

A CLAIM AGAINST THE ESTATE AND A CLAIM ON INHERITANCE: THE JURISDICTIONAL CHALLENGE

1.0 Introduction

The question of jurisdiction is a subject of great controversy and in most court cases the court has been called to make a determination on whether it has jurisdiction at the preliminary stage of proceedings.

Though it is reasonably plain that the jurisdictional question ought to be raised at the earliest opportunity there is no bar to the question being raised at any stage in the proceedings¹.

Such is the importance of the jurisdictional question that a court properly directing itself is obliged to decide the issue based on the material placed before it right away without any hesitation. Once the court in its opinion finds that it has no jurisdiction without any ado, it is expected to discontinue any proceedings before it.

These were the sentiments that were expressed in the celebrated case of *The Owners of Motor Vessel "Lillian S" -vs- Caltex Oil Kenya Ltd*, [1989] KLR 1.

Simply jurisdiction is the power of a court to hear a case; though as simple as it may sound the whole subject of jurisdiction is a rather complicated and for the reason courts have been called severally to make a determination on this at times vexing subject.

Nothing has vexed the courts and practitioners most recently than the question, which between the Environment and Land Court and the Succession Court has jurisdiction to determine the question of ownership where a claim is brought against the estate or a claim is brought on inheritance.

This paper seeks to advance the argument that while both courts are mandated to determine the ownership of a deceased estate; the jurisdiction of each is invoked differently at the point of whether a claim is against the estate of the deceased and on whether a claim is on inheritance.

1.1 Constitutional and legislative mandates of the Environment and Land Court and the Succession Court

This jurisdictional question is best understood by first laying a basis on the Constitutional and legislative mandates of each of the courts. Article 162 (2) of the Constitution enjoins Parliament

¹ See the decision in *Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited* [2015] eKLR.

to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

In this regard under Section 4 of the Land and environment Act, Cap 12A the Land and Environment Court is established. Section 13 of the Act on the other hand empowers the court in exercise of its jurisdiction under Article 162 (2) of the Constitution to hear and determine disputes relating to land and the environment.

The gist of Article 162 (2) of the Constitution of Kenya is that it establishes specialized courts operationalized through legislation and in the instance of the Environment and Land Court, the Environment and Land Court Act that set up Environment and Land Court to specifically deal with disputes relating to the environment and the use and occupation of and title to land.

This means that the Environment and Land Court is exclusively clothed with with the requisite jurisdiction to deal with the issue issues or disputes to do with title to land.

The Succession Court on the other hand, though a court with the status of the High Court as envisaged under Article 162, is limited to determining cases of intestate and testate succession and to the administration of estates of deceased persons. Section 2 (1) of the Law of Succession Act provides as follows:

“Except as otherwise expressly provided in this Act or any other written law the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate and testamentary succession to the estate of deceased persons dying after commencement of this Act and to the administration of estates of those persons”

Having established the constitutional and the legislative mandates of the two courts this paper seeks to delve on the vexatious question on which court has the jurisdiction to determine the question of which between the Environment and Land Court and the Succession Court has jurisdiction to determine claim against the estate of a deceased and a claim on inheritance.

1.2 Distinction between a Claim against the estate of a deceased and a claim on inheritance

For better drawing of this distinction it is important to interrogate a claim based on customary trust and a claim by a heir by virtue of being a child of the deceased

In most communities, the Kikuyu especially, customarily the elder brothers held the father's parcels of land in trust for his other siblings.

It is argued that this custom developed from the colonial legacy of oppression and violence leading to the male heads of the family living in constant fear of either incarceration or death in the hands of the colonial masters.

It was therefore prudent for the father to leave the property in the hands of the eldest son to hold in trust for the other siblings. This is of course considering the patriarchal society where the wife could not hold property.

The claim by the deceased's siblings is always based on the ground that the fact that the deceased being an elder brother holds a parcel of land in trust for himself and them.

