



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 94 OF 2015

PETER KUNGU WAITATHU 1ST APPELLANT

CHARLES KIMANI GATIBA..... 2ND APPELLANT

V E R S U S

RUTH WANJIRU KUNGU..... 1ST RESPONDENT

FRANCIS NJOGU KUNGU2ND RESPONDENT

JUDGMENT

Factual Background

1. This is an appeal arising from the Ruling of Honourable T. L. Ole Tanchu (SRM) delivered on 4th May 2015 in Limuru Senior Principal Magistrate's Court Succession Cause No. 62/2008. In his decision, the learned Magistrate upheld the respondent's objection thus declaring that the applicants herein had no right to petition for a grant of representation in respect of their (appellants)uncle's estate. Further, the court found that it was the objectors (respondents) being a wife and son respectively to the deceased who had the right in order of preference to petition for a grant of representation. Finally, the learned Magistrate held that the deceased who was the registered owner of the two parcels of land the only assets comprising the estate did not hold the same in trust and for the benefit of his brothers who happen to be the respective fathers to the appellants.

2. Aggrieved by the said decision, the applicants moved to this court vide a Memorandum of Appeal dated 4th September 2015 citing eight (8) grounds of appeal as hereunder;

(i) That the Learned Trial Magistrate of the Subordinate Court erred in law and in fact and made a fundamental mistake in making a final finding that the deceased (Kungu Kabage) was not holding the 2 parcels of land (Limuru/Ngecha/T.98 and Limuru/Ngecha/177) in trust for his two brothers;

(ii) That the Learned Trial Magistrate of the Subordinate Court erred in law and in fact in finding that the Appellants were not entitled to inherit the aforesaid land;

(iii) That on the whole the Learned Trial Magistrate of the Subordinate Court failed to apply his minds properly to the matters before him and failing to hold the scales of justice evenly in the circumstances;

(iv) That the Learned Trial Magistrate failed to apply his mind to the Petitioners' submissions and ignored material evidence adduced by them to show their nexas to the deceased;

(v) That the Learned Trial Magistrate's Ruling wrongly ousted the Petitioners as beneficiaries for the simple reason that they were not entitled to administer the estate of the deceased while his widow was still alive and able to administer the same;

(vi) That the Learned Trial Magistrate failed to appreciate the family dynamics and well established and judicially noticed historical injustice perpetrated during the colonial era by members of families against their compatriots in detention which has been reversed in several binding decisions of the Court of Appeal which were brought to his attention;

(vii) That the Learned Trial Magistrate went beyond the scope of his jurisdiction by determining an issue of title to land when he should have confined himself to hearing the objection to the grant by the Respondents and directed the land in issue

to be determined by the High Court which has the proper jurisdiction in the circumstances of this case;

(viii) That the Learned Trial Magistrate failed to give effect to the family dynamics and the reality on the ground, thereby occasioning a manifest miscarriage and failure of substantive justice.

3. This being a first appeal, this court is duty bound to consider, re-evaluate, re-assess and re-analyze the evidence tendered before the trial court and assess the entire material placed before it and then make an informed and independent conclusion, finding or determination without losing sight of the fact that the trial court had the advantage of assessing the demeanour of witnesses having seen and heard them as they testified. See the case of Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira and Co. Advocates (2013)eKLR where the court held as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that;

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

4. Similar position was held in the case of Samuel Komora v Land Registrar Civil appeal No. 20/2008.

5. Before I proceed to determine issues in controversy, a brief summary of the background of the case and evidence tendered before the court would suffice. The deceased whose estate proceedings herein relate died intestate on 27th May 1998. Vide a Citation dated 29th March, 2008 and filed on 3rd April 2008 before Limuru Law Courts, Stephen Njogu Gatiba and Peter Kungu Witacu being nephews to the deceased and the appellants herein cited Ruth Wanjiru Kungu and Francis Njogu Kungu in their capacity as widow and son to the deceased respectively seeking them to show cause why they could not accept or petition letters of administration in respect of the deceased's estate in default they would proceed to process the same.

