



REPUBLIC OF KENYA



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**Kenya African National Traders and Farmers Union (KANTAFU) v Mutie & 2 others
(Civil Appeal 145 of 2018) [2023] KECA 1348 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1348 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 145 OF 2018
HA OMONDI, KI LAIBUTA & GWN MACHARIA, JJA
NOVEMBER 10, 2023**

BETWEEN

**KENYA AFRICAN NATIONAL TRADERS AND FARMERS UNION
(KANTAFU) APPELLANT**

AND

CHRISTINE MWIKALI MUTIE 1ST RESPONDENT

HARRISON MUEMA MUTIE 2ND RESPONDENT

FRANCIS NGIGE WAWERU 3RD RESPONDENT

(Being on Appeal from the Ruling and Order of the High Court at Machakos (P. Nyamweya, J.) delivered on 2nd November 2017 in Succession Cause No. 554 of 2007)

JUDGMENT

1. This appeal is against the order made by the High Court of Kenya at Machakos (P. Nyamweya, J) in Succession Cause No 554 of 2007, concerning the estate of William Mutie Ngilai (deceased), and in respect of which letters of grant of administration intestate issued to the 1st and 2nd respondents. The 3rd respondent was a purchaser of the suit property allegedly registered in the deceased's name.
2. The appellant then filed an application for revocation of the grant dated 9th November 2015 seeking:
 - a. A temporary injunction restraining the administrators, their servants or agents or anyone claiming title through them from interfering, transferring, further charging, trespassing on the suit land or in any way carrying out further subdivision or constructing roads on the suit land pending the hearing and determination of the application and the suit.



- b. The rectified grant issued by the court on 5th December 2014 be revoked and/or annulled.
 - c. Upon granting the said orders, the court do revoke and/or cancel the title issued in the name of Francis Ngige Waweru on 18th June 2015.
3. The application was supported by the affidavit sworn on even date by Peter Mugeka Maina, the appellant's Secretary General. He averred that the core business of the appellant was to purchase land and distribute it among its members; that it had purchased a parcel of land, known as plot No 497 measuring 40 acres (suit land) from one Musembi Mani (now deceased), who had bought it from the deceased herein, Mutie Ngilai; that the latter had been allotted the parcel by Lukenya Ranching and Farming Co-operative Society; that there was a written agreement entered into to that effect; and that the parties to the agreement (Musembi Mani, Mutie Ngilai and Lukenya Ranching and Farming Co-operative Society), wrote a letter dated 30th April 1993 to the Society's officials requesting them to rectify the register accordingly, so that it reflected the appellant as the current owner of the suit property.
4. It was contended that, upon purchase, the appellant wrote to the Ministry of Lands requesting for subdivision of the suit land, which application was approved; that, subsequently, the suit land was subdivided amongst its members who were then issued with share certificates; and that the members took possession of their respective portions, which they developed.
5. It was further contended that the appellant promptly paid Kshs 80,000 to Lukenya Ranching and Farming Co-operative Society, being fees for the land transfer and processing of the title respectively; and that it was subsequently issued with receipts as evidence of payments. In 2011, the appellant conducted a search in the land registry and learnt that the 3rd respondent had been fraudulently registered as the owner of the suit land. By then, the suit land had acquired a new number, namely Mavoko Town Block 3/1956. Aggrieved by this revelation, it (the appellant) filed suit in Machakos HCCC No 306 of 2012 in an effort to reclaim ownership. While the suit was pending determination, it learnt that William Mutie Ngilai had since passed on, and that the 1st and 2nd respondents had taken out letters of administration which were confirmed on 31st March 2009. The administrators then sold the suit land to the 3rd respondent, who charged it to African Banking Corporation Limited for Kshs 32 million on 27th August 2015. It was its contention that the said transaction was tainted with fraud and, therefore a nullity.
6. The administrators opposed the application vide a replying affidavit sworn on 15th December 2015, averring that they were legally appointed and confirmed as the administrators; that the deceased did not sell the suit property to the appellant and that, if there had been such a transaction, they would have been involved and asked to sanction it before the Land Control Board; that, therefore, the alleged transaction was not sanctioned by the Land Control Board; that the appellant was a not a beneficiary of the estate of the deceased and, as such, he had no locus standi to seek revocation of the grant; and that in any event, the suit land had since been sold to the 3rd respondent and, accordingly, the appellant's grievances could only be ventilated in court.
7. On his part, the 3rd respondent, opposed the application and filed a replying affidavit sworn on 26th January 2016. He stated that he bought the suit land from the estate administrators, the 1st and 2nd respondents, after conducting his due diligence and establishing that the deceased was the registered proprietor. He then visited the suit land upon which he found that 15 people had settled on it. After enquiring from the administrators, he was informed that the settlers had been misinformed by land brokers that the land was theirs, but that they would immediately evict them. He stated that he was



duly registered as the owner of the parcel of land No Mavoko Town Block 3/1956 on 19th June 2015, and that he had no knowledge of the appellant's interest in the suit land; that although the appellant had filed the above-mentioned suit in Machakos HCCC No 306 of 2012 in which it sought similar orders as in the Succession Cause, it was his contention that he was the bona fide legal owner of the suit land; that he was an innocent purchaser for value; and that the appellant's claim lies against the 1st and 2nd respondents, and did not affect his entitlement to the suit land.

