



REPUBLIC OF KENYA



**Mbela v Mbela (Succession Cause 3309 of 2007)
[2022] KEHC 586 (KLR) (Family) (20 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 3309 OF 2007

MA ODERO, J

MAY 20, 2022

IN THE MATTER OF THE ESTATE OF DARIUS MSAGHA MBELA (DECEASED)

BETWEEN

JOSEPHINE EGWA MBELA APPLICANT

AND

BEATRICE MGOI MBELA RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated November 19, 2021 by which the Administrator/Respondent Beatrice Mgoi Mbela objected to various applications which had been filed by the Interested party/Applicant.
2. The Preliminary Objection was opposed by the Applicant Josephine Egwa Mbela who filed the Grounds of Opposition dated December 6, 2021.
3. The application was canvassed by way of written submission. The Administrator filed the written submissions dated 16th December 2021 whilst the Applicant relied upon her written submissions dated 7th March 2022.

Background

4. This succession cause relates to the estate of Darius Msagha Mbela (herein ‘the Deceased’) who died intestate on October 6, 2007. The Deceased was survived by a widow Beatrice Migoi Mbela (the Administrator herein) and five children.



5. Following the demise of the Deceased Grant a letters of Administration Intestate was made to his widow on April 16, 2008. The said Grant was duly confirmed on March 8, 2010 and was later rectified on 31st January 2017.
6. Thereafter Eric William Mbela one of the children of the Deceased (and a beneficiary to the estate) passed away on 31st December 2010. The Interested Party/Applicant Josephine Egwa Mbela who was the widow of 'Eric' was appointed co-Administrator of the estate of the late Eric Mbela on July 22, 2015.
7. Vide an application dated August 10, 2016 the Applicant sought to be substituted as a beneficiary of the estate of the late Darius Msagha Mbela. The application was allowed on January 31, 2017.
8. The Applicant then proceeded to file three (3) applications in this Succession Cause, which applications are yet to be heard. The first is the application dated July 17, 2017 by which the applicant seeks that the Administrator render an account of the estate and in particular the properties vested to Josephine Egwa Mbela. The Applicants also seeks that the Administrator be compelled to render account for the proceeds of the sale of Title Number 4752/2 Diani, South Coast Mombasa.
9. By an Application dated July 31, 2017 the Applicant seeks the immediate release of Kshs 2,000,000 to be utilized in payment of school fees for her minor son. Finally, in an application dated December 5, 2017 the Application seeks orders compelling the Administrator to appear in person in court to render an account of the estate of the Deceased.
10. In response to the three applications the Administrator filed the Notice of Preliminary Objection dated November 19, 2021 alleging that this court had no jurisdiction to entertain the three applications filed by the Applicant.
11. The Preliminary Objection was premised upon the following grounds:-
 1. The Grant of letters of Administration of the Estate of the Darius Msagha Mbela (Deceased) was confirmed on 8th March 2010. Transmission of the estate properties to the beneficiaries is not a process under the Law of Succession Act, Cap 160, nor the Probate and Administration Rules. It is process which is provided for under sections 61 and 62 of the Land Registration Act, No. 3 of 2012 and sections 49 to 51 the Land Act, No. 6 of 2012.
 2. Sections 2 and 101 of the Land Registration Act, No. 3 of 2012 and sections 2 and 150 of the Land Act, No. 6 of 2012 provide that the court with jurisdiction with regard to the administration, operationalization, application and interpretation of the two statutes is the Environment and Land Court established under the Environment and Land Court Act, 2011, which statute was enacted by Parliament in accordance with Article 162(3) of the Constitution of Kenya, 2010.
 3. By virtue of Article 162 (2) (b) of the Constitution of Kenya, 2010 and sections 4 and 13 of the Environment and Land Court Act, 2011, the Environment and Land Court has exclusive jurisdiction over all disputes relating to the environment and the use and occupation, and title to, land.
 4. The High Court has no jurisdiction to handle disputes relating to transmission of estate properties following the confirmation of the certificate of grant, which process is provided for under the Land Registration Act and the Land Act, which statutes are subject to the exclusive jurisdiction of the Environment and Land Court. Article 165(5) of the Constitution, 2010



declares that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2) of *the Constitution*.

