



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of cosmas Muange Kivuva (Deceased) (Succession Cause  
1249 of 2012) [2022] KEHC 10374 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10374 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 1249 OF 2012**

**MW MUIGAI, J**

**JUNE 20, 2022**

**BETWEEN**

**JAMES KIOKO MUANGE ..... 1<sup>ST</sup> ADMINISTRATOR**

**MIRIANA MBAIKA MUANGE ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**BENJAMIN NDETI NG'ATI ..... RESPONDENT**

**AND**

**SIMON MUTINDA MUMU ..... INTERESTED PARTY**

**RULING**

1. The deceased herein, Cosmas Muange Kivuva died on 14<sup>th</sup> October, 2011 at Makueni District Hospital.
2. On 13<sup>th</sup> December, 2012, the 1<sup>st</sup> and 2<sup>nd</sup> Administrators herein applied for letters of administration Intestate in the estate of the deceased herein and on 28<sup>th</sup> March, 2013 the Grant of Letters of Administration was granted to the administrator herein.
3. On 21<sup>st</sup> November, 2013, the Administrators, applied for the Confirmation of Grant in the estate of the deceased herein. The consent in support of the Confirmation of the Grant, was signed by the following;

1<sup>st</sup> House

a. James Kioko Muange-son

B. Catherine Mutindi Muange-daughter

2<sup>nd</sup> House



- c. Mariana Mbaika Muange-daughter
- d. Francisca Mutheu Muange-son
- E. Stephen Muthiani Muange-son
- F. Elizabeth Mueni Muange-daughter
- G. Bakhita Mwende Muange-daughter

1. In the schedule of assets, the only property listed for distribution in the estate of the deceased herein was Makueni/kako/667 that is to be transferred to James Kioko Muange and Mariana Mbaika Muange and in a further affidavit, the schedule of distribution was amended to state that the property was to be held in trust by Administrators for the other beneficiaries.
2. Attached to the Certificate of Confirmation of Grant issued on 11<sup>th</sup> January, 2017 and dated 21<sup>st</sup> February, 2017 is a schedule of distribution of the property. The 1<sup>st</sup> Administrator herein is to hold in trust for himself and Catherine Mutindi Muange while the 2<sup>nd</sup> Administrator is to hold in trust for herself and beneficiaries of the 2<sup>nd</sup> House the share of the Suit property Makueni/kako/667.
3. The Interested Party herein filed two applications which are the subject for determination. The Summons for Further Rectification of Grant dated 7<sup>th</sup> August, 2019 and the Summons dated 30<sup>th</sup> July, 2020 seeking Interim Preservatory Order against the Respondent, his servant and/or agents restraining the from practicing deforestation and fencing of parcel of land No. Makueni/kako/665.

Summons for Further Rectification of Grant Dated 7/08/2019

7. The Interested Party sought the following orders:-

1. The Rectified Certificate of Confirmation of Grant dated 21/02/17 be further rectified to include Land Parcel No. Makueni/kako/665.
2. The Grant be issued to the Petitioners herein be confirmed in terms of the attached Schedule of Distribution.

8. The interested party's Summons for further Rectification of the Grant is supported by his affidavit sworn on even date. The Interested Party averred that the deceased herein owned another parcel of land namely Parcel No. Makueni/kako/665 which initially belonged to the deceased's late mother by the name Agnes Nduku Kivuvas per the Certificate of Official Search marked as "SMM2" and "SMM3" respectively.

9. According to the Interested Party, the deceased herein petitioned for Letters of administration Intestate in the estate of her mother and a Certificate of Confirmation was issued to him on 18<sup>th</sup> May, 2011. However, the Interested Party averred that before the demise of the deceased's mother, on 19<sup>th</sup> January, 2011 the deceased's mother sold to him 3 acres of the parcel of land No. Makueni/kako/665 and thereafter 7 acres as per the annexed Sale Agreements marked as "SMM5" and "SMM6" respectively. According to the Interested Party, the deceased herein had been told by the deceased mother to legalize and formalize the sale as per the sale agreement dated 3/10/11.

10. On the advice of his advocate, the Interested Party averred that the said parcel of land was the subject matter in Machakos High Court Succession Cause No.153 of 2012 relating to the deceased person



herein but the matters was withdrawn, closed and parties were ordered to pursue their interest in this instant Cause. According to the Interested Party, it is in the interest of justice that the Certificate of Confirmation of Grant be rectified in terms of the attached Schedule of Distribution.

