



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Aminbai Kara (Deceased) (Succession Cause  
110 of 1987) [2025] KEHC 8506 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 8506 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 110 OF 1987  
G MUTAI, J  
JANUARY 22, 2025  
IN THE MATTER OF THE ESTATE OF AMINBAI KARA (DECEASED)**

**BETWEEN**

**ESSAK ESSA ESSAK ..... ADMINISTRATOR**

**AND**

**IMTIAZ ESSA VONDHIA ..... 1<sup>ST</sup> RESPONDENT**

**HALIMA ESSA VONDHIA ..... 2<sup>ND</sup> RESPONDENT**

**MOTREX LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**ZAINIBUL GIGI T/A GIGI & COMPANY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**HAMZA MOHAMED MAYE OMAR ..... INTERESTED PARTY**

**OSMAN MOHAMED ALI ..... INTERESTED PARTY**

**RULING**

1. There are two applications pending determination before this Court. There is also a Notice of Preliminary Objection. The Court will determine the three together in this consolidated decision.
2. The first application is the Summons dated 20<sup>th</sup> November 2023. Vide the said application, the Administrator/Applicant seeks the following orders:-
  - a. Spent;
  - b. The administrator, Essak Essa, be allowed to complete the administration and distribution of the estate by obtaining and delivering vacant possession of the estate properties now sold to the purchasers:-



- (1) Hamza Mohamed Maye Omar; and
  - (2) Osman Mohamed Ali from the occupants of the said properties hereunder listed: -
    - i. (MN/XVII/909) - Imtiaz Essa Vondha and Halima Essa Vondha; and
    - ii. (MN/XVII/639) - Motrex Limited.
  - c. That the above-mentioned parties by an order of this court be compelled to vacate the premises and hand over vacant possession of the said properties forthwith to the administrator, Mr Essak Essa, to conclude the administration and distribution of the estate which is now 38 years due;
  - d. The officer commanding station Tononoka Central Police Station do assist and provide security for the administrators to obtain vacant possession of the said properties – MN/XVII/909 and MN/XVII/639 from the above-named occupants in any event; and
  - e. Any other orders the court may grant to conclude the matter, which is 38 years overdue.
3. The summons is premised on the grounds therein and the supporting affidavit of the Applicant sworn on 20<sup>th</sup> November 2023. He stated that the deceased herein died on 2<sup>nd</sup> November 1985 and that a grant of probate was issued to Abdullatif Haji Ahmed Haji, who died in 2015, leaving the estate without an administrator. The Applicant then moved the court and was issued a grant, which was also confirmed.
  4. He averred that to wind up the distribution of the estate, he managed to sell the properties which have been transferred to the purchasers by the advocates for parties. He averred that he wished to hand over vacant possession. His wish had, however, been hampered by the presence of the above-named parties, hence the need for a court order for vacant possession. He stated that the beneficiaries of which he is one could not benefit from the estate until vacant possession was given to the purchasers and distribution of the proceeds of the sale was done. He urged the court to allow the application.
  5. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 28<sup>th</sup> November 2023. He stated that the Applicant is his brother, who was adopted by his late aunt, Fatma. He deposed that the deceased had three daughters, Khadija, Zulekha, and Fatma. Khadija, his father's mother, predeceased her mother, Aminbai Kara, the deceased herein, leaving his late Father, Essa Essak Vondhia, as her beneficiary. He further deposed that the deceased herein made his father a beneficiary of one of the suit properties, Plot No. 909, Section XVII, which, in his view, made him a beneficiary of the estate.
  6. He averred that it is unclear how the Applicant applied for letters of administration as they were unaware of it. He deposed that according to his late great-grandmother, the deceased herein, the Applicant was not a beneficiary of the aforesaid suit property.
  7. He stated that the Applicant sold the aforesaid suit property to the 2<sup>nd</sup> Interested Party without considering the will's contents. He only learned about the sale when the 2<sup>nd</sup> Interested Party attempted to demolish the property. The sale was unprocedurally as the Applicant is not a beneficiary of the property according to the will. The 1<sup>st</sup> Respondent averred that he had lodged a caution at the land's office against further dealings with Plot Number 909, Section XVII.
  8. He further stated that the Applicant's application has no merit and urged the court to dismiss the same with costs.