5. For the above reasons this Honourable court lacks the requisite jurisdiction to hear and determine the Interested Part/Applicant's application dated July 17, 2017, July 31, 2017 and 5th December 2017".
12. As stated earlier the Notice of Preliminary Objection was opposed.

Analysis and Determination

13. I have carefully considered this Notice of Preliminary Objection the Grounds filed in opposition thereto as well as the written submissions filed by both parties. The definition of what constitutes a preliminary objection was set out in the celebrated case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Ltd* [1969] EA as follows:-

“As far as I am 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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper practice of raising points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop.” (own emphasis).

14. Closer home, the Supreme Court of Kenya in the case of *Independent Electoral & Boundaries Commission v Jane Cheprenger & 2 others* [2015] eKLR stated thus:-

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

15. Therefore a Preliminary Objection must raise a pure point of law –one which if determined may dispose of the entire case. It is trite law that jurisdiction is everything and without it a court cannot move one step further. In *Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd* [1989] eKLR. The Court Stated:-

“Jurisdiction is everything without it a court of law has no power to make one more step. Where a court of law 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 the moment it holds the opinion that it is without jurisdiction.” (Own emphasis)



16. The Administrator submits that this court has no jurisdiction to handle disputes relating to transmission of estate properties following the confirmation of the Grants. That once a Grant has been confirmed the Succession Cause is deemed concluded and any disputes relating to transmission of estate of properties is a process provided for under the [Land Act](#) and the [Land Registration Act](#) and falls under the exclusive jurisdiction of the Environment and Land Court.
17. The Administrator cited the case of [Re Estate of Sibanus Ramba Odera \(Deceased\)](#) [2020] eKLR in which Hon Justice William Musyoka observed as follows: -
- “.....After a grant is confirmed the process of transmissions is carried out in terms of the relevant land legislation. In other words, transmissions of property in accordance with a confirmation of Grant is not governed by the provisions of the [Law of Succession Act](#) or the Probate and Administration Rules. Disputes around transmission of property, as per the certificate of confirmation of Grant, therefore do not lie to the Probate court, but to the court with jurisdiction. Indeed the [Law of Succession Act](#) and the Probate and Administration Rules do not carry any provisions on transmission.....”
18. The Administrator submits that once the confirmed Grant was issued this court became “functus officio”. They cite the case of [Re Estate Of Andasbe Munyeti \(Deceased\)](#) [2021] eKLR where the court held that the process of transmission of property in accordance with the certificate of confirmed Grant is not a process under The [Law of Succession Act](#) 160 Laws of Kenya. The court stated that –
- “The effect of it is that once the court confirms a grant and issues a certificate or confirmation of Grant, its work would be over. The parties ought to move to the next step of execution of the confirmation orders which happens at the land registries and at the offices of other land authorities.”
19. On the basis of the above it is the position of the Administrator that the Probate court has no jurisdiction to hear and determine the applications filed by the Applicant.
20. In rejoinder the Applicant has cited the duties of an Administrator as set out in Section 83 of the [Law of Succession Act](#). She submits that the Administrator is required by law to complete the process of distribution within six (6) months of the date of confirmation of Grant.
21. The Applicant further submits that an Administrator has a legal duty to render accounts to the beneficiaries of the Estate. She cites the case of [Re Estate of David Kyulu Kaindi](#) [2015] eKLR in which the Court held that personal representatives are also trustees.
22. The Applicant also relies on the case of [Re Estate of Julius Mimano \(Deceased\)](#) [2019] eKLR, which it was held as follows: -
- “Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the Will, in cases of tested succession, and those identified at confirmation of grants in cases of intestacy. They would also be holding it for the benefit of creditors and any other person who might have a valid claim against the estate. That would mean that they are trustees of the estate and, indeed, the trustees Act Cap 167, Laws of Kenya, defines Trustees to include Executors and Administrators. In the circumstances, therefore, the personal representative would stand in a Fiduciary position so far as the property is concerned, and holds a duty to the beneficiaries to render an account to them for their handling of the property that they hold in trust for them. The duty to render account to



the beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on the behalf of the beneficiaries.”(own emphasis)