8. The application proceeded to hearing on 6th October 2016 by way of *viva voce* evidence. The administrators raised a preliminary objection as to whether the court had jurisdiction to hear and determine the appellants' application. The court directed that the preliminary objection and the main application be determined together. The appellant called two witnesses. The administrators called one witness while the 3rd respondent testified on his own behalf.
9. In its ruling, the court demarcated the issues for determination to be: whether it had jurisdiction to hear the appellant's application; whether the appellant was entitled to the suit land; and whether the confirmed grant should be revoked.
10. The court held that the appellant's contention was that it bought the parcel of land from one Musembi Mani, who had bought it from the deceased, while the administrators contended that that parcel of land never belonged to the said Musembi Mani, but that it had always belonged to the deceased. Accordingly, the issue that needed to be determined first was, who as between the deceased and Musembi Mani was the rightful proprietor. According to the trial court, the dispute related to ownership and not succession to the suit land. Consequently, it was an issue for determination outside the ambit of the High Court's jurisdiction.
11. The court went on to state that the dispute arose during the deceased's lifetime and before the succession proceedings commenced; that the appellant could not be considered a creditor for purposes of bringing an action against the deceased's estate having not entered into an agreement with the deceased for the purchase of the suit land; and that the allegations advanced that the deceased was fraudulently registered as the proprietor of the suit land fell for determination by the Environment and Land Court. The court proceeded to strike out the application with costs to the respondents.
12. Aggrieved, the appellant has now preferred the instant appeal to this Court. In its memorandum of appeal dated 3rd April 2018, it raised five grounds of appeal which we have collapsed as follows: that the learned judge erred in law and fact in misapprehending the *Law of Succession Act*, thereby arriving at the wrong conclusion; that the learned Judge erred in law in finding that she had no jurisdiction to hear and determine the matter before her; and that the learned Judge erred in law and in fact by taking into account irrelevant factors, and in failing to take into account all the evidence on record, thereby arriving at the wrong conclusion.
13. The appellant seeks to have the High Court ruling and orders made on 2nd November 2017 set aside; that the application dated 9th November 2015 be allowed; and that the costs of this appeal be awarded to it.
14. The appeal came up for hearing before us on 22nd May 2023. Learned counsel Mrs. Wambugu appeared for the appellant, learned counsel Mr Thuo for the 1st and 2nd respondents, and learned counsel Mr Gitangi appeared for the 3rd respondent. All counsel relied on their respective written submissions with brief oral highlights.
15. On behalf of the appellant, Mrs. Wambugu submitted that the impugned ruling was not based on any sound law, and that the refusal of the learned Judge to revoke the grant was an error. She hinged this argument on the ground that it was clear that the suit land was sold by the administrators through



the process of succession. She submitted that it was trite that the High Court had jurisdiction on matters succession as the appellant had purchased the suit land from a deceased person who had in turn bought it from the deceased in the succession cause for whom the 1st and 2nd respondents were the administrators; that the evidence adduced before that trial court did not disclose that there was sale of the suit land to the appellant; that the 3rd respondent was not a bona fide purchaser, since when he wanted to take possession of the suit land, he found out that it had been occupied by members of the appellant; and that, therefore, he colluded with the 1st and 2nd respondents to have the same transferred to him.

