



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
MISC APPLN NO. 150 OF 2015

IN THE MATTER OF THE ESTATE OF: CLAUDIO OPIYO OMWA (DECEASED)

BETWEEN

CATHERINE AUMA OPIYO.....PETITIONER/APPLICANT

VERSUS

CAROLINE AUMA OPIYO.....1st RESPONDENT

MAURICE OOKO OKERO 2nd RESPONDENT

JOSIAH ODERO OPIYO3rd RESPONDENT

CLEOPHAS ONYANGO OWUOR4th RESPONDENT

RULING

1. By a Notice of Preliminary Objection evenly dated and filed in Court on 06/12/2016, the Respondents opposed the jurisdiction of this Court to deal with the Petition and the Applicant’s application by way of Chamber Summons dated 19/04/2016. The application seeks *inter alia* the cancellation of several title deeds allegedly obtained fraudulently by the Respondents after the death of the deceased herein without undertaking any succession proceedings.
2. At the hearing of the objection, Learned Counsel for the Respondents **Mr. Awino** only restricted the objection to the application and not the entire Petition. He argued that since the acts complained of were allegedly committed fraudulently and without the involvement of any succession proceedings, then the appropriate avenue is for the Petitioner/Applicant to challenge the alleged fraudulent issuance of the title deeds in an Environment and Land Court and once appropriate orders are made and the property is successfully decreed as part of the estate of the deceased, then this Court through this cause can deal with the matter further.
3. **Mr. Jura**, Counsel who appeared for the Petitioner was of the contrary position. He concurred that the property of the deceased was dealt with fraudulently without involving any court process but implored this Court to consider delivering substantive justice to the parties. To him, this Court is seized of jurisdiction.
4. As the issue under consideration was raised by way of a preliminary objection, it is in order for me to

have a look at the law on preliminary objections. Law, J.A. in the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say:-

“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.....”

5. My brother Mwita, J. in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in more clearer terms when he 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.”

6. Before I leave this discourse, my attention has been drawn to the words of **Hon. Ojwang, J** (as he then was) in the case of **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the **Mukisa Biscuits case (supra)** went on to stay that: -

“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.....”

7. Based on the foregone clear legal position, the Respondents raised the preliminary objection on the jurisdiction of this Court. This Court remains clear in its mind that jurisdiction is everything and without it a Court cannot make any more single legal step. Once the jurisdiction of a Court is challenged, that Court must first determine that question at once, and should it hold the opinion that it lacks jurisdiction, it should down its tools. In the famous case of **The Owners of Motor Vessel “LILIAN “S” -vs- Caltex Oil Kenya Ltd (1989) 1 KLR 1** Nyarangi, JA. stated at page 14 that: -

“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 and 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.”

8. The Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction: -

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”

9. I have carefully considered the objection alongside the submissions and the law. It is not in dispute that by the time the deceased passed on, the parcel of land known as **SUNA EAST/KAKRAO/1366** (hereinafter referred to as '**the land**') was registered in his name. It is also not in dispute that the land was sub-divided into several portions and title deeds issued which are now registered in names of the Respondents. It is further agreed that the sub-division and eventual transfer of the land was done without the involvement of any legal succession process. Therefore, the central issue for consideration under the application is whether the land was fraudulent dealt with and whether the Respondents, who are now registered as proprietors of the various sub-divisions, have good title thereto.

10. Given that the dispute relates to title to the land and the resultant sub-divisions the question which now begs an answer is whether this Court is vested with the jurisdiction to deal with such disputes.

11. This Court, being a High Court, is a creature of **Article 165 of the Constitution** and which Article also defines its jurisdiction. Under **Article 165(5)** the Constitution excludes the High Court from exercising jurisdiction over matters falling within the jurisdiction of the courts contemplated in **Article 162(2)**. **Article 162(2)** of the **Constitution** provides that the mandate to deal with disputes relating '**to the use, occupation and title to land**' is a legal preserve of the Court contemplated under that Article. That Court is now the Environment and Land Court. As recently reinforced by the **Supreme Court of Kenya in Petition No. 5 of 2015 Republic vs. Karisa Chengo & 2 others (2017)eKLR**, Judges of one superior Court have no jurisdiction to deal with matters within the clear preserve of any other superior Court.

12. By applying the foregone to this matter, I find the objection merited since what the Chamber Summons application dated 19/04/2016 seeks to deal with is outside the jurisdiction of a succession Court. That dispute, as unveiled, falls within the confines of the Environment and Land Court and is not among those disputes contemplated under the Law of Succession to be handled by the High Court.

13. As a result, this Court declines jurisdiction to deal with the Chamber summons dated 19/04/2016 and the same is hereby struck out accordingly. Since the dispute between the parties is not about to come to an end soon going by the nature and gravity of the issues raised, each party herein shall bear its own costs of the application.

14. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of June 2017

A. C. MRIMA

JUDGE