



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 60 OF 2016

STEPHEN KITHINJI NYAGA 1ST PLAINTIFF

BONIFACE KIMATHI NYAGA 2ND PLAINTIFF

VERSUS

JOSEPH MUCHANGI NTHIGA 1ST DEFENDANT

DAVID MURIUKI NTHIGA 2ND DEFENDANT

PHERIS MUTITU NTHIGA 3RD DEFENDANT

RULING

1. By a plaint dated 30th August 2016, the Plaintiffs sought the following reliefs against the Defendants.

a. A permanent injunction restraining the Defendants themselves, their agents, servants and/or anyone claiming under them from entering, leasing, and/or interfering in any manner with the Plaintiffs occupation and ownership of the land parcel Nos. Gaturi/Nembure/10965 and Gaturi/Nembure/10966.

b. General damages for trespass.

c. Costs of the suit together with interest at court rates.

d. Any other relief that this honourable court may deem fit to grant.

2. The said plaint was amended with leave of court granted on 15th January 2018 in which the Plaintiffs added the 3rd Defendant and sought the following reliefs only;

a. An eviction order

b. General damages

c. Costs of the suit

d. Any other relief the court may deem fit to grant.

3. The basis for seeking the said reliefs was that the Plaintiffs were the registered proprietors of *Title Nos. Gaturi/Nembure/10965 and 10966* (hereinafter known as the suit properties). They were so registered upon transfer by their father, Cyrus Nyaga Njeru, who had acquired the suit property through succession proceedings.

4. It would appear from the various affidavits filed on record that the suit properties initially belonged to the grandfather of the Plaintiffs and the 1st and 2nd Defendants. The parents of both the Plaintiffs and the 1st and 2nd Defendants were to share the suit properties. The latter contended that the Plaintiffs' father had shortchanged their father and fraudulently acquired the suit properties (originally *Title No. Gaturi/Nembure/1382*).

5. It also transpired that there is a pending succession cause being *Embu High Court Succession Cause No. 163 of 2005* (hereinafter Succession Cause No. 163 of 2005) in which the Plaintiffs' father had taken out letters of administration of the estate of the grandfather of

the parties herein. There is also a pending application for revocation of the grant and apparently an order for stay of execution thereof.

6. Vide a notice of preliminary objection dated and filed on 15th January 2018, the Defendants contended that this court had no jurisdiction to entertain the suit. The parties thereafter agreed to dispose of the said preliminary objection through written submissions. The Defendants filed their submissions on 15th June 2018 whereas the Plaintiffs filed theirs on 19th March 2018.

7. The Defendants' counsel submitted that the parties herein were fighting over the same land in Succession Cause No. 163 of 2005. It was submitted that there was a pending application for revocation of the grant issued to the Plaintiffs' father and that there were stay orders in place. It was submitted that the Environment and Land Court is not a succession court hence could not reverse the orders in Succession Cause No. 163 of 2005.

8. It was further submitted on behalf of the Defendants that the Environment and Land Court had no power to reopen the succession case, re-hear the witnesses and vary the decision of the succession court. It was submitted that this court could not act as a Court of Appeal over the Succession Court.

9. The Plaintiffs' response was basically misplaced since it was directed to their earlier application dated 17th October 2017 for leave to amend the plaint. That application was allowed by the court on 15th January 2018.

10. The Plaintiffs nevertheless, contended that the court had jurisdiction to hear and determine this suit. They submitted that the grant in Succession Cause No. 163 of 2005 was confirmed on 13th October 2006 and they were issued with title deeds. No proceedings for revocation of grant were undertaken for 12 years hence they should not be held back in the enforcement of their rights. They contended that they had not been served with any summons for revocation of grant hence they were unaware of such proceedings.

11. The court has considered the Defendants' notice of preliminary objection, their submissions in support thereof, and the Plaintiffs' submissions in opposition thereof. There is no doubt that the Defendants' preliminary objection raises a pure point of law as enunciated in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696**. The issue of jurisdiction can, therefore, be determined as a preliminary objection.

