



REPUBLIC OF KENYA



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**In re Estate of Mathew Liluma Shinjili alias Mathew Lilimi Shinjili (Deceased)
(Succession Cause 851 of 2013) [2022] KEHC 10959 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 851 OF 2013**

WM MUSYOKA, J

JULY 29, 2022

**IN THE MATTER OF THE ESTATE OF MATHEW LILUMA
SHINJILI ALIAS MATHEW LILIMI SHINJILI–(DECEASED)**

RULING

1. This is one of those matters that I took over from F Amin J on June 16, 2022. It was due for ruling on April 12, 2022.
2. It is not too clear to me what I should be ruling on, as there is no pending application. The only application filed herein is dated January 28, 2015, but the same was disposed of on June 3, 2015, where it was allowed. It sought rectification of grant, to correct errors in the names of the administrators and the deceased.
3. On March 9, 2015, Tadeus Kakhayenga Mukabwa, filed an affidavit of protest against confirmation of grant, sworn on March 8, 2016. To that affidavit of protest, the administrator, Dunstone Ilamoya Lihema, filed a reply, through an affidavit sworn on October 18, 2018. He also filed witness statements, on September 20, 2018, by Anjelina Khasindu Mathew and himself.
4. Directions were given on September 26, 2018 for the protest proceedings to be canvassed by way of oral evidence, based on the witness statements. There was no oral hearing on March 28, 2022, where F. Amin J fixed the matter for ruling on April 12, 2022.
5. The protest proceedings herein are misconceived. Firstly, they are initiated by way of an affidavit. Affidavits are not pleadings, and they do not initiate proceedings. Proceedings are initiated wither by way of plaint, petition, originating summons, originating motion, motion or chamber summons. The affidavit supports the pleadings by providing the pretrial or evidential to the process. Secondly, the affidavit of protest is alleged to be against confirmation of grant, yet there is no pending application for confirmation of grant. None has been filed. Thirdly, protest proceedings have no life of their own. They are but a mere response to a summons of confirmation of grant. The affidavit of protest is the reply to the summons of confirmation of grant. Without a summons for confirmation of grant, there can be no protest proceedings. Fourthly, the affidavit of protest does not initiate protest proceedings, its effect is to turn the otherwise uncontested confirmation proceedings contentious.



6. Protest proceedings are promised for under rule 40(6) of *Probate and Administration Rules*. From the language of rule 40(6), it should be clear that the protest affidavit cannot stand alone, for it sides on the back of the summons for confirmation of grant. It is filed by a person who does not agree with confirmation of grant and distribution of the estate as proposed with summons for confirmation of grant.
7. The said provisions, for avoidance of doubt states as follows;

“40(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in form 10 against such confirmation stating the grounds of his objection.”
8. The protest proceedings herein are, therefore, premature and misconceived, and should be ignored. The affidavit of protest was filed premature and in abuse of court process. It shall be struck out and expunged from the record, and so shall the replying affidavit of October 18, 2022 and the two witness statements. The directions given on September 26, September 2018, on the disposal of the protest proceedings, are hereby set aside.
9. The way forward should be that the administrators file application for confirmation of their grant, and Tadeus Kakhayangu would be at liberty, under rule 40(6) of the *Probate and Administration* to file and serve an affidavit of protest to the confirmation of grant on distribution of the estate, or both.
10. I note that Tadeus Kakhayanga Mukabwa, who I think I should refer to as the prospective protestor, alleges to have had bought certain parcels of the land, from the deceased and a son of the deceased, the alleged sales are contested by the administrators, vide the replying affidavit of October 18, 2022 and the two witness statements of even date. It will probably serve no purpose to agitate that claim here as the administrator do not accept the prospective protestor as a legitimate creditor of the estate. The ideal thing should be for the prospective protestor to initiate separate proceedings against the estate to pore his case there against the estate, as cossetted in *In re Estate of Kimani Kimuthia (Deceased)* [2008] eKLR (Ibrahim J) and *in re Estate of Julius Ndubi Javan* (deceased)(2018)eKLR (Gikonyo J).
11. The High Court, sitting as a probate court, cannot determine questions on validity of sales transfer between the deceased or the estate and third parties. That jurisdiction was taken away by the *constitution*, vide articles 162(2) and 165(5) state as follows;

“162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

 - a. employment and labour relations; and
 - b. the environment and the use and occupation of, and title to, land”

“165(5)The High Court shall not have jurisdiction in respect of matters—

 - a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. falling within the jurisdiction of the courts contemplated in article 162 (2).”



12. Transactions or dealings relating to land are governed by the *Land Registration Act*, no 3 of 2012, and the *Land Act*, no 6 of 2012. Disposal of interests in land, by way of sale, fall under such transactions and dealings. Section 2 and 101 of the *Land Registration Act* and sections 2 and 150 of the *Land Act*, identify the Environment and Land Court as the court for the purposes of the two statutes for addressing any actions, disputes and proceedings relating to any of the matters or issues governed by the two said statutes.
13. Sections 2 and 101 of the *land Registration Act* state as follows;
- “ means the Environment and Land Court established by the *Environment and Land Court Act*, 2011 (no 19 of 2011), and other courts having jurisdiction on matters relating to land;”
- “101 The Environment and Land Court established by the *Environment and Land Court Act*, 2011 (no 19 of 2011) and subordinate courts have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”
14. Section 2 and 150 of the *Land Act* provide as follows
- “2 means the Environment and Land Court established under the *Environment and Land Court Act*, 2011; no 19 of 2011”
- “150 The Environment and Land Court established in the *Environment and Land Court Act* is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”
15. Waiting for the administrators to file for confirmation of grant, in order for the prospective protestor file his claim will not aid at all. For at confirmation, he will have to contend with rule 41(3) of the *Probate and Administration Rule* enables the probate court to remove a contested asset from the schedule of distribution to enable the parties initiate separate proceedings to determine the status of ownership of the said contested asset. Rule 41(3) is clear that liability contested claims an ownership of assets are not for determination in succession proceedings for sole purpose. Rule 41(3) of the *Probate and Administration* should be read together with articles `162(2) and 165(5) of the *Constitution*, so that if the High Court has no jurisdiction to determine questions little to property, for that is what the prospective protestor is raising, then the High Court, sitting as a probate court, which proceed with such a claim will utilize rule 41(3) of the *Probate and Administration Rule* by setting aside the contested asset to enable the protestor place the dispute before the Environment and Land Court for determination of ownership.
16. Rule 41(3) of the *Probate and Administration Rule* states as follows:-
- “41(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”
17. These contested transaction relating to land happened, allegedly in 1996 and 1997. Recovery of land is subject to limitation, under the *limitation of Actions* Cap 22 Laws of Kenya. The death of the



perpetrator of the subject land has no effect or impact on the limitation period stated in the *Limitation of Action Act*. Consequently, the prospective protestor herein vows the risk that his claim will become stale as he pursues these ill-advised proceedings before the probate court in this succession cause.

18. I shall leave it at that, and let the parties be guided accordingly.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH
DAY OF JULY 2022**

W M MUSYOKA

JUDGE

