



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.903 OF 2015

**IN THE MATTER OF THE ESTATE OF GEORGE KULATI LILECHI
(DECEASED)**

**CHRISTOPHER ALUNGA KENYOLWA (Suing as the Administrator
of the Estate of EVARLINE ALIVITSA KENYLWA Alias
EVELINE KENYOLWA) ALIVITSA
OBJECTOR**

VERSUS

**OSBORN SHIMOLI KULATI
PETITIONER**

RULING

1. Before this court for determination is the summons for revocation of Grant dated 4/4/2024 which seeks the revocation of Grant of Letters of Administration Intestate issued to the Petitioner on 9/11/2017 and the setting aside of the Certificate of Confirmation of Grant issued on 15/10/2020.
2. The application is premised on the Objector's affidavit and the grounds set out on the face of the Summons. The gravamen of the application is the Objector's claim that prior to his death, the deceased had sold a five acre parcel of land to be excised from L.R. No. KAKAMEGA/LUGARI/49 to the Objector's mother. The

Objector filed the objection proceedings in his capacity as the Administrator of the estate of his deceased mother.

3. It was the Objector's averment that after the deceased had sold the five acres to his mother as well as another two (2) acres to one Stevens Nangame Obede, the deceased proceeded to subdivide the land subsequent to which the five (5) acre parcel of land that was sold to his mother was registered as L.R. No. KAKAMEGA/LUGARI/884. The Objector averred that the deceased failed to transfer the five acre parcel to his mother and there ensued a land dispute which was resolved by the then Land Disputes Tribunal in his mother's favour subsequent to which a title was issued to his deceased mother on 27/6/2012 when the deceased was still alive.
4. According to the Objector, the title in respect to L.R. No. KAKAMEGA/LUGARI/49 was closed and ceased to exist on 22/11/1990 but the Petitioner had proceeded to secure Grant of Letters of Administration on the strength of the non-existent title and is using the Grant to harass purchasers who had not been able to get the deceased transfer the property to them. It is on account of the allegations that the Petitioner concealed material facts relating to the deceased's estate and that he omitted the fact that L.R. No. KAKAMEGA/LUGARI/884 does not form part of the estate of the deceased that the Objector seeks revocation of the Grant.
5. The Petitioner opposed the application and filed a replying affidavit sworn on 3/6/2024. He avers that the Objector is a

stranger to the estate of the deceased and holds title in respect of L.R. No. KAKAMEGA/LUGARI/884 which is illegal, invalid and void as it was obtained as a result of the decision of Lugari Land Disputes Tribunal which did not have jurisdiction to entertain matters on land ownership and transfer. The Petitioner avers that he intends to file for cancellation of title in the Environment and Land Court. He further avers that this court lacks jurisdiction to entertain the Objector's claim as it is a land dispute which should be province of the Environment and Land Court. He further avers that the Objector took advantage of the deceased's frailty, old age and sickness as well as his absence to deprive the deceased of his land. The Objector avers that since the Objector and the others are intruders, he has filed cases in the lower court and intends to file another suit in respect to the parcel of land in dispute for eventual eviction and or permanent injunction. The Petitioner insists that the Objector's mother's title is a mere paper as it stands on nothing since the order culminating in the title was made by a body clothed with no jurisdiction.

6. Pursuant to leave to file a further affidavit, the Petitioner averred that the Objector's deceased mother had filed Civil Suit No. 848 of 1998 against the deceased in respect to the subject parcel which suit was dismissed for want of prosecution. He also avers that the deceased had the original title in respect to L.R. No. KAKAMEGA/LUGARI/884 in his custody all along and at his death, which he has since transferred to his name, and which is seven (7) acres and not five (5) acres as claimed by the Objector.

7. The court directed that the application be canvassed through written submissions which submissions I have duly considered.

OBJECTOR'S SUBMISSIONS

8. It is trite law that jurisdiction is everything. It is a preliminary issue that must be dealt with at the earliest opportunity as it determines whether the court should proceed to hear a matter. In the celebrated case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)**, the Court of Appeal pronounced itself thus:-

"...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."

9. That jurisdiction is the determinant as to whether a matter should proceed before a particular court and cannot be arrogated by the parties or the court was held by the Supreme Court in **Samuel Kamau Macharia v. KCB & 2 others [2012] KESC 8 (KLR)** when the apex court held:-

"1. A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred

upon it by law. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of mere procedural technicality; it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.

2. Where the Constitution exhaustively provided for the jurisdiction of a court of law, the court must operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution conferred 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.”

10. Pursuant to Article 162 (2) of the Constitution and Section 13 of the Environment and Land Court Act, the High Court is precluded from hearing and determining disputes regarding the use, occupation, and title to land which remain under the exclusive jurisdiction of the Environment and Land Court. In the premises, whereas the Probate court has jurisdiction over disputes concerning land, its jurisdiction is confined to disputes regarding the rightful heirs to a deceased person’s estate and their beneficial entitlement and not to claims on title.
11. The test to determine whether a court has jurisdiction over a case is whether the substance of the claim and the relief sought

fall within the authority conferred on the court by the Constitution or statute. In order to attain a proper determination, the courts apply the predominant purpose test or the predominant issue test. Many a times, the issues for determination overlap and cut across different jurisdictions. It behoves the court to dissect the issues in dispute and establish which of the issues is primarily more significant than the others. In **Suzane Achieng Buttler & 4 others v. Redhill Heights Investments Limited & Another [2016] KEHC 1313 (KLR)**, J. M. Ngugi J. held that:-

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.”