6. Although not clear from the court record as to whether there was any response from the citees, the citors proceeded to petition for a grant of representation on 28th May 2008 listing themselves as sons to the deceased. According to form P&A 5 the appellants (petitioners) listed the following as survivors to the deceased;

(i) Ruth Wanjiru Kungu – widow

(ii) John Kimani Kungu – son

(iii) Jeremiah Kamweru Kungu - (son)

(iv) Francis Njogu Kungu - (son)

(v) John Ngige Waithara – (son)

(vi) Peter Kungu Witacu - (son)

(vii) Stephen Njogu Gatiba – (son)

7. Among the properties listed as comprising the estate was; Limuru/Ngecha/177 and Limuru/Ngecha/98. According to form R. 26(2) which deals with consent to making of grant to person of equal or lesser priority, the same was only signed by John Kimani Kungu, John Ngige Waithara and Charles Kimani Gatiba.

8. Upon gazettelement of the estate, a grant of letters of administration was issued jointly to Stephen Njogu Gatiba and Peter Kungu Witacu (petitioners/appellants) on 1st August 2008.

9. On 17th April 2009, the petitioners filed an application for confirmation of grant and proposed to share the estate as follows;

(a) 0.048Ha out of Limuru/Ngecha/98 to be shared jointly between John Kimani Kungu and Francis Njogu Kungu and the remaining portion of 0.048Ha to Stephen Njogu Gatiba.

(b) Out of Limuru/Ngecha/177;

(i) John Kimani Kungu, Francis Njogu Kungu, Peter Kungu Witacu and John Ngige Waithara each to get 0.133Ha.

(ii) Charles Kimani Gatiba – 0.181Ha.

(iii) Stephen Njogu Gatiba – 0.085Ha.

10. On 28th April 2009, Francis Njogu Kungu with the authority of his mother Ruth Wanjiru Kungu (objectors/ respondents) filed an objection to making of a grant to the petitioners (appellants). Among the grounds cited in support of the said objection is that; the petitioners (applicants) are not directly related to the deceased; the petitioners did not obtain their permission before filing the petition and, the petitioners have no interest whatsoever in the estate of the deceased.

11. In their affidavit in support of the objection sworn on 27th April 2009 by Francis Njogu Kungu, he averred that, he is a son to the deceased and that Ruth Wanjiru is his mother having been married to the deceased in 1964 under Kikuyu customary law as a 2nd wife. That the deceased had a first wife who is also deceased. He stated that the first wife was blessed with two children namely: Margaret Kahaki (deceased) and Hanna Wamboi. He further stated that, his mother's house has three children inter alia; John Kimani Kungu, Francis Njogu Kungu and Jeremiah Kamweru Kungu who is deceased but survived by the wife Jane Nyakio and two children Ruth Wanjiru Kamweru and Margaret Njeri Kamweru.

12. According to him, the only beneficiaries entitled to his father's estate are his mother and siblings from his mother's house. He averred that the petitioners and one John Ngige plus Peter Kungu are strangers and imposters to the estate and therefore not entitled to a share of the estate as they are his cousins currently residing at their respective father's estates.

13. In response to the objection application, the petitioners filed a notice of Preliminary Objection dated 21st August 2009 arguing that the objection had been overtaken by events as the court had already issued a grant of letters of administration and, that the application for confirmation could not be challenged by way of an objection. Subsequently, the objectors lodged a caveat dated 22nd July 2009 through the firm of Omondi Wasonga thus seeking to prohibit any dealings or transactions on the subject property of the estate without notice to Ruth Wanjiru.

14. Through a General Summons filed on 22nd October 2009, the petitioners sought orders maintaining the status quo in respect of L.R. Limuru/Ngecha/177. This application was informed from the objectors' alleged interference by cutting trees on the said land which the petitioners claimed ownership of. The court having certified the application urgent granted the prayer for maintenance of status quo. In reply, the respondents filed a replying affidavit sworn on 26th October 2009.

