



**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND COURT**

**LAND CASE NO.265 OF 2013**

**PERES ATIENO ADEYA.....PLAINTIFF/ APPLICANT**

**VERSUS**

**ANASTASIA JUMA OWEYA.....DEFENDANT/RESPONDENT**

**RULING**

1. **Peris Atieno Adeya**, the Applicant, filed the notice of Motion under Certificate of Urgency dated 30<sup>th</sup> September 2013 for temporary order of injunction restraining **Anastasia Juma Oweya**, the Respondent, over land parcel **East Alego/Kogelo-Nyangoma/197**. The Applicant filed a supporting and further affidavits sworn on 30<sup>th</sup> September 2013 and 4<sup>th</sup> March 2015 in which she deponed to among others as follows:

(a) That the Respondent and herself are daughters in law to the late **Pius Nyanja Ochieng** who died on 11<sup>th</sup> April 1974.

(b) That before the death of the deceased he had transferred East Alego/Kogelo-Nyangoma/924 to the Respondent's husband Martin Oweya Nyanja. She has annexed a copy of the certificate of official search that shows

Martin Oweya Nyanja was registered with the land as a first registered proprietor on 1<sup>st</sup> September 1973.

(c) The Applicant further depones that she filed Succession Cause No.116 of 2011 in respect to the estate of Pius Nyanja Ochieng and annexed a copy of the Succession proceedings. The proceedings show that both Applicant and Respondent, who were then the Petitioner and Objector, were appointed administrators of the estate on 26<sup>th</sup> July 2012. Then on 21<sup>st</sup> February 2013 the grant was confirmed.

(d) That consequently the Respondent had land parcel East Alego/Kogelo- Nyangoma/197, which is the suit land, registered in their joint names.

2. The application is opposed by the Respondent through her replying affidavit sworn on 29<sup>th</sup> October 2013 in which she among others depones to the following;

(a) That though Applicant is the one who had filed the Succession Cause, she lost interest and did not attend court during the confirmation proceedings.

(b) That the court distributed the estate between herself and the Applicant equally.

(c) That if the Applicant is not satisfied with the succession court's order on distribution of the estate, recourse should be either an appeal in the High Court sitting as a Succession Court or apply for review or setting aside of the orders.

(d) That this court has no jurisdiction to entertain the application.

3. That on the 11<sup>th</sup> May 2015 counsel for the parties agreed to file written submissions on the application dated 30th September 2013. The counsel for the Plaintiff filed their submissions dated 29th June 2015 and Defendant counsel filed theirs dated 22nd September 2015.

4. The two main issues for determination are as follows:

(a) Has the Applicant established a case for issuance of injunction at the interlocutory stage.

(b) Who pays the costs.

5. The Applicant's counsel submitted that the person who was entitled to the suit land is the Applicant as the Respondent's entitlement had been given to her husband. That the Respondent participation in the succession proceedings and subsequent registration as joint owners of the suit land without Applicant's consent was in bad faith and actuated by greed.

The counsel referred the court to the following cases;

(i) Giella -V- Casman Brown & Co Ltd (1973) E.A. 358.

(ii) Mrao -V - First American Bank of Kenya & 2 others (2003) eKLR,

(iii) Joseph Siro Mosioma -V- H.F.CK 3 others Nairobi HCC No.265 of 2007 which was cited in Olympics Sports House Ltd – V- School Equipment Centre Ltd HCC No.190 of 2012 {2012} eKLR,

(iv) Films Rover International 1986 3 All ER cited also in Olympic Sports House Ltd – V- School Equipment centre Ltd HCC NO.190 of 2012 {2012} eKLR,

And asked for the order as prayed.

6. The counsel for the Respondent submitted that the orders issued by the succession court under which the Respondent acquired registrable rights over the suit land have not been challenged either on appeal or through a review application. That this court lacks jurisdiction to deal with matters of Probate and administration and both the application and suit are misconceived. That the Respondent deposition in the replying affidavit that the Applicant abandoned the succession cause after the Respondent objection proceedings were allowed and both appointed as joint administrators has not been controverted. The counsel referred the court to article 162 of the constitution and Section 13 of the Environment and Land court Act as the basis of this court's Jurisdiction. The counsel also referred to the following decided cases on jurisdiction:

(i) Owners of the Motor Vessel " Lilian S" -V- Caltex Oil (Kenya) Ltd (1989) KLR.

(ii) Samuel Macharia & Another -V- Kenya Commercial Bank Ltd & 2 others Supreme Court Application No.2 of 2011.

The counsel submitted that the Applicant has not established a prima facie case and the application should be dismissed with costs.

## **7. FINDINGS**

Having considered the affidavit evidence, the grounds of the application and submissions by both counsel, the court comes to the following conclusions.

(a) That indeed, the suit land Siaya/Kogelo Nyangoma/197 was registered in the joint names of the applicant and Respondent following the confirmation of the grant issued to both parties in Siaya SPM Succession Cause No.116 of 2011. The Applicant appears to be dissatisfied with the Succession Court's Orders and instead of going back to that court for review or moving to the High court sitting as a Succession Court, filed the suit before this court contemporaneously with the application.

(b) The court concurs with the submission by counsel for the Respondent that there exist a valid order on distribution of the suit land. That order has not been challenged and this court is not the proper forum to challenge an order issued by a Succession Court. The position taken by the two superior courts in the following two cases clearly captured the importance of jurisdiction. The first is the case of **Owners of the motor Vessel "Liuan S" -V- Caltex Oil (Kenya) Ltd** (1989) KLR where Nyarangi JA said the following;

" With that I return to the issue of jurisdiction... I think 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 continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The second is the case of **Samuel Macharia & Another -V- Kenya Commercial Bank Ltd & 2 others Supreme Court Application No.2 of 2011** where the apex court stated as follows;

" A court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a court 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 ... whether a court of law has jurisdiction to entertain a matter before it, is not a matter of 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. 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."

(c) That having found that the Applicant has moved to a court without jurisdiction to challenge rights bestowed on the Respondent by Succession Court, it follows that her application cannot meet any of the principles set in the case of **Giella -V- Casman Brown & Co Ltd** (1973) EA 358 for issuance of injunctive orders.

8. That for reasons set out above the application dated 30<sup>th</sup> September 2013 is without merit and is dismissed with costs.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**4/11/2015**

Dated and delivered this **4<sup>th</sup> day of November 2015**

In presence of

Applicant Present

Respondent Absent

Counsel Mr Omondi for plaintiff

Mr Omolo for Wakha for Defendant

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**4/11/2015**

4/11/2015

S. M. Kibunja J

Oyugi Court clerk

Plaintiff present

Mr Omondi for plaintiff

Mr Omolo or Wakha for Defendant present

Court: Ruling dated and delivered in open court in presence of plaintiff, Mr Omondi for plaintiff and Mr Omolo for Wakha for Defendant.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**4/11/2015**