12. Additionally, in **Lydia Nymambura Mbugua v. Diamond Trust Bank Kenya Ltd & Another [2018] KEELC 1599 (KLR)**, Munyao J. rendered himself as follows:-

“On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the

transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC."

13. I now turn to the first issue that is before this court, which is whether the Petitioner secured Grant of Letters of Administration herein by concealing from the court the fact that L.R. No. KAKAMEGA/LUGARI/884 does not form part of the estate of the deceased thereby securing Grant of Letters of Administration and Certificate of Confirmation based on the said concealment, and whether the proceedings to obtain the grant were improper, irregular and defective on substance.

14. The second issue before the court would be whether one can take out succession proceedings in respect of a stranger's estate and if not, whether the Probate and Administration Court can order a cancellation of title that has been acquired as a result of the said succession proceedings.

15. Section 76 of the Law of Succession Act provides as follows:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a)that the proceedings to obtain the grant were defective in substance;

(b)that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c)that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d)that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i)to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii)to proceed diligently with the administration of the estate; or

(iii)to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e)that the grant has become useless and inoperative through subsequent circumstances.”

16. The Probate and Administration Court is fundamentally concerned with the administration of a deceased person’s estate and the distribution of the same. To that end, the court’s jurisdiction is focused on identifying the rightful beneficiaries, facilitating the management and distribution of the free estate of the deceased, and issuing necessary orders to give effect to objectives of the Law of Succession Act. In **Re Estate of Moses Kirimi Mbogori (Deceased) [2021] KEHC 7943 (KLR)**, the court stated that:-

“8. The primary duty of a succession court is to identify the beneficiaries, ascertain the assets and ultimately distribute the deceased estate to the rightful beneficiaries. The court is assisted in that mandate by the parties who provide evidence as to who is a beneficiary and which are the assets and liabilities of the estate. On that obligation parties are enjoined to be forthright and

candid with the court and a breach of that duty attracts criminal sanction under section 52 of the Act.

9. On the basis of such duty it is expected that a petitioner presents to the court evidence of ownership of the assets of the estate. Such come by way of documents of title or verification thereof. For example, title to land would be evidenced by a recent certificate of search. At that juncture, before a dispute arises to be resolved by evidence tendered at trial, the court relies on prima facie evidence provided.”

17. Under Section 47 of the Law of Succession Act, the High Court has jurisdiction in all matters directly relating to the administration and distribution of the assets of a deceased person and to disputes between the personal representatives of the deceased, the dependants, beneficiaries, and creditors. It does not extend to third parties who are contesting titles. Moreover, this mandate is strictly limited to the distribution of the free estate of a deceased person. The free estate of a deceased person comprise property which was undisputedly owned by the deceased at the time of death. In re Estate of **Alice Mumbua Mutua (Deceased) [2017] KEHC 8289 (KLR)**, the court stated:-

“27. Disputes of course do arise in the process. 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.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows -

'Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...'

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for

resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above."

18. In the present case, there is a serious contention regarding the true ownership of the property that was included in the schedule of assets of the deceased. The Objector claims that the property was long transferred to his deceased mother before the deceased died and has furnished the court with copies of certified copies of the title dated 4/4/2024 reflecting that L.R. No. KAKAMEGA/LUGARI/884 was in the name of his deceased mother as at 24/2/2005 and the registration status stood the same on the date of the search. On the other hand, the Petitioner in his

affidavit sworn on 11/4/2024 asserts that the subject property belonged to the deceased and he has since transferred it to his name. Despite the absence of proof of ownership by the Petitioner, his claims shift the controversy to one of ownership of land.

19. Once the Petitioner maintained the claim of ownership, the predominant issue test then becomes who between the Petitioner's deceased father and the Objector's deceased mother is the rightful owner of the subject property. The controversy then metamorphoses to a substantive challenge to a registered title. Under Section 24 (a) of the Land Registration Act, registration vests absolute ownership in the proprietor and any attempt to impeach such title on grounds of fraud falls within the exclusive jurisdiction of the Environment and Land Court.
20. Whereas this court has jurisdiction to revoke a grant for fraud under Section 76 of the Law of Succession Act, the underlying dispute regarding whether a title lawfully belonged to the deceased or to the Objector's deceased mother constitutes a land dispute. See **re Estate of Andrea Ooko Tianga (Deceased) [2019] KEHC 6077 (KLR)** and **Suslia Akinyi Omollo v. Stephen Okiri Ongoro [2023] KEHC 18999 (KLR)**.
21. In the circumstances, the courts hands are tied. The Objector may have a legitimate claim, but succession having been completed and the dispute being one concerning title to

property, this court is not the proper forum to resolve it. The law compels me to down my tools without any further ado.

22. The upshot is that the Summons for Revocation of Grant is struck out with no order as to costs.

Dated, signed and delivered at Kakamega this 15th day of April 2026.

**A. C. BETT
JUDGE**

In the presence of:

No appearance for Mr. Osango for the Objectors

No appearance for Mr. Magina for the Petitioner

Court Assistant: Polycap