



In re Estate of William Koike Riyies (Deceased) (Succession Cause E066 of 2022) [2024] KEHC 4177 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEHC 4177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
SUCCESSION CAUSE E066 OF 2022
SN MUTUKU, J
MARCH 13, 2024**

BETWEEN

MOHAMMED SHAHID MOUGHAL APPLICANT

AND

THE ESTATE OF WILLIAM KOIKE RIYIES DEFENDANT

RULING

1. By an Amended Notice of Motion dated 4th December 2023 (the Application), the Applicant herein has moved this court under Section 83 and 86 of the *Law of Succession Act*, Cap. 160, Laws of Kenya, Order 51 of the *Civil Procedure Rules 2010* and Sections 1 & 1A, 3 & 3A of the *Civil Procedure Act* Cap. 21 Laws of Kenya and any other enabling provisions of the law, seeking the following reliefs:
 - i. Spent
 - ii. That this court orders the Applicant to be listed as a creditor to the Estate of William Koike Riyies and proceed to make a provision for the creditor's debt settlement before the Estate can be distributed and/or the grant is confirmed.
 - iii. That in the alternative to order 2, this Honourable Court to partially confirm the grant, setting aside the amount or property as security and settle the sum in question in High Court, Civil Case No. 8 of 2020, Mohammed Shahid Moughal v The Estate of William Mopel Riyies pending its determination as transferred to the Environment and Land Court.
 - iv. That the Applicant is paid on priority basis on or after the Letters of Administration are issued.
 - v. That costs of this Application be provided for.



2. The application is supported by grounds found on the face of it and in the Supporting Affidavit sworn by the Applicant on 4th November 2023, which grounds I have read and understood.
3. The Applicant has based his claim on a sale agreement in which he claims to have entered with the deceased in this Succession Cause in respect of Share No. 36 in Kajiado/Olchoro-Onyore/28765 on 25th July 2017 for Kshs 5,550,00 and a further agreement on 7th November 2017 for Kshs 7,300,000. He claims that the amount now stands at Kshs 61,000,000.
4. The Applicant stated that he filed Civil Case No. 206 of 2018 before the Ngong Senior Principal Magistrate's Court which suit was transferred to Kajiado High Court as Civil Suit No. 8 of 2020. The Applicant stated in his Affidavit that the deceased died before the determination of Kajiado Civil Case No. 8 of 2020 necessitating the Applicant to file a Citation in HCFMISC/E024/2022 because the family of the deceased has failed to take up Letters of Administration.

Response

5. The Application is opposed by the Respondent, the Estate of the Deceased. In the Grounds of Opposition filed on 9th August 2023, the Respondent has opposed the Application terming it as unknown in law as it has purported to sue the estate of the deceased when there are administrators of the estate appointed by the court.
6. The Respondent has stated that grounds numbers 7 and 8 on the face of the Application are contradictory to ground number 10 for stating, on the one hand, that there are administrators of the estate and on the other hand relying on the gazette notice containing names of the administrators of the estate of the deceased. That the provisions of the law relied on by the Applicant do not provide for the prayers the Applicant is seeking. That the Applicant's concern is that the Estate will be distributed without taking care of his claim which concern does not hold any legal basis and that the concern is taken care of under section 39 of the *Civil Procedure Act*.
7. The Respondent has stated that Civil Case No. 8 of 2020 Mohammed Shahid Moughal v William Mopel (Deceased) is still pending determination and that it is untenable for the Applicant to seek the Court to compel the Administrators of the Estate of the deceased to pay Kshs 60,000,000 when that suit is contested. That the Applicant has not secured a judgment in that suit and that he is unprocedurally and illegally attempting to obtain a judgment of the Civil Case through a Succession Cause.
8. The Respondent has stated that share number 36 in Keekonyokie Farmers Co-operative Society Limited has translated into LR No. Kajiado/Olchoro-Onyore/28765 and the share does not exist anymore and therefore this court is not clothed with the jurisdiction to determine the issues raised in the instant Application. That Kajiado/Olchoro-Onyore/28765 is not one of the properties listed as forming the estate of the deceased in this Succession Cause.
9. In addition to the Grounds of Opposition, the Respondent, through the Replying Affidavit of Veronica Tianoi Munyere, one of the Administrators of the Estate sworn on 8th December 2023 reiterated the contents of the Grounds of Opposition. The deponent has stated that share number 36 in Keekonyokie Farmers' Co-operative Society Limited has translated into LR No. Kajiado/Olchoro-Onyore/28765 and the said share does not exist anymore; that this property has not been included in the Petition for Letters of Administration.
10. The Respondent has stated that the Applicant has no legal standing to seek the court to partially confirm the Grant and set aside amount or money or property as security in the Civil Suit which is



pending determination at the ELC; that the Applicant has not secured a date before the ELC nor has he secured a decree against the Estate of the deceased.

