



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 78 OF 1992

IN THE MATTER OF THE ESTATE OF MASILIA MWAVU (DECEASED)

ANNAH MBULA MASILIA.....APPLICANT

VERSUS

THOMAS MUTHIANI MASILIA

SIMON KYALO MASILIA

PETRONILA WANZA MUTUKU

JACINTA MUTIO MASILIA.....ADMINISTRATORS/RESPONDENTS

AND

ANGELINA MUKII MWAU.....INTENDED INTERESTED PARTY

RULING

The Applications

1. A Grant of Letters of Administration were issued to Thomas Muthiani Masilia, Simon Kyalo Masilia, Petronila Wanza Mutuku and Jacinta Mutio Masilia on 8th March 2016 with respect to the Estate of Masilia Mwavu (hereinafter referred to as “the Deceased”). The said grant was confirmed on 21st September 2016 and a Certificate of Confirmation of Grant dated 10th October 2016 issued to the said Administrators, who are also the Respondents herein.

2. Two applications were thereafter filed, which are the subject of this ruling. The first application (hereinafter “the First Application”) is by Angelina Mukii Mwau, the Intended Interested Party, and she filed a Summons dated 20th April 2016 seeking to be enjoined in this suit as an interested party. The grounds for the application as stated in the application and supporting affidavit sworn on 20th April 2016 by the Intended Interested Party are that she entered into a sale agreement for the purchase of four plots which were to be excised from land parcel number Makueni/UNOA/471, which at the time was in the name of Thomas Masilia, the 1st Administrator/Respondent herein. The Intended Interested Party attached a copy of the sale agreement.

3. Further, that although she was an innocent purchaser for value without notice, some of the other beneficiaries of the estate of the Deceased objected to the sale, even though the property was in the 1st Administrator’s name. The Intended Interested Party is thus keen on the conduct and outcome of this matter as it will affect her proprietary rights.

4. The second application (hereinafter “the Second Application”) is a Summons for Revocation of Grant dated 20th July 2017 filed by Annah Mbula Masilia, the Applicant herein, seeking the following prayers:

a) That this file be transferred to Makueni High Court for the hearing and determination of the application.

b) That pending the hearing and determination of the application, an order of *status quo* to be maintained do issue barring the Administrators/Respondents from continuing, sub-dividing and selling the Deceased’s parcels of land.

c) That the grant of letters of administration issued to Thomas Muthiani Masilia, Simon Kyalo Masilia, Petronila Wanza Mutuku and Jacinta Mutio Masilia on 8th March 2016 and confirmed on 21st April 2016 be revoked and/or annulled.

d) The Costs of this application be in the estate.

5. The Applicant in her supporting affidavit sworn on 30th June 2017 states that she is the 1st wife of the Deceased, who during his lifetime distributed his land parcels Makueni/Kako/23 and Makueni/Kako/459 to his 2nd Wife Beth Ndunge Masilia and her children, while land parcels Makueni/Unoa/470 and Makueni/Unoa/471 were given to the Applicant and her children. However, as the widow of the Deceased ranking in priority, she was never informed that her children and those of her co-wife had petitioned for a grant of letters of administration and did not consent to the same.

6. According to the Applicant, she was misled to sign certain court papers and the Respondents lied to the Court that she was unwell and could not attend Court. Further, that it is only the land parcels given to herself by the Deceased that have been distributed and not the ones given to the 2nd wife, and that the Administrators failed to disclose that the Deceased had distributed his properties to his two wives before his death.

The Responses

7. The Respondents filed Notices of Preliminary Objection and Grounds of Opposition to the two applications. The Notice of Preliminary Objection to the First Application is dated 25th April 2017 and raised the following grounds:

a) That this Court lacks jurisdiction to entertain the summons as the same became *functus officio* the time this cause was marked as fully settled

b) That there is no succession cause pending before this Court. The Deceased Estate was long distributed among the beneficiaries of the Estate who are now in possession of their respective title documents.

c) That the purported grant to Thomas Muthiani Masilia on whose strength he purportedly sold the aforesaid deceased estate was annulled by this Court

d) That the only recourse available in law to the applicant, if at all, is as against the said Thomas Muthiani Masilia as an individual and not against the estate.

e) That as such the said summons is thus bad in law, incompetent, and abuse of the process of court and improperly before this Court,

f) That the Applicant is thus not entitled to the remedy sought.

8. As regards the Second Application, the Respondents filed a Notice of Preliminary Objection dated 6th September 2017 on the following grounds:

a) The application as drawn and filed is *res judicata*

b) The said application is bad in law, incompetent, an abuse of the process of the court and improperly before this Court

c) The application has no merit and is thus incurably and should be dismissed and/or struck out in the first instance.

d) The application as drawn and filed is at the behest of the 1st Respondent who is purporting to use his elderly mother, the Applicant herein. The Applicant is thus not entitled to the remedy sought.