It should be interpreted and rightfully so that the siblings' claim is that the property does not form part of the estate of the deceased but is held by deceased in trust for him and the siblings.

It suffices to mention that in effect, by the siblings laying a claim on the basis of trust, they lay a claim as owners and not as heirs of the deceased.

A claim on inheritance on the other hand, is by a person who by law is legally entitled to be a heir of the deceased estate, in this regard either as a beneficiary or a dependant.

In this regard, a distinction between a claim against the estate of a deceased and a claim on inheritance comes out clearly. A claim by the siblings of the deceased is that the title to the parcels of land is held in trust for them. Indeed this is a claim for proprietary right. It is a challenge to the title held by the deceased and is therefore a claim against the estate of the

deceased. The claim by heirs is an interest as dependants or direct beneficiaries of the deceased and therefore a claim on succession or inheritance.²

This paper then analyses the most appropriate forum to bring each of the claims.

1.3 The appropriate forum to bring each of the claims

It is contended in this paper that the Succession Court lacks jurisdiction to determine a claim against the estate of the deceased as in effect the court would be making a determination on the ownership of title which is appropriately handled by the Environment and Land Court.

The Law of Succession does not confer on the Succession Court the power to determine the ownership of a parcel of land or make a determination/ declaration that a trust exists.

This means therefore that where there are third parties having a claim of ownership against the deceased or the estate of the deceased then that falls under the exclusive jurisdiction of the Environment and Land Court.

This argument finds fortification in the case of where the court held as follows:

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties. In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights...I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof.³

² Succession Cause 432 of 2009 Monica Wangari Njiri & 4 others v Eunice Wanjiru Igamba & another [2016] eKLR

³ In the Matter of the Estate of Peter Igamba Njoroge, Succession Cause No.432 of 2009 (unreported) quoted in Succession Cause 488 of 2010 In re Estate of the Late Jonathan Kinyua Waititu - (Deceased) [2017] eKLR

In a similar decision⁴ the court held that the succession court has no jurisdiction to resolve a claim brought against the estate /the proprietary interest on land based on an alleged trust and the appropriate forum is the land and Environment Court. The court held thus:

The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

It is important to note that what the court is stating is that the Succession Court being a court of the same status as the Environment Court is not incompetent rather the forum is not appropriate and conducive for the entertainment of such claims.

Succession proceedings on the other hand are appropriate forums to handle disputes relating to the heirs of the deceased and not by third parties having claims against the estate. They are appropriate forums to handle issues regarding the distribution of the free estate of the deceased.

1.4 Claims where a beneficiary has sold property belonging to the estate of the deceased

A rather complex scenario arises where a beneficiary transfers a property forming part of the estate of the deceased to a third party after the demise of the deceased.

The question that begs in this instance is whether this is a claim on ownership against the registered third parties or the other beneficiaries can bring a claim based on Succession.

The other question is on whether the legality of such a transfer can be sustained in a Succession Court and whether the Succession Court can annul and reverse such a transaction.

When faced with this question under similar facts Justice Limo expressed anxiety as regards the circumstances and stated, "*a cursory look at the facts of this application in regard to the*

⁴ H.C. Succession Cause No.864 of 1996 [2015]eKLR

jurisdiction of this court to entertain it may appear simple and clear but a deeper examination of the same presents problematic legal questions which this Court has been called upon to determine.”

The arguments advanced were that the third parties properly obtained ownership of their respective parcels and that in any event; issues or disputes to do with title to land can only be entertained and determined by the Environment and Land Court.

The beneficiaries on the other hand contended that their brother in transferring the property forming part of the estate of the deceased, their brother intermeddled with the estate and breached Section 45 of the Law of Succession Act by purporting to deal with the property of a deceased person without authority.

The court as a Succession Court in affirming its competence to interrogate and entertain the matter took the position that it was making a determination on whether or not the disputed parcel comprised “free property” a matter within the exclusive jurisdiction of the Succession Court.

