



**Kamau & another ((Suing as the Executors of the Estate of Tabitha Muringi Ngunyi (Deceased)) v Muiruri & another (Environment and Land Appeal E079 of 2021) [2024] KEELC 1597 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1597 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E079 OF 2021  
OA ANGOTE, J  
MARCH 14, 2024**

**BETWEEN**

**JERIOUS WANJIKU KAMAU AND ZELIPAH WANGUI  
RUMINJO ..... APPELLANT  
(SUING AS THE EXECUTORS OF THE ESTATE OF TABITHA MURINGI  
NGUNYI (DECEASED)**

**AND**

**AYUB KAMAU MUIRURI ..... 1<sup>ST</sup> RESPONDENT  
NYONIA GIAKWA HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of the Honourable P. Muholi, SRM,  
delivered on 25th day of February, 2020 in the Chief Magistrates' Courts)*

**JUDGMENT**

**Background**

1. Vide a Complaint dated 20<sup>th</sup> June, 2019, the Appellants (Plaintiffs) sought as against the Respondents (Defendants), a declaration that Plot No 269 (old) and 277 (new) within LR No 8469/4 belonged to the deceased and was part of her Estate; a mandatory order compelling the 2<sup>nd</sup> Respondent to cancel registration of Plot No (old) 269 and (new) 277 within LR No 8469/4 in the name of the 1<sup>st</sup> Respondent and a mandatory injunction compelling the 2<sup>nd</sup> Respondent to register Plot no (old) 269 and (new) 277, within LR No 8469/4 in the name of the deceased.
2. It was the Appellants' case before the Trial Court that sometime in 1996, the deceased identified Plot No (old) 269 (new), 277 within LR No 8469/4 (hereinafter the suit property) for purchase from the 1<sup>st</sup> Respondent; that on the day of the purchase, the deceased and the 1<sup>st</sup> Respondent agreed to meet



- at the offices of the 2<sup>nd</sup> Respondent after the deceased had completed market errands to conclude the purchase of the suit property and that the 1<sup>st</sup> Respondent arrived at the offices of the 2<sup>nd</sup> Respondent before the deceased and concluded the purchase in his name without the consent or authority of the deceased.
3. It was averred by the Appellants that the aforesaid actions were fraudulent and constituted an illegality and that the property lawfully belongs to the deceased as she identified the same for purchase and provided the purchase money.
  4. The 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection and averred that the Appellants had no locus to institute the suit; that the Court had no jurisdiction to entertain the suit as it offended the provisions of Sections 51, 67 and 71 of the *Law of Succession Act*, Cap 160 and that the Court had no jurisdiction to entertain and determine the matter because the Appellants were contesting the validity of the Will and should have challenged the same at the Family Division.
  5. In response to the Preliminary Objection, the Appellants filed Grounds of Opposition dated 4<sup>th</sup> February 2020 contending that as executors of the Will of the deceased, they had the liberty to file proceedings to protect the property of the deceased even before grant of probate; that the deceased's Will was valid and had not been successfully challenged; that the objection was based on averments that had to be established in a hearing and that the objection and memorandum of appearance were filed out of time and ought to be struck out with costs.
  6. When the matter came up in Court on 25<sup>th</sup> February, 2020, the trial court dismissed the suit and held as follows;

