



REPUBLIC OF KENYA



**In re Estate of Solomon Syanda Musili (Deceased) (Succession Cause
207 of 1986) [2024] KEHC 15204 (KLR) (25 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 207 OF 1986**

G MUTAI, J

NOVEMBER 25, 2024

IN THE MATTER OF THE ESTATE OF SOLOMON SYANDA MUSILI (DECEASED)

BETWEEN

ESTHER NGUNIA CHANDA 1ST APPLICANT

PAUL MWENDWA CHANDA 2ND APPLICANT

AND

CONSOLIDATED BANK OF KENYA LIMITED 1ST RESPONDENT

COLT PETROLEUM LIMITED 2ND RESPONDENT

RULING

1. According to the Petition filed in this cause on 16th December 1986, Solomon Syanda Musili died on 13th June 1986. He had a wife, Esther Ngunia Syanda, and seven sons and two daughters. On the 10th of July 1987, the grant of letters of administration intestate was issued to Esther Ngunia Syanda or David Mwendwa Chanda. On 9th August 1989, the grant was re-issued to Esther Ngunia Syanda and Paul Mwendwa Chanda.
2. The grant was confirmed on 24th January 2020. The Certificate of Confirmation of Grant indicated that the deceased owned a house without land at Magongo Bokole Section IV/MN/1294 and a residential home on Plot No XVII/771/A, Sagana Street.
3. Vide Summons dated 19th August 2024, the administrators of the estate of the deceased sought the following orders:-
 - a. Spent;
 - b. That this honourable court be pleased to join Consolidated Bank of Kenya Ltd and Colt Petroleum Ltd as the 1st and 2nd Respondents, respectively, in this case;



- c. That the honourable court be pleased to order the cancellation of the charge dated 1st February 2024, registered over Plot No Mombasa /Block XVII/771/A for being an express act of intermeddling with the estate of Solomon Chanda Musili (deceased); and
 - d. That the cost of this application be provided for.
4. The grounds upon which the application was brought up are that the deceased left behind Title No. Mombasa/Block XVII/771/A as part of his estate. The foregoing notwithstanding Consolidated Bank of Kenya Ltd and Colt Petroleum Ltd registered a charge over the property on 1st February 2024. They contended that they did not sign the charge and that, for that reason, the charge registered against the title offended the provision of Section 45 (1) of the *Law of Succession Act*. As dead men/women cannot sign charges, it was urged that the charge was void ab initio.
 5. In the affidavit in support of the application dated 20th August 2024, Mr Paul Mwendwa Chanda averred that they discovered the anomaly when they attempted to transmit the property to the beneficiaries. Since then, nothing has been done, and for as long as the charge exists, no transmission can be registered.
 6. When the matter came before this court, the application was certified urgent, and prayers 1 and 2 were granted. Consolidated Bank of Kenya Ltd and Colt Petroleum Ltd were added as the 1st and 2nd Interested Parties, respectively, in this matter.
 7. The Consolidated Bank of Kenya Ltd entered appearance and filed a replying affidavit. Mr Fredrick Musyoka Savonge swore the affidavit on 20th September 2024. Mr Shonge deposed that in January 2024, Mr Salim Ibrahim Abdullah Farah, a director of Colt Petroleum Ltd, sought a loan of Kes 24,000,00 from the bank. The said facility was secured by a change on title No. Mombasa/Block XV/771/A. The bank's advocates prepared the change documents, which were executed by the borrower and the changer. The charge documents were then registered at the land's office as required by law. The loan was subsequently disbursed in 2 tranches, of Kes.14,000,000/- on 27th February 2024 and of Kes 10,000,000 on 13th September 2024.
 8. Mr Savonge deposed that a due diligence exercise was done by its advocates, which confirmed that the property belonged to the chargee. He averred that these proceedings were in regard to the estate of Solomon Syanda Musili, while the land belonged to Solomon Chanda Musili. He contended that these proceedings res subjudice as there was another case before the Mombasa Environment and Land Court to wit Mombasa ELCMisc. Application No E013 of 2024, in which similar orders were sought.
 9. It was urged that this court lacks jurisdiction to hear and determine this matter, given the provision of sections 13 (2) of the *Environment and Land Court Act*. Specifically, that charged land is an action or other instrument granting an enforceable interest in land which is a purview within the jurisdiction of the Environment and Land Court and not the High Court, Probate and Administration Division, which is specifically denied jurisdiction in matters which the Environment and Land Court has jurisdiction.
 10. Mr Savonge attached as exhibits to his replying affidavit as a copy of the change, loan agreement and the originating summons filed by the applicants in the Environment and Land court.
 11. Paul Mwendwa Chanda filed a supplementary affidavit he swore on 30th September 2024. In the said supplementary affidavit, he averred that the matter before the Environment and Land Court was withdrawn.



