



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Said Ahmed Edrous (Deceased) (Succession Cause
E041 of 2021) [2024] KEHC 4110 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
SUCCESSION CAUSE E041 OF 2021
SN MUTUKU, J
MARCH 11, 2024**

IN THE MATTER OF THE ESTATE OF SAID AHMED EDROUS (DECEASED)

BETWEEN

FANAKA HOMES AFRICA LIMITED APPLICANT

AND

SAYED EMBRAHIM AHMED EDROS PETITIONER

RULING

1. The Applicant brought this application through Amended summons dated April 25, 2022 under section 47, 68(1) and (2), section 70(a)(b)(c) of the law of succession Act Cap 160 Laws of Kenya. Rule 40(6), 41(3) and 49 of the Probate and Administration Rules, section 3 and 3A of the Civil Procedure Act 2010 and Article 159(2)(d) of the Constitution of Kenya, seeking orders that:
 - i. That the Honourable Court be pleased to exercise its inherent jurisdiction to grant leave to the applicant to be enjoined and or to participate in the proceedings herein.
 - ii. That this Honourable Court do issue orders for the Petitioner/Respondent to amend his petition for letters of administration dated May 17, 2021 and filed in this court on June 12, 2021 Form P& A 5, liabilities section to include the objector/applicant as the beneficiary of the whole parcel of land known as Kajiado/Mailua/2418.
 - iii. That on or before confirmation of the Grant of letters of administration herein parcel of land known as Kajiado/Mailua/2418 be appropriated and set aside and or excluded from forming part of the estate of the deceased.
 - iv. That alternatively, pending determination of ownership of parcel of land known as Kajiado/Mailua/2418 by an Environment and Land Court or under Rule 37 of the Civil Procedure Rules, its distribution be stayed or the same be excluded from assets of the estate.



- v. That the proceedings herein be deemed as a protest under Rule 41 of the *Probate and Administration Rules*.
 - vi. That Costs of this Application be in the cause.
2. The application was supported by an affidavit dated January 20, 2022. As deposed in the said affidavit, the deponent is a director of the Objector/Applicant. His case is that his company entered into a sale agreement with the deceased for the sale of the parcel of land known as Kajiado/Mailua/2418 for a sum of Kshs.52,500,000/- but the deceased died before the transaction was completed at which time his company had paid a down payment of Kshs. 26,500,000/-. It is his case that in the interest of justice he should be included as a beneficiary in the letters of administration to finalize the intended transaction.
 3. The Application was opposed vide Grounds of Opposition dated May 6, 2022 and a Replying Affidavit dated April 25, 2022. The Petitioner/Respondent stated that he was appointed as administrator to the estate of the deceased through a Grant issued on October 18, 2021, the son of the deceased and the sole beneficiary of the deceased. He states that the objector has never been a beneficiary to the deceased's estate.
 4. He has stated that the deceased acquired the suit property on or about November, 2009 and charged the suit property in 2014 charged to Co-operative bank to secure a loan of Kshs. 20,000,000/- which was advanced to M/s Smart Price Ltd. The loan fell into arrears and the Bank issued statutory notices threatening to sell the suit property for non -payment of a sum of Kshs. 22,444,127.27/-. To salvage the situation, the deceased engaged the Bank to be allowed to get a buyer for the said property. The deceased engaged the objector who had expressed interest in purchasing the suit property. The purchase price as per the sale agreement was Kshs. 56,500,000/-. A down payment of Kshs. 25,000,000 was to be paid to Co-opertave Bank to offset the deceased's loan and the balance of Kshs. 31,500,000/- was to be paid to the deceased within a period of eight months.
 5. The Objector did not honour the agreement. Despite the efforts to redeem the property and progress the intended sale, the Objector still failed to avail the necessary funds leading to the cancellation of the sale by the deceased. This was communicated to his Bank, which in turn through a letter dated July 17, 2018 issued a communication to the Objector advising that the sale by private treaty had been cancelled. On March 22, 2022 the amount due to the Bank was Kshs. 33,815,490.70. The Bank is still holding the title documents.

Submissions

6. The matter was canvassed by way of written submissions. The Objector/Applicant filed submissions dated March 17, 2023. It is submitted that this court has jurisdiction to deal with the matter as provided under section 47 of the *Law of Succession Act*. The Applicant also relied on Rule 41(3) and Rule 49 of the *Probate and Administration Rules*.
7. The Applicant relied on various authorities as shown in the submissions, among them *Priscilla Ndubi and Zipporah Mutiga -vs- Gerishon Gatobu Mbuji*, Meru Succession Cause No. 720 of 2013 where it was held that:

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule



41(3) of the *Probate and Administration Rules* was enacted so that claims which prima facie valid should be determined before confirmation.”

8. The Applicant argued that jurisdiction is everything; that the suit property’s ownership is a matter in issue which should be dealt with by the Environment and Land Court hence the prayer that this court should set aside Kajiado/Mailua/2418 from the properties available for distribution in the estate of the deceased until the issue of ownership is determined. It was submitted that it is evident that the balance of convenience lies with setting aside the property instead of distributing the same only for the ELC Court to later hold that the property does not belong to the deceased estate.