“This is a matter that touches the deceased’s estates of one Tabitha Muringi Ngunyi. This case ought to be filed at the Family Division of the High Court. Secondly the right powers annexed by the Plaintiff are contained in a document known as a will which is a preserve of the High Court as to its interpretation and final bequest. This suit is wrongly in this Court and is struck out with costs.”
  7. The aforesaid decision triggered the present Appeal. Vide the Memorandum of Appeal dated 29<sup>th</sup> September, 2020, the Appellants have set out three Grounds of Appeal which are;
    - i. That the Learned Magistrate erred in law and in facts in striking out the Appellants' Plaint/suit dated 20<sup>th</sup> June, 2019.
    - ii. That the Magistrate erred in law and facts in finding that the matter should have been filed in the Family Division of the High Court.
    - iii. That the Magistrate erred in law and facts in failing to appreciate that the Magistrate Court had jurisdiction to hear and determine the matter.
  8. The Appellants therefore seeks that;
    - a. The Ruling/Order striking the Plaintiffs' Plaint dated 20<sup>th</sup> June, 2019 in the Environment and Land Case No 4836/2019 at Milimani Chief Magistrates Court' be set aside in its entirety and that this Honourable Court do make its own finding.
    - b. The Respondents be ordered to pay costs for this Appeal.
  9. The Appeal was canvassed by way of written submissions.



## Submissions

10. The Appellants through Counsel submitted that the sole issue for determination is whether the Environment and Land Division of the Magistrates' Court had jurisdiction to entertain the matter.
11. It was submitted that the Appellants filed the suit in the Trial Court in their capacity as executors of the Will asserting that the 1<sup>st</sup> Respondent fraudulently and dishonestly concluded the transaction of the sale of the suit property in his name; that essentially, they were challenging the 1<sup>st</sup> Respondent's title to the suit property and that this is a matter that falls within the jurisdiction of the Environment and Land Court pursuant to Article 162(2)(b) of the [Constitution](#) and Section 13 of the [ELC Act](#).
12. It was submitted that the Trial Courts' assertion that the matter ought to have been filed at the Family Division of the High Court was misconceived; that the Court in [Monica Wangari Njiiri & 4 Others v Eunice Wanjiru Igamba & Another](#) [2016] eKLR, distinguished between a claim made against the Estate of the deceased and a claim on inheritance in respect of the Estate of the deceased finding that it had jurisdiction to determine the matter where the objectors were not claiming any interest as dependants or direct beneficiaries of the deceased but a proprietary right to property held in trust for them.
13. Counsel for the Appellants submitted that in [Peter Kungu Waitathu & Anor v Ruth Wanjiru Kungu & Another](#) [2020] eKLR, the Court was categorical that the probate Court should not assume jurisdiction over land disputes unless it falls within the category of direct beneficial interest of the deceased beneficiaries, dependency or creditors interest. Reliance in this respect was also placed on the case of [Joseph Koori Ngugi v Stephen Ndichu](#) [2017] eKLR and that ultimately, the striking out of the suit by the Trial Court was a mistake, amenable to be set aside by this Court.
14. The Respondents did not file submissions [As at 24<sup>th</sup> January, 2024].

## Analysis and Determination

15. The jurisdiction of a first appellate Court was well settled in the case of [Selle & Another v Associated Motor Boat Co. Ltd & Others](#) [1968] EA 123, where the Court of Appeal stated thus;

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”
16. This position was recently re-affirmed by the Court of Appeal in the case of [Peter M. Kariuki v Attorney General](#) [2014] eKLR, where it was held that:

“We have also, as we are duty bound to do as a first appellate Court, reconsidered the evidence adduced before the trial Court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”



17. As to the circumstances in which this Court can interfere with the decision by the subordinate court, the Court of Appeal in *Khalid Salim Abdulsbeikh v Swaleh Omar Said* [2019] eKLR expressed itself thus;

“We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”

18. The present appeal revolves around the question of whether the lower court was correct in declining jurisdiction to entertain the matter and whether the reasoning was founded on correct principles.

19. At the outset, it is worth noting that when the matter came up on 25<sup>th</sup> February 2020, the Appellants informed the Trial Court that they had filed Grounds of Opposition to the Preliminary Objection, and requested for time to file submissions. The Trial Court appears to have disregarded the Appellants’ position and request and proceeded to make a decision without interrogating the Grounds of Opposition and without affording the Appellants an opportunity to be heard.

