

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE NO. 697 OF 2010

IN THE MATTER OF THE ESTATE OF MOCHE RURAGO

alias MOCHE s/o RURAGO (DECEASED)

JOSPHAT MAINA MOCHE.....

PETITIONER

VERSUS

MUTHUKIA MOCHE.....

RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion Application dated 12.11.2019 and filed by the Petitioner. The Application seeks eviction of the Respondent from parcel No. Lower/Muhito/Kariara/272 pursuant to the judgement delivered on 7.2.2019 and issued on 31.5.2019; to be effected by M/s Hippo General Merchants Auctioneers.
2. The Respondent did not oppose the Application.
3. The Petitioner's case was that the Respondent was in contempt of the court order that required him to vacate the premises. It was further averred that the Respondent had filed

a protest which was dismissed, but he remained on the suit premises, hence the need to forcefully evict him.

4. The Petitioner stated that vide the order of this court dated 7.2.2019, the court dismissed the Respondent's protest and confirmed the grant. The court also directed that the property known as Parcel No. Lower Muhito/Kariara/272 measuring 1.74 acres be transferred and registered in the name of the Petitioner.

Submissions

5. The Petitioner filed submissions on 17.5.2022 by which it was submitted that the Petitioner is the rightful owner of the property. Reliance was placed inter alia on the case of Estate of John Mathiu Irware Deceased Succ Cause No. 113 of 2000 based on which it was submitted that the Respondent was an intermeddler who would be evicted.
6. The Respondent did not file submissions.

Analysis

7. The Petitioner seeks for eviction orders to evict the Respondent from title no. Lower/Muhito/Kariara/272. I have to discern whether I have jurisdiction to do what the applicant seeks to do. The jurisdiction of this court is circumscribed under Article 165) of the Constitution of Kenya.
8. The jurisdiction of the court is set out in Section 3(1) and (2) of the Law of Succession Act, which provides as follows:

Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

9. The duty of the succession court is to assign and transmit properties to the deceased's heirs. It is, however, not the court that ascertains interests in land. The mere fact that a beneficiary is interested in land does not mean that persons occupying land have no interest. The dismissal of a protest basically connotes that the protestor has no testamentary or intestate interest in the land. Occupation is, however, a different ball game. Interest in land moves with the land and not the title. Therefore, after a beneficiary is issued with title by way of transmission, the duty of this court ends there.

10. An order of eviction cannot be issued by the high court sitting as a succession court. It is not clear why the Respondent is in possession. Does he have any possession, prescriptive or trust rights? The court sitting as a succession court is thus not the best court to issue an eviction. The appellant has acquired ownership rights through succession. That in itself does not extinguish claims, including adverse possession. It is only the environment and land court to weigh the facts and make an informed decision. In the case of **Isaac Cypriano Shingore v Kipketer Togom [2016] KECA 656 (KLR)**, the court of appeal [Maraga, Gatembu & Murgor, JJ.A] in dismissing an appeal in all fours with the current application held as follows:

According to Mr. Magare the judgment the High Court is sound; the respondent demonstrated that he was in continuous and uninterrupted possession of the property since taking possession after entering into the agreement for sale on 27th June 1982; that the objection proceedings by the respondent challenging the appellant as administrator or the proceedings he initiated in the Land Disputes Tribunal cannot be construed as interrupting the respondent's occupation of the property. Counsel cited numerous authorities in the respondent's list and bundle of authorities including Nyoro Kimwe

vs. John Anderson Githinji [2009] eKLR and Samuel Miki Waweru vs. Jane Njeri Richu [2007] eKLR

... we have reviewed the evidence. There is no question that the respondent entered into possession of the property in June 1982 based on a sale agreement entered into with the widow of the registered owner. At that time, the property was registered in the name of appellant's father Mayenya Irodanga. The widow did not have capacity to enter into that agreement for sale. Consent of the relevant land control board was also not obtained. The result is that if the agreement for sale was not void ab initio for lack of capacity on the part of the widow, it became void by operation of law for want of the consent of the relevant control board. And as this Court said in Samuel Miki Waweru vs. Jane Njeri Richu (supra) "the continuation of possession by the respondent thereafter could not be referable to the agreement of sale... as it was an independent possession adverse to the title of the original owner." In that case this Court went on to hold that:

"...where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of

the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent’s possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

11. Regarding the requisite junction, it is imperative to note that Section 13 of the Environment and Land Court Act, Cap 8D, provides as follows:

- 1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other laws applicable in Kenya relating to the environment and land.
- 2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
 - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;
 - d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of,

or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including:

- a. interim or permanent preservation orders including injunctions;
- b. prerogative orders;
- c. award of damages.
- d. compensation;
- e. specific performance;
- f. restitution;
- g. declaration; or
- h. costs.

12. Section 152B of the Land Act provides as follows:

An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.

13. For purposes of Section 152D, the application for eviction has to be made to the court. The court is, provided under section 2 of the Land Act as follows:

“Court” means the Environment and Land Court established under the Environment and Land Court Act.

14. The consequence of the foregoing is that the high court, in all its might, does not have the requisite jurisdiction to issue an order of eviction from private land. Can the court then assume jurisdiction by pretending to be dealing with the disobedience of orders issued in a succession cause? To do so, the court must review the issued orders. In this court, only two orders were given. distribution of the property and the dismissal of the protest. There was no positive order granted. The court cannot thus by craft assume jurisdiction that it does not have. In the case of **Macharia & another v Kenya Commercial Bank Ltd & 2 others** [2012] KESC 8 (KLR), the Supreme Court, [WM Mutunga, CJ, PK Tunoi, JB Ojwang, SC Wanjala & N Ndungu, SCJJ] stated as follows:

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.

15. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. What then happens when a court finds it has no jurisdiction? In **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989]** eKLR, Nyarangi JA, as he then was, stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as 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.

16. The saddest part of his application is the lack of understanding of how succession works. Upon the dismissal of the protest, the protestor ceased being a party to the succession causes, in a loose sense of the word. Effectively, he could not be sued in the case. This court became *functus officio*.

17. On costs, an award of costs in this court are governed by Section 27 of the Civil Procedure Act. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others**, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion,

as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs- that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases.

18. As such, Costs follow the event. They are also awarded at the court's discretion. There was no response to the application. therefore, in the circumstances, each party will bear their own costs this being a succession dispute.

Determination

19. In the upshot, I make the following Orders:
- a. The Application dated 12.11.2019 lacks merit and is therefore dismissed.
 - b. Each party shall bear its own costs.

DELIVERED, DATED and SIGNED at NYERI, virtually on this **16th** day of **February, 2026**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Mr. Karweru for the Applicant

No Appearance for the Respondent

Court Assistant: Michael

ORIGINAL