel also submitted that the Probate Court did not have jurisdiction as regards ownership of the suit property and referred to the decision in **Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** where Gikonyo J, stated;-

“...I am aware that this Court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does. It is the court which is constitutionally mandated to determine such matters.”

...thus, where issues on ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed.” (emphasis supplied)

8. To emphasize the jurisdiction of this Court, counsel relied on the decision in **Re Estate of Stone Kathuli Muinde (Deceased)[2016] eKLR** where Musyoka J. stated that;

“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 court can give effect to it.” (Emphasis laid)

9. Counsel, too, submitted that the forgone position was reiterated by L. Mbugua, J in **Isaac Kinyua & 3 Others -vs- Hellen Kaigongi [2018] eKLR**. Further reliance was placed on the decision in **Pricilla Ndubi and Zipporah Mutiga -vs- Gerishon Gatobu, Meru Succession Cause No. 720 of 2013** where it was 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 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)

10. In conclusion Counsel argued that the Respondent’s Preliminary Objection is bad in law, incompetent and meant to waste judicial time. That the respondent has not done any application before this Court to stay proceedings at Oyugis CM succession cause No. 107 of 2019. The applicants prayed that the Notice of Preliminary Objection be dismissed with Costs.

C.The Respondent’s Submissions

11. In his 6 paged submissions dated 12th November 2019, learned counsel for the Respondent admitted that the instant matter is an issue of land as per the provisions of **Article 162(2)(b)** as read with **Section 13 (supra)**. He further submitted that jurisdiction on matters of Succession is donated to this Court through **Section 47 of the Law of Succession Act. (Cap 160 laws of Kenya)**.

12. Counsel, however, submitted that on Succession matters involving land, the High Court and The Environment Court have concurrent jurisdiction. To that end, he quoted the decision in **Re Estate of Andrea Ooko Tianga (Deceased) [2019] eKLR** which cited with approval the decision in **Munyasya Mulili & 3 Others -vs- Sammy Muteti Mulili (2017) eKLR** where Nyamweya J. cited the decision in **Salome Wambui Njau(suing as administratrix of the Estate of Peter Kiguru Njuguna (Deceased) -vs- Caroline Wangui Kiguru, ELC (2013) eKLR** where it was held;

“In matters of succession disputes touching on land, 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.”

... it is thus my finding that since the dispute herein is one between the personal representatives of the deceased and the survivors, beneficiaries and dependants of the deceased, it is a succession dispute to be determined solely within the framework of the law of succession.”

13. Counsel also submitted that upon being cited by the Applicant in **Oyugis Principal Magistrates Cause No. 25 of 2019** to take out letters of administration for the estate of Chrysanthus Onyuka, the respondent filed Oyugis **Succession Cause No. 107 of 2019** where he was granted letters of administration. That upon seeking confirmation of the same, the Applicant herein moved court protesting the confirmation. That they requested stay of the proceedings and sought the trial magistrate to recuse himself. The Respondent further submitted that the said Application was dismissed.

14. Counsel argued that the Applicants are now before this Court purporting to use **section 13 (supra)** to have the Honourable trial Magistrate to recuse himself. In arguing that there was no plausible reason for the Applicants to seek the magistrate’s recusal, the Respondent found support in the decision in **Mohamud Iltarakwa Koochale & 5 Others (suing o behalf of the residents of Laisamis constituency and Karare ward of Marsabit County) -vs- Lake Turkana Wind Power Ltd. & 4 others** in where reference was made to the decision in **Gladys Boss Shollei -vs- Judicial Service Commission & Another (2018) eKLR** where it was remarked;

“A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartialities and instilling self confidence in the administration of justice. On the other hand, a judge has the duty to sit in the case assigned to him or her and may only refuse to hear a case for a extremely good reason.”

15. Counsel further submitted that the applicants are now forum shopping. That they ought to have approached this court on appeal as provided for under **Section 16A of the Environment and Land Court Act No. 19 of 2011**, to contest the decision of the trial Court on recusal and seek that the matter be transferred to a different Magistrate.

16. In view of the foregone discourse, the following issues fall for determination :-

i. Whether the Preliminary Objection is merited

ii. The orders this court should make to meet the ends of justice.

D. Analysis and Determination

17. This court is acutely aware of the meaning of the term “**Preliminary Objection**”; see the **Black’s Law Dictionary 10th Edition at page 1371**.

18. In the *locus classicus* case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** on Preliminary Objection, the court stated:-

*“So far as I am aware, a **Preliminary Objection** consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”* (Emphasis added)

19. I endorse the decision in **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** which elaborated the foregone legal position whereby Mwita J. stated that: -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

20. Similarly, in the case of **County Government of Migori -vs- I N B Management IT Consulting Limited [2019] eKLR**, Mrima J cited with approval the decision in **Oraro -vs- Mbaja (2005) KLR 141**, where Ojwang J. as he then was, quoted the **Mukisa Biscuit Case (Supra)** and expressed himself thus;

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...”

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

21. It is well settled that jurisdiction goes to the root of every matter; see **Republic –vs- Karisa Chego and others (2017) eKLR**.

22. A challenge on a court’s jurisdiction must be considered before any other issue; see **Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko and 2 others (2013) eKLR**.

23. In the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** Justice Nyarangi of the Court of Appeal held as follows:-

*“I think that it 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 tools** in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”* (emphasis laid).

24. On the source of jurisdiction, it was held 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. 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. “ (Emphasis supplied)

25. Admittedly, the Respondent’s complaint herein that this court lacks jurisdiction over the instant matter is a pure question of law. However, the contention that this Court does not have jurisdiction because the dispute is a Succession Matter, is devoid of merit. By virtue of **Article 162(2)(b)** and **section 13 (supra)**, the matter in dispute falls squarely within this Court’s jurisdiction as it relates to ownership of the suit property.

26. Regarding the other grounds, the Preliminary Objection fails to meet the minimum threshold set out in the **Mukisa Biscuits Case (supra)**. Clearly, It alludes to facts regarding Chief Magistrate Succession Cause No. 107 of 2019 that can only be ascertained by way of evidence.

27. This Court approves the position that a Preliminary Objection must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence; see **Oraro -vs- Mbaja (supra)**. In the end, it is the finding of this court that the respondent’s preliminary objection is want of merit.

28. Wherefore, this Court makes the following Orders:

a) The Preliminary Objection dated 22nd October 2019 and filed on even date, is hereby dismissed with costs.

b) The application dated 8th October 2019 to be heard on merits on priority basis.

29. Orders accordingly.

DELIVERED, SIGNED and DATED in open court at **MIGORI** this 27th Day of **February 2020**.

G.M.A ONG’ONDO

JUDGE

In presence of :-

Non-appearance of parties and their respective counsel duly served.

Tom Maurice – Court Assistant