



**Muiruri v Muiruri & another (Succession Cause 1 of 2002)
[2023] KEHC 1909 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 1 OF 2002
HK CHEMITEI, J
MARCH 9, 2023**

BETWEEN

LUCY WAWIRA MUIRURI RESPONDENT

AND

GRACE NJERI KAMAU 1ST APPLICANT

**GRACE NJERI KAMAU & ELIZABETH WANGARI KAMAU (AS THE LEGAL
ADMINISTRATORS OF THE ESTATE OF HANNAH MUTHONI KAMAU
(DECEASED)) 2ND APPLICANT**

RULING

1. This ruling is in respect to a Preliminary Objection filed by the applicants herein dated June 17, 2021 against the respondent's application dated August 7, 2019 on the grounds that;
 - a. That the abovementioned application has been preferred before the wrong court and that this Honourable court lacks the jurisdiction to entertain the matter proffered herein.
 - b. That section 75 of the *Land Registration Act* provides that a caution may be withdrawn by the cautioner or removed by the order of the court with "court" meaning the Environment and Land Court established under the *Environment and Land Court Act*, 2011. (No 19 of 2011).
 - c. That section 75 of *Land Registration Act* is framed in mandatory terms and therefore this Honourable Court lacks jurisdiction to hear and determine this suit.
 - d. That the current application touches on matters of Land Administration, which is a preserve of the Environment and Land Court, therefore, this



Honourable Court being a Probate and/or Family Court, is bereft of jurisdiction to entertain the matter.

- e. That the application filed is improper and in contravention with the law, and clearly set out procedures, thus the same ought to be dismissed and addressed before proper channels.
- f. That the application dated May 19, 2021 is incurably defective, bad in law, incompetent and void *ab inito*.

2. Parties agreed to dispose the preliminary objection by way of written submissions.

1st and 2nd Applicant's Submissions

3. The applicants' in their submissions identified two issues for determination namely; whether this court has jurisdiction to issue the orders sought and whether costs should issue.
4. On the first issue, the applicants submitted that this court lacks jurisdiction to hear and determine the applicant's application dated August 7, 2019. They placed reliance on the cases of *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR and *Owners Motor Vessel Lilian S v Caltex Oil* [1989] eKLR.
5. The applicants submitted that under section 73 (1) of the *Land Registration Act* of 2012 a caution may be withdrawn by the cautioner or removed by order of the court or by the order of the registrar. That the court referred to under aforementioned section was the Environmental and Land Court which jurisdiction is derived from article 162(2) (b) & (3). The respondents submitted further that at no point can any dispute relating to land could be lodged in this court. They urged the court to down its tool as they had demonstrated that it can never be appropriate forum for such grievances unless our legislation was amended. They placed reliance on the cases *National Land Commission v Afrison Export Import Limited & 10 others* [2019] eKLR and *Republic v Chief Land Registrar & Another* [2019] eKLR.
6. On the last issue, the applicants submitted the court should exercise its discretion and direct the respondent to bear the costs of the suit. They placed reliance on section 27 of the *Civil Procedure Act* and the case of *Oryx Oil (Kenya) Limited v Paul Kabeu & 2 others* [2014] eKLR.

Respondent's Submissions

7. The respondent in their submissions identified three issues for determination namely; whether the preliminary objection dated June 17, 2019 is merited, whether this court has jurisdiction to entertain the summons dated August 7, 2019 and who was entitled to costs.
8. On the first issue, the respondent submitted that the application dated August 7, 2019 prayed for the removal of a caution lodged illegally to deny her from accessing parcel of land which she rightly inherited from the deceased who was her husband. That the issue was about the implementation of the judgment delivered by this court on the January 23, 2018 and it was only this court that can ensure that the same was implemented and not the Environmental and Land Court. The court's attention was drawn to the case of *Estate of Simon Githeni deceased* [2020] eKLR and *Estate of Zipporah Njeri Mwaura deceased* [2020] eKLR.
9. The respondent submitted further that the applicants never filed any appeal or review of the aforementioned judgment but instead went ahead and put a caution which amounted to injustice to her. The preliminary objection was misconceived, bad in law and meant to delay the implementation



of the orders of this court. She urged the court to dismiss the preliminary objection as the same lacked merit.

