



Ongicho v Wamatuba & 3 others; Makau (Interested Party) (Enviromental and Land Originating Summons E008 of 2021) [2024] KEELC 3389 (KLR) (17 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2021**

A NYUKURI, J

APRIL 17, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE
ALOYS GEKONGE TUMBO OERI (DECEASED)**

AND

**IN THE MATTER OF PROPERTY KNOWN AS MAVOKO
MUNICIPALITY/MACHAKOS L.R NO. 337/3211 I.R NO. 134550**

BETWEEN

EVANS ASUGA ONGICHO PLAINTIFF

AND

TESSY WAMATUBA 1ST DEFENDANT

WILSON MUTSAMI MULIRU 2ND DEFENDANT

ROSE PHOEBE TUMBO OERI 3RD DEFENDANT

REGISTRAR OF TITLES – NAIROBI 4TH DEFENDANT

AND

PATRICK MASAI MAKAU INTERESTED PARTY

JUDGMENT

Introduction

1. Evans Asuga Ongicho, the plaintiff in this case, filed this suit against the defendants, by way of originating summons dated 26th February 2021, seeking the following orders;



- a. That this honorable court be pleased to certify this matter as urgent and be heard *ex parte* in the first instance.
- b. That this honorable court be pleased to grant the applicant the approval and to ratify the sale of the property and to execute the transfer and all completion documents of property known as Mavoko Municipality/Machakos LR number 337/3211 IR number 134550 forthwith.
- c. That this honorable court be pleased to order the applicant upon completion of the sale transaction of the property known as Mavoko Municipality/Machakos LR number 337/ 3211 IR. number 134550 to file in court an inventory of liabilities and deposit into court of any money at hand after settlement of the following debts owed to me and the following creditors;



No	Name of Creditor	Date of Agreement/ Acknowledgement	Amount received Kshs	Amount to be refunded Kshs
1.	Benson Musila Kimani & Simon Sali Malonza 1 st variation – interest rate 15% 2 nd variation – interest rate 15%	21/06/2011 11/10/2011 11/01/2012	3,000,000.00 2,349,000.00 5,349,800.00	11,498,800.00
2.	Patrick Masai Makau	3/4/2012	4,000,000.00	4,000,000.00
3.	David Kimutai Ngetich – to pay Cooperative Bank (K) Ltd	1,800,000.00 1,070,000.00	2,870,000.00	6,084,400.00
4.	Dr. J. K. Bosek	588,000.00	700,000.00	1,288,000.00
5.	Mercy Mwangi	3,000,000.00	5,250,000.00	8,645,000.00
6.	William Ochieng Ogutu – Lotega - Enterprises		15,000,000.00	15,000,000.00
7.	Mohamed Koriyow Mohammed		19,500,000.00	19,500,000.00
8.	Ongicho- Ongicho & Co. Advocates	11,288,000.00	11,288,000.00	11,288,000.00
9.	Commission and agency fees of 3.5 % of purchase			5,348,000.00



	price Kshs 152,800,000.00			
10.	Costs to be incurred – during the sale including possible disbursements			
11.	Capital gains Tax of 5%			7,640,000.00
	TOTAL	17,746,000.00	70,106,800.00	90,291,000.00

