



In re Estate of Henry Nzioka Mulli (Deceased) (Succession Cause 53 of 2017) [2022] KEHC 13119 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 53 OF 2017**

MW MUIGAI, J

SEPTEMBER 26, 2022

IN THE MATTER OF THE ESTATE OF HENRY NZIOKA MULLI (DECEASED)

BETWEEN

FAITH MUTHEU MULLI 1ST PETITIONER

BENEDETTA MUTINGE MULLI 2ND PETITIONER

AND

ANNAH ITUMBI MULLI & 4 OTHERS RESPONDENT

AND

FRANCIS MUTUA AARON (SUING AS THE ADMINISTRATORS OF THE ESTATE OF AARON KIVIVA KITUSA (DECEASED) INTERESTED PARTY

NEEMA HOLDING LIMITED INTERESTED PARTY

TAMANI CONSTRUCTION COMPANY LIMITED INTERESTED PARTY

RULING

Background

1. The deceased herein, Henry Nzioka Mulli died on July 6, 2015.
2. The applicants and the 1st respondent petitioned for Grant of Letters of Administration Intestate on November 27, 2017 but no Grant has been issued by court.
3. On June 4, 2019, by Ruling delivered by Hon. Kemei J. granted the 1st and 2nd applicants temporary injunction against the 1st respondent and four others restraining them or their agents from intermeddling or dealing in any manner with the assets of the deceased pending the issuance of the Grant of Letters of Administration and Certificate of Confirmation of Grant.



4. Subsequently, the Grant of Letters of Administration Intestate was been issued on May 28, 2021 to Monica Gomes, Bendetta Mutunge Mulli and Faith Mutheu Mulli.

Summons Dated 15/01/2021

5. The Applicants herein Tamani Construction Limited seek the following orders:-
 1. That the Hon. Court be pleased to grant leave to enjoin Tamani Construction Company Limited as a necessary/Interested Party in this suit.
 2. That upon grant of prayer (1) above, this Hon. Court be pleased to expunge Land Reference No. 37/254/33 situated along Gandhi Road in Nairobi West from the Schedule of Assets listed in this succession cause as belonging to the Estate of Henry Nzioka Mulli.
 3. That upon grant of prayer (2) above, this Hon. Court be pleased to specifically lift and/or set aside the orders issued on the 4th June, 2019 by Hon. Justice Kemei as against LR No. 37/254/33 situated along Gandhi Road in Nairobi West.
 4. That in the alternative this Hon. Court do issue such further directions as it may deem fit for the expedited hearing and determination of the Summons herein.
 5. That the cost of this application be in the cause.
6. The Summons is principally premised on the ground that the 3rd IP purchased the suit property herein from Annah Itumbi Mulli, 1st respondent herein for the sum of Kshs.67,000,000/-. According to the 3rd IP, it deposited with the 1st respondent a commitment fee of Kshs.13, 400,000/- being 20% of the purchase price but the 1st respondent was unable to complete the sale and subsequently the 3rd IP sued the 1st respondent in Milimani HCCOM Suit No. E057 of 2019 Tamani Construction Limited vs. Annah Itumbi Mulli.
7. According to the 3rd IP, it obtained an interlocutory judgment against the 1st respondent for the decretal sum of Kshs. 20,100,000/- plus interest, costs and a decree was issued on May 31, 2019 hence the suit property does not form part of the estate as it devolved to Annah Itumbi Mulli upon the demise of Henry Nzioka Mulli with whom they were joint tenants.
8. The Summons is supported by the Supporting affidavit of a Director of the 3rd IP, Daniel Kamau Mburu who swore the affidavit on January 15, 2021. The Director's averments has been considered by the court.

1st Applicant Grounds Of Opposition Dated 10/02/21

9. On grounds that:-
 1. The application is misconceived, bad in law, frivolous and incompetent for all purposes and an abuse of this Hon. Court process
 2. The ruling of this Hon court delivered Ruling on June 4, 2019 in this matter and granted injunction which is still binding as the same has not been appealed against, varied and or set aside and as such the court is functus officio.
 3. The Interested Party is neither a creditor nor a beneficiary of the estate of the deceased person to whom the cause pertains and as such it has no locus at all to bring before this Hon. court summons seeking to be enjoined in any manner whatsoever.



