

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELCA. NO. E002 OF 2023**

**RACHAEL      CHERONO      SUNYAI      .....      1<sup>ST</sup>**

**APPELLANT ELEGANT INVESTMENT LIMITED ..... 2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**SOPHIA      WANJIKU      NGURU      .....**

**RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the Ruling of the Honorable J. Nyariki, SRM delivered on 6<sup>th</sup> December 2022 in Mombasa CMCC No. 1847 of 2021.
2. By a Notice of Motion dated 10<sup>th</sup> November 2021, Sophia Wanjiku Nguru (hereinafter “the Respondent”) sought for an order of injunction restraining the two Appellants herein from collecting rental income, selling, leasing and/or in any way interfering with houses situated on a property known as Plot No. 261 Mkindani pending the hearing and determination of the suit.

3. The said application was supported by an Affidavit sworn by the Respondent and was premised on the grounds:

- i) That the Respondent had been collecting rental income from the said houses since the year 2012;**
- ii) That the 1<sup>st</sup> Appellant had instructed the 2<sup>nd</sup> Appellant to collect rental income from the said houses as from July 2021;**
- iii) That the 1<sup>st</sup> Appellant had further issued notices to all the tenants to pay rent through the 2<sup>nd</sup> Appellant;**
- iv) That the Respondent was greatly prejudiced as she entirely depends on the said property to cater for her needs and those of her children; and**
- v) That if the orders sought were not granted, the Respondent's case would be rendered nugatory and she would suffer irreparable loss.**

4. The application was opposed by Rachael Cherono Sunyai (the 1<sup>st</sup> Appellant). In her Replying Affidavit sworn on 13<sup>th</sup> January 2022, the 1<sup>st</sup> Appellant avers that the house erected on Plot No. 261 Mikindani was registered in the name of Andrew Kipkemei Sunyai who is now deceased and whose entire

estate is undergoing succession in Bomet High Court Succession Cause No. 033 of 2021.

5. The 1<sup>st</sup> Appellant asserted that she is the sole administratrix of the Estate of Andrew Kipkemei Sunyai and she was not aware of any beneficial interest claimed by the Respondent herein. The 1<sup>st</sup> Appellant further asserted that the Respondent did not state under what circumstances she had started collecting the rental income. The 1<sup>st</sup> Appellant further averred that the death of the deceased divests this court of jurisdiction to determine any claim against the estate as the same ought to be canvassed in the succession cause.
6. Upon hearing the application and in her Ruling delivered on 6<sup>th</sup> December 2022 aforesaid, the Learned Magistrate allowed the Respondent's application with costs.
7. Aggrieved by the said Ruling, the 1<sup>st</sup> Appellant moved to this court and lodged a Memorandum of Appeal dated 6<sup>th</sup> January 2023 urging this court to set aside the said Ruling on grounds listed as follows:

**1) That the Learned Magistrate erred in law and fact and misdirected himself by hearing and determining the Application and suit whose substratum is entitlement to the proceeds of an estate property**

**thus usurping and countermanding the jurisdiction of the High Court in Bomet High Court Succession Cause No. 033 of 2021 - In the matter of the Estate of Andrew Kipkemei Sunyai;**

- 2) That the Learned Magistrate erred in law and fact and exceeded his powers under Section 9 of the Magistrate's Court Act, 2015 and Section 26 of the Environment and Land Court Act, 2011;**
- 3) That the Learned Magistrate erred in law and fact by mischaracterising the application and the suit as a property dispute when the Respondent is clearly laying her claim on the suit property on the allegation that her child is a beneficiary to the estate of the deceased owner;**
- 4) That the Learned Magistrate erred in law and fact on disregarding the Appellant's evidence, submissions and judicial authorities cited thus arriving at a conclusion that it is not supported by law; and**
- 5) That in any event, the Learned Magistrate erred in law and in fact in holding that the Respondent had satisfied the grounds for the grant of a temporary injunction when the Respondent had not even demonstrated (sic).**

8. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions **[See Peters -vs- Sunday Post Limited (1958) EA 424].**

9. As was stated in **Selle & Another -vs- Associated Motor Boat Company Ltd & Others (1968) 1 EA 123:**

**“...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind (the fact) that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally. (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”**

10. I have accordingly carefully perused and considered the Record of Appeal as well as the Ruling which is the subject matter of this Appeal. I have similarly perused and considered the submissions placed before the court by the Learned

Counsel acting for the Appellant. I was unable to find any submissions filed by the Respondent.