20. The right to a hearing is a fundamental right that cannot be limited. This right is clearly spelt out in the *Constitution*. Article 50(1) of the *Constitution* which provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

21. Article 25 of *the Constitution* stipulates that:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

- (a) .....
- (b) .....
- (c) the right to a fair trial;
- (d) .....

22. The Supreme Court in *Christopher Odhiambo Karan v David Ouma Ochieng & 2 Others* [2018] eKLR discussed this principle thus;

“The scope of fair hearing was also extensively examined in Kidero in the following terms:

(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether



indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.”

- (258) What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & Others v. Union of India & Others*, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others*, AIR 1962 Cal. 460).
- (259) That Court in *Union of India v. J.N. Sinha & Another*, 1971 SCR (1) 791 and *C.B. Boarding & Lodging v. State of Mysore*, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In *Mineral Development Ltd. v. State of Bihar*, 1960 AIR 468, 160 SCR (2) 909 the Court further observed that the concept of fair hearing is an elastic one and “is not susceptible of easy and precise definition.”
- (260) The Court of Appeal at Kampala in Uganda in *Obiga v. Electoral Commission & Anor.*, Election Petition Appeal No. 4 of 2011 [2012] UGCA 29 (Obiga) held that in order to determine whether a party received a fair hearing, the Court has to look to the statutes, case laws, and regulations that govern the decisions that the Court made.
- (261) It is important to restate that a literal reading of the provisions of *the Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” (See *Steel and Morris v. United Kingdom*, [2005] ECHR 103, paragraph 59).”
- (54) It is therefore settled law that all persons who come to any Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of *the Constitution* 2010 in Article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters.”
23. Indeed, the Trial Courts’ failure to accord the Appellants an opportunity to respond to the Preliminary Objection was a violation of their right to a fair trial. The Trial Court went ahead to summarily dismiss the suit on the basis of locus and jurisdiction which were pertinent issues in the objection.
24. This Court will nonetheless proceed to determine whether the Trial Court was correct in declining jurisdiction. In the locus classicus case of *Owners of the Motor Vehicle M.V. Lillians v Caltex Oil (Kenya) Limited* (1989) KLR1, the Court had this to say on the issue of jurisdiction;
- “Jurisdiction is everything. Without it, a court has no power to make one more step.”



25. On the source of jurisdiction, it was held in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others (2012) eKLR that;

“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 counsels 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 ... 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.”

26. The jurisdiction of this Court to hear and determine disputes relating to the environment, use and occupation of and title to land is provided for under Article 162(2) (b) of *the Constitution* of Kenya, 2010. Further, Section 13 of the *Environment and Land Court Act* provides 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. (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.”

27. The aforementioned provisions of law are replicated under Section 9(a) of the *Magistrates’ Courts Act*, 2015, which gives the Magistrate’s Court jurisdiction over environment and land matters. It is provided inter alia that;

“A magistrate’s court shall in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (No. 19 of 2011) and subject to the pecuniary limits under section 7(1)...

28. On the other hand, the probate court’s jurisdiction in intestate or testamentary succession to the estates of deceased persons is derived from Sections 2 and 47 of the *Law of Succession Act*. Section 2, under the head Application of the Act provides as follows;

“(1) 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.
- (3) .....
- (4) .....

29. Whereas Section 47 of the Law of Succession Act provides;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

30. In the case of *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR, 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”.

31. The distinct and separate legal regimes of these two courts has led to the Environment and Land Court court declining to enter into the realm of succession disputes and vice versa. In *re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR the High Court held;