- d. That the honorable court be pleased to order the 4th defendant to rectify the register by cancelling, deleting and expunging the entry number 2 made on the 23rd March 2020 and the effect the transfer to be lodged and executed by the applicant hearing in relation to the property known as Mavoko Municipality/Machakos LR number 337/3211 IR number 134550.
- e. That this honorable court be pleased to order and or give directions as it may deem fit to grant in relation to the sale of property known as Mavoko Municipality/ Machakos LR number 337/3211 IR number 134550.
2. The originating summons is supported by grounds on its face together with the supporting affidavit sworn by the plaintiff on 26th February 2021. The plaintiff claimed that in 2012, the late Professor Aloys Gekonge Tumbo-Oeri (herein after referred to as the deceased) engaged his law firm to act for him in various land transactions which had stalled and donated specific power of attorney, giving him authority to issue appropriate undertakings as the circumstances would warrant.
3. He further stated that the deceased executed irrevocable specific power of attorney in his favor on 27th June 2012 authorizing him to dispose parcel number Mavoko Municipality/Machakos LR number 337/3211 IR number 134550 (herein after referred to as the suit property) by way of sale, so as to settle his debts arising from previous sale transactions. That the deceased and the plaintiff in the company of a government surveyor visited the suit property and identified the beacons thereof. He claimed that the deceased instructed him to contact all previous buyers of the suit property whose sale had fallen through so as to negotiate modalities of settling or refunding their deposits upon sale of the property to other purchasers.
4. It was his averment that before 2012, the deceased had executed sale agreements with Patrick Makau, David Musili Kimani and Simeon Saili Malonzo who are represented by the firm of Mativo & Company Advocates and Malonza & Company Advocates respectively. He also stated that in view of the instructions and authority given to him, he negotiated with Patrick Makau’s advocates the amount to be refunded. He stated that the deceased had also executed a sale agreement with one Mercy Mwangi who deposited to the deceased accounts a sum of Kshs 3,000,000/= and the balance was to be paid upon transfer. He stated that the transfer was not effected as the intended subdivision was not done leading to various complaints against the plaintiff at the Law Society of Kenya and the Advocates Disciplinary Tribunal in DC Case Number 160 of 2015 whereof he was ordered to pay a sum of Kshs 3,000,000/= which he complied with.



5. The plaintiff also claimed that the deceased borrowed from his law firm a sum of Kshs 11,288,000/=, which amount was to be recovered from the sale of the suit property. He alleged that the deceased executed a sale agreement and through his law firm he was paid a deposit of Kshs 950,000/= and the balance paid in installments of Kshs 150,000/= to the vendor's Cooperative Bank account which is yet to be completed. He stated that these sums were borrowed from his law firm.
6. Further that on 17th December 2017, the deceased executed a sale agreement with one William Ochieng Ogotu of Lotega enterprise and received a sum of Kshs 15,000,000/= as deposit and the balance was to be paid upon transfer. He maintained that this deposit ought to be refunded. He also stated that on 16th January 2018, the deceased entered into an agreement with Mohammed Koriyo Mohammed and that a deposit of Kshs 19,500,000/= was made to the deceased's account.
7. He stated that in 2019, squatters invaded the suit property and illegally put up structures thereon which led the plaintiff to seek for the eviction through the local administration. He maintained that this court has jurisdiction to approve the sale transaction and issue orders sought. He stated that he had learned that the 1st and 2nd defendants had moved Mavoko Chief Magistrates Court and obtained grant of letters of administration without notifying him or all the interested parties. He further stated that the 1st and 2nd defendants confirmed the grant and applied for provisional certificate of title leading to issuance of Gazette Notice dated 9th April 2020 by the Land Registrar. He stated that he objected to that notice as he has the original title. That upon hearing the case by the Registrar of titles, it was confirmed that he had the original title. It is his case that the 3rd defendant moved the Mavoko Chief Magistrates Court for revocation and nullification of the grant issued to the 1st and 2nd defendants and that the same was revoked in a ruling dated 11th February 2021. He stated that the entry made by the Registrar of titles transferring the suit property to the 1st and 2nd defendants was based on the nullified grant. According to him, as the grant was nullified, it is imperative for this court orders that, that entry be removed from the records of the 4th defendant.
8. The applicant also stated that there exists pending completion sale agreements which if not acted upon will unnecessarily expose the applicant to unwarranted debts and claims when the defendants are not cooperative to have the suit property disposed leading to invasion by squatters. He held the view that the defendants will not suffer prejudice if the plaintiff is granted authority and allowed to exercise authority to complete the sale and pay out debts and deposit the balance to this court for purposes of distribution to the beneficiaries of the deceased's estate.
9. He attached copies of specific power of attorney; photographs of the suit property; several agreements; a letter to the advocates of Patrick Makau; proceedings in the Advocates Disciplinary Tribunal case; acknowledgement of receipt of money from the deceased; undertakings and payment receipts; letters of grant of administration; Kenya Gazette; and ruling revoking the grant.
10. Patrick Masai Makau filed the chamber summons dated 6th April 2021, seeking to be joined to this suit and for an order that security in the sum of Kshs 45,000,000/= be deposited in court within 30 days by the plaintiff. By a ruling of this court dated 18th January 2023, the court joined the said Patrick Masai Makau to these proceedings as an interested party but declined to order the depositing of the security sought of Kshs 45,000,000/= in court.
11. On 16th April 2020, the 3rd defendant filed a preliminary objection dated 15th April 2021 objecting to the originating summons on the grounds that it offends section 45 of the Law of Succession Act which prohibit intermeddling of the deceased estate; further that the suit property belongs to a deceased person; that no letters of administration have been issued to the 3rd defendant and therefore she cannot be sued in her own individual capacity; that the grant issued to the 1st and 2nd defendants has since been



