



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO 9 OF 2012

P L R.....PLAINTIFF

-VERSUS-

J N R.....1ST DEFENDANT

DISTRICT LAND REGISTRAR NAROK.....2ND DEFENDANT

RULING

The Plaintiff commenced this suit by way of a plaint that was filed in court on 09/10/2012 and sought, *inter alia*, the following orders-

1. A declaration that the transaction that saw the 1st Defendant issued with a Title Deed for land parcel No. NAROK/CISMARA/EORR-ENKITOK/301 was obtained by fraud hence null and void and there be a cancellation order against the 2nd Defendant of the title deed in respect of the suit premises now registered in the names of the 1st Defendant, further that the subdivision and subsequent distribution of the suit land be done through a succession cause.
2. A permanent injunction restraining the defendants either by themselves, their agents, representatives and/or anybody under them from dealing in, evicting or in any other way interfering with the use, enjoyment or occupation of the suit premises
3. A declaration that the suit premises herein land parcel No. NAROK/CISMARA/EORR-ENKITOK/301 having belonged to the deceased before his demise and having not been subdivided vide a succession cause, still belonged to him and can only be subdivided and apportioned to beneficiaries or dependants of the estate in a properly lodged succession cause.

Contemporaneously with the plaint, the Plaintiff filed a Notice of Motion seeking interim orders that the defendants be prohibited from interfering with his peaceful occupation and cultivation of the suit land and be further restrained from interfering or dealing with the suit land.

The 1st defendant has raised a Preliminary Objection to the suit by a notice of Preliminary Objection filed on 1st November 2012. She seeks to have the suit struck out on the following grounds-

1. That the matter herein relates to the property of a deceased person settled through a will and any challenge to the same ought to be dealt with in a succession cause.
2. That the plaintiff's claim that he is a dependant/beneficiary of the estate of the deceased ought to be canvassed through an application presented under Section 26 of the Law of Succession Activities
3. That the plaintiff herein is not a direct dependant of the deceased and therefore has no locus standi to present this suit.

It is not disputed that this property belonged to NR who died on 24/09/2011 and was registered in his name at the time of his death and that a succession cause for the distribution of his estate has not been commenced. The Plaintiff herein alleges that he is entitled to the suit premises being a grandson hence a beneficiary of the deceased and has lived on the suit premises all his life: That the deceased herein died testate and left a will dated 15th January 2011, he subdivided the property into 3 amongst the Plaintiff's deceased grandmother, the first defendant and a third party. That he is claiming entitlement of the suit property as one of the beneficiaries of his grandmother who would have been a beneficiary under the Law of Succession. He alleges that the 1st Defendant herein has caused the suit premises to be subdivided and has since obtained a title and has evicted the rest of the family from the suit premises. That all this was done without letters of administration being obtained.

The 1st Defendant on her part admits that the suit premises were registered in favour of the deceased at the time of his death. However, by a will dated 21st August 2006, he bequeathed her a portion of the suit land. That prior to his death, he had obtained consent to sub-divide the suit land, conducted a mutation and registered all the documents in the lands office and alluded that he had the intention of transferring the same to her. She denies that the Plaintiff is a beneficiary of the estate of the deceased and therefore he lacked locus standi to bring the suit herein.

Counsels for the parties made several submissions in support of their cases. Mr. Githui for the Plaintiff submitted that this matter falls within the probate and administration division and not the ELC court: That where a person wishes to challenge the provision of a will he can only do so in a succession cause and cited Sections 7 and 17 of the Law of Succession Act Cap 16: That if the 1st Defendant was intermeddling with the estate as alleged, then there is recourse under Section 5 of Cap 160. He further submitted that the Plaintiff lacked locus standi to bring the suit on behalf of the deceased's estate as he did not have letters of administration as is required under Schedule 5 part 4 of the Law of Succession Act. For these reasons he asked this court to strike out the suit.

