



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Samuel Kahiu Waithaka (Deceased) (Succession Cause E159 of 2021) [2023] KEHC 19561 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19561 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE E159 OF 2021**

**A MSHILA, J**

**JUNE 30, 2023**

**IN THE MATTER OF THE ESTATE OF SAMUEL KAHIU WAITHAKA (DECEASED)**

**BETWEEN**

**BEATRICE WAWIRA NJERU ..... APPLICANT**

**AND**

**JAGI GAKUNJU ..... RESPONDENT**

**RULING**

1. By the Summons dated August 22, 2022 and brought under Sections 66 of the *Law of Succession Act* and Rule 49 of the Probate & Administration Rules, the inherent powers of the court and all other enabling provisions of the law, the Applicant sought for orders;-
  - a. That this Honourable court be pleased to join the applicant as an interested party and that the applicant be listed as a creditor/intended beneficiary in the estate of the late Samuel Kahiu Waithaka.
  - b. That plot A being proposed subdivision on LR No. 155/30 (Original No. 155/11/1) measuring 0.4049 Ha be allocated and transferred by the administrator to the applicant from the deceased's estate upon payment of the balance of the purchase price of Kshs. 21,880,000/=.
2. The Summons are premised on the grounds that the Applicant is an intended beneficiary having purchased Plot A when the deceased was alive *vide* a sale agreement where she paid part of the purchase price on 18/2/2021 being Kshs. 8,100,000/=. The Applicant ought to be enjoined as an interested party and the suit property allocated to her upon payment of Kshs. 21,880,000/= being the balance of the purchase price which she is ready and willing to pay.



3. Beatrice Wawira Njeru in her supporting affidavit deposed that on 18/02/2021 she entered into an agreement with the deceased for sale of the suit property where she paid Kshs. 8,100,000/= out of the purchase price of Kshs. 30,000,000/=. That John Muiruri, the deceased's representative forwarded to her a draft Agreement for Sale through email on 14/7/2021. That she also received a Power of Attorney executed by the deceased in favour of the Respondent to be able to effect the sale and transfer. She stated that she also received a Deed of Variation and that the deceased commenced sub division of LR No. 155/30 which was approved *vide* a Notification dated 12/5/2021. That she paid Kshs. 20,000/= for physical planning services. The Applicant contends that she is willing to complete the transaction as such ought to be enjoined in the Succession Cause as a creditor to the deceased's estate to avoid disputes arising from the administration of the estate by the respondent.
4. Subsequently, Norrene Njeri Waithaka And Haniel Kahiu Waithaka filed their grounds of opposition on 18/11/2022. They stated that the application was an abuse of the court process as the probate court is meant for distribution, that the Applicant is not a beneficiary of the deceased's estate and that the court lacks jurisdiction. Further, the said Sale Agreement was said to be a subject to criminal investigations. The suit property was said to have been included in the will dated 25/6/2021. The claim was said to belong to the civil court. They stated that the suit land where they were brought up was not available for sale.
5. Beatrice Wawira Njeru filed a further affidavit on 28<sup>th</sup> December, 2022. She stated that the grounds of opposition and/or Preliminary Objection is fatally defective as it is not a pure point of law which can dispose of the suit. She contended that being a creditor to the deceased's estate, she has an identifiable interest upon the distribution of the estate having paid Kshs. 8,120,000/= to the deceased as part payment for the sale of the suit land. She stated that she was not aware that the deceased's wife had died on 13/05/2020 as the same was not disclosed by the deceased. In any case, the deceased became the surviving joint proprietor. She contended that her claim ought to be determined first before distribution. The deceased was said to have failed to disclose about the will dated 26/06/2021. She contended that she would suffer irreparable loss if the orders sought are not granted.
6. John Mbugua Muiruri filed his affidavit in support of the Applicant's application. He deposed that he was the deceased's personal assistant and a signatory of the deceased's bank account no. 204xxxx764 ABSA Bank. That the deceased fell ill in the year 2020 and none of his children were available to assist the deceased as they lived abroad as such the deceased sold Plot A to the applicant to raise money for his treatment. He stated that the Applicant paid Kshs. 8,120,000/= being part payment of the purchase price which was partly used to cater for medical expenses. He urged the court to grant the orders sought by the Applicant.
7. Jagi Gakunju filed his affidavit on 17/02/2023 as the administrator of the deceased's estate and executor of the deceased's. That he filed a petition for grant of letters of administration following the deceased's death on 18/07/2021. That the deceased had trusted him to take care of him as his immediate family lived in America. He confirmed the sale of Plot A to the Applicant by the deceased where the deceased had conferred powers to him *vide* a power of attorney to effect the sale and transfer. He stated that the Applicant paid Kshs. 8,100,000/= being part payment to the deceased's account where he was a signatory and the money was used to cater for the deceased's medical expenses. He contended that these facts had been made aware to the beneficiaries who were available. He supported the Applicant's application to be identified as a creditor in the deceased's estate.