annulled by the ruling of the court dated 11th February 2021 in Succession Cause No 109 of 2018 at Mavoko; that the power of attorney relied upon by the plaintiff ceased to have effect upon the demise of the deceased and hence any action by the plaintiff on that basis amount to intermeddling with a deceased person's property. He further stated that the 3rd defendant and other persons have since filed a succession case at Milimani Law Courts regarding the deceased's estate and that therefore this court lacks jurisdiction to entertain this suit as this is not a land matter but a succession matter.

12. The suit was opposed. Tessy Wamtuba, the 1st defendant filed a replying affidavit dated 17th July 2021. According to her, the plaintiff's suit is incompetent and lacks merit. She stated that she was the wife of the deceased and that the power of attorney allegedly signed between her late husband and the plaintiff is by virtue of his death revoked.
13. She also averred that she was aware that the deceased had instructed the plaintiff in 2012 to sell a portion of the suit property to enable him offset a mortgage owed to Cooperative Bank regarding their house. She stated that for a long time, the plaintiff did not perform his obligation and in May 2012 the deceased was frustrated when the bank intended to repossess their house due to nonpayment. That the plaintiff did not deliver his promise to find a suitable purchaser of the suit property and neither did he settle any money with the Cooperative Bank which was owed in excess of Kshs 12,000,000/=.
14. It was the 1st defendant's case that the deceased asked the plaintiff by letter dated 10th June 2013 requiring accounts regarding settlement of the mortgage which he responded to. Further that vide the letter dated 29th May 2012 and 8th October 2013, the deceased wrote to the plaintiff requesting him to give a comprehensive report of the suit property, but the plaintiff never provided the same and also failed to deliver the terms of the power of attorney.
15. She stated that the bank had before the death of the deceased severally threatened to auction their house for nonpayment of the loan. She confirmed that with the 2nd defendant they obtained grant of letters of administration on 9th April 2019 but that the same was revoked by court on 11th February 2021. She maintained that allegations by the plaintiff that there are sale agreements that were entered into concerning the suit property are not true, are ill motivated and meant to unjustly enrich himself from the deceased's estate by holding on to the power of attorney. She stated that if the plaintiff did receive deposits, there was no reason why he did not pay the mortgage. She insisted that the plaintiff failed to comply with the instructions of the deceased but has now resurfaced upon the demise of the deceased raising concerns on several transactions.
16. According to her, the amounts alleged to be owed to creditors from paragraphs 3 to 11 of the originating summons are not authentic, they are unjustified and ill motivated to assist the plaintiff to rip from the deceased estate when there are no supporting documentation to show payments made, as no bank statements have been produced to that effect. She stated that the plaintiff had attempted selling the suit property on 20th November 2020 through his company called Sarah holdings limited where he promised to give up 50% of the sale price which is illegal and derogative from the power of attorney provisions and contrary to the Law of Succession Act which prohibit intermeddling with a deceased person's property.
17. She insisted that the agreements between the deceased and Benson Musila Kimani and Simon Saili Malonzo are plain forgeries as can be he discerned from the face of the document because the signature shown to belong to the deceased is not genuine and there were no competent witnesses attesting the signature. She stated that the acknowledgement of Simon Saili and Benson Musila Kimani alleging to have paid to the deceased Kshs 4,000,000/= is just a typed statement with no supporting bank statement and that the same is witnessed by Simon Saili Malonzo who is also the purchaser and the advocate and therefore the document is a forgery.



