



In re Estate of Kamau Macharia (Deceased) (Succession Cause 213 of 2006) [2025] KEHC 20 (KLR) (10 January 2025) (Ruling)

Neutral citation: [2025] KEHC 20 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 213 OF 2006
SM MOHOCHI, J
JANUARY 10, 2025**

IN THE MATTER OF THE ESTATE OF KAMAU MACHARIA (DECEASED)

BETWEEN

JULIUS KARATU MACHARIA APPLICANT

AND

JANE MBEERE KAMAU 1ST RESPONDENT

MARY WAMBUI KAMAU 2ND RESPONDENT

MARY NYAKIANDA KAMAU 3RD RESPONDENT

TERESIA WAIHERA KAMAU (DECEASED) 4TH RESPONDENT

NICHOLAS GITAU KAMAU 5TH RESPONDENT

AND

JULIUS KARATU MACHARIA INTERESTED PARTY

RULING

1. What is before Court for determination is a Notice of Motion dated 30th September, 2024 brought under the provisions of Articles 40, 48, 50 and 60 of *the Constitution* of Kenya, Sections 1A, 1B, 3A, 6 of the *Civil Procedure Act*, 2010, Order 1 rules 5 and 10, Order 8 rule 8 and Order 51 rule 1 of the Civil Procedure Rules, 2010 seeking the following relief(s);
 1. Spent....
 2. That this Honourable Court be pleased to grant leave to the intended interested Party to fully participate in the proceedings herein and file such pleadings, affidavits, submissions and other documents subject to joinder.



3. That cost of this application be granted to the applicant.
2. The Application is predicated on the grounds that, the Applicant is a bona fide purchaser for value and that ownership of land and more so property being an emotive issue, it is extremely necessary and in the interest of justice that this Court does certify the instant Application as urgent and proceed to hear Counsel for the applicant ex parte at the first instance. and supported by the sworn Affidavit of Julius Karatu Macharia filed on the even date. That;
 - a. He is a bona-fide purchaser for value in the estate of Kamau Macharia (deceased).
 - b. He came about owning a piece of land in the Estate of the Late Kamau Macharia vide an agreement dated the 21st of November, 2002. (Annexing and exhibiting a copy of the agreement regarding the said sale).
 - c. the said sale was for the property Kijabe/Kijabe 1/ 2434 measuring approximately 2.02 hectares. (Annexing and exhibiting a copy of the title deed to the said property).
 - d. parties to the sale being himself and the deceased Kamau Macharia agreed for the sale of the entire property at a consideration of Kshs. 500,000/-
 - e. the consideration was paid part in cash and part through bank transactions. (Annexing and exhibiting copies of the receipts showing different bank transactions).
 - f. the applicant has since been in possession of the property as agreed in the agreement dated 21st November, 2002.
 - g. the Applicant is bona fide purchaser who should get value for his money, despite the title deed being yet to be issued as transfer to the property was not effected before Kamau Macharia died (Annexing and exhibiting a copy of the death certificate).
 - h. in all fairness, the said parcel of land herein should be properly distributed to the Applicant and the title deed issued upon transmission.
3. A further undated further supporting Affidavit sworn by John Mucai Kinyanjui the caretaker of the property Kijabe/Kijabe 1/ 2434 depones that he was aware the property was sold to the Applicant and that in all fairness the Court should distribute the same to the Applicant.
4. That the Applicant is in some possession of the property and instructed him to continue caretaking the same.
5. The Court had directed on the 8th October 2024 directed that the Application shall be heard by way of filed written submissions the Applicant was granted seven days to file written submissions while the 1st and 2nd Respondents were granted 21days each to file responses and written submissions. Ruling was reserved for the 10th December 2024.
6. The 1st Respondent filed her Replying affidavit dated 28th November 2024 together with a further affidavit by Grace Nyambura Kamau evenly dated and written submissions dated 10th December 2024 and the 2nd to the 5th Respondent did not file any representation.
7. The 1st Respondent disputes the purported sale of the property Kijabe/Kijabe 1/ 2434 by the deceased to the interested party, the alleged possession by the interested party, the failure to complete the alleged transaction during the life time of the deceased, the actual acreage of the property Kijabe/Kijabe 1/ 2434 not being 2.2 acres but rather 5 acres and finally that such a claim if at all may be filed not in



the Succession Court but rather the Environment and Land Court and that a Succession Court lack jurisdiction to determine ownership disputes.

