



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

SUCCESSION CAUSE NO 88 OF 2017

IN THE MATTER OF THE ESTATE OF MUYOKOTHA MBALU MAVULYA (DECEASED)

ANN NDUNGE MBALU.....1ST ADMINISTRATOR

BETH WAVINYA MUYOKOTHA.....2ND ADMINISTRATOR

VERSUS

GRACE MUNEE MAUNDU.....PROTESTER/OBJECTOR

JUDGMENT

BACKGROUND

The dispute before the court arises from the estate of the late Muyokotha Mbalu Mavulya, who passed away on 11/9/2007, leaving behind parcels of land described as follows in the petition:

- a) Mbitini/Maatha/390;
- b) Nzau/Kikumini/426;
- c) Nguu Ranch Plot 1187; and
- d) Nzau/Kikumini/119.

The deceased is said to have been survived by a widow and seven (7) children. The Administrators herein petitioned for a grant of Letters of Administration intestate and the same was granted on 15/8/2017. Thereafter, the Administrators applied for confirmation of

the grant vide an application dated 26/6/2018 but filed on 17/7/2018. It was at the confirmation stage that the Objector/Protestor filed an affidavit of protest to the confirmation of grant. The record shows that another application for confirmation of grant dated 31/3/2022 was filed on 5/4/2022 after the initial application was withdrawn on 8/3/2022.

THE APPLICATION FOR CONFIRMATION OF GRANT

The summons for confirmation of grant was filed by the Administrators. In the application, the Administrators proposed a mode of distribution of what was believed to be the estate of the deceased herein.

THE OBJECTION/PROTEST

The affidavit of protest was sworn on 2nd October, 2018 and filed on the same date. The Objector deposed that she was the sister to the deceased herein. Her objection was in respect of distribution of land parcel number Mbitini/Maatha/390. The objector claimed that she purchased the said parcel of land from her deceased mother but the deceased herein unlawfully took possession and had the land registered in his name without the knowledge and consent of the Objector. That the objector was entitled to inherit land parcel number Mbitini/Maatha/390 wholly.

RESPONSE TO THE PROTEST

The Administrators filed an affidavit sworn by the 2nd Administrator on 16/11/2018 in opposition to the protest. It was deposed that the protest was misplaced, misleading, malicious and an abuse of the process of court. The 2nd Administrator deposed that land parcel number Mbitini/Maatha/390 was the exclusive property of the deceased and that there was no evidence to support the allegations by the Protestor. That the deceased was registered as the absolute proprietor of the parcel of land and that the Protestor had no legitimate claim at all, in the estate of the deceased.

DIRECTIONS ON DISPOSAL OF THE DISPUTE

The record indicates that on 11/12/2023 the parties agreed and the court directed that the protest be heard by way of *viva voce* evidence.

THE EVIDENCE***The Protestor/Objectors' Case.***

The Objector called four (4) witnesses in support of her objection. PW 1 Grace Muneo Maundu (hereinafter referred to as the Objector) adopted her statement as part of her testimony. The gist of her testimony is that she bought land parcel number Mbitini/Maatha/390 from one Kiamba Kivwau before adjudication. That she even constructed two houses thereon. That the deceased bought a parcel of land which bordered the Objector's land. The Objector stated that during adjudication in 1976 or thereabout, the deceased converted all the parcels into one block and got himself registered as proprietor. That the deceased did not stay on the land in issue but used it for grazing. The Objector urged the court to award her the parcel of land.

PW 2 Monica Mutindi Muinde also adopted her statement as part of her testimony. She stated that the Objector was her sister in-law. That in early 1970's, the Objector relocated the witness and her family to her land in Kikumini where she had built two houses. The witness described the land as Mbitini/Maatha/390. That later, the Objector invited the deceased herein to purchase a parcel of land at the same area. The deceased purchased the parcel of land and later purchased another parcel which bordered the land in issue herein. PW 2 stated that during adjudication, the deceased consolidated the parcels of land into one and caused the same to be registered in his name. That the land in issue belongs to the Objector.