9. These grounds were also reiterated in Grounds of Opposition to the Second Application dated 6th September 2017, wherein it was stated the matters raised in the application were adjudicated upon and settled by this Court with the full knowledge and participation and approval of the Applicant. Further that the 1st Respondent has not cooperated since a grant he unlawfully and fraudulently obtained was annulled by the Court. It was also stated that the Applicant has consented to all the proceedings by affixing her thumbprint to all the documents, and that in particular she signed the consent in the presence of the Advocate of the Deceased's estate who explained to her the purpose and content thereof. That the Applicant in her present application has perjured herself.

10. On 18th September 2017 this Court gave directed the parties to file and serve their submissions on the two Preliminary Objections and summons which were to be heard and determined together, and reserved ruling on the two applications on 11th March 2018 upon compliance. This Court determination on the two applications is as follows:

The Determination

11. The issues before this Court for determination are whether the Respondents' Preliminary Objections have merit, and if not, whether the Applicant should be joined as an Interested Party in this suit, and whether good cause has been shown for revocation of the confirmed grant issued herein.

12. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

13. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

14. On the First application, the Respondents allege that this Court has no jurisdiction to handle the application as the dispute herein has been settled. Whether or not a Court has jurisdiction is a pure question of law, and this position is best explained in the often cited decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** as follows:

“

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

15. E.K Njagi & Co Advocates for the 2nd, 3rd and 4th Respondents urged in their submissions that the succession cause for the estate of the Deceased was concluded on 21st September 2016, when a Certificate of Confirmation of Grant was issued. Further, that at the time of the purported sale of the alleged four plots by the 1st Respondent to the Intended Interested Party, the seller had no *locus standi* or legal capacity to sell the properties of the Estate of the Deceased as was held by Jaden J. on 23rd November 2015, when she revoked the Grant issued to the said 1st Respondent.

16. In addition, that the said transaction has been rendered null and void for lack of Land Control Board Consent. Lastly, the Respondents submitted that the said plots have also since been allocated and/or distributed to beneficiaries of the Deceased’s estate, and are not available for re-distribution. According to the Respondents, the only recourse available to the Intended Interested Party lies with the 1st Respondent and not the estate of the Deceased.

17. Kalinga & Co Advocates for the Intended Interested Party on the other hand submitted that the law protects a bona fide purchaser for value without notice such as the Intended Interested Party, who in this regard is specifically protected by section 93 of the Law of Succession Act. Reliance was placed on the decisions in **Bob Njoroge Ngarama vs Mary Wanjiru Ngarama & Another, (2014) e KLR** and **In Re Estate of Josiah Mantu (2017) eKLR**, where the rights of bona fide purchasers for value were protected.

18. The intended Interested Party disputed the allegation that there is no succession cause pending in Court as there is still an application challenging the confirmed grant. Further, that the 1st Respondent held a confirmed grant at the time he sold the subject property to the Intended Interested Party, and it was the responsibility of the seller to obtaining land Control Board consent. Therefore, that the estate of the Deceased should recognize the rights of the Intended Interested Party, and re-distribute the estate.

19. I have considered the arguments made with respect to the First application. Jurisdiction is always granted by law or other like legal instrument and not by way of political doctrine, as was held by the Court of Appeal in **The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [1989] KLR 1**. The Court stated as follows:-

“By jurisdiction is meant the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by the stature, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

20. This Court’s jurisdiction to hear and determine disputes regarding succession to a Deceased’s person’s property is granted by section 47 of the Law of Succession Act which provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. The Intended Interested Party claims to be a beneficiary of the Deceased’s land that is subject to distribution in this Cause, and this Court would ordinarily have jurisdiction to

entertain her claim.

21. However, there are additional allegations made by the Respondents as regards the obtaining of the Land Control Board consent with respect to the sale agreement entered into between the Intended Interested Party and the 1st Respondent, which will certainly require further evidence and argument to establish their veracity or otherwise. This issue also makes the Intended Interested Party's claim one that is beyond the powers of this Court sitting as a succession Court, and also raises dimensions to her claim that she is a bona fide purchaser for value that will need to be clarified.

22. Musyoka J. in this regard expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction in **In Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** as follows:

“....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.

27. 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 a 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. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘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 property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.

23. The issue as to this Court's jurisdiction can therefore only be determined by first answering the question whether this Court can effectively determine the nature of the Intended Interested Party's claim over the Deceased's property within the framework provided by the Law of Succession Act. The question of the legal effect of the sale agreement entered into between the Intended Interested Party and 1st Respondent, and particularly on the requirement of Land Control Board consent thereto, will need to be answered first, before this Court as a probate Court can make a determination at the Intended Interested Party's interest in the Deceased's property.

24. This resolution of that question will in addition involve application of the law on title to land, and the Intended Interested Party's application therefore goes beyond being merely a claim of succession to the Deceased property. It is notable in this regard that disputes primarily concerning ownership of and title to land fall within the jurisdiction of the Environment and Land Court as provided by Article 162 (2)(b) of the Constitution, and section 13(1) and (2) of the Environmental and Land Court Act.