18. The 1st defendant alleged that the agreement drafted by Mativo and company advocates dated 3rd April 2012, is improper as the same is not properly attested and the signatures at the bottom do not belong to the deceased. Further that the alleged third creditor David Kimutai is the only creditor whom she knows since they live in a house that he previously owned under the mortgage which the plaintiff undertook to offset from the proceeds of the sale but did not fulfil the said obligations as he never sourced for any purchaser. She insisted that the plaintiff has cunning behaviour which led her to lodge a disciplinary action before the Advocates Complaints Committee over his malicious actions of claiming that the original title of the suit property had been damaged, destroyed or missing yet he had it in his possession and that he only emerged after she lodged an application for replacement of the lost title at the Ministry of Lands.
19. She took the view that a person representing the deceased must have grant of letters of administration. She insisted that all creditors claiming from the estate of the deceased can do so from the administrators of the estate of the deceased and in any event all contractual agreements prescribed for terms to resolve any defaults. She pointed out that some transactions by the plaintiff are purported to have been acted upon before the power of attorney was registered and that the plaintiff is a busy body. She faulted the plaintiff alleging that he drafted the power of attorney without including the default clause deliberately making it ambiguous to give leeway for illegal and corrupt acts. According to her, the plaintiff took advantage of the deceased and misguided him to give him obligations under a fiduciary relationship but he used them to enrich himself unjustly.
20. She maintained that the power and authority given to the plaintiff lapsed on the death of the deceased and he cannot seek to get others to administer the estate of the deceased when there are legitimate beneficiaries who are ready and who have petitioned the court to administer the estate. She stated that the power of attorney is not a will and that the plaintiff's actions amount to intermeddling with the estate of the deceased. She stated that she is not the administrator of the deceased's estate and therefore not the right person to be sued. She maintained that the plaintiff should address his concerns with administrators of the deceased's estate if any, for them to do a proper inventory to the rightful creditors owed by the deceased and to be refunded through a legal process.
21. The interested party Patrick Makau, filed a replying affidavit dated 26th April 2023 and stated that he purchased a parcel of land from the deceased measuring five acres to be excised from the suit property. He stated that he took possession and use of the five acres but the transaction was frustrated until the vendor passed away. According to him, the vendor through his advocates agreed to refund him Kshs 4,000,000/= but the same has not been done. He claimed to have several communications with the vendor about the refund. He took the position that since 2008 up to date, the value of the land has shot up to Kshs 9,000,000/= per acre and that if any refund should be forthcoming it should be Kshs 45,000,000/=.
22. He stated that the applicant acknowledged that he is a purchaser for value in prayer 3 of the originating summons and that the land was sold at Kshs 8,000,000/= per acre confirming that his 5 acres have a high value.
23. Regarding the preliminary objection, he stated that he acknowledged that the property in dispute as belonging to the deceased and letters of administration are not mandatory in an originating summons of this nature. He claimed that revocation of grant has not been supported as alleged and that the preliminary objection on the existence of the Succession Cause has not been disclosed. He attached a sale agreement and some letters.
24. The 4th defendant did not file any response despite service.



25. On close of pleadings, the court directed that both the preliminary objection and the originating summons be heard together and the same be disposed by way of written submissions. On record are the plaintiff's submissions dated 20th September 2023; the 1st and 2nd defendants' submissions dated 5th July 2023; the 3rd defendant's submissions dated 1st September 2023; and the interested party's submissions dated 18th September 2023.

Plaintiffs submissions

26. On behalf of the plaintiff, counsel submitted that the preliminary objection by the 3rd defendant was unmerited and this court has jurisdiction to hear and determine this matter. Counsel argued that the evidence by the plaintiff shows purchasers as creditors as shown in the affidavit of the plaintiff. It was the plaintiff's submission that the 1st to 3rd defendants' allegation to be involved in a succession matter was demonstrated and that the interests of the creditors has not been spelt out or catered for.
27. Reliance was placed on several cases including *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696, *Peter Mungai v Joseph Ngaba Kumia & another, Leah Njeri Ndichu (Interested Party)* [2022] eKLR and *The estate of Boniface Njeru Ngemi (Deceased)* [2020] eKLR. Counsel submitted that the court has power to adjudicate over the interests of the parties as a contrary position will defeat the interests of the plaintiff and the innocent creditors.