9. The 3<sup>rd</sup> Respondent, through its director, Iqbal Ahmed Bayusuf, also filed a replying affidavit sworn on 22<sup>nd</sup> December 2023. He stated that the Applicant brought the application in bad faith and had not come to equity with clean hands as he had failed to disclose all facts regarding this matter and that he had no locus standi.
10. Further, the 3<sup>rd</sup> Respondent had been a tenant of the premises situated on plot number MSA/BLOCK XVII/639, one of the suit properties, for over 40 years. The premises are in perfectly good and habitable condition. He deposed that the 3<sup>rd</sup> respondent had always diligently paid rent via cheque payments to the Administrator /Applicant as the landlord. He contended that on 22<sup>nd</sup> July 2023, the 3<sup>rd</sup> Respondent was served with a proclamation of attachment of goods for distress for rent by Alfajiri Auctioneers under instructions from the 1<sup>st</sup> interested Party as the alleged landlord.
11. The 3<sup>rd</sup> Respondent proceeded to pay rent arrears in the sum of Kes.650,000/- via a banker cheque dated 26<sup>th</sup> July 2023 in the name of Valueconsult Limited, which was acknowledged and received on 27<sup>th</sup> July 2023, covering rent owed up to and including July 2023. He stated that there is a pending suit between the 3<sup>rd</sup> Respondent, 1<sup>st</sup> Interested Party, the agent of the 1<sup>st</sup> Interested Party and the auctioneers in respect of the proclamation and or attachment. Therefore, he contended that the application filed herein against the 3<sup>rd</sup> Respondent is res judicata.
12. It was further deposed that there is a pending case at the Business Premises Rent Tribunal to wit BPRT No. E021 OF 2023; Motrex Ltd versus Essak Essa, in which the 3<sup>rd</sup> Respondent had objected to the notice of termination of tenancy issued to it on 8<sup>th</sup> December 2022 by Valueconsult Limited, as the agents of the applicant.
13. He averred that the Applicant sold the property without considering, informing, notifying or giving notice to the 3<sup>rd</sup> Respondent, who is a tenant and thus, the sale was done un-procedurally. The Applicant had no locus standi to seek orders for vacant possession having sold the aforesaid property to the 2<sup>nd</sup> Interested Party.
14. He stated that the application herein lacks merit, is frivolous, vexatious, and is an abuse of the court process. He urged the court to dismiss the same with costs.
15. The 2<sup>nd</sup> Interested Party filed a Replying Affidavit sworn on 5<sup>th</sup> December 2023. He stated that he purchased the suit properties from the Applicant after being satisfied that he was the administrator of the deceased's estate. The Applicant supplied him with all necessary documents, following which he conducted due diligence. Transfer of the properties was concluded in his favour through transfer forms dated 26<sup>th</sup> June 2023. He deposed that the sale and purchase were lawful and had not been challenged. However, he was unable to take possession of it as the Respondents are still occupying the suit properties.
16. He stated that despite being fully aware of his ownership of the suit properties and even though a request to vacate was made, the Respondents had not complied, making it difficult for the Administrator to hand over the properties to him. This had caused him prejudice as he could not utilise and benefit from the said properties. He urged the court to allow the Applicant's application.
17. The application was canvassed by way of written submissions. The Administrator/Applicant, through his advocates, Messrs. Opolu & Co. Advocates, filed written submissions dated 7<sup>th</sup> June 2024. Counsel submitted on two issues, namely, whether the Respondents, being administrators de son tort, can curtail the administration of the estate of Aminbai Kara(deceased) and what the appropriate reliefs are in the circumstances.



18. Counsel relied on Sections 45 and 47 of the Law of the Succession Act and submitted that the Applicant/Administrator obtained the grant of letters of administration with written will annexed of the unadministered assets of the estate of the deceased herein upon the death of the executor Abdullatif Hajji Osman.
19. Counsel also relied on Section 80 of the Act and submitted that the Administrator/Applicant was issued with a grant of letters of administration de bonis non on 7<sup>th</sup> September 2019 and is therefore bound by Sections 82 (a) and (d) and 83(g) of the *Law of Succession Act*. The administration of the estate of the deceased had not been completed since 1985 when the grant was confirmed. In discharging his duties as an administrator, the Applicant sold the two main assets of the estate and was under legal obligation to complete the administration by providing and giving vacant possession and accounting to the court within 6 months after confirmation of the grant. He submitted that the Respondents were impeding him from concluding his obligations to complete the administration of the estate.
20. Counsel submitted that the application is neither subjudice nor res judicata as no other proceedings under the law of succession concerning the estate of the deceased herein have been taken out or concluded by this court or any other court on any element of administration of the estate or is pending, or has been decided on merit between the estate and the 3<sup>rd</sup> Respondent.
21. It was further the fact that a grant of probate was issued to Abdullatif Haji Ahmed Osman had not been contested.
22. Counsel submitted that the 3<sup>rd</sup> Respondent had not provided any lease or tenancy agreement with the deceased, Aminbai Kara, or any administrator of the deceased's estate. It was submitted that rent payments to a management company answerable to administrators de son tort could not hinder the completion of the estate administration.
23. It was urged that this court has jurisdiction to determine this application under Section 47, 50 of the *Law of Succession Act*, Rule 73 of the Probate and Administration Rules and Article 165 (3) of *the Constitution* and, therefore, the provisions of *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* cannot be used to oust the jurisdiction of this court.
24. On lack of capacity, counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are not beneficiaries of the estate of the deceased herein, neither are they personal representatives or administrators of the estate of Essa Essak Vondhia (Deceased) and cannot, therefore, initiate any legal proceedings on behalf of Essa's estate or the estate of Aminbai.
25. In conclusion, counsel urged the court to dismiss the objection and allow the application as prayed.
26. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent through their advocates, Mkan & Company Advocates, filed written submissions dated 31<sup>st</sup> July 2024. Counsel submitted on two issues for determination, namely, who are the beneficiaries of Aminbai Kara's estate, who are entitled to the suit property, and whether the Administrator/Applicant deserves the orders prayed for.
27. On the first issue, counsel submitted that the issue of beneficiaries is not in dispute as the only contested issue is whether suit property No.909 belongs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as per the will.
28. On the 2<sup>nd</sup> issue, counsel submitted that any action and /or dealing with the suit property without considering the interest of the 1<sup>st</sup> & 2<sup>nd</sup> Respondent and their siblings is unlawful, illegal, null and void ab initio. Therefore, the Administrator /Applicant does not deserve the orders sought. It was thus urged that the court dismiss the application.