8. This Court further notes that, this instant motion was filed on the eve of a viva voce hearing of the substantive petition thereby disrupting the same and that the deceased was polygamous with four houses and thirty-one (31) beneficiaries disclosed at the filing of the same. This probate constitutes a backlog and the continued delay in its conclusion is an injustice to all beneficiaries.

The Applicants Submissions

9. The Applicant in its written submissions dated 2nd December 2024 laments of the Courts direction that reviewed the *ex parte* ruling allowing the application to be heard *inter parte* contending that despite being accordingly admitted as an interested party in the proceedings he has no substantive litigant rights.
10. The Applicant submits that, in the rights of a bona fide purchaser where the proprietor is deceased when transfer had not been effected at the time of his death.
11. Reference is made to a Ugandan case of *Katende v. Haridar & Company Limited* (2008) held that a bona fide purchaser in a succession case is someone who has purchased property in good faith without knowing of any fraud or other claims to the property.
12. That to qualify as a bona fide purchaser, a person must: Have a certificate of title; Have purchased the property in good faith; Have no knowledge of fraud; Have purchased without notice of any fraud; Not have been party to any fraud; Have purchased the property for value; and Have no actual or constructive notice of any defects in the seller's title.
13. That a bona fide purchaser is protected by property rights under Article 40 of *the Constitution*. The question of whether someone is a bona fide purchaser can only be determined at trial.
14. Further reference is made to the case of *Johnson Muinde Ngunza & Another v Michael Gitau Kiarie & 12 Others* (2017) eKLR, the Court stated that: "The *Law of Succession Act* recognizes the purchaser's rights and in support of these submissions the said (sic) the Law of Succession defines a "Purchaser". Purchaser according to the Act means a purchaser for money or money worth."
15. A determination of the respective parties' entitlement to the suit properties can only be made on the basis of an analysis of the various indentures produced by the parties and their evidence as regards the circumstances of their procurement, and their legal effect.
16. Further reference is made to the Court of Appeal case of *Weston Gitonga 10 others vs Peter Ruga Gikanga & another* held as follows as regards a bona fide purchaser.
Black's law Dictionary 8th Edition defines "bona fide purchaser" as:
"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration. for property without notice of prior adverse claims."
17. The Applicant submits that he leaves it to the Court to make a determination on the suit property herein as earlier stated in its ruling.



Administrator/1st Respondent's Case

18. The Administrator/1st Respondent has opposed the application by way of a Replying affidavit dated 28th November 2024 together with a further affidavit by Grace Nyambura Kamau evenly dated.
19. She submits on the solo issue; Whether the Applicant should be enjoined as interested party?
20. That, the Applicant claims that he has beneficial interest on parcel known as Kijabe/Kijabe 1/2434 having purchased the same from the deceased sometimes in 2002. The Beneficiaries of the estate of the deceased petition for letter of Administration sometimes in 2006 and since then, the Applicant has never raised any objection nor approached the Administrators of the estate of the deceased concerning the transfer of the aforementioned property even with the knowledge of the demise of the deceased. He recognizes that the property is still under the estate of the deceased.
21. Reliance is placed in the matter of the Estate of Stone Kakhuli Muinde(deceased) (2016) eKLR by Musyoka J the case involved an Application by third parties for joinder into a succession cause, the Judge stated as follows:

“The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by Court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal Court appearance. The whole process is tailored to be non-contentious, and the only contemplated Court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.”
22. That, the cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the Court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the Court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.
23. That, the Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.
24. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the Probate Court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.
25. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a Civil Court in accordance with the provisions of the [Civil Procedure Act](#) and the Civil Procedure Rules. This could mean filing suit at the magistrates' Courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such



- decree should be presented to the probate Court in the succession cause so that that Court can give effect to it.
26. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the Probate Court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the Court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place."
27. Reliance is placed on the case of *In Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, in which again, W. Musyoka J, held as follows:
- "Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate Court. The mandate of the probate Court under the *law of succession Act* is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate Court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. Consequently, and for the reasons above stated, I wish to find and hold that this Court has no mandate to resolve the proprietary interest on land based on the alleged trust".
28. Further reference *In re estate of Solomon Mwangi Waweru (deceased)* (2018) eKLR, A.K. Ndungu J remarked as follows:
- "Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not thru an objection like the one before Court..".....It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land Court. The succession Court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit".
29. The Administrator/1st Respondent submits that, the claims made by the Applicant are matters that are squarely within the province of the Environment and Land Court and not this High Court. The parties who would be outright interested parties in a succession suit are beneficiaries, spouses and children. Creditors and any other persons with proven legal claims against the estate can also be admitted as interested parties. In this case, the Applicant cannot be said to be an interested party as he is neither a beneficiary nor a creditor of the deceased, the Applicant only claims that he is purchaser of the parcel known as Kijabe/Kijabe 1/2434. It is not in dispute that the entire property is still in the name of the deceased and therefore still part of the estate.
30. That, the exhibited copy of the Sale Agreement between the deceased and the Applicant is dated 21st November; 2002. The deceased, died sometimes in 2005. The Applicant has also lied to the Court that he is in occupation of the said property. He has also not explained why he has never pursued the transfer even after learning about the demise of the deceased in the year 2005 to date. The Applicant is therefore a stranger to the estate and therefore this Application lacks merit and should be dismissed with costs.