12. The parties filed written submissions. Those of the Applicants are dated 1st October 2024. The 1st Interested Party's submissions are dated 1st October 2024.
13. Although Colt Petroleum Ltd was served through one of its directors, Salim Farah, via his mobile phone number 07xxxxxx72, the company never entered an appearance nor filed a reply or grounds of opposition or preliminary objection.
14. The applicants' counsels, Munyithya, Mutugi, Umara & Muzna Co. Advocates submitted that the change registered by the 1st and 2nd Interested Parties was fraudulent as the deceased could not have resurrected to sign a change in favour of the 1st Interested Party at the instigation of the 2nd Interested Party. Counsel submitted that although both Interested Parties were served, the 2nd Interested Party filed no response.
15. They submitted that the charged property belongs to the estate of the deceased person and that registration of a change against the said title was an act of intermeddling with the estate of a deceased person, which action is an offence under Section 45 of the *Law of Succession Act*. It was urged that under Section 47 of the said *Act*, the court has absolute power to determine any dispute arising from this act and to pronounce such orders therein as may be expedient.
16. It was urged that the change could only have been signed by the Applicants but not by the deceased. Having been signed by a deceased person, it was void ab initio. Reliance was placed on the celebrated case of *Benjamin Leonard McFoy vs United Africa Company Ltd* (1961) 2 All ER 1109 where it was held that:-

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
17. It was therefore urged that the change registered in favour of the 1st interested Party be cancelled so that the property could revert back to the estate of the deceased.
18. In their submissions, the 1st interested party urged that its advocates, Mulando & Co Advocates, conducted a due diligence exercise before registering the charge. Being satisfied that the transaction was legitimate and that the chargor had a good title, it registered a charge on the title on 2nd February 2024, which was registered as entry number C-8 in the encumbrance section of the registrar.
19. The 1st Interested Party submitted that the property was registered in the name of Solomon Chanda Musili, which it reckoned was a different person from the deceased herein.
20. The 1st Interested Party's counsel identified three issues as coming up for determination. These are:-
 - a. Whether this court has jurisdiction to hear this suit;
 - b. Whether the change is proper and lawful; and
 - c. What orders can this court issue.
21. On the 1st issue, it was urged that this court lacks jurisdiction under Section 13(2) of the *Environment and Land Court Act*. It was submitted that the dispute herein is whether the charge was lawfully registered against the suit property. Counsel urged that the issue could only be determined by the Environment and Land Court and not by the Family Court in the exercise of its Probate and



Administration jurisdiction. In support of this contention, reliance was placed in the decision of the court in [Woodcrest Investment Co. Lt & 2 others vs Jamii Bora Bank Ltd & another](#) [2017]eKLR and [Lydia Nyambura Mbugua vs Diamond Trust Bank Ltd & another](#) [2018]eKLR.