29. I have considered the application, the responses, and the parties' submissions. It is not in dispute that there is a confirmed grant. The same has not been set aside. What the administrator is required to do is to distribute the estate of the deceased to the beneficiaries.

30. The application, as I understand it, seeks the aid of this Court against third parties who are in occupation of the suit premises. Can the Family Court grant such orders?

31. Article 162(2) of *the Constitution* of Kenya, 2010 provides that:-

“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.”

Article 165(5) of the said Constitution, for its part, provides that:-

- “(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).”

32. From the foregoing provision of *the Constitution* it is clear that this Court lacks jurisdiction to entertain the application before it. I am guided by the decision of the Court in re estate of P N N (Deceased) [2017] eKLR, where it was held that:-

“According to Article 162(2) of *the Constitution*, the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of *the Constitution* states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of *the Constitution*. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of *the Constitution*, meaning that this court then, by virtue of Article 165(5) of *the Constitution*, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri. Under Rule 41(3)(4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.”



33. The court in the case of *In re Estate of Alice Mumbua Mutua (Deceased)* [2017] KEHC 8289 (KLR) 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. 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.

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 ...’

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.

34. In the circumstances I find and hold that the application has no merit and is dismissed.
35. The second application is by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent which is a summons for revocation of grant dated 28<sup>th</sup> November 2023, seeking to have the following orders:-
- a. Spent;



- b. Spent;
  - c. That the grant of letters of administration and confirmation of grant be revoked and or annulled;
  - d. That this honourable court be pleased to order title arising from property known as one flat (with land on which it stands) on Plot Number 909 Section XVII to the Administrator / Applicant and subsequently to the 2<sup>nd</sup> Interested Party be cancelled and title reverts back to the name of the deceased awaiting grant of letters of administration testate;
  - e. That the Administrator/Applicant be ordered to refund the purchase price of the suit property to the 2<sup>nd</sup> Interested Party; and
  - f. That the costs of this application be awarded to the respondents.
36. The application is premised on the grounds therein and the supporting affidavit of Imtiaz Essa Vondhia sworn on 28<sup>th</sup> November 2023. The deponent reiterated the position in his Replying Affidavit to the administrator’s application dated 20<sup>th</sup> November 2023.
37. In response, the Administrator/Applicant filed a Replying Affidavit sworn on 8<sup>th</sup> February 2024. The Administrator termed the application as an afterthought, with no merit and meant to stifle the distribution of the estate. That he was issued with a grant of letters of administration de bonis non administratis with the will annexed of the estate of Aminabai Kara on 16<sup>th</sup> September 2019 after the death of Abdullatif Haji Ahmed Haji Osman in 2015. The executor died before completing the distribution of the estate.
38. Further, despite constant and continuous service of court process, orders and hearing notices, none of the beneficiaries attended court, nor did they raise any objection to his application for a grant or apply for a grant themselves. Imtiaz had actively participated in the estate administration and was fully aware of all the happenings, including the negotiations to sell the said properties to the buyers. Imtiaz agreed to get five units as his share, valued at Kes.5,000,000/- each. The Applicant averred that he gave Imtiaz Kes.150,000/- from the estate in advance, which was meant for him to set up a shop and pay legal fees for his divorce case at Mombasa Kadhi’s Court. He involved all the beneficiaries in his application for grant and in all his dealings with the estate.
39. He stated that the court does not have jurisdiction to cancel a lawfully obtained and transferred in the administration of the estate of Aminabai Kara. Property rights have already passed, and the estate no longer belongs to the estate. That no material non-disclosure or element of fraud had been proven. He urged the court to dismiss the application.
40. The 2<sup>nd</sup> Interested Party filed a Replying Affidavit sworn on 14<sup>th</sup> May 2024. He reiterated his position in his affidavit in response to the administrator’s application. He stated that he is a bona fide purchaser for value and he is not privy to the allegations raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. He opposed the application and urged the court to dismiss the same with costs as granting the same would prejudice him and infringe his constitutional right to benefit from the properties.
41. My first port of call is the applicable provision of the *Law of Succession Act*. Section 76 of the said Act provides 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 order or allow; 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.”