Respondent's Replying Affidavit Sworn 27/09/2021

11. The respondent opposed the summons for further Rectification of the Grant vide his Replying Affidavit sworn on 27<sup>th</sup> September, 2021. He averred that the Interested Party is not an administrator or beneficiary of the estate herein hence his claim of being a buyer of the parcel of land lies with the Environment and Land Court.
12. According to the Respondent, the Summons is misconceived, frivolous, and incompetent and an abuse of the court process as it has been brought under Section 74 of the *Law of Succession Act* which only envisages to errors in a Certificate of Confirmed Grant. According to the Respondent, the addition of a new asset, addition of a new beneficiary and redistributing an asset are fundamental changes to the Certificate of Confirmation and cannot be classified as errors as they go to the core of distribution.
13. According to the Respondent, he is a bonafide buyer of the parcel of land as the Applicant hence their dispute over ownership of land lies with the Environment and Land Court and not in this Court. The Respondent urged this Court to dismiss the Summons with costs.

#### **Summons Dated 30/07/2020**

14. The Interested Party sought the following orders:
  1. This Application be certified urgent and be heard ex parte in the first instance.
  2. An Interim Preservatory Order be issued against the Respondent by himself, his servants and/or agents restraining them from practicing deforestation and fencing Land Parcel No. Makueni/kako/665 pending the hearing and determination of the Applicant interpartes.
  3. An Interim Preservatory Order be issued against the Respondent by himself, his servants and/or agents restraining them from practicing deforestation and fencing Land Parcel No. Makueni/kako/665 pending the determination of this Succession Cause.
  4. An Order be issued directing the Respondent herein to remove the fence he has erected on Land Parcel No. Makueni/kako/665.
  5. Cost of this Application.
15. The Summons is supported by the Interested Party affidavit sworn on even date. According to the Interested Party, he is a purchaser, the deceased's mother sold to him 3 acres of the said parcel of land at Kshs. 360,000/- as per the annexed sale agreement marked as "SMM2". He averred that the deceased's mother further sold him 7 acres. According to the Interested Party, the deceased herein and his mother passed on before effecting transfer of 10 acres to him of parcel of land No. Makueni/kako/665.
16. He averred that he has learnt that the Respondent, Benjamin Ndeti Ng'ati, a purchaser is practicing deforestation and fencing on whole parcel of land causing wanton destruction. According to the Interested Party, the Respondent is neither a beneficiary of the deceased herein nor an Interested Party whatsoever. According to the Interested Party, it is in the wider interest that the deceased's estate and by extension his interest the suit property be preserved to avert further damage. He asserted that he stands to suffer immensely unless the orders he has sought are granted.



### **1<sup>ST</sup> Administrator's Replying Affidavit Sworn 25/10/2021**

17. In response to the Interested Party's twin applications, the 1<sup>st</sup> Administrator averred that the Interested Party and Respondent dispute over parcel No. Makueni/kako/665 can only be determined the Environment and Land Court. He averred that he does not recognize either of them. According to the 1<sup>st</sup> Administrator, he will abide by the ruling of the Environment and Land Court.

### **Interested Party's Supplementary Affidavit Sworn 6/12/2021**

18. In response to the Respondent's and 1<sup>st</sup> Administrator's replying affidavits, on the advice of his advocate, the Interested averred that this Court has the requisite jurisdiction to Rectify a Grant as well as issue Preservatory Orders regarding the property of the deceased. According to Interested Party, vide a ruling delivered at Machakos High Court Succession Cause No.523 of 2012, the Respondent herein had been granted 60 days to regularize his position by taking steps vide Makueni SPM Succession Cause No.3 of 2011 but the Respondent has never complied.
19. The Interested Party accused the Respondent for being in unlawful possession of 1.5 acres of the parcel of land No. Makueni/kako/665 and not the 10 acres bought by the Interested Party. According to the Interested Party, in July 2020 the Respondent started fencing and practicing deforestation on the said parcel of land without any colour of right whatsoever.

### **Interested Party's Submissions**

20. On behalf of the Applicant, it is submitted that the issues for determination are:-
1. Whether the Applications dated 7/08/2019 and 30/07/2020 are merited
  2. Whether the Environment and Land Court has jurisdiction to entertain the twin application
  3. Who should bear costs.
21. On the first issue, it is submitted that rectification of Grants is a preserve of this Court as per Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules.
22. It is submitted that it is not in contention that:
- a. The parcel of land No. Makueni/kako/665 is registered in the name of the deceased herein as per the official search marked as "SMM2".
  - b. The said parcel of land belonged to the deceased mother Agnes Nduku Kivuva (Deceased) as per the official search marked as "SMM3".
  - c. The deceased herein obtained the letters of administration in respect of the estate of his mother as per the Grant marked as "SMM4".
23. It is submitted that as per the sale agreement attached and marked as "SMM5", the deceased's mother sold 3 acres to the Interested Party. According to the Interested Party, prior to the demise of the deceased mother, she further sold 7 acres to the Interested Party.



24. In support of the Interested Party’s submissions, reliance was placed on the case of *In re Estate of Stanley Mwiti Itheria (Deceased)* [2017] eKLR where Gikonyo J. opined inter alia:

“ Accordingly, by the power conferred upon the Court in Section 74 of the *Law of Succession*, I hereby order that:

- a. ....
- b. ....
- c. The 1000 shares in National Bank of Kenya Ltd in the Share Certificate No[.....] but which had been omitted from, shall now accordingly included in the Certificate of Confirmation of Grant;.....”