“Article 162 provides for the system of courts in Kenya. Article 162(2) authorizes Parliament to establish courts that are to occupy the same plain with the High Court and whose jurisdiction is to hear and determine disputes relating to employment and labour relations, and environment and the use and occupation of and title to land. Those courts were established by Parliament, for the purpose of land disputes relating to use and occupation thereof and title thereto was established ELC. Read together, Article 162(2) and Article 165(5) of the Constitution 2010 would mean that the High Court has no jurisdiction whatsoever over matters that fall within the jurisdiction of the courts set up under Article 162(2) of the Constitution. In other words, the courts established under Article 162(2) have exclusive jurisdiction over the matters for which those courts have been established. I have not had a chance to peruse through the file in ELC No. 121 of 2009, as the court file in respect of that matter was never put together with this file despite the consolidation order, but what I can gauge from the papers placed before me is that it relates to a dispute between a buyer and a seller of land. It hinges on whether the buyer should have possession or occupation thereof. It is about title, for the buyer is no doubt asserting entitlement to the property having exchanged money with the sellers over the same. That would squarely place the matter within Article 162(2) of the Constitution. In those circumstances, it would mean then that the High Court has no jurisdiction over the matter by virtue of Article 165(5) of the Constitution. It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. 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. 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.”

32. Whereas the Environment and Land Court in *Beatrice Wambui Kiarie & v Beatrice Wambui Kiarie & 9 Others* [2018] eKLR held as follows:

“On the second issue, as to whether this court has the jurisdiction to hear and determine this matter, it has not been disputed that the original suit land being Nyandarua/Silbwet/24 belonged to the deceased one Maria Wabai Nganga. That upon her death, the Plaintiffs submitted, that the 1st Defendant proceeded to unlawfully sub-divide and transfer the resultant parcels of land to her co-defendants. That this was done irrespective of the deceased’s will herein annexed in the Plaintiffs list of documents. That the Plaintiffs are now desirous of cancelling the titles and having the land reverted into their mother’s name.

There having been a will in place, I do find that that although it is clear from the provisions of Article 162 (2) (b) of [the Constitution](#) and sections 4 and 26 of the [Environment and Land Court Act](#) that this court has unlimited and original jurisdiction to deal with disputes relating to the environment and the use and occupation of, and title to land in the whole country. However in the present case and looking at the plaint filed by the Plaintiff, and the annexures thereto, I find that the issue raised herein is a succession dispute that ought to have been filed either in the High Court or the Chief Magistrates’ Court.

I find that this court has no jurisdiction to try matters pertaining to succession disputes.”

33. Lastly, In re Estate of Atibu Oronje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling), the Court stated:

“The design of the [Law of Succession Act](#) was that the mandate of the probate court was limited to distribution of the assets, and where a dispute arose on ownership of any asset, then the same should be placed in another forum, and not the succession cause, for litigation and determination. That was the spirit of rule 41(3) of the Probate and Administration Rules. Succession proceedings were not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution. Besides the provisions of the [Law of Succession Act](#) and the Probate and Administration Rules, the applicants had to also contend with [the Constitution](#) of Kenya, 2010 (Constitution), so far as the jurisdiction of the High Court was concerned, with respect to disputes over title to land and trusts over land related to title to the land. Article 162(2) of [the Constitution](#) envisaged a court with jurisdiction to handle disputes relating to title or ownership of land. Under article 165(5) of [the Constitution](#) the High Court should



not exercise jurisdiction over the matters to be placed under the court contemplated by article, 162(2). The court envisaged in article 162(2) was subsequently established under the *Environment and Land Court Act*, to handle the disputes stated in article 162(2). The *Land Registration Act* and the *Land Act* identified the Environment and Land Court as the court for the purposes of disputes relating to matters touching on land, including registration, which was at the core of the instant application. Those provisions were in sections 2 and 101 of the *Land Registration Act* and sections 2 and 150 of the *Land Act*. Section 47 of the *Law of Succession Act* did not grant the High Court elastic jurisdiction to grant such orders as it pleased. It had been equated with section 3A of the *Civil Procedure Act* as saving the inherent powers of the court. Section 47 of the *Law of Succession Act* merely stated that the High Court had jurisdiction to deal with applications and determine disputes that arose over matters that were governed by the *Law of Succession Act*, and pronounce decrees and make orders as could be expedient, in the context of the provisions of the *Law of Succession Act*. It did not confer jurisdiction to handle disputes and applications that were not provided for under the *Law of Succession Act*. Inherent power was not saved under section 47 of the *Law of Succession Act*, but under rule 73 of the Probate and Administration Rules. The High Court could only exercise jurisdiction, according to section 47, with respect to the matters covered by or provided for under the Act. It said no more than that. The *Law of Succession Act* was divided into 8 parts, and the High Court was limited to handling applications that arose with respect to the matters that were governed in those 8 parts. The jurisdiction of the High Court came out clearly when juxtaposed against that of the Magistrates Courts as set out in section 48(1) of the *Law of Succession Act*. The jurisdiction of the Magistrate’s Court was not as wide as that of the High Court.”