23. According to the Applicant the court cannot be said to be ‘functus officio’ when the Administrator has not rendered accounts as required by law. The Applicant places reliance on section 47 of the [Law of Succession Act](#) and Rule 73 of the Probate and Administration Rules. She urges the court to dismiss this Preliminary Objection.
24. The [Law of Succession Act](#) authorizes and indeed requires an Administrator to execute transfer and transact the estate of the Deceased to the identified beneficiaries in accordance with the confirmed Grant.
25. Section 83 of the [Law of Succession Act](#) provides for the duties of Personal representatives. Section 83(f) provides that
 - “Personal representatives shall have the following duties:-
 - a.
 - b.
 - c.
 - d.
 - e.
 - f. subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
26. Section 84 of the same Act provides that Personal representatives shall be deemed to be trustee’s for the beneficiaries of the estate. Any failure by an Administrator to comply with the provisions of sections 83 and 84 of the [Law of Succession Act](#) amounts to a breach of his/her fiduciary duties.
27. The Applicant has alleged that the Administrator has failed to comply with the Act by failing and/or refusing to give a statement account to the court and/or to the beneficiaries and by failing within six (6) months, to conclude the distribution of the estate. These in my view are matters which falls squarely under the jurisdiction of the Probate Court. The Administrator has not denied any of the allegations made by the Applicant instead, she has filed a Preliminary Objection seeking to have the very valid queries being raised by the Applicant struck out.
28. The Administrator has insisted that the matters being raised by the Applicant fall under the jurisdiction of the Environment and Land Court, as the same involve the question of transmission of the estate to the beneficiaries.
29. I have carefully perused the three applications filed by the Applicant. The applications do not cause raise issues regarding transmission of the estate alone. The applications raise issues concerning accountability by the Administrator, request for funds for education of a minor and accountability in respect of an estate property, which was allegedly sold. These issues do not fall under the exclusive jurisdiction of the ELC.



30. The duty of the Probate Court is to oversee and supervise the distribution of the estate to the genuine beneficiaries. In *the Estate of Alice Mumbua Mutua (Deceased)*[2017] eKLR Hon Justice Musyoka stated as follows:-

“.....The *Law of Succession Act*, and the Rules made thereunder, 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.

..... The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants.....” (Own emphasis)

31. Where an Administrator has failed to comply with any of his/her obligations as set out by section 83, then it falls to the Probate Court to enquire into the matter. Where as in this case a beneficiary has expressed frustration about the failure to distribute the estate a full fourteen (14) years after the Grant was issued then the Probate Court must enquire into the issue and must call the Administrator to account.

32. The issues raised by the Applicant do not amount to a purely land disputes nor do they amount to dispute over ownership of land as is being suggested by the Administrator. The Applicant has alleged that the Administrator has failed in her duties as personal representatives. This is not an issue for the ELC court but falls squarely within the purview of the Probate Court.

33. Section 47 of the *Law of Succession Act* provides as follows: -

“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” (own emphasis)

34. Similarly Rule 73 of the Probate and Administration Rules provide that –

“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.”

35. I find that the dispute herein falls squarely within the jurisdiction of this court. I find no merit in the Notice of Preliminary Objection dated 19th November 2021. The same is dismissed in it’s entirety. The Administrator will meet the costs for this Preliminary Objection.

DATED IN NAIROBI THIS 20TH DAY OF MAY 2022

MAUREEN A. ODERO

JUDGE