The 1st and 2nd defendants' submissions

28. Submitting on the preliminary objection, counsel for the 1st and 2nd defendants argued that the originating summons is incompetent and ought to be struck out as the suit property belongs to the late Aloys Gekonge Tumbo Oeri, a deceased person. Counsel submitted what the 3rd defendant has no letters of administration and therefore she cannot be sued in her individual capacity since she cannot sue or be sued in relation to the estate of the late Professor Aloys Gekonge Tumbo Oeri. It was also submitted that the 1st and 2nd defendants' grant was revoked in a ruling delivered on 11 February 2021 in Succession Cause Number 109 of 2018 at Mavoko law courts and therefore as of now, there is no person with grant of letters of administration capable of being sued in relation to the deceased's estate.
29. Regarding the power of attorney, counsel submitted that the same ceased to exist and has no legal effect upon the demise of the deceased, and therefore the plaintiff has no power to execute anything regarding the estate of the deceased and on that basis, counsel argued that the originating summons is therefore fatally defective and the plaintiff has no capacity to institute legal proceedings regarding the deceased's estate.
30. Counsel argued that the 3rd defendant's preliminary objection was merited as the actions of the plaintiff amounted to intermeddling with the estate of the deceased. It was further argued that this court lacks jurisdiction to determine this matter as the defendants herein have no grant of letters of administration, although they have since filed Milimani Succession Cause No 715 of 2021. That this court lacks jurisdiction to determine this suit because it is not a land matter where all the plaintiff's grievances and other orders are prayed for can be determined.
31. Counsel took the position that the plaintiff's actions amounted to intermeddling with the estate of the deceased and the power of attorney relied upon ceased to exist and has no legal effect. They relied on section 45 of the *Law of Succession Act* and argued that the plaintiff has no locus standi to institute these proceedings.
32. The court was referred to the cases of *Veronica Njoki Wakagoto (Deceased)* (2013) eKLR, *Re estate of M'Ngarithi M'Miriti* [2017] eKLR and *Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 others*



for the proposition that where suits are filed by persons who have no capacity to file suit on behalf of a deceased estate, the same ought to be struck out. Counsel contended that it is not disputed that both the plaintiffs and the defendants have no letters of administration for the state of the deceased and that the grant issued to the 1st and 2nd defendants has since been revoked. Reliance was placed on section 82 A of the [Law of Succession Act](#) and Rule 73 of the [Probate and Administration Rules](#).

33. On whether the plaintiff is deserving of the order sought, counsel argued that the plaintiff was instructed in 2012 to sell a portion of the suit property to enable the deceased offset a mortgage owed to Cooperative Bank regarding the house occupied by the 1st and 2nd defendants. It was their submission that for the longest time, the plaintiff did not perform his obligation resulting in the frustration of the deceased as the bank intended to repossess his house for nonpayment of the loan. Counsel argued that the plaintiff failed to render account and did not execute the terms of the power of attorney. Counsel disputed the existence of sale agreements relied upon by the plaintiff, arguing that the plaintiff intends to enrich himself unjustly.
34. It was further submitted for the defendants that if the plaintiff received the deposits, he failed to give reasons why he failed to perform his obligation of offsetting the mortgage and why the amount alleged to have been paid was deposited in the deceased's account.
35. Counsel held the position that the plaintiff failed to adduce evidence to demonstrate bank statements to show that the amounts alleged to have been paid were deposited in the deceased's bank account if at all the said transactions exist. Counsel insisted that the plaintiff had advanced his ill motive by trying to sell the suit property to Sarah Holdings Limited promising them up to 50% of the sale price which is illegal and derogative from the power of attorney provisions.
36. Counsel argued that the agreement allegedly done between the deceased and Benson Musila Kimani and Simon Saily Malonza is a forgery as seen from the face of the document because the signature alleged to belong to the deceased is not genuine and there is no competent witness who certified that the deceased actually entered into that agreement. On the purported acknowledgement of Simon Saily and Benson Malonza, alleging that Kshs 4,000,000/= was paid to the deceased, counsel submitted that the same is just a statement with no support by way of a bank statement. On that basis, counsel argued that therefore the plaintiff is undeserving of the orders sought.
37. On whether the interested party's claim was merited, counsel argued that the interested party is busy body acting in cahoots with the plaintiff to defraud the estate of the deceased as that claim can only be addressed in the probate and administration court that has jurisdiction to handle creditors owed by the estate upon proof of existence of such debts. Counsel submitted further that the interested party's claim is unsubstantiated without backing of bank statements or receipts to prove existence of such sale.
38. On who should pay costs of the suit, reliance was placed on section 27 of the [Civil Procedure Act](#) and counsel submitted that costs are awarded at the discretion of the court, which discretion must be exercised judiciously. They sought that costs be awarded to the 1st and 2nd defendants.