15. Upon canvassing the Preliminary Objection, the court pronounced its ruling although no dated upholding the Preliminary Objection.

16. Consequently, the objectors/caveators (respondents) filed an affidavit of protest sworn on 22nd July 2010 by Ruth stating that; the deceased had two brothers namely; Gatiba and Ndungu who are deceased and that during their life time none of them laid claim over the deceased's property.

17. She averred that she had information from elders that Mr. Ndungu a father to the petitioners did sell his share at the point of sub-division to Peter Kariuki Thande. That out of the proceeds realized from the land sold, Ndungu paid dowry for his wife and moved to Rift Valley where he bought 3^{1/2} acres and 14 acres.

18. Regarding Mr. Gatiba, she averred that he was equally given his land and sold the same. That Gatiba was only buried on her husband's land in Ngecha out of sympathy hence his children have no right to claim a share on what their father did not own.

19. She stated that, during the hearing, she was to produce letters of administration application and affidavits which were to be filed by her co-wife (1st wife) in court in the year 1983 which documents were signed by among others Kamau Waitathu a brother to one of the appellants herein. That in those documents the survivors to the estate were listed as; her co-wife, herself, John Kimani, Francis Njogu and Jeremiah Kamweru. With that, she contended that the petitioners (appellants) have never been beneficiaries to the estate. Eventually, the matter was set down for hearing of the protest.

Protestor's Case

20. During the hearing of the protest, Ngige Njoroge (PW1) a member of the deceased's clan told the court that he was born in 1922. He stated that the deceased herein Kungu Kabage had two brothers known as Gatiba and Ndungu all of whom are deceased. He stated that during demarcation in 1959, the deceased had his land registered in his name and subsequently obtained a title. That the brothers never claimed Kungu's land during their lifetime.

21. He recognized Ruth Wanjiru and her children as the only beneficiaries to the deceased's estate. On cross examination, he stated that his father and the deceased were brothers. On further cross examination he admitted that Gatiba a brother to the deceased was buried on the deceased's shamba now in dispute. He also responded that Gatiba had no land and that he did not understand why he was buried in Kabage's land.

22. On further cross examination, he further admitted that while the deceased's brothers were in detention, the family agreed the land in question to be registered in Kungu Kabage's name.

23. PW2 Ruth Wanjiru told the court that she got married to the deceased in 1965. She confirmed that her husband had two brothers namely Ndungu and Gatiba. She claimed that Ndungu lived in Nakuru where he had a farm in which he was buried. She literally adopted her averments contained in her affidavit in support of the protest. She maintained that, since she got married, she never saw the petitioners nor their parents claim a portion of the deceased's land.

24. On cross-examination, she admitted that Gatiba's children Njogu, Charles and Kariuki lived in Ngecha on a plot given to them by the deceased. She stated that she now wants them evicted from her land.

25. PW3 Francis Njogu son to the deceased and PW2 corroborated his mother's evidence. On cross examination, he admitted that Gatiba and his wife were buried on the deceased's land. He also admitted that Gatiba's son Njogu has built a stone house on the plot they allowed him to occupy on humanitarian grounds as they had no land.

Petitioners' Case

26. The Petitioners did not testify but instead called three witnesses to testify on their behalf. DW1 Peter Kiragu stated that, his father and James Gatiba were brothers. He further stated that the deceased had two brothers and that the deceased had a piece of land which he had divided into three pieces. That Francis Njogu Kungu was given T.98. He further stated that although the properties were registered in the deceased's name, they were physically sub-divided with the deceased's brothers having their share through their heir. On cross examination, he admitted that his father a brother to the deceased and mother were buried in Nakuru.