The court’s finding was anchored on the provisions of Section 45 (1) and 47 of the Law of Succession Act (Cap. 160). Section 45 (1) provides as follows:-

“Except so far as expressly authorized by this Act, or by any written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person” (emphasis mine)

The court further based its decision on the fact that since the issue in controversy revolved around the action of a beneficiary in exclusion of other beneficiaries transferring the property forming the part of the estate and the fact that the action amounted to intermeddling then the question fell within the jurisdiction.

This paper takes a different position and supports the position of the third parties. This is that once the property was transferred to third parties this matter ceased to be a claim on Succession and became a claim against the estate. It is a claim for proprietary interest. It is therefore the Environment and Land Court that is clothed with jurisdiction to determine the proprietary rights of the third parties against the competing proprietary rights of the beneficiaries that the property formed the estate of the deceased.

The fact that there are third parties who have acquired the property then the matter falls within the purview of the Environment and Land Court. Such third parties are neither beneficiaries nor

heirs. This argument finds fortification from the finding of Justice Ibrahim⁵ though in a decision of a declaration of trust where he held thus:

This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

It follows then that if the succession proceedings are not appropriate claims against an estate by third parties, then the same forum is not appropriate when the estate brings a claim against third parties.

1.5 Treatment of a property on a claim based on trust

Having no mandate to dig deeper into the issues of ownership or title to land on a claim for against the estate/ based on trust, an objector therefore ought to file a case before an Environment and Land Court

In the event that the court finds that the property belonged to the objector and not the estate then the property is excluded from the schedule of the estate properties however if the property is found to form part of the estate, then the court ought to be moved to distribute it or amend the list of assets.

The other treatment for properties with a claim on trust and included in the estate properties is under Rule 42(2) of the Probate and Administration rules which empowers the Succession court before confirmation to remove the property in contest from the schedule of assets and have the same determined separately as to its proprietorship in the Environment and Land Court. If the property is found to be part of the estate of the deceased the same is restored back to the schedule of assets for distribution. Rule 42(2) of the Probate and Administration rules provides as follows:

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

⁵ Quoted on the decision of Monica Wangari Njiri & 4 others v Eunice Wanjiru Igamba & another [2016] eKLR

appropriate and set aside the particular share or estate or the property comprising it to abide determination of the question arising 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.’

Justice Musyoka in a succession proceeding⁶ where the Applicant was claiming ownership over one of the properties, the court noted the dispute in the land over ownership and referred the matter to the Environment and Land Court for the determination of ownership and went on to rule that the administrators could move the court on the strength of the decree stating that the property belonged to the deceased for its restoration to the estate. The court stated:

My understanding of this is that where a claim is brought by anyone, whether a beneficiary or survivor of the deceased or even a third party, that he has an interest of one sort or other in estate property, such property shall be set aside or be removed from the schedule of assets to await determination of the question as to the interest of the claimant. Should it be established that the property or part thereof belongs to the claimant then the asset or part thereof remains removed from the schedule. However, should it be established that the claimant had no interest of any sort in it; the property is restored to the schedule and thereafter distributed under section 71 of the Act... The applicant is claiming exclusive ownership of Plot No. 1 – 310 Mathare North. That is a matter that this court ought not to venture into determining. That is the exclusive province of the Environment and Land Court. The role of the probate court is to distribute those assets that are indisputably the deceased’s.

2.0 CONCLUSION

In view of the foregoing the Succession Court lacks the jurisdiction to adjudicate claims against the estate by third parties. The Succession Court with its limited jurisdiction lacks the mandate to resolve the proprietary interest on land and this falls within the exclusive mandate of the Environment and Land Court.

⁶ *In Re Estate of Francis Peter Njuguna Rurigi (Deceased) [2016]Eklr In The Matter of The Estate Of Francis Peter Njuguna Rurigi Alias Francis P. Njuguna Rurigi Alias Francis Njuguna Alias F. P. Njuguna Rurigi Alias Francis Peter Rurigi (Deceased) Succession Cause No. 1566 of 2013*

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