Analysis and Determination

31. Having considered the pleadings in support of the Application and those in opposition, whether in the circumstances of this case the Applicant has made a case warranting grant of the prayers sought, the first issue for determination is whether the Applicant has demonstrated a sufficient interest to be enjoined in the succession.
32. In Kenya, *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013, Rule 7, establishes the process for an individual or entity to become an interested party in a legal proceeding. An interested party must submit a formal application or motion. The application must clearly explain the interest and the reason for intervention. The Court may grant leave for the applicant to become an interested party.
33. An interested party is a person or entity that has a legal interest or stake in a proceeding. They are not a party to the cause, but they are affected by the Court's decision.
34. The application must include: A clear and identifiable interest in the matter. A demonstration of the prejudice that the interested party would suffer if they were not joined. A clear outline of the case and the submissions the interested party intends to make.
35. A demonstration that the submissions are relevant and not a replication of what other parties will be making.
36. In the case of Francis Kariuki Muruatetu & another v Republic & 5 others Petition No. 15 as consolidated with No 16 of 2013 [2016] eKLR, the Supreme Court set out guiding principles on the requirements for successful application for joinder as an Interested Party at paragraph 37 the Court stated that, the Applicant(s) must show:
 - i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
 - iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.
37. The Supreme Court, in *Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 others* [2015] eKLR reaffirmed the principles - the applicant has to have a stake in the subject matter before the Court, he has to show that he will be affected by the decision of the Court, and that his interests will not be articulated well in his absence from the proceedings.
38. Furthermore, in the case of *Skov Estate Limited & 5 others v. Agricultural Development Corporation and another* [2015] eKLR, the Court emphasized the point that, the applicant in an application of this nature must demonstrate that it is necessary that he/she be enjoined in the suit. That becomes important if he has to show that the issues before the Court cannot be effectively adjudicated upon in his absence. Being affected by the order of the Court is not enough. The Applicant must show that in addition to being affected the reliefs which will be granted will not be fully decided upon because an important element of fact, which he has, shall miss if he is not added to the proceedings.



39. This Court is thus enjoined to consider whether or not the Application herein meets the above conditions. The first question is whether or not the Applicants have a direct interest or stake in the proceedings in the instant case?
40. The manner in which the Applicant moved the Court is irregular notwithstanding the Respondents not raising the issue. A notice of motion has no place in succession proceedings and some of the provisions cited as the basis of the Application are outrightly inapplicable and irrelevant for example Order 8 Rule 8 with regard to amendments of pleadings, Order 51 Rule 1 with regards to venue for Court hearing.
41. While a direct interest is demonstrated in the property Kijabe/Kijabe 1/2434 which the Applicant entered into a sale agreement, I am unpersuaded as to whether such a claim can well be adjudicated within the succession cause.
42. This Court is unpersuaded as to why the said transaction was ever concluded? Why the deceased never executed a transfer pursuant to the agreement for almost four (4) years up to the demise of the deceased person.
43. This Court is equally unable to make any finding on the Applicants assertion that he paid the consideration for the said property Kijabe/Kijabe 1/2434.
44. A Succession Court undertakes inquisitorial process and abhors adversarial and antagonistic approaches by the parties and noting that the Applicant alleges to have purchased land from a deceased person who is now unavailable and the best recourse would to move to the Court with competent jurisdiction against the estate of the deceased.
45. It is for that reason, that I find the Application dated 30th September, 2024 to be without merit. I thus make the following orders;
 - a. That the Application dated 30th September, 2024 is dismissed for want of merit.
 - b. That Costs of this Application are awarded to the 1st Respondent.

It is so ordered.

SIGNED DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF JANUARY, 2025.

.....

Mohochi S.M.

Judge of the High Court