27. DW2 Geoffrey Njenga Waitathu a cousin to the deceased confirmed that the registered owner of L.R. Limuru/Ngecha/177 and Limuru/Ngecha/T.98 was the deceased. He asserted that the deceased was registered as trustee for the benefit of his two brothers who had been detained during demarcation and also on account of being an elder brother in accordance with Kikuyu customary law. He also stated that the land in question was divided into three portions taking into account the three brothers.

28. He confirmed that Njogu Stephen and Kamau K. Charles children to Gatiba a brother to the deceased have erected permanent homes in Plot No. T.98.

29. DW3 Edward Kamau Waitathu corroborated the testimony of DW2. Upon close of their respective cases, parties filed written submissions. After analyzing the evidence on record, the Magistrate upheld the objectors' (respondents') case stating that; they were not direct relatives to the deceased hence not beneficiaries; that the petitioners had not proved that the deceased held the land in question as trustee for the petitioners' (appellants) or their fathers' benefit; that the petitioners' parents having failed to lay claim over the property as trustees during their life time implies that they had no rightful share; the petitioners cannot seek grant of representation when the widow and son to the deceased are there and, that the objectors were at liberty to file for a full grant for a grant of letters of administration.

Appellants' submissions in support of the appeal

30. Through the firm of Chesikaw & Kiprop Advocates, the appellant filed their submissions on 28th August 2019 which they entirely relied on without highlighting. Counsel submitted on grounds 1 and 2 that, the application by the appellants before the lower court was purely for grant of letters of administration which was disputed and not on ownership of land. That it was the court on its motion which raised the issue of ownership although not raised by the appellants.

31. He further submitted that, issues touching on rights over land can only be determined by a court with proper jurisdiction in this case Environment and Land Court. That the Family Division does not have jurisdiction to determine matters touching on rights over land.

32. Counsel opined that, the court erroneously relied on some documents purported to be an application for grant of representation allegedly prepared by the 1st wife to the deceased in 1983 but which documents were not filed nor authenticated.

33. He further contended that failure to claim a right within the required period does not extinguish the right of the appellants. That mere registration of the land in question in the deceased's name does not affect or dissolve an existing trust in favour of the appellants. In support of this proposition, counsel referred the court to the decision in the case of **Justus Maina Muruku vs Jane Wathira Mwangi (2018)eKLR** and **Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & Another [2015]eKLR**.

34. Concerning grounds 3, 4 and 5 counsel argued that the appellants' witnesses had confirmed that since demarcation the land has been divided into three portions representing the three brothers (deceased, his brothers Ndungu and Gatiba).

35. Touching on grounds 6, 7 and 8, counsel opined that the court did not make its finding that customary law trust did not arise. That in any event, the court did not have jurisdiction to determine customary trusts when the matter squarely lie before the Environment and Land Court (ELC) under Article 162(2) and 165(5) of the Constitution. He contended that the appellants only claimed the land as owners and not beneficiaries. To fortify this position, counsel referred the court to the decision in the case of **Monica Wangari Njiri & 4 others v Eunice Wanjiru Igamba and Another (2016)eKLR** where the court held that:-

“The mandate of the probate court is limited. A distinction ought to be made between a claim against the Estate of a deceased and a claim on inheritance in respect of the estate of the deceased. In our instant suit the objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. Their claim is that the title to the parcels of land is held in trust for them. Indeed, this is a claim for proprietary right.”

36. To emphasize on the same argument counsel made reference to **Succession Cause No. 864/1997 in Re. Estate of Mbai Wainana (deceased) (2015)eKLR**.

Respondents' submissions

37. On their part, Wasonga and Associates filed their submissions on 19th September 2019 opposing the appeal citing two issues for

determination as follows;

(a) Whether or not the learned trial Magistrate erred in law and in fact in holding that the appellants herein were not entitled to administer the estate of the deceased (Grounds 1, 2, 3, 4, 5, 6,8) and

(b) Whether or not the learned trial Magistrate went beyond the scope of his jurisdiction in determining this matter (ground 7)

38. Counsel literally adopted the averments contained in the affidavit in support of the protest. Regarding the issue of grant of letters of administration, he submitted that the respondents had a right in order of priority under Section 66 of the Law of Succession to take out letters of administration. That the appellants being nephews to the deceased had no superior right over a widow and a son of the deceased.