Mr. Maragia for the Plaintiff relied on the further affidavit of P L R sworn on 27th November 2012. He submitted that the plaintiff sought orders of injunction and cancellation of title, which the probate and administration division did not have jurisdiction to grant. He added that the constitution demanded that matters be heard on merit and this court should not dwell on procedure. He stated that by virtue of being a beneficiary, the Plaintiff had locus to bring the suit herein.

I have considered the submissions and I find that the matters for determination are:-

1. whether this court has jurisdiction to hear and determine this matter
2. whether the plaintiff has locus standi to prosecute the suit.

Firstly, the suit property belonged to the deceased at the time of his death. Although the same is currently registered in favour of the 1st Defendant, the registration was done after his death. There is no other document showing that the same had been transferred to her by the deceased before his death. A will does not in my opinion confer any interest in land. It remains a testamentary document expressing the will of a deceased person up to the time it is confirmed by court after considering the factors provided for under the Law of Succession Act and the mode of distribution therein approved.

Consequently, this property being the estate of the deceased is governed by the Law of Succession Act. Section 2 (1) of the Law of Succession Act provides that the provisions therein applied to all cases of intestate or testamentary succession to the estates of deceased persons and to the administration of estates of those persons. An estate means the free property of a deceased person that is the property of which that person was legally competent free to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. It is clear that at the time of his death the deceased was free to deal with the suit property as he wished, the same not having been legally transferred to a third party including the 1st Defendant.

In addition, in order to determine the suit, this court would be required to determine questions of validity of the wills and whether the Plaintiff is a beneficiary of the deceased's estate and therefore

entitled to his estate. The property and the issues to be determined in the suit fall under the realm of the Law of Succession Act. The Environment and Land Court is a special court established under Article 162 (2) (b) and Section 4 (1) of the Environment and Land Court Act No. 9 of 2011 and it is meant to deal with matters concerning the environment and the use and occupation of and title to land. However matters of ownership and entitlement to a deceased person's property, including land are governed by the Law of Succession Act and are to be determined by the Family Court. Thus by virtue of Section 2 (1) of the said Act, this court lacks jurisdiction to determine the same.

Counsel for the Plaintiff argued that the question of jurisdiction was a mere procedural technicality that could be cured by the exercise of this court's inherent jurisdiction. He also argued that the court gained jurisdiction because of the nature of the orders sought in the suit, which include an order for cancellation of the title issued to the 2nd Defendant. I do not agree with these submissions. I find that jurisdiction of a court is fundamental and goes to the root of the matter and without it, the court cannot take any step, make any determination or issue any orders therein and the entire proceedings would be null and void *ab initio*. The Supreme Court in the case of Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others [2012] eKLR held as follows on jurisdiction-

“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 counsel 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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. 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”

The Constitution is very clear on the jurisdiction of this court that it is only to deal with matters of environment and land. As I have already found, a will is not an instrument that confers an interest on land. Its provisions can only be acted upon once it has been confirmed and a grant of letters of administration issued by the Probate and Administration Court. It is at this juncture when an interest which has been conferred by transmission is created and it is this interest that is actionable before this court. Having found as above and there being no other interest disclosed by the parties in the suit, other than by virtue of being beneficiaries, it follows that this court lacks jurisdiction to hear the matter or grant the orders sought.

Without jurisdiction, this court has nothing and cannot purport to make any other determinations in this matter including the question of *locus standi* of the Plaintiff to prosecute the suit. From the pleadings it emerged that the Plaintiff was concerned about wastage of the estate of the deceased. The Law of Succession Act at Section 45 prohibits intermeddling with the estate which includes taking possession of or disposing of the estate of the deceased. The Family Court is therefore empowered under Section 47 of the Act and Rule 73 of the Probate and Administration Rules to issue such orders as may be necessary to preserve the estate pending distribution of the same.

For the above reasons, I find that the preliminary objection dated 30th October 2012 has merit and hold that this court cannot issue the orders sought before the succession cause in respect of the estate of the deceased is concluded. I therefore strike out the suit with costs.

Dated signed and delivered at Nakuru in open court this 5th day of July 2013

L N WAITHAKA

JUDGE