16. On his part, Mr Thuo submitted that the 1st and 2nd respondents were the bona fide administrators of the estate of the deceased; and that the suit land was part of the deceased's estate, and which they sold to the 3rd respondent. He submitted that there was no nexus between the appellant and the deceased as the appellant never bought the land from him and, as such, the appellant has to seek redress from the Environment and Land Court pursuant to Article 162 of the *Constitution*; that the suit the appellant is relying on, namely Machakos HCCC No 306 of 2012, was determined long after the deceased had died; that the deceased never participated in the suit; and that, consequently, it has no probative value to the proceedings herein.
17. Mr Gitangi submitted that the suit land originally belonged to the deceased, and that he was not the one who sold it to the appellant; that the appellant was not a beneficiary of the deceased; that section 13(1) of the *Environment and Land Court Act* provides that the issue of title is a preserve of the Environment and Land Court; that, under rule 41 of the *Probate and Administration Rules*, where there is a share that is in dispute, the court cannot distribute that share and cannot determine its ownership; that as a result, the issue herein as to the ownership of the suit land should be set aside for determination by the Environment Land Court; and that it then follows that the High Court did not have jurisdiction over the issue of the ownership of the suit land, and that it rightfully struck out the appellant's application.
18. In a quick rebuttal, Mrs. Wambugu submitted that the suit land had been transferred to the 3rd respondent, and that the appellant sought revocation of the grant so as to have the property vested back to the administrators; that the administrators fraudulently acquired the title and transferred it; and that the only way to recoup the property was through a succession cause. She urged that the appeal be allowed as prayed.
19. Having carefully considered the record of appeal, the respective submissions and the law, we find that the issues arising for determination in this appeal are: whether the High Court had jurisdiction to entertain the appellant's application; and, if the answer is in the affirmative, whether the High Court should have revoked the grant issued to the 1st and 2nd respondents.
20. On the issue of jurisdiction, the Black's Law dictionary defines the word 'jurisdiction' as "A court's power to decide a case or issue a decree". Jurisdiction may be simply defined as the power of the court to hear and adjudicate upon a case. It is the authority of a court to determine the dispute before it. A court's jurisdiction flows from the *Constitution* or legislation, or both. A court cannot confer upon itself jurisdiction that it does not have. Where a court is not conferred with jurisdiction and proceeds to determine a case, that decision amounts to nothing. Consequently, a court must down its tools the moment it decides that it has no jurisdiction. It cannot arrogate itself jurisdiction beyond that which is conferred to it by law.



21. In the *locus classicus* case of *Owners of the Motor Vessel 'M.V. Lillian S' v Caltex Oil (Kenya) Limited* (1989) KLR1, the Court of Appeal had this to say on 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 a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

22. Article 165(5) of the *Constitution* limits the jurisdiction of the High Court, and provides that:

5. The High Court shall not have jurisdiction in respect of matters: -
 - a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. Falling within the jurisdiction of the courts contemplated in Article 162(2).

23. Article 162(2) provides as follows:

162. System of courts.
 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a. employment and labour relations; and
 - b. the environment and the use and occupation of, and title to, land.
 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

24. Pursuant to Article 162(2), the *Environment and Land Court Act*, 2011 was enacted and in section 13, clothes the Environment and Land Court with jurisdiction as follows:

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 plannings, 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, chooses in action or other instruments granting any enforceable interests in land; and
 - e. Any other dispute relating to environment and land.



25. Further, the *Law of Succession Act* in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:

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.

26. Rule 41(3) of the *Probate and Administration Rules* 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 of 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."

27. From the foregoing provisions of statute law, it is evident that the mandate of the probate court under the *Law of Succession Act* is limited, limited in the sense that it does not extend to the determination of issues of ownership of land. From the outset, we wish to clarify that the mandate of the probate court is not limited because the court is incompetent to deal with such issues as regards ownership of land. Rather, it is because the provisions of the *Law of Succession Act* and the relevant subsidiary legislation do not provide a convenient mechanism for determining such issues. That is why rule 41(3) of the *Probate and Administration Rules* is categorical that, where 'in the cause of administration of an estate, 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 should set aside the particular share or estate of the property for determination in accordance with the relevant *Civil Procedure Rules*.
28. What this implies is that, a party wishing that the dispute over ownership of a suit land be determined, he or she ought to file a substantive suit before the Environment and Land Court before lodging a claim over the land in a probate court. At the point that the party goes to a probate court, the issue of the ownership of the suit land will have been substantively determined by a court of competent jurisdiction; and the probate court will then arrogate itself its rightful jurisdiction of distribution of the estate of the deceased. This explains why the Legislature, pursuant to Article 162(2) of the *Constitution*, enacted the *Environment and Land Court Act*, 2011. We have spelt out the mandate of the Environment and Land Court as set out under section 13 of the Act; one of which is to hear and determine disputes relating to title to land.
29. We need not overemphasise the fact that the issue of ownership of land can only be handled by the Environment and Land Court in accordance with the provisions of Article 165(2) (b) of the *Constitution*. Accordingly, it is our view that the trial court had no jurisdiction in venturing into the untested waters to establish the ownership of the suit parcel. The trial court had no jurisdiction to determine the question of ownership, title to, and occupation of, the suit land in the succession proceedings.
30. In the circumstances, we cannot fault the trial court for downing its tools, and we find no basis for interfering with the ruling, orders and/or decree of the High Court. And, having arrived at this conclusion, we have no basis to delve into the next issue for determination. Accordingly, we find that this appeal lacks merit and we hereby dismiss it with costs to the respondents.



DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