## Applicants Submissions

8. The application was disposed of by way of written submissions and submitted that the preliminary objection is based on disputed facts other than points of law hence fails to meet the threshold. Reliance was placed on the case of *Samuel Waweru vs Geoffrey Muboro Mwangi* (2014) eKLR where the court stated that a preliminary objection is a point of law if argued may dispose of the suit. It was also submitted that failure to file a replying affidavit rendered the averments in the application uncontroverted. Reliance was placed on among others the case in *Faustina Njeru Njoka vs Kimunye Tea Factory Limited* (2022) eKLR where an application stood unopposed for failure to file a Replying Affidavit. Further, the Applicant was said to be a creditor in the deceased's estate having bought Plot A. Reliance was placed on *Re estate Isaac Ngoru Munyua (deceased)* (2016) eKLR where a purchaser of the deceased's estate was said to qualify to be a creditor. The court was urged to find that the Applicant qualifies to be a creditor. The Applicant's claim was said to rank in priority to those of the beneficiaries.
9. Reliance was placed in *Re estate of Prisca Ong'ayo Nande (deceased)* (2020) eKLR where it was held that debts and liabilities are settled first before the estate is distributed. Lastly, it was submitted that the demise of the deceased's wife did not affect the sale as the deceased was a surviving joint tenant as such the property does not form part of the deceased's wife's estate. Case cited was *Re estate of Johnson Njogu Gichohi (deceased)* (2018) eKLR where the principle of survivorship in land owned jointly automatically passes to the surviving owner without the need to file for succession.

## Respondents Submissions

10. The beneficiaries submitted that there were glaring differences that would infer that the Sale Agreement was a forgery as the agreement was allegedly executed on 18/02/2021, while the deceased's wife died on 13/05/2020 in the USA and the last will and testament was written on 26/06/2021 bequeathing the suit property to the children of the deceased and the applicant was not included as a beneficiary. It was also submitted that the Applicant's claim lies in the civil court as she is not a dependant in the cause herein so as to be enjoined. The court herein was said to lack jurisdiction to deal with the Applicant's claim. Case relied on is the case *Re estate of Stone Kathuli Muinde (deceased)* (2016) eKLR where Musyoka J directed a claim involving ownership of land to be resolved in a civil court.

## Issues For Determination

11. Having considered the summons, the grounds of opposition and the rival submissions, the only issue framed for determination are;
  - i. Whether this court has jurisdiction to entertain the Applicants claim.

## Analysis

12. The Applicant claims that on 18/02/2021 she entered into an agreement with the deceased for sale of the suit property where she paid Kshs. 8,100,000/= out of the purchase price of Kshs. 30,000,000/= . She contended that she was willing to complete the transaction as such ought to be enjoined in the suit as a creditor to the deceased's estate to avoid disputes arising from the administration of the estate by the Respondent.
13. She submitted that she qualifies to be a creditor in the deceased's estate having bought Plot A and that her claim ranks in priority to those of the beneficiaries hence should be settled first before the estate is distributed.



14. The Respondent as the administrator of the deceased's estate and executor of the deceased's will supported the applicant's application. He confirmed the sale of Plot A and that the deceased had conferred powers to him vide a Power of Attorney to effect the sale and transfer. He submitted that the Applicant paid Kshs. 8,00,000/= being part payment. The application was also supported by the deceased's personal assistant.
15. It is the beneficiaries of the deceased's estate being the children of the deceased that were opposed to the application. They contended that the suit land was included in the will for distribution to the beneficiaries therefore, it was not available for transfer to the applicant. They indicated that the claim belonged to the civil court as such the court herein lacks jurisdiction. The validity of the sale agreement was also being questioned being that the deceased even after entering into the alleged sale agreement still included the property in his last will and testament.
16. It is this court's considered view, that in order to determine whether the Applicant is a creditor of the deceased's estate and before enjoining the Applicant as a creditor, the validity of the sale agreement needs to be determined; Also in need of being addresses is the part payment of Kshs. 8,120,000/= made by the applicant; thus a determination on whether the suit property should be transferred to the applicant and completion of payment of the full purchase price.
17. These issues are better placed in the Environment and Land Court as a succession court only deals with distribution of ascertained assets belonging to the deceased's estate.
18. Article 162(2) provides that:-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

- (a) ...
- (b) the environment and the use and occupation of, and title to, land.”

19. Article 165 of the [Constitution](#) sets out the jurisdiction of the High Court.

20. Article 165(5) states as follows:

“The High Court shall not have jurisdiction in respect of matters-

- (a) ...
- (b) falling within the jurisdiction of the courts contemplated in Article 162(2).”

21. Reference is made to the case [In re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) [2020] eKLR where Musyoka J stated that:-

Jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction the court cannot exercise power without violating the principles of rule of law and legality. It was in that context that the Court of Appeal, in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, stated:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



22. Also in the case *In re Estate of Boniface Njeru Ngemi (Deceased)* (2020) eKLR where Onyiego J. quoted the case of *In re estate of Solomon Mwangi Waweru (deceased)* (2018) eKLR where faced with a similar situation the court had this to say;-

“Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”

The court went further to state thus;

“It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.

23. The *Constitution* 2010 and the *Environment and Land Court Act* gives the Environment and Land Court the mandate and jurisdiction to hear and determine issues relating to ownership of land; This court being a succession one has no jurisdiction to determine any disputes that centre on ownership, occupation and use of land. Therefore, this court is not the proper forum as it has no jurisdiction to entertain the Applicants claim.

## **FINDINGS AND DETERMINATION**

24. For the reasons stated above this court makes the following findings and determinations;
- i. The application for enjoinder as an Interested Party is found to be incompetent and it is hereby struck out with no order as to costs.
  - ii. The applicant can file her claim in a court clothed with the requisite jurisdiction.
- 25 Orders Accordingly.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 30<sup>TH</sup> DAY OF JUNE, 2023.**

**A.MSHILA**

**JUDGE**

**In the presence;**

**Githua – for the Applicant**

**Githui- for the Beneficiaries/Respondents**

**N/A – by Mbichire & Co**

