



REPUBLIC OF KENYA



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In re Estate of the Nathan Kiio Itinga (Deceased) (Succession Cause E002 of 2021) [2022] KEHC 11638 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
SUCCESSION CAUSE E002 OF 2021
GMA DULU, J
JULY 22, 2022**

IN THE MATTER OF THE ESTATE OF THE NATHAN KIIO ITINGA (DECEASED)

BETWEEN

**REUBEN KIOKO KAKYEMA 1ST APPLICANT
JOYCE WANZA WAMBUA 2ND APPLICANT
MBOYA WAMBUA ITINGA 3RD APPLICANT**

AND

**KIOKO WAMBUA ITINGA 1ST RESPONDENT
JAMES KYALO WAMBUA 2ND RESPONDENT**

RULING

1. This is an application dated October 27, 2021 brought by way of Summons under article 159 of the [Constitution](#), section 47, 50(1) and 70 of the [Law of Succession Act](#) and rules 59,67 and 73 of the [Probate & Administration Rules](#), filed through counsel A.M Musau & company advocates seeking the following orders –
 1. (Spent)
 2. The court be pleased to extend time within which this appeal should have been filed.
 3. The court be pleased to set aside in entirety the order issued in the lower court on June 23, 2021 in Makueni Chief Magistrates Succession Cause No. 139 of 2016 – In the matter of the Estate of Nathan Kiio Itinga (deceased) pending the hearing of these summons.
 4. The court be pleased to set aside in entirety the order issued by the lower court on June 23, 2021 in Makueni Chief Magistrates Succession Cause No. 139 of 2016 – in the matter of the Estate of Nathan Kiio Itinga (deceased) pending hearing and final determination of the summons.



5. The court be pleased to stay proceedings in Makueni Chief Magistrate's Succession Cause No. 139 of 2016 – In the Matter of the Estate of Nathan Kiio Itinga (deceased) pending the final determination of the ELC proceedings.
 6. The court be pleased to order compensation for land as stated in the awards dated May 26, 2021 for Kenya Shillings, Four Million, Three Hundred and Ninety Eight Thousand, Eight Hundred and Seventy Four (Kshs.4,398,874) and Kenya Shillings Four Hundred and Sixty Eight Thousand (Kshs.468,000) for Mavindini/Mavindini/1238 and Mavindini/Mavindini/1239, respectively, be deposited in court pending final determination of the ELC proceedings and ,
 7. The costs of the summons be borne by the 1st and 2nd respondents.
2. The application has grounds on the face of the Summons, that the 1st appellant/applicant is beneficial owner of two parcels of land, having purchased them from the deceased in 2002 at an agreed purchase price which he paid in full, that the deceased suddenly fell sick and died before transferring the two parcels to the 1st appellant/applicant and, that in 1998 the deceased was sued by King'oo Ngovi (King'oo) at the SPM court in Machakos Civil Suit No. 555 of 1998 in which the plaintiff claimed that the deceased through an alleged agreement for sale dated 5th March 1997 had sold to him a portion of land in Makueni. Kathukuni, and the deceased had received Kshs.8,700/= as part payment of purchase price agreed to be Kshs.20,000/=, that the deceased and the 2nd appellant/applicant approached the 1st appellant/applicant to lend them some money and in exchange offered to sell the two parcels of land to the 1st appellant/applicant and initially obtained a loan of Kshs.8,000/=, that subsequently the 1st appellant loaned the deceased several amounts of money and used the loan to instruct D.M Ndungu advocate to represent him in the civil case, that after the court case they agreed that the 1st appellant would pay Kshs.174,100/= which was the balance of the agreed price, that NLC (National Land commission) then compulsorily acquired the two parcels of land for development of Thwake dam, that NCL failed to pay the agreed amount of Kshs.3,162,435/= allegedly because the respondents had laid a false claim on the developments, that the 1st and 2nd respondents secretly approached the lower court for grant of Letters of Administration in Makueni SPM Succession Cause No. 139 of 2016 – in the matter of the Estate of Nathan Kiio Itinga (deceased), that due to objections filed the 1st appellant moved the Makueni ELC Court vide Makueni ELC Case No. E0011 of 2020 Reuben Kioko Kakyema –vs- Kioko Wambua Itinga, James Kyalo Wambua and NLC for compensation, that the Summons for Confirmation of Grant in the Succession proceedings proceeded ex-parte, despite an order staying the proceedings pending determination of the ELC proceedings, that the order given on 23rd June 2021 for confirmation of grant of letters of administration should be set aside in its entirety, that in the interests of justice the compensation for the land parcels stated in the award dated 26th May 2016 of Kshs.4,398,874/= and Kshs.468,000/= for Malivani/Mavindini/1238 and Mavindini/Mavindini/1239 respectively, be deposited in court pending the final determination of the ELC proceedings.
 3. The Summons was filed with a Supporting Affidavit sworn by Reuben Kioko Kakyema the 1st appellant/applicant on 27th October 2021, which amplifies the grounds of the application. A number of documents were annexed to the affidavit.
 4. I note that a memorandum of appeal dated October 27, 2021 was also filed.
 5. The application has been opposed through a preliminary objection and grounds of opposition filed by Maosa & Company advocates for the respondents, on November 15, 2021, in the following terms –