Submission of Parties

11. The Application was canvassed through written submissions. The Applicant has identified two issues for determination in his submissions dated 5th December 2023, namely:
 - i. Whether the Applicant is a creditor with an enforceable debt.
 - ii. Whether the court can order partial confirmation of the grant.
12. In respect to the first issue, the Applicant claims that as at the time of the death of the deceased, the debt stood at Kshs 66,000,000. He provided a breakdown of the amount in a table which shows the amount as Kshs 60,000,000! He has cited the alleged terms of the contract between him and the deceased and submitted that the deceased breached the contract by failing to pay the amount due including the interest compounded after every 40 days on or before 6th March 2018.
13. The Applicant has submitted that the Law of Succession Act recognizes creditors and therefore the Applicant is entitled to the debt that is owed to him and which ought to be offset by the Administrators of the Estate of the deceased. He has relied on Section 83 of the Act. He also relied on In re Estate of Barrack Deya Okul (Deceased) [2018] eKLR.
14. The Applicant has submitted that it is the duty of the personal representatives to notify the court of any liability to the Estate which the Respondents in the instant application have not done. He has submitted that he entered into an enforceable agreement and that this debt has been brought to the attention of the Administrators to pay but they have failed to do so.
15. On the second issue, the Applicant has submitted that this court has powers to make the necessary orders for ends of justice. He has submitted that the Civil Suit transferred to the ELC has not been assigned a case number. He has relied on Succession Cause No. 1108 of 2019, the Estate of Gideon Ngari Gitehi where the Court allowed the Creditor 30 days to obtain orders/judgment and file it in the Succession Cause.
16. The Applicant has submitted that it does not prejudice the Respondents if they are ordered to preserve some property of the Estate for purposes of offsetting a debt owed to the Estate.
17. The Respondent's submissions were filed on 9th August 2023. Three issues have been identified for determination, namely:
 - i. Whether the Applicant is a Creditor to the Estate?
 - ii. Whether the Court can order the Respondent to pay the Applicant Kshs 60,000,000 or as the Court may award in Kajiado Civil Case No. 8 of 2020 Mohammed Shahid Moughal v William Mopel (Deceased) on a priority basis before any property of the Deceased is distributed or the Grant is confirmed?
 - iii. Who bears the costs of the instant Application?
18. In respect to the first issue, the Respondent has submitted that Section 83 (b) and (d) of the Law of Succession Act is clear that the duties of personal representatives include (b) getting in all free property of the deceased including debts owing to him and moneys payable to his personal representatives by reason of his death and (d) to ascertain and pay out of the estate of the deceased, all his debts and liabilities.



19. The Respondent cited Section 86 of the Law of Succession that Debts of every description enforceable at Law and ordered by or out of the estate shall be paid before any legacy and submitted that the Applicant is not a creditor because his Civil Case challenging non payment of debts of the Estate to him is contested and is yet to be determined and that the Applicant ought to pursue that case and obtain a judgment/decree which he can then enforce.
20. The Respondent has submitted that the Applicant's concerns are catered under Section 39 of the Civil Procedure Act which provides that:
1. Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.
 2. Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally.
21. The Respondent has submitted that Kajiado/Olchoro-Onyore/28765 which was acquired by the deceased in respect of share number 36 does not form part of the properties listed in this Succession Cause, but that notwithstanding, the Respondent has set aside some property and money to cater for other liabilities of the Estate.
22. It has been submitted that the Respondent is aware that the Law of Succession Act allows for protection of the rights of bona fide creditors and for settlement of debts by a deceased's estate to bona fide creditors, but the Applicant is not a creditor.
23. The Respondent cited several authorities quoted in Jackson Kamau Nthiga v Humprey Kirimi Mbuba & another [2016] eKLR (*the estate of Zakaria Nthiga Matumo (Deceased)*) where the Court in that cause stated that:

“The net holding in those decisions was that the jurisdiction of a family court dealing with a Succession Cause is limited. Such a 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. Such a court cannot delve into establishing the validity of a claim such as the one before this court. In the case before this court, there are serious issues that need to be established and or ascertained by either the lower court or the court which has jurisdiction to entertain a claim to land. That however, does not bar a family court from ascertaining if one is a creditor of an estate. In the circumstances of this case, the Interested Party and the Objector have not yet been so determined by a court of law. This court cannot determine their claims in these proceedings.

In view of the foregoing, since the claims of the Objector and Interested Party have not been formally been determined, they cannot lead to the revocation of the grant made in favour of the Petitioner. However, having established that they probably have a claim which is yet to crystalize, i.e a suit by the Objector which is still pending and a claim either of ownership vide Land Dispute Tribunal Case No.01/03/02 or adverse possession by the Interested Party, this court being a court of both law and equity cannot allow the said claims to be defeated on a technicality. It should be remembered that both claims were lodged against



the deceased before he died. The claims were as against the very same property that is sought to be distributed and which happens to be the only asset of the estate.”

24. The Respondent submitted that Kajiado Civil Case No. 8 of 2020 is still pending determination and therefore the Applicant’s claim as a creditor has not been determined. Further, it was submitted that section 55 (1) of the Law of Succession Act provides that, no grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate or to make any division of property unless and until the grant has been confirmed as provided under Section 71 and (2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.
25. The Respondent submitted that the Application lacks merit and ought to be dismissed with costs.

Analysis and Determination

26. I have considered the issues raised in this Application. I am aware that the Applicant brought Kajiado Civil Case No. 8 of 2020, Mohammed Shahid Moughal v. Eunice Metial Mopel and Veronica Tainoi Munyere, being sued as the Administrators of the Estate of William Mopel (Deceased). The Administrators, who were the Defendants in the matter raised a Notice of Preliminary Objection (PO) filed on 16th June 2023 seeking to have the Plaintiff’s claim dismissed with costs for reasons that it was filed in the wrong court because the subject matter in that suit is land. That PO was determined with the result that the matter was transferred to the ELC.
27. I have considered the grounds relied on by the parties in support of the application and in opposition to the application, respectively. The case for the Applicant is simply that he is a creditor of the Estate of the Deceased by virtue of an agreement they entered into before the death of the deceased in respect to share number 36 at Keekonyokie Farmers’ Cooperative Society Limited. The Applicant seeks to have the Administrators refund him money paid in respect of that contract.
28. On the other hand, the Respondent denies the claim and states that the Applicant has not proved that he is a creditor to the Estate and that his case where he intends to prove he is a creditor is opposed and stands undetermined.
29. It is my considered view, as stated in Zakaria Nthiga Matumo case, above, the jurisdiction of this court, sitting as a Probate Court, is limited to ascertaining what assets form the estate of a deceased person, who the beneficiaries are and how to distribute the assets to the beneficiaries. That jurisdiction does not extend to determining who the creditors are unless such creditors have been acknowledged and listed as such in the Petition for Letters of Administration. Anyone claiming against the estate of a deceased person and whose claim is contested, must first go to the court with the jurisdiction to determine such an issue and once his claim has crystallized, he can return to the Probate Court and lay his claim by presenting the decree/judgment.
30. The rights of the Applicant, as creditor, are protected by the law. Section 39 of the Civil Procedure Act is clear on that and comes to aid the Applicant. Further, Sections 83 and 86 of the Law of Succession Act come to the aid of a creditor who has proved his claim as such a creditor.
31. In this matter, the Grant was issued on 20th July 2023 and is due for confirmation. The Applicant ought to move with haste and seek determination of the ELC matter. It is not lost to me that the property in dispute is not part of the properties forming the estate of the deceased.



32. Consequently, the Amended Notice of Motion dated 4th December 2023 is hereby dismissed with costs to the Respondent.
33. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF MARCH 2024.

S. N. MUTUKU

JUDGE