4. The alleged vendor Ann Itumbi Mulli was a second wife of the deceased person to whom this cause pertains thus setting in a polygamous marriage and the property herein having been jointly registered in the names of the deceased husband and herself, could only hold the same as a trustee to all other wives and the aspect of survivorship on joint tenancy does not surface.
5. The alleged vendor Ann Itumbi Mulli is just a mere beneficiary to the deceased estate to whom this cause pertains and has no capacity to dispose off any part of the assets of the estate hereof and the 1st respondent is working in cahoots with the Interested Party herein to disinherit rightful beneficiaries of the estate.
6. The alleged agreement for sale of LR No.37/254/33 was entered into on 18.7.2018 during the subsistence of this cause, which was filed in court on November 27, 2017 as a means to defeat justice notwithstanding that a Memorandum of Appearance was filed on January 5, 2018 by Muttisya & Co. Advocates on behalf of the Respondent including the alleged vendor.
7. The interested party is at liberty to proceed any free assets solely on the names of Ann Itumbi Mulli or exercise any other mode of execution including committal to civil jail in respect of the decree it holds and put its hands off the deceased's assets to whom this cause pertains
8. That it is in the wider interest of justice that the Summons dated January 15, 2021 be dismissed with costs.

2nd Applicant Grounds of Opposition Dated 9/02/21

10. On grounds that:-

1. The proposed interested party has no locus standi to be enjoined in these proceedings within the meaning of rule 41(3) of the *Probate and Administration Rules* or in any other way whatsoever.
2. The estate of the late Henry Nzioka Mulli is not indebted to the Proposed Interested Party who remains a stranger to the proceedings before this Hon. court.
3. This Hon. Court on 4.06.19 dismissed a similar application to expunge property LR No.37/254/33 from the list of assets in the estate of Henry Nzioka Mulli which application dated 24.09.18 has been filed by the 1st Respondent herein.
4. The Probate Court lacks jurisdiction to examine the status/ownership of the title and has directed parties to file their claims at the Environment and Land Court in Clause VI of the ruling dated 4.06.19.
5. The Proposed interested party is a stranger to the Succession proceedings herein and this court lacks jurisdiction to execute the Proposed interested party's decree for a liquidated claim.
6. The application is premature as the proposed interested party has admitted in its application that the suit against the 1st respondent in Milimani Suit No. E057 of 2019 Tamani Construction Co. Limited vs. Annah Itumbi Mulli is still pending in court.
7. That the said application be dismissed with costs.

2nd Applicant Replying Affidavit Sworn On 21/06/21

11. The 2nd applicant has averred that she is the 3rd Administrator herein representing the 1st family. She averred that she is opposed to the Summons on the basis that the proposed Interested Party has



confirmed that his claim is against the respondent herein and not the estate of Henry Nzioka Mulli hence the prayer seeking to expunge LR No. 37/254/33 situated along Gandhi Road in Nairobi West from the Schedule of Assets in the Petition is untenable.

12. According to the 2nd applicant, the prayers sought in Summons are res judicata since this court dismissed similar prayers in a Ruling on 4th June, 2019. She averred that the Respondents are cahoots with the proposed interested party to ensure that the suit property is not shared among all the family members. According to the 2nd Applicant, the Respondent are dishonest for they have first failed to defend Milimani HCCOMM Suit No. E057 of 2019 thus paving way for an interlocutory judgment, secondly supported the Summons dated January 15, 2021 and thirdly the focus being on the suit property as the only asset available for execution. She has averred that the Respondent have failed and/or refused to deposit rent proceeds for the suit property or any other property.
13. The 2nd applicant has urged the court to dismiss the Summons dated January 15, 2021 with costs.

