Mwok & another (Suing as Executors and Administrators of the Estate of Paul Mwok- Handa - Deceased) v Arum (Enviromental and Land Originating Summons 2 of 2023) [2024] KEELC 4498 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4498 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 2 OF 2023

AY KOROSS, J

JUNE 6, 2024

BETWEEN

JOYCE ATIENO MWOK ..... 1ST PLAINTIFF

CATHERINE GRACE OLOO ..... 2ND PLAINTIFF

SUING AS EXECUTORS AND ADMINISTRATORS OF THE ESTATE OF PAUL MWOK- HANDA - DECEASED

AND

HILLINGTON ARUM ALIAS HALLINGTON ..... DEFENDANT

JUDGMENT

Background

1. When loved ones depart this world, the people left behind are usually anguished and in emotional turmoil and at times, in the spur of the grieving process, they may make rational or irrational decisions. After all has settled down, the consequences of their decisions during the difficult process, may come to haunt them later. That is now the situation in this case.

2. When the defendant's mother Rose Awinja Andumbu (Rose) died sometime on 12/07/2023, a fundraising mechanism was created and all parties herein who are Paul Mwok- Handa's (Paul) children participated therein.

3. Nevertheless, all broke loose when the defendant stated he had a share in Paul's land which later emerged he had referred to land parcel no. South Ugenya/Rangala 857 (suit property) that is registered in Paul's name.

4. On this disclosure, and without much ado, the plaintiffs' filed their application dated 1/07/2023 whereby they sought restraining orders against the defendant and as fate would have it, they filed the application in Kisumu ELC and on hearing them, the file was transferred to this court.

5. However, the defendant allegedly beat them up in the process and swiftly cut down trees on the suit property, put up structures thereon, and interred Rose's remains in the suit property hence the amended originating summons (OS) dated 8/07/2023 filed by the plaintiffs that is the subject of determination in this judgment.

Plaintiffs' case

6. In the amended OS, the plaintiffs sought the following reliefs from this court: -

    a. The defendant and his agents be compelled to exhume Rose's remains from the suit property.

    b. The defendant and his agents vacate the suit property and reinstate it to the condition it was in before the defendant entered it and before Rose's interment.

    c. The orders herein be enforced by the Siaya County Government and the OCS of the nearest police station where the suit property is located.

    d. General damages.

    e. Any other orders that will serve the interests of justice.

7. The motion is supported by the grounds set out on the body thereof and on the supporting affidavit deposed on even dated by the plaintiffs.

8. Essentially, the plaintiffs contended Paul left behind a valid will on 1/09/1982 and they were his beneficiaries, executors, and administrators of his estate whilst the defendant was just a mere ordinary dependant of Paul's estate who had already received a lump sum payment from the said estate. To this end, they referred to Nairobi HC Succession Cause No. 313 of 1990.

9. As to Rose, it was their contestation she had no interest whatsoever on Paul's estate and that in Nairobi HC Succession Cause No. 313 of 1990, she participated therein as the best friend of the defendant who was then a minor.

10. It was their position it was undisputed Paul's estate owned the suit property and neither the defendant nor Rose had ever resided on it or had vested interest in it.

11. They contended if Rose's remains were not exhumed, they feared that Rose's larger family including her children, fathers to her children, grandchildren, siblings, and all persons with relations with her would continue as the defendant has, to trespass on the suit property thus causing damage to it.

12. The plaintiffs' averments were supported by documentary and photographic evidence which included a court order issued in Nairobi HC Succession Cause No. 313 of 1990 on 6/04/1993 which appointed them as executors and administrators of Paul's estate and a title deed of the suit property which is registered in Paul's name.

13. In addition, they tendered a ruling in Nairobi HC Succession Cause No. 313 of 1990 which in its dictum stated the defendant was Paul's child, a dependant whom Paul intermittently maintained and a lumpsum payment of ksh.100,000/- or equivalent property was to be paid off to him and a bundle of photographs which showed cut trees, structures and a congregation of people.