10. On the second issue, the respondent submitted that the summons was brought to this court under the provisions of section 47 of the Law of Succession Act, rule 73 of the Probate and Administration Rules, Section 73 of the Land Registration Act and any other enabling provisions of the law. That the said provisions gave this court inherent jurisdiction to entertain such summons and make orders that would be in the interest of justice and further, to prevent abuse of the court process.
11. On the last issue, the respondent submitted that costs should follow the event and are granted at the discretion of the court as per the provisions of Section 27 of the Civil Procedure Act.
12. In conclusion, the respondent urged the court to dismiss the preliminary objection with costs in her favour and that the summons dated August 7, 2019 be allowed as prayed.

Analysis and Determination

13. I have considered the preliminary objection and the submissions by both parties. In my view the only issue for determination is whether this court has jurisdiction to hear and determine the application dated August 7, 2019.
14. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
15. In *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:

“So far as I’m aware, 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 of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
16. In addressing the preliminary objection herein, I would first start with the first ground since it raises a jurisdictional issue which is a point of law. In the said preliminary objection, the said ground seeks dismissing of the application on the grounds that this court lacks the jurisdiction to entertain the same as it belongs to the Environmental and Land Court. That the application dated August 7, 2019 filed by the respondent touched on land administration. Having looked at the said application, I note that the same under prayer 2 seeks for this court to lift/ remove forthwith the caution placed on land known as Bahati/Wendo Block 5/185 Wendo Farm.
17. Jurisdiction is everything and the court must down its tools upon establishing that it has no jurisdiction to hear or determine a case. The Supreme Court in the case of *Nasra Ibrahim Ibren –vs- Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No 19 of 2018).

“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. (See Republic –vs- Karisa Chengo & 2 Others [2017] eKLR.”



18. When considering the issue of jurisdiction, Nyarangi JA in the *MV Lillian 's'* (1989) KLR stated as follows;

“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 should be no basis for a continuation of proceedings pending other evidence. A court of law should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. Article 162 of the [Constitution of Kenya 2010](#) provides as follows;

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2);
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);
4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with the Article.”

20. On the other hand, Section 47 of the [Law of Succession Act](#), the high court has inherent powers to make appropriate orders in the interest of justice and for the preservation of the deceased’s estate. It reads as follows;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and 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.”

21. Rule 73 of the [P&A](#) also provides;

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

22. Clearly this is a succession matter, *in the Re Estate of Alice Mumbua Mutua (deceased)* [2017] eKLR the Judge considered when a case can be heard as a succession cause or when it can be heard in other courts with concurrent jurisdiction – like the ELC. The judge said;

“The Law of Succession Act, and the Rules made there under, 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.....”

23. The issue of removal of caution was addressed in the case of *Margaret Wanjiku Kabubu -V- Nyabangi Nguni and 2 others* [2014] eKLR it was stated: -

“The Applicant brought her application under Section 73 (1) of the Land Registration Act, 2012. This has prompted counsel for the Respondents to contend that this Court has no jurisdiction to deal with this matter as it is purely and essentially of a nature that could only be handled by the Environment and Land Court. To that end this Court is in agreement with the counsel for the Respondents that indeed the said provision falls under the province of the Environment and Land Court. Indeed, the Respondents’ contention that the jurisdiction of the Family and Probate Court emanates from the Law of Succession Act, Cap 160, in so far as concerns administration of deceased persons’ property is quite correct.

This Court however, notes that the Applicant’s application is also brought under any other enabling provisions of law. This being a succession matter and given the fact that registration and or removal of a caution is not expressly provided for under the Succession Act, this Court is of the considered view that its jurisdiction under Section 47 of the Succession Act, Cap 160 and rule 73 of the Probate and Administration Rules are appropriate in the instant case.”

24. In the instant case, the respondent has brought the application under rule 73 of *Probate and Administration Rules* and Section 47 of the *Law of Succession Act*. The *Law of Succession Act* which gives this court inherent jurisdiction to deal with administration of Estates has no provision to remove a caution from the land forming the estate of a deceased person. However, the court finds that the provisions under which this application is brought gives this court inherent powers to entertain the application dated August 7, 2019 and make orders that would be in the interest of justice and to prevent abuse of court process.
25. In the premises, the preliminary objection herein lacks merit and the same should be dismissed.
26. Having stated so there is nothing to stop the court from allowing the application dated August 7, 2019. The caution placed on the said land especially after the judgement of this court had been delivered clearly burdens the applicant for nothing. The respondents have not demonstrated what they stand to lose in any event.
27. Should the parties have any other issues relating to the suit land other than its administration then the best place to take the battle after here is the Environment and Land Court.
28. For now, the application dated August 7, 2019 is allowed with costs to the applicant.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 9TH DAY OF MARCH 2023.

H. K. CHEMITEI.

JUDGE