3rd defendant's submissions

39. Counsel for the 3rd defendant relied on the case of [CCB v MIB & another](#) [2014] eKLR on the definition of irrevocable power of attorney. It was their submission that section 47 of the [Law of Succession Act](#) together with the Rule 73 of the [Probate and Administration Rules](#) conferred jurisdiction on the High Court to hear matters touching on the preservation and administration of a deceased's estate as was expounded in the case of [In Re estate of Kitur Chepsungulgei \(Deceased\)](#) [2021] eKLR.



40. Further, counsel relied on sections 45 and 82 (a) of the *Law of Succession Act* as well as the case of *In Re estate of Kimutai Tiony deceased* [2019] eKLR.
41. On whether the power of attorney was still in force, counsel argued that the power of attorney given to the plaintiff was revocable on the death of the donor or the incapacity of the donor and therefore the deceased having died, the power of attorney stopped being in existence and the plaintiff cannot purport to sue based on the said power of attorney. Counsel argued that the plaintiff had, during the lifetime of the deceased, overtly acted negligently regarding his obligations under the power of attorney. That he failed to provide reports of the progress made regarding selling the suit property as he failed to find a suitable purchaser despite being prompted by the donor multiple times to do so and it's surprising that the sale of the suit property did not go through during the donor's lifetime therefore causing the donor much distress with the bank threatening foreclosure severally.
42. On whether the 3rd defendant has capacity to be sued, counsel submitted that although the 3rd defendant is the lawfully wedded wife of the deceased, this does not automatically make her the personal representative of the deceased's estate as she has no grant of letters of administration issued to her and therefore, she is not qualified to be a personal representative of the estate of the deceased. Counsel argued that this suit was therefore brought against a wrong party as the 3rd defendant has no capacity to defend this suit until granted the grant of representation.
43. On jurisdiction, counsel contended that this court lacks jurisdiction to determine this matter as the matter involves a parcel of land belonging to a deceased person which is subject to succession proceedings ongoing in the High Court and that since jurisdiction to hear matters regarding preservation and administration of a deceased person's estate is under the ambit of the High Court, this court has no jurisdiction to hear this matter.
44. On costs, counsel argued that the 3rd defendant ought to be paid costs as the suit was filed in bad faith based on the misdeeds of the plaintiff.

Interested party's submissions

45. Counsel argued that upon the death of the deceased, the power of attorney granted to the plaintiff stood extinguished by operation of the law as was held in the case of *Lois Wanjiru Meru & 3 others v John Migui Meru* [2017] eKLR. It was also submitted for the interested party that during the lifetime of the deceased, the plaintiff failed to refund the interested party's monies thus frustrating him.
46. On whether the interested party has a valid claim, counsel submitted that the death of the deceased did not extinguish the fact that there exists purchasers for value of the suit property. Counsel argued that the interested party had purchased part of the suit property measuring 5 acres and had paid Kshs 1,000,000/= as deposit for the purchase in the year 2008 and that the parties agreed to vary the terms of the agreement pursuant to a supplementary agreement entered into on 3rd April 2012 where the deceased offered to compensate the interested party the sum of Kshs 4,000,000/= as a final settlement.
47. Counsel relied on the originating summons to argue that the plaintiff acknowledges the claim by the interested party as a purchaser for value and argued that one acre was supposed to be sold at Kshs 8,000,000/=. Counsel argued that the interested party had presented sufficient evidence to prove his claim.
48. On whether the preliminary objection is merited, it was submitted for the interested party that the preliminary objection was based on section 45 of the *Law of Succession Act* which prohibits intermeddling with the deceased property. Counsel argued that the court cannot dispose that question without evaluating evidence from the parties as to whether the suit property belongs to the deceased