Defendant's case

14. In opposition, the defendant filed a notice of preliminary objection (PO) on the following grounds: -

    a. The amended OS was incompetent, misconceived, and an abuse of court process.

    b. The OS offended Sections 14 and 15 of the *Civil Procedure Act* as this court did not have jurisdiction and the suit ought to have been filed at Ukwala Law Courts which had geographical jurisdiction as that was where the suit property was located and that the parties resided in Ugenya- Ugunja Subcounty.

    c. A valuation report had not been filed before court to establish if this court had pecuniary jurisdiction.

    d. In their capacity, the plaintiffs' powers were by Section 83 of the *Law of Succession Act* restricted to only distribute Paul's estate and not sue a beneficiary and that the estate of the deceased had not been distributed by a confirmed grant.

15. In opposing the amended OS on matters of fact, the defendant filed a replying affidavit which he deposed on 26/09/2023. He asserted he was the product of a marital relationship between Paul and Rose the latter having died on 12/07/2023 as evidenced by a letter from the chief dated 11/09/2023.

16. According to him, Paul had other wives namely Marion Muok, Rose Awinja, Anne Nyawacha, and Lucy Akothe Dede and the suit property which had not been administered belonged to Paul and by consanguinity, as envisaged by Sections 38, 41 and 42 of the *Law of Succession Act*, parties were in the 1st degree of consanguinity.

17. He supported his assertions by availing a letter from the chief dated 11/09/2023 which showed Paul's alleged beneficiaries, Rose's death certificate, and the suit property's title deed.

Plaintiffs' grounds of opposition and further affidavit

18. The plaintiffs countered the defendant's PO on the following grounds: -

    a. The PO had not met the threshold of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696.

    b. Paul's estate was settled in Nairobi HC Succession Cause No. 313 of 1990.

    c. The defendant was a trespasser and was guilty of misrepresenting or concealing material facts and had not come to court with clean hands.

    d. Section 83 of the *Law of Succession Act* stipulated the non-exhaustive list of an administrator's role.

    e. Section 82 of the *Law of Succession Act* capacitated administrators to sue.

    f. By Section 162 (b) of *the Constitution*, this court had unlimited jurisdiction on matters of environment, use, and occupation of land.

19. In rebuttal of the facts contained in the defendant's affidavit, the plaintiffs filed a further affidavit sworn on 4/10/2023. Some of the averments rehashed those contained in the grounds of opposition and affidavit in support of the amended OS and this court need not reiterate them.

20. In addition, they stated the defendant was in the year 1994, paid the lumpsum payment of 100,000/- as ordered in Nairobi HC Succession Cause No. 313 of 1990, and consequently, he had no interest over the suit property and the probate court is functus officio.

21. They stated the letter of the chief was false, speculative, and rebuttable, Nairobi HC Succession Cause No. 313 of 1990 had determined Paul's relationship status with various women including that of Rose, Anne Nyawacha and Lucy Akoth Dede and neither Rose nor the defendant fell within the 1st degree of consanguinity and that Paul died testate and thus, Section 51 (3) of the Law of Succession sufficed.

Parties' submissions

22. The amended OS and PO were canvassed by written submissions. The plaintiffs' counsel on record M/s. Gitonga Kinyanjui & Co. Advocates filed written submissions dated 4/10/2023. These submissions were on the PO and on an application which has already been disposed of.

23. Therefore, this court will only deal with the relevant portions of these submissions appertaining to the issues at hand. The plaintiffs identified the following issues for this court's determination; (a) whether this court had jurisdiction (b) whether the PO met the threshold and (c) whether they had the authority to restrain the defendant from trespassing.

24. The defendant's law firm on record Ms. Jesse David, Ochanyo & Kurgat Advocates LL. P (JDOK Advocates LL. P) filed two sets of submissions one was on the PO and the other on the amended OS and both were dated 4/10/2023 and cumulatively, both identified the following issues for determination; (a)whether the amended OS is merited and (b) whether this court has jurisdiction.