25. This Court cannot in the circumstances entertain the Intended Interested Party's application nor grant the orders sought therein at this stage, until her interest in the Deceased's land has been confirmed by the appropriate Court. The First Application therefore fails for these reasons, as this Court is not able to make any determination as to her entitlement to the Deceased's property.

26. On the Second Application, the 2nd, 3rd and 4th Respondents reiterated in their submissions that the allegations that the grant was obtained fraudulently by making of a false statement and or concealment of material facts is not true, as the Applicant was actively involved in the proceedings in the cause. In particular, that she consented by putting her thumbprint to a new grant of letters of administration being issued, and to the confirmation of the said grant. In addition, that it is not true that she has been left out in the distribution as she has been allocated various properties of the Deceased in the confirmed grant.

27. The Applicant did not file any submissions on her application.

28. The grounds for revocation of a grant are provided in section 76 of the Law of Succession as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on

application by any interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

29. It is notable that the issues raised by the Respondents are issues of contested facts which cannot be raised by way of a preliminary objection. I will therefore address them as raised in their grounds of opposition. I have perused the record as regards the issue of letters of grant of administration and confirmation of grant herein. On 8th March 2016, this Court (Muriithi J.) adopted as an order of the Court a consent dated and filed in Court on 14th January 2016 that the letters of administration be issued to the Respondents herein. There is also no record that the Applicant was present in Court on that date when the grant was issued.

30. It is notable in this regard that the law prioritizes the persons who can be administrators of a Deceased's estate, and as between the Applicant and Respondents, the Applicant who is a wife of the Deceased, and mother of the Respondents, would have priority in a contest as to who should be the administrator of the estate of the Deceased. Section 66 of the Law of Succession Act provides a general guide as to those who will be preferred to administer the estate of a deceased as follows-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

31. Various proceedings thereafter took place in Court on the confirmation of grant and rectification of the confirmed grant pursuant to consents filed in Court. The said consent did not have the Applicant's name, neither was it signed by the Applicant. Likewise, the affidavit in support of confirmation of grant sworn by the Respondents and filed in Court on 18th April 2016 did not have the Applicant's name and signature. The only consent with the Applicant's name and thumbprint is one dated and filed on 30th August 2016 that sought to compromise a summons dated 12th July 2016 that sought to substitute some beneficiaries, and to also amend the schedule of distribution of the Deceased's estate among other prayers.

32. When the summons for confirmation of grant and summons for rectification came up for hearing on 21st April 2016 and 1st September 2016 before this Court, on both occasions all the beneficiaries other than the Applicant were present in Court, and it was recorded that the Applicant was sickly on both occasions. The other beneficiaries also availed her Identity Card as an indication of her consent to the proceedings.

33. The Applicant alleges that she was misled into signing the consent and availing her identity card and did not know the nature of the proceedings. The Respondents dispute her version of events and have accused her of perjury. I find that the record of non-participation of the Applicant in the proceedings, and supports a finding of concealment of material facts and/or untrue allegations by the Respondents. The Respondents if so minded will have to pursue their allegations of perjury in separate proceedings. In the premises, these succession proceedings will require to start afresh.

34. There is an outstanding prayer in the Second Application for transfer of this succession cause to Makueni High Court. From the record, it is indeed the position that the Deceased was domiciled in Makueni County, and the properties that are subject of this succession cause are located in the said County. I however note that there were directions given herein as to the hearing of an outstanding application for contempt of court as against the 1st Respondent, which will need to be disposed of first before such transfer. The Applicant shall be at liberty to thereafter apply for transfer of this cause to Makueni High Court, which can be by way of oral application given the observations already made in this ruling in this regard.

35. I accordingly order as follows:

1. The prayer in the Summons dated 20th April 2016 seeking to enjoin Angelina Mukii Mwau, in this suit as an interested party is hereby declined, and the said summons is dismissed with costs to the Respondents.
2. The grant of letters of administration intestate issued to Thomas Muthiani Masilia, Simon Kyalo Masilia, Petronila Wanza Mutuku and Jacinta Mutio Masilia on 8th March 2016 with respect to the Estate of Masilia Mwau and confirmed on 21st September 2016 be and is hereby revoked.
3. The *status quo* that shall be maintained with respect to the properties of the estate of Estate of Masilia Mwau pending the appointment of new administrators shall be that **the beneficiaries of the Estate shall continue to be in possession and occupation of the properties and assets they currently occupy; and** there shall be no further sale, transfers, dispositions, developments on, wastage of, or any other subsequent dealings of any kind with respect to the said properties.
4. The beneficiaries shall within 90 days agree on the new administrators of the estate of Estate of Masilia Mwau, failing which the Court shall be at liberty to appoint the said administrators in accordance with the applicable provisions of the law.
5. There shall be no order as to costs as regards the Summons dated 20th July 2017.

36. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF JULY 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MACHAKOS THIS THIS 31ST DAY OF JULY 2018

G. V. ODUNGA

JUDGE