39. Touching on the issue of trust, counsel opined that there was no proof documentary or otherwise that the deceased was holding the land in question in trust for his brothers. That the appellants did not testify hence relied on the witnesses. He urged that he who alleges trust must prove it in accordance with Section 107 of Evidence Act. To fortify this argument counsel cited the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro (2015)eKLR** where the court held that the legal burden of proof generally lies with the person who invokes the aid of the law.

40. Counsel further relied on the provision in Section 28 of Land Registration Act which recognizes that title is a prima facie evidence of proof of absolute ownership of land with indefeasible right. He therefore urged the court to hold that the deceased being the registered owner of the land was the absolute owner. He submitted further that customary trust must be proved by the person relying on it. To support this proposition counsel placed reliance in the case of **Peter Moturi Ogutu vs. Elmelda Basweti Matonda & 3 Others (2013)eKLR** where the court held:-

“... a trust whether implied, constructive, resulting or customary must be established.”

41. He further relied on the decision in the case of **In Re Estate of Mwangi S/o Ngamba alias Mwangi Ngamba (deceased) (2015)eKLR**. He urged that, the land in question is held under statutory tenure and not customary trust and succession of such land should be under statutory regime.

42. As to whether the Magistrate's court had jurisdiction, counsel referred to Section 48 of the Law of Succession and the monetary jurisdiction of an SRM under the Magistrate's Act 2015 which grants an SRM monetary jurisdiction of 7 million and below. Regarding the argument that the Magistrate exceeded jurisdiction, counsel submitted that it was not correct.

43. Counsel further submitted that the dispute over ownership of the said land on account of trust is currently pending before **ELC Thika being ELC No. 131/2019**.

Analysis and Determination

44. I have considered the grounds of appeal herein and counsel's oral submissions. Although the appellants cited eight (8) grounds of appeal, I will condense them into two substantive issues for determination as follows;

(i) Whether the appellants were entitled to take out a full grant of letters of administration in respect of the deceased's estate.

(ii) Whether the trial court had jurisdiction to hear and make a determination on ownership of land based on customary trust.

45. It is an admitted fact that the deceased died on 27th May 1981, a few days before the Law of Succession Act came to force. The Law of Succession came to force on 1st July 1981. Section 2(1) of the Law of Succession provides that;

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”

46. However, Section 2(2) of the said Act does recognize the application of the Law of Succession in so far administration of intestate estates of persons who died before the Succession Act came into force. That provision does state as follows;

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

47. See the case of **In the matter of the estate of Mwaura Mutungi alias Mwaura Gichingo Mburu alias Mwaura Mburu (deceased) Nairobi High Court Succession Cause No. 935 of 2003** where the court held that;

“Where the deceased died before the Law of Succession Act came into force the distribution of his estate may be strictly governed by the applicable customary law, but the provisions of the Law of Succession Act as set in Section 2(2) govern administration of such estate.”

48. In view of Section (2) (2) of the Law of Succession, the administration of this estate shall be subject to the provisions of the Law of Succession notwithstanding the fact that the deceased died before the Act came into force.

Whether the appellants were entitled to take a full grant of letters of administration in respect of the administration of the deceased's estate

49. There is no dispute that the deceased left a widow and children surviving him. The widow is the 1st respondent and the second respondent is one of the sons that survived him. It is also an admitted fact by both parties that the appellants were nephews to the deceased being children of the deceased's brothers. The question is, who between the appellants and respondents was entitled to petition for grant of letters of administration.

50. The relevant provision governing issuance of letters of administration is Section 66 of the Law of Succession which provides;

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be

made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors.”