or other stakeholders claiming rights over the same including the purchasers. Counsel argued that the claim by the interested party was merely for refund of his money or a share of the land and that he had satisfied the provisions of section 107 of the Evidence Act.

49. On costs, counsel relied on section 27 of the Civil Procedure Act and submitted that costs follow the event, unless there is reason to deny the winning party their costs. It was their submission that having proved their case they deserved to be paid costs.

Analysis and determination

50. Having considered the originating summons, the preliminary objection as well as the parties' rival submissions, the issues that arise for determination are as follows;

- a. Whether 3rd defendant's preliminary objection is merited.
- b. Whether the plaintiff is entitled to the orders sought.

51. A preliminary objection is a pure point of law which is raised on the pleadings on the basis that all the facts relied upon are not disputed. In the case of *Mukisa Biscuits Limited v West End Distributors* [1969] EA 696, the court held as follows;

A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Example are an objection to the jurisdiction of the court or a plea for limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.

In the same case, Sir Charles Newbold P. stated as follows;

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion confuse the issue, and this improper practice should stop.

52. The 3rd defendant's preliminary objection is based on the grounds that the suit property belongs to the deceased and no grant of letters of administration have been issued to the 3rd defendant and therefore she cannot be sued in her own individual capacity; that the power of attorney relied upon ceased to have effect upon the demise of the deceased, and the actions of the plaintiff amount to intermeddling with the deceased's estate; and that this suit is not a land matter but a succession matter where the plaintiff's grievances can be determined. The issues raised of capacity and jurisdiction are matters of law and are properly raised as a preliminary objection and therefore this court will interrogate the two matters as preliminary legal questions. The issue of whether the power of attorney granted to the plaintiff herein was extinguished by the death of the deceased is a matter that touches on merit of this suit and can only be dealt with, if this court finds that it has jurisdiction to determine this suit.
53. Locus standi is defined in the Black's Law Dictionary 9th Edition as "the right to bring an action or to be heard in a given forum".
54. The 1st to 3rd defendants have argued that they cannot be sued because none of them has been issued with grant of letters of administration regarding the estate of the late professor Aloys Gekonge Tumbo - Oeri. The fact that the 1st, 2nd and 3rd defendants have no grant of letters of administration for the estate of the deceased, has not been challenged by the plaintiff and the interested party. It is also not



disputed that the grant issued to the 1st and 2nd defendants in 2019 was revoked on 11th February 2021, while this case was filed on 3rd March 2021. It therefore follows that as at the time of filing this suit, there was no grant of administration issued to any of the 1st to 3rd defendants herein.

55. Section 82 (a) of the *Law of Succession Act* provides for the powers of personal representatives 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;

56. Therefore, for anyone to sue or be sued regarding the estate of a deceased person, they must be personal representatives of the deceased's estate and must therefore have obtained grant of letters of administration in that regard. In the instant case, the 1st, 2nd and 3rd defendants have no grant of letters of administration for the deceased's estate and therefore have no capacity to be sued regarding the estate of the deceased herein. Hence, I find and hold that this suit as against the 1st, 2nd and 3rd defendants is incompetent and the same is hereby struck out for want of capacity.

57. On the question of jurisdiction, Article 162 (2) (b) of the *Constitution* provides the jurisdiction of this court as follows;

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- (b) the environment and the use and occupation of, and title to, land.

