



**Grand Creek LLC & another v Chelangat (Sued as the Legal Administrator of the Estate of the Late Nathan Cheson Moson) (Commercial Case 214 of 2011) [2024] KEHC 10225 (KLR) (Commercial and Tax) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10225 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 214 OF 2011  
A MABEYA, J  
AUGUST 16, 2024**

**BETWEEN**

**GRAND CREEK LLC ..... 1<sup>ST</sup> PLAINTIFF**

**JOHN KRISTLER COORS ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPHINE CHELANGAT ..... DEFENDANT**

**SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE  
NATHAN CHESON MOSON**

**RULING**

1. By a Motion on Notice dated 15/8/2023, the plaintiffs sought to restrain stopping the defendant from dealing with the various shares held by the late Nathan Cheson Moson (“the deceased”) and as well as the deceased’s bank accounts held at I&M Bank and Transnational Bank.
2. They further sought to prohibit the defendant from in anyway dealing with the properties known as Eldoret Municipality Block 12/411 and Eldoret Municipality Block 12/421 (“the suit properties”).
3. The application was brought under Article 159 of the *Constitution*, Order 2, Order 22 rule 48 and Order 51 of the *Civil Procedure Rules* and Sections 13, 68 and 69 and Section 323 of the *Companies Act*.
4. The grounds upon which the application was brought were set out on the face of the Motion and in the affidavit of John Kristler Coors of even date. These were that the 1<sup>st</sup> plaintiff obtained a judgment against the deceased.



5. The deceased appealed against that judgment and by consent, the execution of the judgment was stayed pending appeal on condition that the deceased deposited a sum of Kshs 500,000/- in a joint interest earning account and the title documents to the properties known as Eldoret Municipality Block 12/411 and Eldoret Municipality Block 12/421 be deposited in court as security for the due performance of the decree. Subsequently, the defendant passed on and the appeal was dismissed on 6/11/2020.
6. The application for execution was therefore brought against the administrator of the estate of the deceased. The plaintiffs intend to attach 6 parcels of land forming part of the estate and monies deposited in I&M bank and Transnational Bank.
7. That the defendant had failed to list the decree as part of the liabilities of the deceased estate. That the title documents were no longer held by the Court. In the premises, the plaintiffs were apprehensive that the defendant was in the process of distributing the estate and intends to evade the debt.
8. In opposition to the application, the defendant filed a Preliminary objection to the application on grounds that the Court lacks jurisdiction to deal with a creditor of the estate of the deceased; that the appropriate court is the Probate and Succession Court. Further, that the application was contrary to Order 37 of the Civil Procedure Rules and was fatally defective in both substance and form.
9. The defendant also filed a replying affidavit sworn by herself as the administrator of the defendant's estate. She contended that a confirmation of grant was issued on 17/3/2023 as per the attached copy of confirmation of grant and that the estate had since been distributed among the deceased beneficiaries.
10. That the beneficiaries were not parties to this case and they also deserved to be heard. That the plaintiffs as creditors of the estate should file their application at the Succession Court where all parties can be given audience. Further, that two title deeds had been deposited in court and the value of the property was sufficient to settle the claim.
11. The parties argued the application vide written submissions. The plaintiffs submitted that the Court has jurisdiction under section 37 of the Civil Procedure Act to entertain the matter. That the defendant was not challenging the application on the basis that the properties were not available for execution. That the estate was comprised of immovable property and prohibition orders could issue under Order 22 rule 44 of the Civil Procedure Rules.
12. For the defendant, it was submitted that the orders sought could be granted under section 76 and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. That the claim over a right to the estate should be determined by the Succession Court.
13. That the plaintiffs were creditors of the estate within the meaning of the Law of Succession Act. The case of Estate of Stone Kathuli Muinde (2016) eKLR was cited in support of the proposition that if a decree is obtained by a creditor, it should be presented to the probate court in the succession cause to give effect to the decree. That the application should therefore be struck out.
  1. Whether the court has jurisdiction
  2. Whether the application has been filed in breach of Order 37 rule 1 and should be struck out
  3. Whether prohibition orders can be issued to prevent dealings with the defendant's properties.
  4. Final orders of the court.
14. The Law of Succession Act Cap 160 of Laws of Kenya deals with matters of probate and intestate succession. The preamble of the Act states: "An Act of Parliament to amend, define and consolidate the



law relating to intestate and testamentary succession and the administration of estates of the deceased persons, and for purposes connected there with and incidental thereto.”

15. In *Priscilla Ndubi Zipporah Mutiga v Gerishon Gatobu Mbui* Meru Succession Cause No. 720/2013, the court held that the primary duty of a probate court is to distribute the estate to the rightful owners.

16. *In Re Estate of Alice Mumbua Mutua* (2017) eKLR, Musyoka J held that: -

“The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning parties who are neither survivors of the deceased nor beneficiaries, are for resolution outside the framework set out in the *Law of Succession Act* and Probate and Administration Rules. Such are to be resolved through the structures created by the Civil Procedure Rules, which have elaborate rules on suits by and against executors and administrators.

...

The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table.”

17. On the other hand, section 34 of the *Civil Procedure Act* provides: -

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

18. On its part, section 37 of the *Civil Procedure Act* provides: -

“1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.

2) Where the decree is executed against such legal representative, ... he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; ... the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit”

19. From the foregoing, it is clear that sections 34 and 37 of the *Civil Procedure Act* gives this Court jurisdiction to deal with execution proceedings. There is a decree which has not been satisfied. The defendant, who is the legal representative of the deceased cannot turn around and feign ignorance of the decree herein. She was duty bound to disclose to the Probate and Administration Court of the decree herein as part of the liabilities of the estate.

20. Accordingly, the preliminary objection is without merit and is hereby dismissed with costs.



21. The next issue is whether prohibition orders can be issued to prevent dealings with the subject properties. It is clear from the provisions of section 37 aforesaid that attachment and sale can be done to execute a decree where property is in the hands of a personal representative of an estate of a deceased person.
22. Order 22 rule 48 of the *Civil Procedure Rules* provides that: -

“Where property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in anyway and all persons from taking any benefit from such purported transfer or charge and the attachment shall complete and effective upon registration of a copy of a prohibitory order or inhibition against title to the property.”
23. In *Peter Kariuki Njeru v Erastus Gilbert Kimani & another* (2022) eKLR, the court held that: -

“... the essence of a prohibitory order is to ensure that the property is not transferred, charged or dealt with in any manner until the court issues a further order.”
24. In the present case, it is not in dispute that the applicant holds a valid decree of this Court. Further, that the properties targeted belong to the judgment-debtor who is now deceased. The applicant has also demonstrated that assets available for distribution include parcels which were ordered by the Court to be isolated as security for the due performance of the decree herein. That for some unexplained reasons, the titles that were supposed to be deposited in Court are no longer in the custody of the Court.
25. I have seen a Certificate of confirmation of grant which was issued by the Probate and Administration Court. There is therefore eminent risk of final transmission of the properties to the beneficiaries to the detriment of the decree-holders in this suit.
26. The defendant contended that the plaintiffs were guilty of delay. They have however explained that they are foreign nationals and that they were not aware of legal processes of succession or that the deceased property had been distributed. I note that the appeal was dismissed on 6/11/2020 and the application for execution was made on 21/7/2023. That was after 2 years and 8 months. The grant was confirmed on 17/4/2023.
27. My view is that, notwithstanding that delay, the plaintiffs have finally come to the seat of justice and are entitled to the same. I will grant the orders sought as they are well merited.
28. Accordingly, the application is allowed as prayed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