12. The jurisdiction of a court to entertain a suit is of paramount importance. In the case of the **Owners of Motor Vessel 'Lillian S' Vs Caltex Oil (Kenya) Ltd [1989] KLR1** the Court of Appeal of Kenya held as follows with regard to jurisdiction;

“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 continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

13. But what is meant by the term “jurisdiction?” The Court of Appeal in the case of the **Owners of Motor Vessel 'Lillian S'** (supra) cited the following passage from **“Words and Phrases Legally Defined” – Volume 3 at page 113;**

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance 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 cognizance, 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 judgement is given”

14. Similarly, in the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 Others [2012] eKLR** the Supreme Court of Kenya held 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 respondent 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...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.”

15. So, where is the jurisdiction of the Environment and Land Court derived from? The relevant provisions are to be found in **Article 162 (2) (b) of the Constitution of Kenya 2010** and the **Environment and Land Court Act, 2011**. There are, of course, various other statutes e.g the **Land Act 2012, Land Registration Act, Environmental Management and Coordination Act**, etc which confer jurisdiction upon the Environment and Land Court.

16. For purposes of this suit, the material provisions on jurisdiction are to be found in **section 13 of the Environment and Land Court Act**

which provides as follows;

“13 (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 law applicable in Kenya relating to 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 environment 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) Deleted by Act No. 12 of 2012, Sch

(6) Deleted by Act No 12 of 2012, Sch

(7) 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.**

17. Looking at the remedies which the Plaintiffs are seeking in their amended plaint, it is clear beyond peradventure that the suit relates to land as contemplated in **Article 260 of the Constitution and Article 162 (2) (b) of the Constitution of Kenya. Section 2 of the Environment and Land Court Act (Cap 12A)** defines land in relation to the meaning assigned by **Article 260 of the Constitution of Kenya.**

18. It must be borne in mind that the Plaintiffs are not claiming the two suit properties as beneficiaries or creditors of the estate of their deceased grandfather or their deceased father. The determination of the question as to who is entitled to what property of a deceased person are admittedly questions to be determined by the Succession Court under the **Law of Succession Act (Cap 160)**. Those questions were determined in *Succession Cause No. 163 of 2005* when the grant was confirmed on 13th October 2006. Any person aggrieved by such determination can only challenge such decision through an appropriate application in those proceedings or by way of appeal.

19. There is no doubt that the Succession Court did its part in consequence of which the Plaintiffs' father was registered as proprietor of the suit properties (*original No. Gaturi/Nembure/1382*). The Plaintiffs' father later on sub-divided the land and transferred portions thereof to his children amongst whom are the Plaintiffs in this suit. The Plaintiffs were thereafter issued with title deeds in consequence whereof they filed the instant suit.

20. In those circumstances, the Environment and Land Court cannot be said to be usurping the jurisdiction of the Succession Court in any manner by adjudicating on the claims of the Plaintiffs. It is not sitting on appeal over anything the Succession Court may have done. There is simply no claim before this court on the distribution of the estate of any deceased person.

21. The court is aware that the Defendants have since applied for revocation of the grant which was issued to the Plaintiffs' father. The matter is still pending and that grant has not been revoked or recalled so far. The pendency of the application for revocation of grant in the succession court cannot deprive the Environment and Land Court of its constitutional and statutory jurisdiction. As and when, the succession matter is concluded, the Succession Court will make its determination and issue appropriate directions which may or may not affect the current title of the Plaintiffs.

22. It would appear that the Defendants would like the instant suit to be stayed pending the hearing and determination of their application for revocation of grant. That may be a prudent manner of dealing with the instant situation. But that is quite different from asserting that the court has no jurisdiction at all to entertain the suit.

23. The upshot of the foregoing is that the court finds no merit in the Defendants' notice of preliminary objection dated and filed on 15th January 2018 and the same is consequently dismissed with costs.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 14th day of JUNE 2018.

In the presence of the 2nd Plaintiff in person, Ms Muthama holding brief for Mr P.N. Mugo for the Defendants and in the absence of the 1st Plaintiff.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

14.06.18