



**In re Estate of Maurice Mulela Nzili (Deceased) (Succession Cause 767 of 2011) [2024] KEHC 2420 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2420 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 767 OF 2011**

**FR OLEL, J**

**MARCH 6, 2024**

**IN THE MATTER OF THE ESTATE OF MAURICE MULELA NZILI (DECEASED)**

**CHARLES KILONZO MULELA .....PETITIONER**

**VERSUS**

**NDUKU KIILU MASILA**

**KENNEDY MWEU WAMBUA**

**SALLY MUTHEU MATHEKA**

**ELIJA MULELA NDETO.....APPLICANTS**

**BETWEEN**

**CHARLES KILONZO MULELA ..... PETITIONER**

**AND**

**NDUKU KIILU MASILA ..... 1<sup>ST</sup> APPLICANT**

**KENNEDY MWEU WAMBUA ..... 2<sup>ND</sup> APPLICANT**

**SALLY MUTHEU MATHEKA ..... 3<sup>RD</sup> APPLICANT**

**ELIJA MULELA NDETO ..... 4<sup>TH</sup> APPLICANT**

**RULING**

**A. Introduction**

1. Before court is a chamber summons application dated 16<sup>th</sup> November 2022 filed by the applicant’s seeking for orders that the Deputy Registrar High court of Kenya at Machakos be empowered to



sign transfer documents for land parcel Machakos town block 3/931 to enable the beneficiaries/ applicants acquire title deeds for the said parcel of land on behalf of Kennedy Mweu Wambua, Sally Mutheu Matheka And Elija Mulela. The grant herein had been confirmed/issued to the Respondent on 19<sup>th</sup> July 2013 and each beneficiary share was indicated therein. The Petitioner/Respondent had completely refused to complete the distribution process of the estate and thus it was necessary to have the Deputy Registrar execute the said forms to enable the applicants/beneficiaries herein to acquire title documents for their respective portions of estate property.

2. The Applicants also did further state that some of the beneficiaries had died and that it was their humble prayer that the deceased beneficiaries be substituted as follows;
  - a. Susan M. Wambua be substituted with her son Kennedy Mweu Wambua
  - b. Rebecca Kimani be substituted with Sally Mutheu Matheka (her daughter)
  - c. Mutile Ndeto be substituted with Elija Mulela Ndolo (his son)

And that no prejudice would be occasioned upon the Respondent should the said orders be granted.

3. The Respondent did oppose this application through his Replying Affidavit dated 17<sup>th</sup> May 2023. He termed the said chamber summons application dated 16<sup>th</sup> November 2022 as frivolous, vexatious and constituted an abuse of the process of this court as the grounds set out in the said application and facts stated in the supporting Affidavit did not warrant granting of the orders sought. He had commenced the process of transfer by personal representatives to the beneficiaries and on 19<sup>th</sup> January 2019 had submitted transfer by transmission documents to the lands office. Unfortunately during the Covid-19 pandemic the original title deeds of the Estate properties got lost within the lands office and he had been allowed to gazette their loss so that new titles could be issued.
4. The Respondent further averred that after gazette, he had been allowed to lodge documents to effect transfer by personal representative entitled under intestacy. It was therefore not necessary to have the deputy registrar of this court, sign transfer by transmission forms as he would undertake distribution to the beneficiaries as provided for under the confirmed grant and give a full and accurate inventory of the estate book if so required. The allegations that he had refused to sign off the transfer documents was therefore not true and he had always informed the Respondents of the progress made but they always doubted the truth. The court was invited to take judicial notice of the somewhat poor service delivery at the lands office and that was an issue which was beyond his control. The Respondent urged the court to therefore give him more time to complete/finalize this process.
5. The 1<sup>st</sup> appellant filed a further affidavit reiterating facts earlier pleaded and the need for distribution to be affected as per the confirmed grant dated 19.07.2013. Her three sisters had died and were entitled to a share of property known as Machakos Town Block 3/95 measuring approximately 2 acres and it would be proper that they be substituted with their respective children as proposed in their application. The Respondent had been hostile to the applicants and slept on his duty for over 10 years only had been awoken from his slumber by this application. The prayer sought were thus justified in order to avoid a situation where the applicant was continuing to frustrate the other beneficiaries. The orders sought should therefore be allowed to hasten this process and finalize distribution.

## **B. Determination**

6. I have reviewed all the pleadings filed in support of the application, and in opposing thereto, the submissions filed by the respondent and deduce that the only issues for determination are, whether this court should direct/empower the deputy registrar to sign transfer document's to enable the



beneficiaries acquire title deeds for their share of the estate and whether I should substitute the deceased dependents with their children as proposed by the Beneficiaries/Applicant.

