



**In re the Estate of Mambo Ngala alias Mumbo Ngala Chitu (Deceased) (Succession Cause 551 of 2007) [2022] KEHC 11295 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11295 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**SUCCESSION CAUSE 551 OF 2007**  
**JO NYARANGI, J**  
**JULY 27, 2022**  
**IN THE MATTER OF THE ESTATE OF MAMBO NGALA ALIAS MUMBO**  
**NGALA CHITU (DECEASED )**  
**PETER NGALA & OTHERS .....APPLICANTS**  
**VERSUS**  
**JAMES KALUGU MUMBO**  
**CARLOS MUMBO CHARO .....RESPONDENTS**  
**AND**  
**HARON MWANG'OMBE MAGHANJO**  
**PARTRICK WAMBUGU NYOIKE .....INTERESTED PARTIES**

**RULING**

1. The deceased herein Mambo Ngala Nyala alias Mumbo Ngala Chitu died intestate on 22<sup>nd</sup> September, 1992. On 4<sup>th</sup> October 2007, James Kalugu and Carlos Mumbo Charo (respondents) in their capacity as the deceased's sons petitioned for a grant of letters of administration intestate. In their petition, they stated that the deceased was survived by two widows and four sons them included. The only property listed as comprising the estate was Kilifi/Mywapa/788.
2. A grant was issued on 9<sup>th</sup> February, 2009 and confirmed on 18<sup>th</sup> December, 2009. Subsequently, the administrators subdivided the property into Kilifi/Mtwapa /3312-3717.
3. Consequently, Peter Ngala and others being half siblings to the deceased claiming that the deceased had been registered and therefore held the property in trust for the family, lodged an application dated 8<sup>th</sup> April, 2013 and filed on 10<sup>th</sup> April, 2013 seeking to revoke the grant on grounds that they are beneficiaries to the estate and that they were not consulted. They also filed an application dated 3<sup>rd</sup> July, 2013 seeking restraining orders against the interested parties from disposing of L.R No 3715 and 3717 Kilifi/Mtwapa sold to them by the respondents.



4. In their response, the respondents (petitioners) confirmed that they had sold the two plots arising from the sub division of the only listed estate asset. They also confirmed that they had sold Kilifi/ Mtawapa 3715 to the 2<sup>nd</sup> interested party one Patrick Wambugu and 3717 the 1<sup>st</sup> interested party Haron Mwangombe.
5. After hearing the two applications, the court dismissed them on 24<sup>th</sup> January, 2021 on grounds that the court had no jurisdiction to determine issues of land ownership dispute based on trust; that the applicants were time barred to claim dependency after confirmation of the grant; the applicants being brothers and nephews to the deceased were not direct heirs to the deceased while the deceased's children were alive and had the right to dispose of the property.
6. Subsequently, the applicants Peter Ngala and others filed a notice of motion application dated 12<sup>th</sup> October 2020 seeking to stay proceedings in Kilifi SRMCC No. E65 of 2020 between Rachel Mbeyu Chidoti vs Peter Mwaruga Ngala and others pending interpartes hearing and subsequently pending hearing and determination of the appeal filed herein being Court of appeal civil appeal case number 47 of 2021 against the ruling delivered by justice Thande.
7. The application is premised upon grounds stated on the face of it and averments contained in the affidavit in support sworn by Peter M. Ngala on 12<sup>th</sup> October, 2021 on his own behalf and that of his co-applicants. Basically, the applicants argued that they have filed an appeal against the ruling of this court delivered on 24<sup>th</sup> January, 2021; that they have a good appeal with high chances of success considering that the court had recognized them as dependants; that there will be no prejudice in granting the orders; that the widow to the 1<sup>st</sup> interested party had filed Kilifi SRM CCNE65 of 2020 seeking to evict them from the suit property where they are staying and unless the orders sought are granted, they were likely to be evicted.
8. In response, the interested parties filed a preliminary objection dated 28<sup>th</sup> October, 2021 stating that this court has no jurisdiction to hear matters before ELC which is a specialized court under Article 162(2) (b) of *the Constitution*, section 9 of the magistrate's court and Section 26 of the *Environment court Act*.
9. They further filed grounds of opposition of even date stating that the application is an abuse of the court process, it is frivolous and vexatious; there cannot be a stay while there is nothing to execute; the orders sought are meant to perpetuate illegal occupation; application is premature as there are no orders for execution and that this court has no jurisdiction to entertain the suit.
10. Besides, Rachel Mbeyu swore an affidavit on 28<sup>th</sup> October, 2021 claiming to be a widow of the 1<sup>st</sup> interested party thus opposing the application by reiterating the grounds of opposition.
11. When the matter came up for directions, parties agreed to file submissions to dispose the application. The applicants filed their submissions on 10<sup>th</sup> November, 2021 through the firm of Madzayo, Murima and Jadi advocates basically reiterating the averments contained in the affidavit in support of the application. It was contended that the appeal pending before the court of appeal will be rendered nugatory if stay of execution is not granted. To support that argument, counsel cited the case of *Kenya Wildlife vs James Mutembei* (2019)eKLR. It was further contended that the applicant will suffer prejudice should the orders be declined.
12. Counsel submitted that the interest of justice demands that the application be allowed pending the outcome of the appeal already preferred. That the preliminary objection is misplaced as this court has unlimited jurisdiction to supervise a magistrate's court and that Article 162(2) (b) of *the Constitution*



does not create magistrate's court; that the relevant court to issue stay is the court that issued the impugned orders.

