



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 301 OF 2017

ISAAC KINYUA.....1ST PLAINTIFF

GEOFFREY MUNENE KARANDI2ND PLAINTIFF

SOLOMON KITHINJI KARANDI3RD PLAINTIFF

DANIEL MUTEMBEI KARANDI 4TH PLAINTIFF

(Suing as legal representatives of FRANCIS KARANDI MWIRICHIA Deceased)

VERSUS

HELLEN KAIGONGIDEFENDANT

(Sued as administrator to the estate of SABELIO KINOTI deceased)

RULING

1. In the application dated 9.4.2018 (filed on 23.4.2018), applicants (plaintiffs) are seeking for the following orders;

i. Spent.

ii. That this honourable court be pleased to order a stay of proceedings in SRM succession cause no. 22 of 2016 at Githongo Law Court until the hearing and determination of this suit.

iii. That costs of this application be provided for.

2. The grounds in support of this application are:

i. That the SRM succession case no. 22 of 2016 at Githongo Law Courts concerns the distribution of land parcels No. Abothuguchi/L- KAONGO/424 and ABOTHUGUCHI/L-KAONGO/651 which belongs to Sabelio Kinoti (deceased).

ii. That the subject matter of this suit is the applicants claim in the two land parcels.

iii. That the applicants stand to suffer if the succession cause proceeds before their claim before this Honourable court is heard and determined.

3. The 1st plaintiff, Isaac Kinyua has also sworn an affidavit filed on 23.4.2018 on behalf of the other applicants where he has deponed as follows:

i. That the suit concerns their claim in land parcel No. Abothuguchi/L- Kaongo/424 and Abothuguchi/L-Kaongo/651 which is registered in the name of Sabelio Kinoti (deceased).

ii. That the estate of Sabelio Kinoti is currently the subject of SRM succession Cause NO. 22 of 2016 at Githongo Law Court which is set for hearing on 2.5.2018.

iii. That they filed the suit claiming interest in the land because it is family land and the deceased Sabelio Kinoti held it in trust on their behalf.

iv. That the respondent herein is the petitioner in the SRM succession cause at Githongo.

v. That plaintiffs fear that if the succession cause is finalized before this suit is heard and determined, the land may change hands and their claim will become a nullity.

vi. That it is in the interest of justice that the succession suit at Githongo Law Courts be stayed pending the hearing and determination of this suit.

4. The application was argued orally on 22.5.2018.

Case for the Applicants

5. Applicants argued that they desire to have a stay of the proceedings in the Githongo succession cause so that their rights may be determined in the present ELC suit. It has also been submitted for the applicants that the Githongo case is ongoing and there is even a hearing date in the month of May 2018.

6. Further, applicants aver that the orders sought for will not be prejudicial to the parties herein and that no replying affidavit was filed. It is also averred that this is the court with the jurisdiction to hear issues of trust.

Case for the Respondents

7. It is contended by respondents that in the Githongo case, the present applicants had engaged advocate Mrs. Ntarangwi to file a protest on their behalf as they were raising issues of trust. The Githongo Court had given directions on how the suit was to be heard.

8. Respondents aver that what is being canvassed in this suit is what is before the Githongo court and hence this amounts to duplicity of proceedings. They also aver that the Githongo court is the one with the requisite jurisdiction to deal with the issues at hand. Finally respondents aver that no trust is registered in respect of the two parcels of land.

Determination

9. I frame the issues for determination as follows:

i. Land ownership (including trust) claims in succession matters.

ii. Jurisdiction of the court

Land ownership (including Trust claims) in succession matters.

10. Rule 41 (3) of the probate administration rules (under the law of succession Act) provides that:-

“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 the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant”.

11. In the case of *Pricilla Ndubi and Zipporah Mutiga vs. Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013*, the court was facing a more or less similar question for determination. It was held that **“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are *prima facie* valid should be determined before confirmation”.**

12. From the foregoing it is apparent that when a dispute regarding ownership in respect of the property of a deceased person arises, then the court can set aside the share in dispute to await the outcome of the resolution of the dispute from the court with jurisdiction.

Jurisdiction

13. The jurisdiction of this court is provided for under article 162 (2) of the constitution where it is provided that **“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— environment and the use and occupation of, and title to, land”.**

15. The jurisdiction of the court is further stipulated under section 13 of the environment and land court Act where in subsection (1), it is provided that; **“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”.** Subsection (2) provides that in exercise of its jurisdiction, the court will have powers to hear and determine the following; 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.”

15. From the foregoing, the ELC court exercises its supervisory role upon the magistrate’s court but only in matters stipulated under the aforementioned provisions of the Environment and Land Court Act. Succession matters do not fall under the ambit of the jurisdiction of the ELC court. If this court was to grant stay orders in respect of the succession cause, it would in essence amount to straying in a field where the court has no jurisdiction.

16. It follows that whereas the probate and administration rules do make provisions for the setting aside of a share in dispute to await the determination of the ownership dispute, such orders cannot be granted by the ELC court. Jurisdiction in the first instance lies with the court seized of the matter.

17. In the circumstances, I find that the application dated 9.4.2018 lacks merits, the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 11TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Muchomba for defendant/respondent

Miss Mwiraria holding brief for E.G. Mwangi for plaintiff present

HON. LUCY. N. MBUGUA

ELC JUDGE