2nd Applicant's Submissions

14. On behalf of the 2nd applicant, it has been submitted that the proposed interested party is a stranger to the proceedings for it is neither a beneficiary nor a creditor to the deceased's estate. According to the 2nd applicant, the 1st respondent entered into an Agreement for Sale of LR No.37/254/33 knowing the estate had no representative nor was the same distributed hence she lacked the capacity to enter into any transaction. The 2nd Applicant has asserted that the Proposed Interested Party has admitted that it rescinded the Agreement for Sale on February 22, 2019 hence it does not have any valid claim and interest on LR. No. 37/254/33.
15. It has been submitted that the proposed Interested Party has failed to prove that the debt is due and owing from the deceased estate envisaged under section 86 of the [Law of Succession Act](#).
16. According to the 2nd applicant, the proposed interested party seeks this court to find that the 1st respondent is the owner of property LR. No. 37/254/33 by virtue of joint ownership when this court is bereft of jurisdiction on the questions of ownership which is a preserve of the Land and Environment Court as directed by Kemei J. in his ruling of June 4, 2019. The 2nd applicant has asserted that a debt owed by the 1st respondent cannot form part of the estate's liabilities hence not enforceable by this court. According to the 2nd applicant, the proposed interested party should not be enjoined in these proceedings.
17. It has been submitted that this court has no powers to act on a decree for execution of a liquidated claim as this court's jurisdiction is limited. Reliance was placed on the case of [Jackson Kamau Nthiga vs. Humphrey Mbuba & another](#) [2016]eKLR on the proposition that this court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate. According to the 2nd applicant, the representatives to the estate have been appointed but the estate has not been distributed hence the Proposed Interested party has to wait and lay a claim on any assets distributed to the 1st respondent and proceed with execution. Reference was made to the 1st respondent's averment in paragraph 4 of her replying affidavit dated September 28, 2020 annexed and marked as "DMK 5" supporting the Summons which averment the 1st respondent has now gone against to support the 1st respondent's application. According to the 2nd applicant, the 1st Respondent is a trustee to the property as per her advocate's letter marked as BM-A (1).
18. As to whether the suit property should be expunged from the list of assets in the Petition before this court, it has been submitted that it is premature since the estate has not been distributed and no order has been issued by the Environment and Land Court in respect of the ownership.



19. The 2nd applicant has urged this court to dismiss the Summons dated January 15, 2021 with costs.

3rd Interested Party (ip) Submissions

20. On behalf of the 3rd IP, it has been submitted that the suit property known as LR No.37/254/33 situated along Gandhi Road, Nairobi West devolves upon Annah Itumbi Mulli as the surviving joint proprietor and lawful registered sole proprietor. According to the 3rd IP, it was acquired and registered on November 26, 1969 in the joint names of Henry Nzioka Mulli and Annah Itumbi Mulli as confirmed by Entry No.17 endorsed against the Certificate of Title No.LR.12675 for the suit property.
21. It has been submitted that when Henry Mulli died on July 6, 2015, Annah Itumbi Mulli automatically became the sole proprietor having notified the Land Registrar of the death and thereafter on May 24, 2018 registered the Certificate of death No. 0310075 against the title using Form LRA 38 as stipulated under Rule 54(1) of the [Land Registration Act \(General\) Regulations, 2017](#).
22. According to the IP, the doctrine of survivorship (jus accrescendi) apply to the suit property as it was jointly acquired notwithstanding the fact that the deceased was in a polygamous marriage. The IP asserts that Section 8 of the [Matrimonial Property Act](#) is not applicable since there existence of a clear stipulation of the law on how the property registered as joint tenancy shall devolve upon the demise of one of the joint owners.
23. It has been submitted that the suit property was not to be held in trust as alleged by the Respondents since the title did not bear the phrase “as trustee” as required under section 66 of the [Land Registration Act](#).
24. As to whether the sale of the suit property by Annah Itumbi Mulli was valid, it has been submitted that the transaction was above board consummated vide an Agreement for Sale dated 1 July 8, 2018. According to the IP, it undertook the necessary due diligence exercise and ascertained itself that the suit property belonged to Annah Itumbi Mulli as the sole surviving owner and was clean without caveat. It has been submitted that it is clear from the contract and the circumstances of the sale that it was the intention of the parties that the sale transaction would be concluded within the completion period despite Annah Itumbi Mulli revoking the sale at the time of completion forcing the applicant to rescind the sale and seek refund of its purchase deposit in addition to liquidated damages for breach of contract.
25. It has been submitted that a Prohibitory Order can issue against the suit property since Annah Itumbi Mulli as a judgment debtor execution can be undertaken against the suit property pursuant to section 44 of the [Civil Procedure Act](#). According to IP, the suit property being an immovable property attachment can be done through issuance of a Prohibitory Order as envisaged under Order 22 Rule 48(1) of the [Civil Procedure Rules](#) with the attachment being complete upon registration of the Prohibition Order against the title. It has been submitted that the decretal sum owed to the 3rd IP by Annah Itumbi Mulli has been outstanding since May 31, 2019.
26. According to 3rd IP, the temporary injunction issued in the matter on June 4, 2019 applied only to properties that belonged to the Estate of Henry Nzioka Mulli(Deceased) and not the suit property which belongs to Annah Itumbi Mulli.It has been submitted that the suit property is unavailable for transmission to the beneficiaries of the estate.
27. The 3rd IP has urged the court to delist the suit property from the schedule of assets purported by the Petitioners/Respondents to belong to the estate of Henry Nzioka Mulli.