13. The interested parties filed their submissions through the firm of Oddiaga & company advocates on 12<sup>th</sup> November, 2021 principally reiterating their preliminary objection, grounds of opposition and replying affidavit to express the point that this court does not have jurisdiction to hear a land dispute over ownership. To support this position, the court was referred to holding in the case of Owners of Motor Vessel Lillian "S" vs Caltex Oil (K) Ltd (1989) e KLR where Nyarangi J A stated that without jurisdiction a court cannot move one more step

### Determination

14. I have considered the application herein, response thereto and submission by both parties. Issues that arise for determination are;
  1. Whether this court has jurisdiction to issue stay of execution order against Kilifi SRM CC E65OF 2021.
  2. Whether the application has met the threshold for stay of execution in respect to the ruling delivered on 24<sup>th</sup> January, 2020.
15. The genesis of the application herein is the delivery of the ruling dated 24<sup>th</sup> January, 2020 where the court dismissed a revocation application filed by the applicants. It's this dismissal that triggered one Mbeyu a widow to the 1<sup>st</sup> interested party who had purchased part of the estate comprising of L.R No. Kilifi Mtwapa/3717 to file civil suit No 65/2021 Kilifi seeking to evict the applicants from the suit property. According to the 1<sup>st</sup> interested party and the respondents, the suit before Kilifi court is a land related dispute to which this court has no jurisdiction to hear and determine.
16. The key question is, does this court sitting as a probate court have jurisdiction to entertain the application. It is trite law that jurisdiction is everything and without it, a court cannot move any further step. This position was succinctly stated in the frequently quoted case of Owners of Motor Vessel "Lillian"s" Vs Caltex oil (K) Ltd ( Supra)
17. Similar position was held in Samuel Kamau Mwaura and another Vs Kenya Commercial Bank and 2 others Supreme Court Civil Appeal No 2 /2011(2021) e KLR. Equally, in the matter of advisory opinion of the court under Article 163 of the Constitution Application No 2/11 at para 30, the Supreme court held as follows;

“it is trite law that a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of parliament; where the legislation is clear and there is no ambiguity”
18. There is no dispute that Kilifi magistrate's court is handling a matter relating to a dispute over land ownership. Section 13 (1) of the environment and land court Act bestows original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution to the ELC. Sub -section (4) further provides that the ELC does exercise appellate jurisdiction over decisions of subordinate courts or local tribunals in matters falling within the jurisdiction of the court. Therefore, supervisory powers over magistrate's court when exercising jurisdiction over land ownership disputes squarely lie before the ELC with equal status to the high court.
19. In view of these clear provisions, the high court can not purport to exercise its supervisory jurisdiction over magistrate's court when dealing with land related issues. A probate court cannot arrogate itself



jurisdiction on land related disputes. There is no substantive suit pending before the high court relating to land dispute. The notice of motion is not anchored on any substantive suit hence cannot stand on its own. In the circumstances, it is my holding that this court has no jurisdiction to entertain the instant application.

20. Regarding stay of execution of the ruling of Justice Thande delivered on 24<sup>th</sup> January, 2020, the applicant must prove the ingredients of Order 42 rule 6 (2) which provides; proof that the applicant is likely to suffer substantial loss should the court decline to grant the order; the application has been filed within reasonable time and that security for due performance of the decree has been deposited.
21. However, before the court attempts to consider whether the three conditions have been met, the court must be satisfied that there is an order capable of execution. According to the ruling of 24<sup>th</sup> January, 2020, the court merely dismissed the application for revocation. To that extent, there is no positive order issued capable of stay. It is trite that negative orders are not capable of execution. See *Raymond M. Omboga vs Augustine Ayam Maronga Kisii* HCCCA No. 15/2010 where Makandia J stated that;  
  
“the order dismissing the application is in the nature of a negative order and is incapable of execution ... Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order.”
22. Similar position was held in the case of *Mbarak Said Ali & another Vs Sultan Palace development Limited* ( 2021) e KLR where the court of appeal held that;  
  
“ Given that the appellants are seeking to stay a negative order, we have come to the conclusion that the two limbs for consideration in a 5(2) (b) application have not be satisfied...”
23. Taking into consideration the totality of the circumstances surrounding the relevant law governing stay of execution of proceedings, Order 42 rule 6 (2) of the *CPPRS* cannot apply. This is because there is no order for execution hence nothing to be stayed. Accordingly, the application herein is incompetent and therefore frivolous. The same is dismissed with costs to the 1<sup>st</sup> interested party.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27<sup>TH</sup> DAY OF JULY, 2022**

.....

**J. N. ONYIEGO**  
**JUDGE**