42. In my view none of the grounds adduced meet the requirements of section 76 of the Act. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not show that the process by which the grant was obtained was defective in substance, or that the grant was obtained fraudulently or by concealment of material information or by the means of untrue allegations.

43. From the evidence adduced, it seems that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were aware of the succession proceedings and took part in them.

44. Revocation of grant is a drastic remedy which should be allowed sparingly. The court’s power to revoke a grant was discussed by the court in the case of *Albert Imbuga Kisigwa vs Recho Kavai Kisigwa* [2016]eKLR. In the said case the Court stated as follows:-

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

45. The court expounded on the grounds for revocation of a grant under section 76 of the *Law of Succession Act* in *In re Estate of Prisca Ong’ayo Nande (Deceased)* [2020] eKLR, by stating as follows:-

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation



was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

46. In this case despite being aware of the succession proceedings, they did nothing for an extended period of time and, in fact, received a portion of their inheritance. I, therefore, agree with counsel for the Respondents that the application is an afterthought. In the circumstances, the application is dismissed.
47. I see no need to consider the prayers for cancellation of titles as I have clearly stated that this Court has no jurisdiction to determine issues of title to land.
48. That being the case the 1<sup>st</sup> and 2<sup>nd</sup> Respondents application has no merit and is thus dismissed.
49. The 3<sup>rd</sup> respondent filed a notice of preliminary objection dated 5<sup>th</sup> December 2023. The grounds it was based on were that this court lacks jurisdiction to grant the orders sought and this application is res judicata. These are BPRT NO. E021 OF 2023; Motrex Ltd vs Essak Essa, for objection to a notice of termination and CMC ELEC NO.E126 OF 2023 Motrex Ltd vs Hamza Mohamed Maye Omar and three others with regard to objection to the proclamation of goods and for distress for rent.
50. The 3<sup>rd</sup> Respondent, through his counsel Aboo & Company Advocates, filed written submissions to the preliminary objection dated 12<sup>th</sup> April 2024. Counsel submitted on two issues for determination: whether the Honourable Court has jurisdiction and authority to issue orders about Land and Environment matters; and whether the suit offends the doctrine of subjudice.
51. On the 1st issue, counsel submitted that the matter concerns privately owned property, which falls in the jurisdiction of the Environment and Land Court. The power to order for vacant possession lies with the Business Premises Rent Tribunal.
52. On the second issue, counsel submitted that since the two matters mentioned above were pending before courts of competent jurisdiction, these matters were subjudice. Counsel urged the court to allow the application as prayed.
53. The Probate and Administration Court derives its jurisdiction from Section 47 of the [Law of Succession Act](#) and Rule 73 of the Probate and Administration Rules. These provide as follows:-

#### Section 47

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:



Provided that the High Court may, for the purpose of this section, be represented by Resident Magistrates appointed by the Chief Justice.”

#### Rule 73

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

54. In the case of *The Owners of the Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR), Nyarangi, JA stated:-

“A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.”

55. Further, the Supreme Court in the case of *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR) stated:-

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

56. This Court cannot arrogate itself jurisdiction it does not have by way of judicial craft.

57. In discussing the issue of subjudice the court in the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] KEHC 10142 (KLR)

“In order to check this very problem, there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.

In this regard, section 6 of the *Civil Procedure Act*<sup>[6]</sup> expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



58. I agree that similar issues are pending before courts with jurisdiction. It is those courts that should determine the matter. In the circumstances, I uphold the preliminary objection dated 5<sup>th</sup> December 2023.
59. The upshot of the foregoing is that:-
1. The application dated 20<sup>th</sup> November 2023 is dismissed;
  2. The application dated 28<sup>th</sup> November 2023 is also dismissed; and
  3. The preliminary objection dated 5<sup>th</sup> December 2023 is upheld.
60. Each party will bear its own costs of the application.
61. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 22<sup>ND</sup> DAY OF JANUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Ms Meeme holding brief for Mr Aboo for the 3<sup>rd</sup> Respondent;

Mrs Omondi holding brief for Mr Gathu for the Interested Parties;

Mr Mkan for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents;

Arthur - Court Assistant.