25. As this court identifies the issues for determination later in this judgment, it will consider each of counsels' arguments on each identified issue including provisions of law and authorities that they relied upon to support their cases.

Issues for determination

26. Having carefully considered the grounds of the PO, opposition thereto, amended OS, affidavits and rival parties' submissions including provisions of law relied upon and judicial precedents, it is my considered view, the following issues arise for determination: -

    a. Whether the PO has met the legal threshold.

    b. Whether in their capacity as executors and administrators of Paul's estate, the plaintiff's could sue the defendant.

    c. Whether this court has jurisdiction to entertain this suit.

    d. Whether the defendant and or Rose had an interest in the suit property.

    e. What orders should this court issue including an order as to costs?

Analysis and determination

27. The issues recognized as arising for determination by this court shall be dealt with consecutively. Nonetheless, in considering the issues, this court will bear in mind that its jurisdiction is set out in Article 162 (2) (b) of *the Constitution*.

28. Since it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law, it will not wade into issues that are the preserve of courts that have jurisdiction to handle probate proceedings.

It must be observed the outcome of Nairobi HC Succession Cause No. 313 of 1990 is pertinent to this decision.

a. Whether the PO has met the legal threshold.

29. The defendant's counsel was silent on this but I agree with the plaintiff's counsel that the decision of Mukisa Biscuit Manufacturing Co. Ltd (Supra) has long settled the principles of POs.

30. And, from this decision, it is deduced that for a PO to succeed, it must meet 3 tests which are, it raises a pure point of law, on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In addition, the PO should be capable of disposing of a suit.

31. The plaintiffs' counsel submitted the 3 tests had not been met and the court has to interrogate the grounds to establish the legal position. Grounds (a) (b) and (c) of the grounds of opposition touched on the competency and jurisdiction of this court.

32. Although the decision of the Apex court in Mary Wambui Munene Vs. Peter Gichuki Kingara and 2 Others, [2014] eKLR emphasized that questions raised on a court's jurisdiction were pure points of law, the defendant had to fulfill all the other tests.

33. In questioning this court's geographical and pecuniary jurisdiction and referring to Ugenya-Ugunja sub-county which according to the defendant is where the parties reside or that suit property is within the jurisdiction of another sub-county or that the course of action arose at Ukwala law courts or that a valuation report ought to be considered are in my view all factual issues.

34. Thus, they have to be ascertained. Further, the plaintiffs' place of residence is contested since in their pleadings, they stated they reside in Nairobi. Even the decision of Selina Vukinu Ambe v Ketan Shashikant Khatri [2020] eKLR which the defendant's counsel relied upon to support his argument took a similar stand as this court.

35. Suffice to say, it is the finding of this court that the only ground of PO that meets the threshold is whether, in their capacity as executors and administrators of Paul's estate, the plaintiffs could sue the defendant. This ground is capable of disposing of the suit.

b. Whether in their capacity as executors and administrators of Paul's estate, the plaintiffs could sue the defendant.

36. It was uncontested that the plaintiffs are executors and administrators of Paul's estate. The defendant contended the plaintiffs' mandate was restricted by Section 83 of the *Law of Succession Act* while the plaintiffs took a contrary stand and were categorical that this provision of law was non-exhaustive and Section 82 (a) of the said Act gave them power to sue the defendant.

37. The defendant's counsel did not argue this issue in his submissions whereas the plaintiffs' counsel submitted the Court of Appeal decision of Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR demonstrated the plaintiffs could sue the defendant. This decision held thus: -

> " To determine who may agitate by suit any cause of action vested in him 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. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an

all inclusive answer. It says "personal representative means executor or administrator of a deceased person."

38. I adopt this holding that is binding on this court. Section 82 (a) of the *Law of Succession Act* expressly allows the plaintiffs to institute this suit and there is no legal basis for the objection as the court order of 27/10/1993 did not limit them in any way. This proviso states thus: -

> " 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. It is noted Section 83 of the *Law of Succession Act* which the defendant's counsel relies upon to anchor his ground does not hold water and instructively, it outlines the non- exhaustive obligations of personal representatives. I must agree with the plaintiffs' counsel and find the plaintiffs could sue the defendant.

c. Whether this court has jurisdiction to entertain this suit.