PW 3 Charles Kitili Wambua testified that the land in dispute originally belonged to his grandfather known as Kiamba Kivwau. That the land was unregistered then. PW 3 stated that the land belonged to the Objector. That his grandfather had told him that he had sold the land to the Objector's husband. PW 4 Anthony Mutua Mutiso testified that Kiamba Kivwau was his grandfather. That his grandfather informed him that he had sold the land in issue to the Objector herein.

The Administrators' Case

Only the 2nd Administrator testified in support of their case. Her evidence was that the land in issue belonged to her deceased father (deceased herein). She produced a copy of the title deed which confirmed that the land was registered in the name of the deceased herein. The 2nd Administrator urged the court to dismiss the Protestor's claim.

MAIN ISSUES OR QUESTIONS FOR DETERMINATION

Having perused the application and considered the evidence on record, I find that the main issues or questions for determination are as follows:

- i. Whether the court has jurisdiction to hear and determine the objection;
- ii. Whether the objection to confirmation of grant should be upheld;
- iii. Whether the court should proceed and distribute the estate of the deceased;
- iv. If so, how should the court distribute the estate of the deceased;
- v. What other orders should the court make if need be.

SUBMISSIONS BY THE OBJECTOR/PROTESTOR

The objector filed written submissions. She relied on the provisions of Rule 41(3) of the Probate and Administration Rules as well as her evidence and urged the court to allocate the land in dispute to her.

SUBMISSIONS BY THE ADMINISTRATORS

The Administrators also filed written submissions. They submitted that the protest was a claim for title to land camouflaged as a protest. The Administrators argued that the court, while sitting as a succession court, lacked jurisdiction to delve into allegations of proprietary interest in land. That the grievances by the Protestor ought to be canvassed in a different forum, which is the Environment and Land Court. The Administrators relied on an authority whose copy was not annexed. The Administrators submitted that there was no evidence to show that the Objector bought the land as was alleged. That the sale agreement was not exhibited. The Administrators wondered why the Objector did not claim the land while the deceased was alive and had to wait for 41 years to do so. They relied on their evidence on record and urged the court to dismiss the protest.

ANALYSIS AND DETERMINATION

I have considered the objection as well as the evidence on record. I have further considered the submissions filed by the parties. I will begin by addressing the issue of jurisdiction. In the writings of John Beecroft Saunders in a treatise entitled "**Words and Phrases Legally defined**" - Volume 3: I - N at page 113, quoted in the case of Seven Seas Technologies Limited v Eric Chege [2014] eKLR, the following was said about jurisdiction:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

In the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*, Justice Nyarangi (as he then was) of the Court of Appeal held as follows:

"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, 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. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

In *Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 others* [2012] eKLR, the Supreme Court of Kenya pronounced itself on jurisdiction and stated:

“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.”

Section 7(3) of the Magistrates Court Act provides as follows:

“A magistrate’s court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law—

- (a) land held under customary tenure;***
- (b) marriage, divorce, maintenance or dowry;***
- (c) seduction or pregnancy of an unmarried woman or girl;***
- (d) enticement of, or adultery with a married person;***
- (e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and***
- (f) intestate succession and administration of intestate estates, so far as they are not governed by any written law.”***

Section 47 of the Law of Succession Act provides that:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice”.

Section 48(1) thereof provides:

“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application

and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 of the Magistrates' Courts Act (Cap 10)".

From the Preamble of the Law of Succession Act, it is evident that a succession court deals with the intestate and testamentary succession and the administration of estates of deceased persons and issues connected therewith and incidental thereto. This means that the primary mandate of a succession court is:

- a) Determining who are the rightful heirs and beneficiaries;
- b) Identifying and distributing the estate of a deceased person; and
- c) Overseeing the Administration of the estate in accordance with the law.

