

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO.10 OF 2020
IN THE MATTER OF THE ESTATE OF ZAKAYO OKUTOTO alias
ZAKAYO OKUTOTO (DECEASED)
BETWEEN

PETER ZAKAYO OLUKHALIKHA-----
PETITIONER

AND

SAIDI MUTICHI OKUTOTO-----
APPLICANT

AND

IN THE MATTER OF ALI MERAB IMUNDU-----
PROTESTOR

RULING

1. The petitioner herein filed an amended summons for confirmation dated 30th January 2023 for the estate of the deceased Zakayo Okutoto, who died on 20th August 1972.
2. In opposition, the protestor filed an affidavit dated 5th July 2023 since he claimed that he was not listed amongst the beneficiaries to the estate of the deceased, despite being recognized as a *liability*, as he had purchased 1 $\frac{3}{4}$ Acre comprised on LR. NO EAST WAGA /LUBINU/510.
3. He claimed that he purchased the 1 $\frac{3}{4}$ acres from the petitioner Peter Zakayo, the petitioner's mother Martha Amanyia Okutoto, and Asman Okola Okutoto in 2005. He produced evidence of the agreement and evidence of a letter from the senior chief, Lusheya Location, dated 28/5/2019.
4. He started living on his portion measuring 1 $\frac{3}{4}$ acres, comprised on L.R. No. East / Wanga/Libinu /510 since the year 1998, where he and his son have put up their homes.

5. The applicant filed a notice of preliminary objection on the affidavit of protest. He claimed his protest was based on a sale agreement on ownership of land, which the court had no jurisdiction under Article 162 (2) b as read together with Article 165 (5) b of the constitution.
6. The protestor did not file a response to the preliminary objection.

ANALYSIS AND DETERMINATION.

7. The main issue for determination is whether this court has jurisdiction to determine the protest, which is anchored on an alleged land sale agreement and ownership rights.
8. Article 162(2)(b) of the Constitution establishes courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Further, Article 165(5)(b) expressly bars the High Court from exercising jurisdiction in respect of matters falling within the jurisdiction of courts contemplated under Article 162(2). This constitutional framework created the Environment and Land Court (ELC), which has exclusive jurisdiction to hear and determine land ownership and use disputes.
9. It is trite law, as underscored in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, that jurisdiction is everything, and without it, a court must down its tools. Similarly, in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR**, the Supreme Court reaffirmed that a court cannot arrogate itself jurisdiction not conferred by the Constitution or statute.

10. The Court of Appeal has also emphasized this principle in several decisions. **In Karisa Chengo & 2 Others v Republic [2017] eKLR, the Court of Appeal** (later upheld by the Supreme Court) held that jurisdiction flows from the Constitution and statutes, and courts cannot assume jurisdiction by implication. **In Co-operative Bank of Kenya Ltd v Patrick Kang'ethe Njuguna & 5 Others [2017] eKLR**, the Court of Appeal reiterated that disputes concerning use, occupation, and title to land fall squarely under the ELC's jurisdiction. Likewise, in **Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR**, the Court of Appeal underscored the need to transfer matters filed in the wrong forum to the court with proper jurisdiction rather than striking them out where possible.
11. In succession proceedings, the role of the probate court is to identify heirs, beneficiaries, and liabilities to the estate, and to oversee distribution of the estate to the rightful beneficiaries. Where a protestor asserts ownership of land by virtue of purchase, that claim ceases to be an issue of succession but rather one of ownership and enforceability of a sale agreement. Such matters fall squarely within the jurisdiction of the ELC.
12. Accordingly, this court cannot adjudicate on the validity of the sale agreement between the protestor and the petitioner or their family members, nor can it determine ownership of the disputed 1¾ acres. Those issues lie within the exclusive jurisdiction of the ELC.

13. I find that the preliminary objection raised by the applicant is merited. This court lacks jurisdiction to determine the protest grounded on land ownership. Consequently, the affidavit of protest dated 5th July 2023 is hereby struck out.
14. The amended summons for confirmation of grant dated 30th January 2023 shall therefore proceed to be heard and determined on its merits, limited to the issues properly within the jurisdiction of this court. The protestor, if still intent on pursuing his claim, is at liberty to file an appropriate suit before the Environment and Land Court.
15. Each party to bear its own costs of this proceedings.
16. Hearing for summons for confirmation of grant on 16.3.2026.
17. Right of appeal 30 days.
18. It is so ordered.

**DATED, SIGNED and DELIVERED at KAKAMEGA this 7th day of
OCTOBER, 2025**

S.N. MBUNGI

JUDGE

In the presence of:

Court Assistant: Agong'a

Mr. Munyendo for the objector, present.