11. By her application filed before the Lower Court, the Respondent herein had sought for an order of temporary injunction restraining the 1<sup>st</sup> Appellant and her agent from collecting rental income, selling, leasing and/or in any way interfering with certain houses situated on Plot No. 261 Mikindani pending the hearing and determination of the suit she had filed in that court.
12. The Respondent's application was premised on the ground that the Respondent had been collecting rent from the said houses since the year 2012 and that the 1<sup>st</sup> Appellant had since instructed all tenants to pay rent through her agent Ms. Elegant Investment Ltd. It was the Respondent's case that the decision of the 1<sup>st</sup> Appellant would greatly prejudice her as she was entirely dependent on the rental income to take care of her children.
13. Opposing the said application, the 1<sup>st</sup> Appellant asserted that the suit property formed part and parcel of her deceased husband's estate which was undergoing succession proceedings before the High Court at Bomet. The 1<sup>st</sup> Appellant

told the court that she was the sole administratrix of the estate of Andrew Kipkemei Sunyai and that she was not aware of any beneficial interest that the Respondent had in the estate of the deceased.

14. Having heard the dispute and in his Ruling delivered on 6<sup>th</sup> December 2022, the Learned Magistrate allowed the Respondent's application on the ground that the Respondent had established a prima facie case with the probability of success.
15. From my reading of the Record the crux of this matter is whether or not the Learned Magistrate had the jurisdiction to hear and determine the application as filed before him by the Respondent. Where the question of jurisdiction is raised, the court must first and foremost investigate and establish whether it has the requisite jurisdiction to hear and determine the matter.
16. As the Court of Appeal stated in ***Owners of Motor Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd (1989) I KLR:***

**"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.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”**

17. Similarly, in the case of ***Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others (2012) eKLR***, the Supreme Court pronounced itself as follows:

**“[68] 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...”**

18. In the matter before me, the reasons for the Respondent’s claim of collecting rental income from the suit property could be discerned from a perusal of Paragraphs 2, 4 and 5 of her Further Affidavit sworn on 23<sup>rd</sup> May 2022 wherein she deposes as follows:

**“2. That I am the wife of Andrew Kipkemei Sunyai (deceased) who died on 9<sup>th</sup> June 2021 and we were blessed with a daughter Faith Chebet Sunyai on 1<sup>st</sup> January 2005;**

**4. That during his lifetime and immediately prior to his death, the deceased took care of our daughter and I by maintaining us and providing for us. Further he allowed me to collect rental income from the two houses on the suit property since the year 2012 and the same never changed nor was it disputed by the 1<sup>st</sup> Defendant/ Respondent; and**

**5. That during his lifetime and immediately prior to his death, the deceased catered for our daughter’s school fees from Primary School until Secondary School..”**

19. It was clear from those averments that the Respondent acknowledged that the suit premises belonged to Andrew Kipkemei Sunyai and that she was aware that the said Andrew had passed away on 9<sup>th</sup> June 2021. It was further clear from the material placed before the court that on 14<sup>th</sup> December 2021 the High Court at Bomet had issued a Grant of Letters of

Administration Intestate for the Estate of Andrew Kipkemei Sunyai to the Appellant.

20. As it were, it is common knowledge that when a dispute concerns an asset in a deceased's estate and arises between parties who claim to be beneficiaries, dependants or persons who are beneficially interested in the deceased's estate, such a dispute can only be handled by the Probate Court.
21. That position was rightly stated in ***In Re Estate of Alice Mumbua Mutua (2017) eKLR*** where the court pronounced itself thus:

**“The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the Probate Court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the Probate Court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets... The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of**

**disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators...”**

22. In the matter that was before the Lower Court, it was self-evident that the Respondent made the application as a person who was beneficially interested in the deceased estate and not a third party, and the Learned Magistrate ought to have made that distinction.

23. While in her application the Respondent challenged the manner in which the grant was issued to the Appellant, those were not issues that could properly be canvassed before that court; they belonged to the Succession Court that had issued the grant. It was clear to me that the substratum of the matter was property belonging to the estate of a deceased

person and the court therefore had no jurisdiction to entertain the suit.

24. In the premises I was persuaded that the Learned Trial Magistrate fell in error by allowing the application for injunction against the administratrix of the estate and that there is merit in the Appeal.

25. Accordingly, I hereby allow the Appeal, set aside the Ruling delivered by the Lower Court on 6<sup>th</sup> December 2022 and replace the same with an order striking out the suit being Mombasa CMCC No. 1847 of 2021 with costs to the Appellant.

**Judgment dated, signed and delivered in open court and virtually at Mombasa this 11<sup>th</sup> day of December, 2025**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Kiptoo holding brief for Kiplang'at Advocate for the Appellant
- c) Ms. Maiga Advocate the Respondent