The question I wish to pose is this; is the dispute between the parties within the mandate of the succession court? It is clear that the Objector is not claiming to be a beneficiary of the estate of the deceased herein. Her claim is that she is the rightful owner of land parcel number Mbitini/Maatha/390 and as such, the same should not form part of the estate of the deceased. The gist of the Objector's claim is that land parcel number Mbitini/Maatha/390 ought not to form part of the estate of the deceased as it belongs to her. It is a claim for title to land. The implication of the Objector's claim is that the deceased was registered as proprietor of the land, to hold in trust for her as the true owner. My view is that this court sitting as a succession court cannot determine disputes touching on ownership or title to land. The protest, in my view, is akin to a suit for a claim of ownership to land by the Objector. Such a claim cannot be determined by this court in its current setting.

In re Estate of ***Atibu Oronje Asioma (Deceased)*** [2022] KEHC 11046 (KLR), Musyoka J had this to say:

"Does this probate court have jurisdiction to determine the dispute framed in the application dated October 2, 2018? The starting point should be with the mandate of the probate court. The probate court is constituted for one sole purpose, distribution of the property of a dead person. The law which governs this area of distribution of assets of a

dead person is the Law of Succession Act, cap 160, Laws of Kenya. The preamble says it is 'An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons, and for purpose connected therewith and incidental thereto.'

The central areas of concern, in probate and administration, are the dead person and his property. With regard to the dead person, what is of importance would be, whether there is proof of his death; and, once that is established, the next consideration will be determination of the individuals entitled to the property. If he died testate, having left a valid will, it will be the individuals named as beneficiaries in the will; if he died intestate, without a will, it will be the persons entitled under the applicable law of intestacy. With respect to property, there is only one critical consideration, whether he owned any property. Modern property is subject to registration, and whether a person owns a piece of property is evidenced by documents of registration or ownership. What is in dispute here is land, what would evidence ownership of the subject property would be evidence of registration of the same in the name of the deceased. The probate court only distributes assets that are undisputedly owned by the deceased. Assets that are unencumbered or the subject of ownership disputes are not undisputedly owned by the deceased, and are not available for distribution by the court until the encumbrances are removed or the ownership disputes resolved. Property available for distribution is defined in section 3 of Law of Succession Act as the free propriety of the deceased. The design of the Law of Succession Act is that the mandate of the probate court is limited to distribution of the assets, and where a dispute arises on ownership of any asset, then the same should be placed in another forum, and not the succession cause, for litigation and determination". (Emphasis supplied)

In the authority of *In re estate of Kimani Kimithia [2008] eKLR*, Ibrahim J (as he then was) held that succession proceedings were not the appropriate way to challenge the title of the deceased to assets said to comprise his estate, on claims that such assets were subject to a trust in favour of the claimant. It was stated that such claims ought to be subjected to separate proceedings, where the claimants have to prove the trust, and thereafter seek revocation of the title or partition, which requires declaratory orders on the

existence of the trust. The court further held that it was not the function of the succession cause, where the claimant was neither a beneficiary nor dependant of the deceased, and that succession proceedings were not appropriate for resolution of seriously contested claims against the estate by third parties.

DISPOSITION

The upshot of the above considerations is that this court sitting as a succession court, is devoid of jurisdiction to hear and determine the protest. The Objector's claim ought to be filed in the Environment and Land Court. Consequently, I make the following orders:

- a) The Objector's protest is hereby dismissed;
- b) However, land parcel number Mbitini/Maatha/390 shall be left out of the distribution of the estate of the deceased, temporarily, to give time to the Objector to lay her claim in the appropriate forum;
- c) The objector should move to the appropriate forum within 30 days from today, failure to which the court will proceed with distribution of the estate of the deceased wholly;
- d) In the meantime, the court shall consider confirmation of the grant with respect to the remainder of the estate of the deceased. The Administrators are at liberty to file a further affidavit in the event that they would wish to re-adjust the proposal on distribution;
- e) Costs are awarded to the Administrators.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 13TH DAY OF
NOVEMBER, 2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