22. On whether the change was valid, it was urged on behalf of Consolidated Bank that the 1st Interested Party conducted a due diligence exercise. It was submitted that the bank dealt with Solomon Chanda Musili and not Solomon Syanda Musili, who was identified by his national identity card.
23. Counsel relied on the case of [re Estate Alice Mumbua Mutua \(deceased\)](#) [2017]eKLR, [Waita and another vs Njiraini & another](#) (2024)KEELC 5777 (KLR) and [re Estate of Mbai Wainaina \(deceased\)](#) [2015]eKLR for the proposition that where a dispute involved third parties the Probate and Administration Court has no jurisdiction to hear and determine it. It was submitted that the issues in this matter involve third parties.
24. I have read the application, the supporting affidavit, the supplementary affidavit, the replying affidavit of the 1st Interested Party and the parties' written submissions. The court has considered the purport and import of the said documents and must make its determination.
25. It is common ground that the applicants herein have a valid confirmed grant in respect of the estate of Solomon Syanda Musili.
26. The applicants aver that Solomon Syanda Musili was also known as Solomon Chanda Musili. This is important as the registered owner of the suit premises is called Solomon Chanda Musili.
27. The power of the Probate and Administration court is given in sections 47 of the [Law of Succession Act](#) and Rule 73 of the [Probate and Administration Rules](#), 1980 which provide as follows:-

Section 47 of the [Law of Succession Act](#):-

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

Rule 73 of the [Probate and Administration Rules](#):-

“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.”

28. Although these powers appear to be broad, the orders that the court may issue are more circumscribed. The court may only issue those orders consistent with its jurisdiction. In my view, the Probate and Administration court may not, in the purported exercise of its powers under section 47 of the [Law of Succession Act](#), take up matters that fall within the jurisdiction of the specialized courts or, indeed, issue orders in areas of law, not within its purview.
29. Since the question of jurisdiction has been raised, the court must consider it as a preliminary point, for without jurisdiction, it should lay down its tools, for without jurisdiction, it cannot do anything further. The wise words of Nyarangi JA in [Owners of the Motor Vessel “Lillian S” vs Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR ring true now, as they did when he wrote them.



30. Thus, I must consider whether the Probate and Administration Court can consider a challenge to the registration of a charge against a title held by a deceased person's estate.
31. The contention in this case is that a charge is a transaction arising out of land and that the proper court to hear the challenge as to the manner the instrument was registered is the Environment and Land Court.
32. The Applicant aver that the issue herein is one of intermeddling, which his court can deal with under section 45 as read with Section 47 of the *Law of Succession Act*.
33. In view this Court lack the jurisdiction to consider the question as to the validity of the charge. I am guided in this by the persuasive authority of the judgment of Munyao Sila, J in where he stated as follows:-

“22. It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the *Land Act* and *Land Registration Act*. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the *Land Act* and *Land Registration Act*, (formerly in the Registered *Land Act* now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of Stephen Kibowen –vs- Agricultural Finance Corporation (2015) eKLR). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the *Land Act* and *Land Registration Act*, and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.”

34. I am also guided by the decision of the Court *in re estate of P N N (Deceased)* [2017] eKLR, where it was held that:-

“According to Article 162(2) of the *Constitution* the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the *Constitution* states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the *Constitution*. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the *Constitution*, meaning that this court then, by virtue of Article 165(5) of the *Constitution*, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri. Under Rule 41(3) (4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may



set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.”

35. In the circumstances I find and hold that this court lacks the jurisdiction to hear and determine the matter.
36. The Applicants were issued with a confirmed grant in 2020. It would appear to me that once the grant was confirmed, the court became functus officio, save or compliance with Section 83 regarding the provision of accounts and inventory. Upon confirmation, the administrators accrue all the rights of an owner and can do everything the owner can do. That would include pursuing relief for wrongful registration of a charge.
37. I must note that the administrators did not provide a copy of the title of the property. The court cannot tell which name appears on the title and what identification document was used during registration to compare it with what was supposedly used during the registration of the charge.
38. As the dispute appears to be who, between Solomon Chanda Musili and Solomon Syanda Musili, who owns the land, assuming that these are two different persons, it is my opinion that the proper court to resolve the matter is the Environment and Land court.
39. I note that Solomon Chanda Musili appeared before an advocate of the High Court of Kenya and executed change documents. In my view, only the ELC court can unravel the mystery of whether the deceased’s middle name was “Chanda“ or whether fraud was committed with the aid of an officer of this Court.
40. For the Probate and Administration court to carry out these tasks would be judicial overreach.
41. I find and hold that the application is for dismissal. The same is dismissed with no orders as to costs.
42. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Munyithya, for the Administrators/Applicants;

Ms Kinuva, for the 1st Respondent; and

Arthur - Court Assistant.