1. That the said Notice of Motion (should be Summons) is incurably defective in that the applicants have engaged in a litigation process with elaborate arguments while an application should be on facts only.
2. That the grounds in support of the motion 1-34 all Inclusive amount to litigation and delivery of evidence which is not permissible in an application.
3. That the supporting affidavit is incorrectly drawn, and the same has dwelt on unchallenged evidence instead of confirming (confining) itself to facts in terms of order 19 of the Civil Procedure Rules (on affidavits).
4. That no substantive appeal against the decision of the lower court has been filed and the Civil Procedure Rules do not make provision for a Succession appeal as stated in the motion.
5. That the notice of motion is grossly defective and the same is a misuse of the court process.
6. The respondent will raise a Preliminary Objection to the extent that the motion is a misuse of the court process, and there is no substantive appeal which has undergone directions by the court.
6. The 1st respondent Kioko Wambua Itinga, also filed a replying affidavit which is neither sworn nor dated. I will ignore the said purported affidavit as it is fatally defective, for not being sworn as dated.
7. The application and preliminary objection were together canvassed through the filing of written submissions. In this regard, I have perused and considered the submissions filed by the applicant's counsel B.M Musau & company advocates and those filed by Maosa & company for the two respondents. I note that counsel for the applicant has listed the issues herein as whether the court should extend time within which to file appeal, whether the impugned order issued on June 23, 2021 should be set aside pending determination of the summons, whether compensation for the subject land, held by NLC pending succession proceedings should be released to court, and lastly who bears the costs.
8. I have considered the application, documents filed, the preliminary objections and grounds of opposition and submissions on both sides. Though I note that some of the averments in the application go beyond what can be determined in an interlocutory application as he one herein, I will not strike out the application as there are other averments applicable to an interlocutory application. I thus find that the application is not fatally defective.
9. Coming to the merits of the application, prayers 3 and 4 have been spent as the request therein is for issuance of orders pending determination of this application. Once this ruling is issued therefore, they lapse In any case the orders sought would determine the intended appeal as they are substantive in nature. Such orders cannot be issued in an interlocutory application. I will thus decline to grant prayers 3 and 4.
10. The prayers for determination are thus the request for extensions of time to appeal, deposit to this court of moneys, stay of further proceedings in the magistrate's court, and costs of the application.



11. With regard to leave to appeal, out of time, appeals in succession proceedings from decisions made the Magistrates' court to the High court, are governed by section 50 of the Laws of Succession Act (Cap.160) which provides as follows –

“50(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.

12. It thus follows that the High Court has jurisdiction to entertain an appeal from any order or decree of the magistrates' court in succession proceedings. I note that the section does not stipulate a time frame for filing an appeal. However, I take it that an appeal should have been filed within 30 days.

13. The ruling sought to be appealed against, was delivered on June 23, 2021 while the present application was filed on October 28, 2021. This was a period of more than 4 months. The reasons for delay in filing appeal have not been explained. However, in view of the provisions of article 50 and 159(2) of the Constitution of Kenya 2010, for availing parties a chance for fair hearing and taking into account the Covid – 19 pandemic situation in the country in 2021, I will extend time for the applicants to file an appeal within 30 days from today. I will also grant stay of proceedings in the magistrate's successions proceedings in order not to make the appeal nugatory.

14. With regard to the prayer for deposit in this court of money paid for land compensation, having been informed that there are pending proceedings on the same land assets in the ELC court, in my view, the prayers relating thereto have to be made in the ELC court for determination.

15. As for costs of the application, I will grant costs of the application to the respondents, as this court cannot at this stage be certain if indeed an appeal will be filed.

16. Consequently and for the above reasons, I order as follows –

1. I grant extension of time for the applicants to file an appeal from the succession proceedings herein. The appeal will be filed within 30 days from today.
2. I grant stay of any further proceedings in Makueni Chief Magistrates Succession Cause No. 139 of 2016 pending determination of the intended appeal herein. If the appeal is not filed within 30 days, the stay orders granted herein will automatically lapse.
3. I decline to grant orders for deposit in court of land compensation money, which in my view, can be pursued in the pending ELC proceedings.
4. I award the costs of the present application to the respondents, as no formal appeal has been filed yet.

DATED SIGNED & DELIVERED, THIS 22ND DAY OF JULY 2022, VIRTUALLY IN COURT AT MAKUENI.

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George Dulu

Judge