**I. Whether this court should direct/empower the deputy registrar to sign transfer documents to enable the beneficiaries to acquire title deeds for their share of the estate.**

7. The confirmed grant of representation to the estate of the late Maurice Mulela Nzili (Deceased) was issued to the respondent herein on 19<sup>th</sup> July 2013 and the estate properties known as Machakos Town Block 3/951 and Mumbuni/Kasinga/1536 were distributed to the beneficiaries as stated thereunder. It was the applicant contention that the respondent had refused to cooperate with them and sat on the distribution process for over ten (10) years to their detriment. It was thus prudent to allow the deputy registrar to sign off the transfer by transmission documents to enable all the beneficiaries acquire their respective title deed for the portion of estate property they were apportioned.
8. The respondent on the other hand demonstrated by his response that indeed he had started the transmission process and that the delay was caused by the Covid-19 pandemic shutdown, and subsequently the lands office had misplaced the original estate title deeds earlier surrendered to enable them effect transfer by transmission. He had followed up and the lost title deeds had been gazetted as lost and finally he had been allowed to lodge the transfer by personal representative forms to finalize this process. The delay was caused by circumstances beyond his control and emphasized that he was not at fault. There was no need to have the Deputy Registrar sign the transfer by transmissions forms.
9. Section 82 of the *Law of Succession Act*, Cap 160 captures the for power of personal Representative;

Personal representatives' Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
  - ii. (ii) no immovable property shall be sold before confirmation of the grant
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
  - (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and



liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will—

- i. no appropriation shall be made so as to affect adversely any specific legacy;
- ii. no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

10. Section 83 of the *Law of Succession Act*, Cap 160 further provides for the duties of the administrator(s);

Duties of personal representatives' Personal representatives shall have the following duties—

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case maybe
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any



interested party in the estate, to produce to the court a full and accurate account of the completed administration.

11. It is obvious that the powers of the administrator under the *law of succession Act*, are vast, but he/she must ensure that the estate of the deceased is well looked after, collect and collate the asset of the estate and after confirmation of the grant, to the vest a specific legacy in the legatee thereof. He must also complete administration within six months from the date of confirmation of the grant, or such longer period as the court may allow, in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.
12. The grant herein had been confirmed on 19<sup>th</sup> July, 2013 and obvious, there has been a long and unnecessary delay in completion of the process of vesting specific property to the beneficiaries herein. Though the applicants have been prejudiced, it has been shown by the respondent that he has started the process of transmission of estate property under the confirmed grant and as at January 3, 2023 he had filed form LRA 42, which provides for transfer by personal representative to person entitled (under will or an intestacy). It is therefore not necessary for this court to invoke its discretionary powers under Section 47 of the *law of succession Act*, or Rule 73 of the *probate and administration rules* to direct the deputy registrar to sign the transfer by transmission forms.

## **II. Whether the court should substitute the deceased Beneficiaries with their children as proposed by the Beneficiaries/Applicant.**

13. The applicant did aver that some of the estate beneficiaries namely; Susan M Wambua, Rebecca Wambua & Mutile Ndeto were all deceased and since the confirmed grant had not been effected, it was their humble prayer that the deceased beneficiaries be substituted and the said children to get their parents share. The deceased beneficiaries and the proposed substitutes were ;
  - i. Susuan M Wambua be substituted with Kennedy Mweu Wambua (Her Son)
  - ii. Rabecca Kimani be substituted with Sally Mutheu Matheka (Her daughter)
  - iii. Mutile Ndeto be substituted with Elijah Mulela Ndeto (His son)
14. The petitioner/ Respondent in his replying affidavit, did not respond to this pray and the court would not be wrong to conclude that his silence, means concurrence.
15. The law is that where a party seeks to substitute a deceased beneficiary, they must approach court for review of the grant and not rectification of grant. This can be undertaken through rule 44, 63 ( on application of *civil procedure rules*) and 73 of the *probate and administration rules*. This is because both grant of letters of administration and the certificate of confirmation of grant are court orders which can only be amended through an application for review unless a party seeks to correct an error as to names or descriptions of any party, property or place of death of the deceased, under which circumstance they ll move court under rule 43 for rectification of grant.
16. Further, Section 47 of the *Succession Act*, Cap 160, provides that;

“The high court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such degree and make such orders therein as maybe expedient.”



17. Rule 73 of the *Probate and Administration Rules* also provide that

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

18. As noted above, the application to have the deceased beneficiaries to be substituted by their children is not expressly opposed by the petitioner/respondent and not controverted both in his replying affidavit and submissions filed. The objective of this court is to uphold substantive justice and substitution of a deceased beneficiary would be just under the circumstances to ensure that the process of distributing the estate is complete. It is my opinion that death of a beneficiary and substitution is a “sufficient reason” within the meaning of Rule 44 of the probate and administration rules to justify granting of the orders sought.

### **Disposition**

19. Flowing from the above, the orders that commend themselves under the circumstances herein are as follows;

- a. Prayer (1) of the chamber summons dated 16<sup>th</sup> November 2022 is unmerited and the same is dismissed.
- b. The certificate of confirmation of grant dated 19<sup>th</sup> July 2013, is hereby revoked and a fresh certificate of confirmation of grant be and is hereby issued amending the schedule thereof to substitute the following deceased beneficiaries and replacing them with their children as follows;
  - (i) Susuan M Wambua be substituted with Kennedy Mweu Wambua (Her Son).
  - (ii) Rabeca Kimani be substituted with Sally Mutheu Matheka (Her daughter).
  - (iii) Mutile Ndeto be substituted with Elijah Mulela Ndeto (His son).
- (c) The Applicant will file a further Affidavit attaching the National Identity card of the new beneficiaries before the said confirmed grant is reissued.
- d. As provided for under Section 83 (g) and (h), the Petitioner/Respondent is directed to complete the process of transmission of the estate property to its beneficiaries within the next 120 days and file an affidavit in court giving a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.
- d. Each Party will bear their own costs.

20. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6<sup>TH</sup> DAY OF MARCH, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6<sup>TH</sup> DAY OF MARCH, 2024.**

In the presence of;



Mr. Muema for Petitioner  
Applicants present in court  
Sam Court Assistant