25. Regarding the Summons dated 30<sup>th</sup> July, 2020 seeking Preservatory Orders, reliance was placed on Section 45(1)(2)(a) and (b) of the *Law of Succession Act*. Section 45 is to the effect that intermeddling with estate of the deceased is a criminal offence punishable under Subsection 2(a). Reliance was also placed on section 47 of the *Law of Succession* and rule 73 of the Probate and Administration Rules which confer this Court with inherent powers to make orders in the interest of safeguarding the deceased estate. The Interested Party relied on the case of *Floris Piezzo & Another vs. Giancarlo Falasconi* [2014] eKLR where the Court of Appeal upheld the High Court reliance on section 47 and Rule 73 to invoke its inherent jurisdiction to make orders as may be necessary for the ends of justice or prevent abuse of the process of court. It is submitted that the respondent has started practicing deforestation and fencing the whole parcel of land Makueni/kako/665 causing wanton destruction as per the photographs marked as annexure “SMM6”.

26. According to the interested party, he has sought the intervention of this Court since the 1<sup>st</sup> and 2<sup>nd</sup> Administrators have failed to discharge their duties as embedded under section 83 of the *Law of Succession Act*.

27. As to whether it is this court or the Environment and Land Court that has the jurisdiction to entertain the interested party twin applications, it is submitted that it is clear that the alterations, amendments and/or rectification of Grants coupled with preservation of the deceased’s estate is a preserve of this court. According to the Interested Party, there is nothing to be heard and determined by the Environment and Land Court owing to the Respondent’s non-compliance with the High Court Ruling in Succession Cause No.523 of 2012.

28. According to the interested party, rule 69 of the *Probate and Administration Rules* is to the effect that award of costs is a discretion of the court. That it is trite law that costs follow the event hence the Interested Party is entitled to costs since the twin applications have merit. According to the Interested Party the Environment and Land Court is devoid of jurisdiction.

### **1<sup>st</sup> Administrator & Respondent Submissions**

29. The 1<sup>st</sup> Administrator and the respondent waived their right to file written submission and placed reliance of their replying affidavits.

### **Determination**

30. I have considered the twin Applications, affidavit in support and in opposition to the applications as well as the submissions and cases relied upon. The court is asked to determine the following issues;



## Rectification of Grant

31. This court is guided by the following provisions of law;  
The *Law of Succession Act* section 74 provides for rectification as follows;  
Errors may be rectified by court Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.
32. The interested party's claim to include land parcel No Makueni/Kako/665 that is alleged to be in the deceased's name but acquired from the deceased's late mother's estate as beneficiary does not amount to an error envisaged under section 74 LSA.
33. The interested party's claim is of a proprietary interest as a purchaser not of the deceased's estate but of the deceased's mother's estate.
34. The interested party cannot legally and successfully seek to rectify the confirmed grant of the deceased's estate herein in the absence and/or with consents of the administrators and beneficiaries as the claim amounts to redistribution of the estate of the deceased to the beneficiaries contrary to the confirmed grant.
35. Further, the interested party lacks locus standi to file the instant application in these proceedings as it is only administrator or beneficiary of the estate of the deceased who may file to rectify the grant of representation or the confirmed grant.
36. The interested Party is not joined to the proceedings and thus cannot institute the rectification application without notice to beneficiaries and/or administrators of the estate.
37. The interested party's remedy is to file the matter in Environment & Land Court (ELC) which has jurisdiction to determine use, title and ownership of land among other issues by virtue of section 13 of the *ELC Act*.

## Preservation Orders

38. The Application is premised on section 45 of the *Law of Succession Act* and rule 73 of the Probate and Administration Rules. Section 45 provides:-
  - “(1) Except so far as expressly authorized by this Act, or by any other 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.
39. Hon. W. Musyoka, J. in *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR while interpreting the provision stated that:
  - “The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”



40. The interested party has no grant of representation, any legal right bestowed by law either by LSA or any other written law and therefore cannot succeed in grant of interim preservation of Land Parcel No Makueni /Kako/665 against the respondent; yet the Respondent is another interested Party who claims similar proprietary right over the same land as the interested party as a purchaser.
41. Again, this court has jurisdiction in administration and distribution of the deceased's estate that is to confer beneficial right/ interest of the deceased's estate to the beneficiaries but not determine purchase of land disputes. Hence in such instance grant of interim orders of preservation without requisite jurisdiction to undertake determination of each party's claim to the suit property is for the court to act in vain.

### **Disposition**

1. The application to rectify Confirmed Grant is denied dismissed.
2. The Application for interim preservatory orders is denied dismissed.
3. Being a Family matter each party to bear own costs.
4. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 20<sup>TH</sup> DAY OF JUNE, 2022 (VIRTUAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