Determination

28. I have considered the Summons, Grounds of Opposition, affidavit in support and in opposition as well as the submissions and cases relied upon by parties through Counsel.
29. The dispute revolves around the suit property number LR. No. 37/254/33 which the Proposed Interested Party asserts should be expunged from the Schedule of assets in the estate of Henry Nzioka Mulli. According to the proposed interested party, the 1st respondent became the owner of the suit property upon the death of Henry Nzioka Mulli. On the other hand, the applicant assert that the proposed Interested Party is a stranger to this cause and its claim lay against the 1st respondent not the deceased's estate.
30. The issues that emerge for determination are;
1. Whether leave should be granted to join Tamani Construction Company Limited as a necessary/Interested Party in this suit?
 2. Whether Land Reference No. 37/254/33 situated along Gandhi Road in Nairobi West should be expunged from the Schedule of Assets listed in this succession cause as belonging to the Estate of Henry Nzioka Mulli?
 3. Whether to lift and/or set aside the orders issued on the June 4, 2019 by Hon. Justice Kemei as against LR No. 37/254/33 situated along Gandhi Road in Nairobi West?
 4. Appropriate orders for the court to make?
31. Before delving into the merits of the Summons, jurisdiction of this court is contested by the 2nd applicant. According to the 2nd applicant, this court as a Probate court lacks the jurisdiction to examine the status/ownership of the title of the suit property LR No. 37/254/33 situated along Gandhi Road in Nairobi West which is listed as one of the assets that comprise of the deceased's estate. Nyarangi, JA. in the *locus classical* case of *Owners of the Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd* (1989) KLR. Nyarangi JA. held:

“Jurisdiction is everything. Without it, a court has no power to make one more step..”

32. Musyoka J. in the case of *In re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, wherein he stated: -

“It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. 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.”

Disputes of course do arise in the process. 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. However, claims by and against third parties,



meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules.” (Emphasis added)