Respondent’s submissions

9. The Respondent filed submissions dated April 14, 2023 and submitted on whether Duncan Muasya Mutuku has demonstrated the necessary locus standi to swear the Supporting Affidavit; that it has not been demonstrated that the deponent has the capacity/authority to swear the said affidavit.
10. The Respondent relied on various authorities as shown on the face of the submissions including the case of *East African Portland Cement Ltd -vs- Capital Markets Authority & 4 others* [2014]eKLR, to emphasize the point that the deponent has not been authorized to swear the affidavit on behalf of the Respondent.
11. On whether the objection by the Applicant is merited it was submitted that Section 68 of the *Law of Succession Act* as read with Rule 17(1) of the *Probate and Administration Rules* provides for the requirements for lodging an objection; that in the present case the grant was issued on October 18, 2021 and the Objection was filed on January 24, 2022; that the Objection was not filed in compliance with section 68 of the *Law of Succession Act* and that no leave was sought to file the objection outside the limitation period.
12. The Respondent submitted that the *Law of Succession Act* and the *Probate and Administration Rules* do not provide for enjoining of an Interested Party to a Succession Cause. He relied on *Estate of Jason Atinda Ouko* on this issue and submitted that Prayer 1 of the Summons is misplaced and ought not to be granted; that the Applicant has described himself as both Objector and Protestor which is inappropriate as Rule 2 of the *Probate and Administration Rules* defines a protestor as “protester” means a person who has filed a protest under rule 40(6) against the confirmation of a grant”, while Rule 40(6) of the *Probate and Administration Rules* provides that:

“ Any person wishing to object to the proposed confirmation of grant shall file in the cause in duplicate at the principal registry an affidavit of protest in form 10 against such confirmation stating the grounds of his objection.....”
13. It was submitted that there is no application for confirmation of grant pending before this court and therefore, the Amended Summons is an abuse of court process.
14. It was submitted that the Applicant wants to lay claim as a beneficiary while he is neither a surviving spouse, child of the deceased or a relative in the nearest degree of consanguinity to the sixth degree but a third party and that this court is not clothed with jurisdiction to determine the issue of ownership of the suit property and should down its tools. To support the submissions on this issue, the Respondent relied on *Samuel Kamau Macharia & another -vs- Kenya Commercial Bank Limited & 2 others* [2012]eKLR and argued that the court with jurisdiction as regards this issue is the Environment and Land Court as outlined under section 13 of the *Environment and Land Court Act* and that the Applicant acknowledges this fact as he has filed a supplementary affidavit though without leave of court showing that he has filed suit in the ELC, being ELC No. E20 of 2023.



Analysis and Determination

15. I have identified the following issues for determination:
- i. Whether this Court is seized with jurisdiction to determine the issue on the suit property?
 - ii. Whether the Applicant should be enjoined in these proceedings?
 - iii. Whether the Deponent to the supporting affidavit had capacity and/or authority to swear the said affidavit?
16. On the first issue, the parties in this matter contest the ownership of the suit property. The Applicant states that he was in the process of purchasing the same before the demise of the deceased. The Respondent states that the property was not sold, and it is still charged to the bank.
17. The law on jurisdiction is well-settled. Starting with the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989), it was held that:
- “Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
18. This Court, sitting as a Probate Court, can only deal with free property of the deceased. In this instant case there is an issue of ownership of property which is land being Kajiado/Mailua/2418. The Court that is clothed with the jurisdiction to deal with land issues is the Environment and Land Court Article by dint of 162(2) of *Constitution* and Section 13(2) of *ELC Act* No.19 of 2011 which clearly gives power to ELC to hear and determine disputes relating to *inter alia*, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues.
19. Both parties in this matter have not disputed that the issue of ownership should be dealt with the Environmental and Land Court. There is no dispute on this issue because it is acknowledged by both parties and this court agrees with the parties that it is not seized with requisite jurisdiction to determine ownership of the suit property.
20. On the second issue, I have read *In re Estate of David Aura Wesonga (Deceased (Succession Cause 257 of 2012)* [2023] KEHC 20222 (KLR) where it was held that:
- “.....If the court were to strictly take the word “enjoin” for what it means, the application would be struck out for making no sense at all. “Enjoin” means to “urge” or “injunction.” I am sure that is not what the applicant intended to ask the court to order. The proper prayer should be for an order to be “joined.” The word “enjoin” is not used in any of the provisions in the *Civil Procedure Act*, Cap 21, Laws of Kenya, and the *Civil Procedure Rules*, for joinder or adding of parties to a cause.
- The *Law of Succession Act*, cap 160, Laws of Kenya, and the *Probate and Administration Rules* do not provide for joinder of interested parties. That would leave room for whoever seeks intervention in a probate matter to just file their application, without seeking leave to be added as a party.”



21. While the above authority does not bind this court and is persuasive, it is my view that Article 159 of the Constitution enjoins this court to apply substantive justice in determining matters before it and in exercising the inherent jurisdiction under Rule 73 of the Probate and Administration Rules, this Court can, in deserving cases join a party to Succession Causes where failing to do so would result in injustice or denial of rights to an applicant.
22. On the third issue, the deponent to the supporting affidavit stated that he was the Director of the Objector's/Applicant's Company. The Court of Appeal in Spire Bank Limited v Land Registrar & 2 others [2019] eKLR, discussed the rationale behind Order 4 Rule 1(4) of the Civil Procedure Rules and the consequences of its non-compliance and stated thus:
- “It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”
23. Similarly in Madin Clearing & Forwarding Limited v Bamburi Supermarket Limited [2022] eKLR, when faced with a similar issue the court held that “directors have power to act on behalf of companies unless demonstrated otherwise.”
24. In our instant case the Respondents did not demonstrate that the deponent to the Supporting Affidavit was not the director.
25. I have noted that the Applicant did not seek leave to amend the Summons under consideration. This issue was raised by the Respondent and has not been addressed by the Applicant.
26. In In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR it was held on the issue of a claim of ownership of property forming part of the estate of the deceased that:
- “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.”
27. This court lacks jurisdiction to determine that issue. I note that the Applicant has already filed a claim before the ELC. This court is not able to grant the orders he is seeking for the reasons stated in this ruling. Consequently, this application fails and is hereby dismissed with costs to the Respondent.
28. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MARCH 2024.



S. N. MUTUKU
JUDGE