51. Section 39 under Part V of the Law of Succession does provide that;

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half brothers and half sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

52. From the above order of preference, the appellants being children of the deceased's brothers are ranked in the fourth degree in the order of consanguinity. In the instant case there is a spouse and children who in order of preference have priority against the appellants in taking out a grant of letters of administration. However, this is subject to the unfettered court's discretion as the order of preference may not be automatic and binding on the court and the court can vary the same if the interest of justice demands.

53. In the case of **In Re Estate of Gamaliel Otieno Onyiego (deceased)(2018)eKLR** the court stated that in accordance to Section 66 of the Law of Succession, the spouse had the right to obtain a grant of letters of administration in priority to the deceased's grandson.

54. From the record, the appellants did cite the respondents to petition for a grant. After they failed, they were prompted to file a petition for a full grant. However, from the record, there is no proof of service of the said citation. It therefore follows that the filing of the petition by the appellants without the respondents' consent as claimed was irregular and improper.

55. It is trite that, before any party petitions for a grant of letters of administration, such party must notify and seek consent of those entitled in priority. See the case of **Samuel Wafula Wasike v Hudson Simiyu Wafula (1993)LLR (CAK)** where the Court of Appeal held that:-

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

56. Similar position was held **In the matter of the Estate of Ngaii Gatumbi alias James Ngaii Gatumbi (deceased) Nairobi High Court Succession Cause No. 783 of 1993.**

57. Fortunately, in this case, the appellants do not claim priority in taking letters of administration. In the circumstances of this case and considering that consent was not obtained from the widow to the deceased and all those beneficiary entitled in order of priority, the trial court

was right to declare that the grant was improperly issued to the appellants.

58. To that extent, I am in agreement with the trial court's holding that the grant ought to be given to the respondents. Considering that this is an old matter since 2008, and with discretionary authority conferred upon this court under Section 76 of the Law of Succession, I will and I do hereby revoke the grant herein issued to the appellants on 1st August 2008 and do direct that the same be issued to the respondents as joint administrators. For expeditious delivery of justice and in the attainment of the objective of oxygen principle under Sections 1A and 1B on expeditious delivery of justice, the respondents do not need to file afresh application.

Whether the trial court had jurisdiction to determine and make a declaration on issues of ownership of land based on customary trust

59. According to the appellants, they are entitled to a share out of the deceased's property on the ground that the deceased was registered and held the property in question in trust and for the benefit of their deceased fathers.

60. The respondents contended that, the issue of trust was not proved nor did it exist. According to Mr. Wasonga for the respondent, the land in question was registered under Statute hence cannot be resolved under customary law.

61. It is apparent that the appellants are not coming to court as dependants nor beneficiaries to the deceased although in the petition they lied by claiming that they were sons to the deceased (see Form P&A 5). They are not coming as creditors either. The claim is purely on ownership of the subject property based on trust. Does a court dealing with probate issues of an estate have the capacity to determine ownership disputes over land on account of trust?

62. The appellants submitted that the court should not have overstepped its mandate by determining issues that were not in dispute before it nor did it have the mandate to determine such issues which is the preserve of ELC under Article 162 (2) of the Constitution. Article 162(2) provides for establishment of a court of the status of High Court to deal with disputes relating to (b) environment and use and occupation of, and title to; land.

63. Although the matter herein commenced before the new Constitution was inaugurated, such matters previously were handled by the High Court. By 2015 when the protest was heard, the ELC was operational. This court has been called upon to determine whether the trial court had jurisdiction to hear and determine the dispute concerning ownership claims based on trust. If I make a finding that the court had no jurisdiction, I will not endeavour to determine or delve on the merits of the evidence adduced before the trial court as that will prejudice any outcome that may arise should the issue end up before the ELC.

64. It is trite that jurisdiction is the cornerstone of any court in determining disputes without it a court has no legs to stand on. See Owners of **Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Ltd (1989)KLR**, where justice Nyarangi stated that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step.”