40. The ELC is a creature of Article 162 (2) (b) of *the Constitution* and in giving effect to this provision and by powers bestowed upon it under Article 162 (4) of *the Constitution*, parliament enacted the ELC Act.

41. Section 13 of the ELC Act sets out the jurisdiction of this court in the following words: -

> " (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) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(f) restitution;

(g) declaration; or

(h) costs."

42. To ensure reasonable and equitable access to justice in counties and in exercise of Article 169 (2) of *the Constitution*, Section 26 (3) and (4) of the ELC Act provides that gazetted magistrates are conferred with jurisdiction to handle matters on the environment and the use and occupation of, and title to, land but subject to pecuniary and territorial limitations which are provided for in Section 9(a) of the Magistrates' Act, Section 26 (4) of the ELC Act and Sections 12 and 15 of the *Civil Procedure Act*. This Section 26(4) of the ELC Act states: -

"(4) Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

SUBPARA(a)

disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

43. The place of suing as envisaged by Sections 11, 14, and 15 of the *Civil Procedure Act* was explicated in the case of Selina Vukinu Ambe (Supra) which position this court adopts. This decision stated:-

" The law governing institution of suits is set out in Section 11, Section 14 , and Section 15 of the *Civil Procedure Act* (the Act). Section 11 applies to filing of suits in subordinate courts and provides that a suit should be instituted in the court of the lowest grade competent to try it but if it involves a point of law or for any other sufficient cause, a suit may be instituted in a subordinate court other than that of the lowest grade. Section 14 and 15 on the other hand envisages a situation where the cause of action arises in the geographical jurisdiction of one court and the defendant(s) resides, caries on business or personally works for gain in the geographical jurisdiction of another court. In such a situation, the plaintiff has an option of instituting suit in the court in whose jurisdiction either the cause of action arose or where the defendant resides, carries on business or works for gain."

44. Section 13 (1) of the ELC Act demonstrates this court does not have comparable jurisdiction with the subordinate court and instead has unlimited and unfettered jurisdiction.

45. The ELC's jurisdiction is a creature of Article 162 (2) and (4) of *the Constitution* which is the supreme law of Kenya and because of its unlimited jurisdiction, it can handle all civil suits disputes on the environment and the use and occupation of, and title to, land irrespective of their nature or the value of the subject matter and the administrative or limitative nature of Sections 14 and 15 of the *Civil Procedure Act* cannot limit the unlimited jurisdiction of this court. I find this court has jurisdiction to handle the suit.

d. Whether the defendant and or Rose had an interest in the suit property.

46. Section 25 (1) and (2) of the *Land Registration Act* protects the rights of a proprietor and his interests are free from all other interests and claims, but can only be limited by the said Act. The registered proprietor's rights are subject to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register. This right is also subject to liabilities, rights and interests as affect the same and are declared by Section 28 of the said Act.

47. In propounding his assertions on his interests on Paul's estate, the defendant contended that he was Paul's son, Rose was Paul's 2nd wife and that Paul's estate had not been administered.

48. The plaintiffs attacked these allegations and armed with an order and ruling in Nairobi HC Succession Cause No. 313 of 1990 together with Paul's will, they asserted Paul died testate and that Rose participated in the probate proceedings as the next friend of the defendant. They stated the probate court established Rose was not Paul's wife and the defendant was a mere dependant thus provisions were made for him.

49. Because of this clashing stand, this court will interrogate Nairobi HC Succession Cause No. 313 of 1990 as it will put the issues to rest.

50. A cursory glimpse of the order issued on 6/04/1994 in Nairobi HC Succession Cause No. 313 of 1990 confirms the deceased died testate and the plaintiffs were appointed as the executors and administrators. This court is perplexed that notwithstanding glaring evidence, the defendant has totally turned a blind eye on these proceedings.

