



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION NO. 112 OF 1990**

**IN THE MATTER OF THE ESTATE OF THE LATE CHABARI  
M'ITUANGONDU.....(DECEASED)**

**PETER MWONGERAH.....1<sup>ST</sup> APPLICANT**

**GERALD KIAMBI M'CHABARI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**PATRICK SAFARI MUINDI.....RESPONDENT**

**RULING**

1. The applicants through an application dated 17<sup>th</sup> December, 2012 brought pursuant to Section 47 of the Law of Succession Act, Rules 49 and 73 of the Probate and Administration Rules sought inter alia; that the mutation form dated 31<sup>st</sup> May, 2012 be cancelled and the same be replaced/substituted with mutation form dated 12<sup>th</sup> March, 2010; that the land parcels Nos: Abothuguchi/Makandune/1862, 1863, 1864, and 1865 be resurveyed and boundaries and/or position/location thereof be changed as per mutation form dated 12<sup>th</sup> March, 2010; that the relevant cadastral map in respect of land parcel No's Abothuguchi/Makandune/1862, 1863, 1864, and 1865 be amended as per mutation form dated 12<sup>th</sup> March, 2012, that the orders thereof be served upon the District Surveyor and the District Land Registrar, Imenti North District for compliance. The application is based on several grounds on the face of the application and affidavit in support dated 15<sup>th</sup> December, 2012 and further affidavit dated 8<sup>th</sup> February, 2013.
2. That before the applicants' application could be heard the respondent filed notice of preliminary objection dated 17<sup>th</sup> March, 2014 raising objection to the effect that the application lies on the face of Article 162(2),(b) and (3) of the Constitution and Section 13 of the Environment and Land Act No. 19 of 2011.
3. On 19<sup>th</sup> May, 2014 the court directed that the preliminary point of objection be determined by way

of written submissions. The respondent filed his submissions on 9<sup>th</sup> June, 2014 whereas the applicants filed their response on 9<sup>th</sup> July, 2014. The court has carefully considered the pleadings in this cause and the counsel respective opposing positions. The issue of determination is whether the respondent's preliminary objection is merited and whether the issues raised in the applicants' application are issues for succession court or for Environment and Land Court.

4. The applicants' application arises out of confirmation of the grant over the estate of the deceased estate in respect of the shares of each of the deceased beneficiaries. In succession Causes, the court has power to determine who are the beneficiaries or the dependants. Their respective shares or the mode of distribution of the deceased estate and any party who is aggrieved with the mode of distribution has the right to move the Succession Court for appropriate orders.
5. The respondent's contention is that the applicants' application is inviting this court to deal with land matters that can best be dealt with by the Environment and Land Court. That the issues raised are not Succession matters but are disputes relating to occupation and use of land and as such the issues can best be handled by Environment and Land Court and not in a Succession Cause. The respondent further urged jurisdiction conferred in Succession Court is to deal with matters which fall within the scope of Section 2 of the Law of Succession Act and that scope is to deal with intestate and testament Succession and the administration of the estate of the deceased person. The respondent challenged the courts jurisdiction and referred to the case of **OWNERS OF MOTOR VESSEL "Lilians" VERSUS CALTEX OIL(KENYA) LTD (1989) KLR** where the Court of Appeal stated:-

***"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, court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the 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.***

6. The applicants countered the respondent's preliminary objection urging that the High Court has jurisdiction to entertain any application and determine any dispute under the Law of Succession Act and pronounce such decrees and make such orders therein as may be expedient. The applicants further urged that the application is brought under Rule 73 of the Probate and Administration Rules which give the court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The applicants argued that they got their share through this cause in which the 1<sup>st</sup> applicant was a purchaser and the 2<sup>nd</sup> applicant was a beneficiary of the estate of the deceased estate by virtue of being a child of the deceased. That before confirmation of the grant each party had developed his respective portion but the respondent who is the administrator allocated the applicants underdeveloped portions. That the applicants are seeking court's orders as to where their respective shares of the aforesaid land should be and that the issue can be determined in this cause and not by filing a separate suit before an Environment and Land Court.
7. The applicants are creditors and beneficiaries to the deceased estate and entitled to the deceased estate as envisaged under Section 66 and 29 respectively of the Law of Succession Act. The court has power to determine who are the beneficiaries or the dependants, their respective shares as well as the mode of distribution. The issue before this court and in the applicants' application is between an administrator and the deceased's creditor and the issue can only be determined in a Succession Cause as a dispute between beneficiaries in respect of their respective shares and the mode of distribution but not before an Environment and Land Court. This is not a case of occupation and use of land but of shares, and mode of distribution of the deceased estate. This court has jurisdiction to determine the present application by virtue of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

8. The upshot is that the preliminary objection is not merited and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 8<sup>th</sup> DAY OF OCTOBER, 2014.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:**

1. Mr. Nyenyire for the respondent
2. Mr. J. G. Gitonga for the applicant

**J. .A MAKAU**

**JUDGE**