65. Disputes over property in succession matters basically are issues that revolve around a claim of direct beneficial interest or on account of dependency or creditor's interest. The appellants are not claiming any of those. They are purely claiming ownership of land based on trust. Ordinarily, disputes relating to land disputes are matters of another jurisdiction (forum) in this case a court statutorily or constitutionally empowered to handle land disputes.

66. A probate court cannot transform itself to an ordinary civil court dealing with otherwise purely civil land disputes which are not anchored anywhere in the Succession Act.

67. In the case of **Monica Wangari Njiri and 4 Others v Eunice Wanjiru Igamba and Another (supra)** the court stated that;

“The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts”.

The court went further to state;

“Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest in land based on the alleged trust.”

68. Similar position was held in the case of **In the Estate of Richard Karanja Javan (deceased) Succession Cause No. 619 of 1991 (2014)eKLR**.

69. I do agree with the appellants' counsel that, issues relating to breach of trust relation to land disputes can only be handled by the relevant court with such mandate in this case ELC. It is no wonder that there is already a suit pending in an ELC over the same subject. Although the allegation that **ELC Case No. 131/2019 Thika** is pending is not backed with any evidence as it was information passed through submissions, the respondents did not comment on it.

70. The ideal situation should have been for the trial court to have resolved the issue of who was entitled to a grant of letters of administration which he correctly determined and then reserve the issue of confirmation pending parties prompting a civil court for determination of ownership of land based on trust.

71. It is clear therefore from case law that a probate court should not assume jurisdiction over land disputes unless it falls within the category of direct beneficial interest of the deceased's beneficiaries, dependency or creditor's interest. The dispute should therefore be lodged before the ELC which shall determine all issues relating to trust and then make a determination on who owns what.

72. Should the ELC recognize the claim in favour of the appellant, the probate court shall then distribute only the share entitled to the deceased to his heirs to the exclusion of the share entitled to his brothers now deceased which will then be given to their respective heirs. Should the ELC court find in favour of the respondents, then upon confirmation the entire estate shall be shared between the rightful heirs to the estate, dependants or creditors if any.

73. Having held as above, and as earlier stated, I do not find it necessary to determine the dispute as to who is entitled to what share of the land before a declaration is made before an ELC. To that extent, I do agree with the appellant that the trial court exceeded its mandate by determining issues to which it had no jurisdiction.

74. With the revocation of grant and an order that the same be issued to the respondents, either party shall be at liberty to move and petition ELC for declaration and determination of the said trust. If the suit is not already filed, the same should be filed by the appellants if they so wish within 60 days from the date of this judgment. If already filed, the probate court shall await the outcome of the already filed suit before the respondents could file an application for confirmation to determine distribution of the estate subject to the finding of the ELC.

75. Accordingly, and for the reasons stated herein, the appeal herein partially succeeds and partially fails with Judgment entered against the respondents as follows;

(a) That the grant of letters of administration issued to the appellants on 1st August 2008 be and is hereby revoked.

(b) That a grant of letters of administration shall issue to the respondents jointly by the Limuru Senior principal Magistrate's Court within 45 days from the date of this judgment.

(c) That upon issuance of the said grant, the appellants herein Peter Kungu Waitathu and Charles Kimani Gatiba or anybody on their behalf shall be at liberty to file a claim of ownership on account of trust in respect of the land/properties in question before a competent ELC with jurisdiction within 60 days from the date of this Judgment in default the respondents Ruth Wanjiru and Francis Njogu Kungu shall be at liberty to file an application for confirmation of the grant to the exclusion of the appellants herein.

(d) That in the event there is ELC NO. 131/2019 pending before the ELC over the same subject, the probate court shall await its outcome before distributing the estate.

(e) That the status quo shall remain pending the fulfillment of the above conditions and further orders of the trial court.

(f) That the Deputy Registrar shall immediately forward a copy of this Judgment together with the original file to Limuru SPM' court for the necessary action and compliance.

(g) This being a family related dispute, I shall order that each party bears own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF JULY 2020.

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J. N. ONYIEGO

JUDGE