51. Be that as it may, Paul in his will bequeathed his estate to his children Fanuel Owino and the plaintiffs herein. By failing to make provisions for his dependants, the court in considering Sections 26 and 27 of the *Law of Succession Act*, made provisions for Anne Nyawacha, Lucy Akoth and the defendant herein as Paul's son.

52. Since this court is only keen on what the probate court stated on Rose and the defendant's position whom it referred as Arum. Only the relevant excerpt of this decision shall be captioned. The court stated thus when making provisions for the defendant: -

> " Then there is the case of Arum. Arum is a child of the deceased who was not provided for. Arum was getting intermittent provision. That was his mother's evidence. He may only get a lumpsum payment of money...As for Arum, the deceased was not wholly maintaining him. He only used to make occasional financial and material contribution for his upkeep. A sum of Ksh. 100,000/= or its equivalent in property will more that adequately do for him...an application may be made for the confirmation of grant."

53. The plaintiffs' assertion that they complied with this ruling by making a lump sum payment of ksh. 100,000/- in the year 1994 was not rebutted by the defendant and despite participating in the probate proceedings, Rose was only keen to protect the defendant's interests in Paul's estate and no more.

54. From the ruling, there is no shred of evidence that Rose had any relationship with the deceased other than that they shared one child - the defendant.

55. The probate process already determined the rights between the parties herein or the relationship between the defendant, Rose and Paul. If the defendant or Rose felt that that decision was not proper, then they ought to have appealed to the Court of Appeal and in the absence of evidence to demonstrate this decision was overturned, I must find the defendant and Rose do not have an interest in the suit property.

56. Though this court is yet to comprehend the defendant's motive of interring Rose's remains on the suit property without invocation from the plaintiffs, it can be concluded that he was entangled in the grieving process and was caught up in the moment.

57. Even if this court sympathizes with him and understands the great grief he must have suffered during the demise of his mother Rose which made him loose his senses and caused him to act irrationally, this court cannot overlook the law.

58. In addition, he trespassed on the suit property, interred Rose's remains on it and as evidenced from the photographs, cut up trees and put up structures upon the suit property. Since trespass is actionable per se, and considering none of the counsels addressed me on the quantum, I will assess general damages at ksh. 100,000/=

59. Ultimately, for reasons stated above, I find the plaintiffs have proved their case on a balance of probabilities and are entitled to judgment in their favor. It is trite law costs follow the event, however, because of the special relationship of the parties herein who are half siblings, each party shall bear their respective costs of the suit. I therefore make the following final orders: -

    a. The defendant is hereby ordered to disinter the remains of Rose Awinja Ondumbu out of the land parcel title no. South Ugenya/ Rangala/ 857 and to do so within the next fourteen (14) days.

    b. The plaintiffs to contact the Public Health Officer Siaya or the nearest Subcounty Public Health officers to assist them and give advice on the exhumation process. In default the plaintiffs to be free to apply for an order to exhume.

    c. The OCS of the most proximate police station to land parcel title no. South Ugenya/ Rangala/ 857 to provide security during the exhumation process.

    d. The defendant is hereby granted 90 days from the date of service of the orders of this court to remove himself and his developments from land parcel no. South Ugenya/ Rangala/ 857 and give the plaintiffs vacant possession, and in default, the plaintiffs shall forcefully evict the defendant together with his servants or agents.

    e. That an order of permanent injunction is hereby issued, restraining the defendant and/or his servants, agents and/or assigns from occupying, wasting, or otherwise interfering with the plaintiffs' quiet possession of the land parcel no. South Ugenya/ Rangala/ 857.

    f. General damages for trespass are ordered in the sum of kshs 100,000/- payable by the defendant to the plaintiffs.

    g. Each party shall bear their respective costs of the suit.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 6TH DAY OF JUNE 2024.

HON. A. Y. KOROSS

JUDGE

6/6/2024

JUDGMENT DELIVERED IN OPEN COURT VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

Mr. Okech for the plaintiff

Mr. Ochanyo for the defendant

Court assistant: Ishmael Orwa