58. Section 13 of the *Environment and Land Court Act* delineates the jurisdiction of this court as follows;

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 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.
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—
 - i. Interim or permanent preservation orders including injunctions;
 - ii. prerogative orders;
 - iii. award of damages;
 - iv. compensation;
 - v. specific performance;
 - vi. restitution;
 - vii. declaration; or
 - viii. costs
59. Therefore, the jurisdiction of this court is to hear and determine matters touching on the environment and the use and occupation of, and title to land. Therefore, the issue herein is whether the plaintiff's claim concerns use and occupation of, or title to land.
60. The 1st to 3rd defendants have argued that the plaintiff's suit is not a claim touching on land. They submitted that it is a matter concerning succession which ought to be determined by the High Court as a probate and administration matter. I have considered the objection as against the plaintiff's claim in the originating summons. The prayers sought by the plaintiff are for the court to approve and ratify the sale of the suit property and for the court to execute transfer documents of the suit property. The plaintiff also sought for orders that he be allowed to file in court inventory of liabilities and deposit in court monies after settlement of debts owed to him and other creditors. He specified the following 11 creditors namely, Benson Musili who is allegedly owed a refund of Kshs 11,498,800/=; Patrick Masai Makau allegedly owed Kshs 4,000,000/=; David Kimutai allegedly owed Kshs 6,000,000/=; Doctor J.K Bosek allegedly owed Kshs 1,288,000/=; Mercy Mwangi allegedly owed Kshs 8,645,000/=; William Ochieng Ogutu - Lotega Enterprises allegedly owed Kshs 15,000,000/=; Mohammed Koriyo Mohammed allegedly owed Kshs 19,500,000/=, Ongicho-Ongicho and company advocates allegedly owed Kshs 11,288,000/=; Commission and agency fees of 3.5% of purchase price Kshs 5,348,000/=; undisclosed costs to be incurred during the sale including possible disbursements; capital gains tax of 5% Kshs 7,640,000/=. According to the plaintiff, the total amount owed to creditors and which should be paid after selling the suit property is the sum of Kshs 90,291,000/=. He also sought for cancellation of entry number 2 in the register of the suit property which was made on 23rd March 2020 and effect the transfer which should be lodged and executed by the applicant.
61. What I understand the plaintiff to be seeking, is that the deceased owes 11 creditors, which includes his law firm, a sum of Kshs 90,291,000/= and therefore the court ought to sanction the sale of the suit property so that the proceeds thereof can settle the aforesaid debts and the balance to be deposited in court for onward transmission to the deceased estate's beneficiaries. The basis for the sale is the power



of attorney given to him by the deceased. Clearly, the plaintiff and the interested party do not lay any claim on the suit property but they want the suit property to be sold for them to get what they are allegedly owed by the estate of the deceased.

62. Is this therefore a dispute that this court has jurisdiction to determine? In other words, is this suit about use and occupation of, or title to land? I do not think so. As the whole reason and purpose for the plaintiff seeking the sale of the suit property is to settle debts allegedly owed by the deceased's estate to the listed creditors, which alleged debt is a pecuniary claim of Kshs 90,291,000/=, it is clear that, the plaintiff's claim of Kshs 90,291,000/= is a claim of a commercial nature which ought to be filed in the High Court. It is only after the claim herein is proved and allowed by the High Court that the plaintiff may then seek execution by way of sale of the suit property, if he so wishes to attach the suit property. Asking for the sale of the suit property to satisfy debts that are yet to be proved in any competent court, does not transform the plaintiff's claim into a land dispute. I therefore find that the plaintiff's claim herein does not touch on use and occupation of, or title to land and therefore, it is outside the purview of the provisions of Article 162 (2) (b) of the Constitution as read with section 13 of the Environment and Land Court Act. Consequently, I find and hold that this court lacks jurisdiction to hear and determine this suit which is a claim for payment of debts which ought to be filed in the High Court. For the above reasons, I strike out this suit for want of jurisdiction, with costs to the 1st, 2nd and 3rd defendants.

63. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17th DAY OF APRIL 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ongicho for plaintiff

Mr. Makau for interested party

Mr. Chacha for 3rd defendant

No appearance for 1st, 2nd, and 4th defendants

Court assistant - Josephine