34. From the Plaintiff, it is evident that the Appellants were asserting the deceased’s proprietorship of the suit property and sought to have the cancellation of the 1<sup>st</sup> Respondent’s title as proprietor. The suit was in respect to the issue of title to land and not succession, which the Trial Court was well vested with jurisdiction to determine.
35. Thus, it was in error for the Court to hold that the dispute was with regard to the estate of the deceased and “fell within a will” and should be referred to the family court. The Trial Court made a determination on wrong principles.
36. Lastly, the Trial Court alluded to the question of locus. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in the case of *Trouistik Union International & Another v Jane Mbeyu & Another* (2008) IKLR (G&F) 730 where it was held that:

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the *law of succession Act*. That section confers that power on personal representatives and on them alone.”
37. In *Alfred Njau & Others v City Council of Nairobi* [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”
38. Section 82 (a) of the *Law of Succession Act* provides as follows:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -



- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.”
39. Section 3 of the *Law of Succession Act* provides that personal representative means the executor or administrator, as the case may be, of a deceased person. Executor is then defined as a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided.
40. In the case of *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* (1987) eKLR, the Court of Appeal while contrasting Section 80(2) and 80(1) of the *Law of Succession Act* stated as follows:
- “In contrast section 80(1) provides that a grant of probate shall establish the will from the date of death and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action because he derives title from the will and the property of the deceased vests in him from the moment of the intestate's death.... .”
41. Further, it has been held that executors can bring proceedings even where the Will is under challenge. The mere challenge to the Will does not take away their locus. The Court of Appeal in *Sakina Sote Kaitany & another v Mary Wamaitha* (1995) eKLR held as follows;
- “Secondly, it is urged that the will has been challenged and that until the challenge fails the executorship is in abeyance. That in my judgement, cannot per-se be correct having regards to the statutory provisions and case law above cited. I know of no authority (and none was cited) in support of the proposition that when there is a challenge to a will the executorship remains in limbo until the challenge fails.”
42. And in *Osman Tahir Sheikh Said & Another* (suing as the executors of the will of Tahir Sheikh Said Ahmed) v *Nomad Energy Limited; Sabir Tahir Sheikh Said & 5 Others* (Interested Parties) [2019] eKLR it was stated:
- “There is no doubt that the will of the deceased is being challenged in courts in Mombasa. The law as stated in the case of *Virginia Edith Wamboi Otieno and Sakina Sote Kaitany* (supra) is that an executor of a will of a deceased is free to bring proceedings even where the will is being challenged. I therefore find that the applicants have locus standi to bring the present suit and the application.
43. This Court finds that the Appellants had locus to institute the suit and the Trial Court erred in finding otherwise. For those reasons, the Court finds that the appeal is merited. The Court makes the following final orders;
- a. The decision of the Trial Court striking out the suit is hereby set aside and the suit is reinstated.
  - b. The suit is remitted back to the Environment and Land Division-Magistrates Court for hearing and determination before a different Magistrate.
  - c. The Respondents will bear the costs of this Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**



**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Masai for Appellants

No appearance for Respondent

Court Assistant: Tracy