33. The court finds that it has jurisdiction to hear and determine the proposed interested party claim. The proposed interested party claim is not about ownership of the suit property but on whether the suit property devolved to the 1st respondent upon the death of the deceased herein. It is not in dispute that the suit property was/is registered only in the name of the deceased and not the 1st respondent or the proposed interested party. The proposed interested party claim is premised on the ground that the 1st respondent and the deceased were joint tenants. It is not in dispute that the 1st respondent is a wife/widow to the deceased. The court’s view is that the question of joint tenancy between the deceased and the 1st respondent fall within the jurisdiction of this court.
34. The court further notes that the proposed interested party are asking the court to ‘enjoin’ them as parties in this cause rather than to ‘join’ it as an interested party. This words have been used interchangeably by litigants but they do no mean the same thing as to “join” a party to a suit as defined under the Black’s Law Dictionary, Tenth Edition, means to add that person to the suit while to “enjoin” in law, means to injunct, or to bar a party from doing something. The proposed interested party having used the word enjoin in its pleadings is therefore asking to be injuncted or barred or prohibited from the cause instead of being joined but the court is inclined to stretch the application of article 159 of *the Constitution* and Rule 73 of the Probate and Administration Rules, to presume that the applicants intended to be “joined” as opposed to “enjoined,” and proceed to determine the application on its merits.

1. Whether leave should be granted to join Tamani Construction Company Limited as a necessary/ Interested Party in this suit?

35. The 1st Applicant is opposed to the proposed interested party being joined a s party to the cause on the ground that it is neither a creditor nor a beneficiary of the estate of the deceased person. According to 2nd applicant, the proposed interested party cannot be joined within the meaning of Rule 41(3) of the Probate and Administration Rules.
36. The Interested party has a legal and legitimate civil claim against Annah Itumbi Mulli for alleged sale of the suit property LR No. 37/254/33 situated along Gandhi Road in Nairobi West from the 1st respondent herein for the sum of Kshs.67,000,000/-. The Proposed interested deposited with the 1st respondent a commitment fee of Kshs.13, 400,000/- being 20% of the purchase price but the 1st Respondent was unable to complete the sale and subsequently the 3rd IP sued the 1st respondent in Milimani HCCOM Suit No. E057 of 2019 Tamani Construction Limited vs. Annah Itumbi Mulli.
37. The Proposed interested party obtained an interlocutory judgment against the 1st respondent for the decretal sum of Kshs. 20,100,000/- plus interest, costs and a decree was issued on May 31, 2019 and seeks to be joined these proceedings and/or have the suit property LR No. 37/254/33 situated along Gandhi Road in Nairobi West removed from the deceased List of Assets that comprise his estate and available for distribution to the beneficiaries.
38. Firstly, the succession cause is at the Preliminary stage of recent appointment of Administrators of the deceased’s estate and grant of representation issued. The Administrators shall exercise their legal mandate vested in them by virtue of section 82 & 83 LSA to gather and collect the assets that form part of the deceased’s estate and verify the existing assets before summons of confirmation of grant proceedings commence.



39. Therefore, all assets registered in the names of the deceased and/or with another are part of the deceased's estate and subject to Probate Administration & Distribution processes under the LSA until during the Summons for Confirmation proceedings that an enquiry as to confirmation of List of beneficiaries, list of assets available for distribution and the proposed mode of distribution.
40. Until then, for now the Proposed Interested party cannot be joined as interested party to succession proceedings as and verification and determination of assets of the deceased's estate is ongoing. At the stage of summons for confirmation of grant the interested party may lodge a protest either to have the said property or relevant portion hived off and left pending as the other assets are distributed to allow the interested party and 1st respondent pursue their legal rights over either land or refund of sale proceeds in appropriate forum(s) or better still pursue execution on the person of the 1st respondent as the interested party is not a creditor of the deceased's estate.
41. The proposed interested party cannot be joined at this stage
Unless as a Creditor of the deceased's estate under section 66 LSA but the deceased did not sell any property prior to his demise.

Disposition

1. In the premises, the court orders as follows;
 - a. The application of 15/1/2021 is dismissed
 - b. The orders vide Ruling by Hon J D.K.Kemei shall remain in force until proceedings of summons for Confirmation.
 - c. The interested party may lodge enforce interlocutory judgment and decree to/on the person of 1st respondent Anne Itumbi Mulli for refund of 20% deposit or execution against her properties but not estate of the deceased.
 - d. The earliest the interested party's claim if any maybe considered is during confirmation of grant proceedings.
 - e. No orders as to costs

It is so ordered

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2022.

M.W. MUIGAI

JUDGE

