



**In re Estate of M’Kaibuala Kaibuala alias Kaibuala Kaibuara (Deceased)
(Succession Cause 299 of 2004) [2024] KEHC 6194 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 299 OF 2004**

TW CHERERE, J

MAY 23, 2024

**IN THE MATTER OF THE ESTATE OF M’KAIBUALA
KAIBUALA ALIAS KAIBUALA KAIBUARA (DECEASED)**

AND

IN AN APPLICATION FOR CONFIRMATION AND PROTEST

BETWEEN

JOHN MWONGELA M’KAIBUALA PETITIONER

AND

JUSTUS MACHIKI UTHAKA INTERESTED PARTY

AND

JUSTUS MACHIKI UTHAKA INTERESTED PARTY

RULING

1. By an order dated 18th February, 2020, the court directed John Mwangela M’Kaibuala (Petitioner) to apply for confirmation of the grant within 30 days’ failure Justus Machiki Uthaka (Interested Party) was at liberty to apply.
2. By summons dated 02nd July, 2020, Interested Party stated that he had bought land from the deceased and applied to distribute the estate of the deceased comprised in LR. Njia/Bireururi/950 and LR. Njia/Bireururi/1904 as follows:

LR. Njia/Bireururi/950

Justus Machiki Uthaka

LR. Njia/Bireururi/1904



John Mwangela M’Kaibuala

3. By protest filed on 14th July, 2021, Petitioner disputed that the Interested Party had an interest on deceased’s estate and proposed that the estate be distributed as follows:

LR. Njia/Bireururi/950 equally

1. Henry Nguru and Lucy Kananu Julius (the children of Mutuma M’Arimba on one part
2. Martha Kathei Mwangela, Evans Muchui Mwangela Mickline Kendi (the wife and children of John Mwangela M’Kaibuala

LR. Njia/Bireururi/1904

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4. I have considered the summons 02nd July, 2020 protest filed on 14th July, 2021 and the Petitioner’s and Interested Party’s submissions filed on 01st November, 2021 and 27th October, 2021 respectively. I have also considered the Interested Party’s affidavit of protest filed on 11th December, 2009 in which he avers that he purchased Petitioner’s share in LR. Njia/Bireururi/950.
5. I have also considered the chief’s letter filed in this cause which discloses the Deceased’s children were the Petitioner and M’Arimba M’Kaibuala aka Mutuma M’Kaibuala alias Mutuma M’Arimba.
6. The court record reveals that deceased’s estate comprised of LR. Njia/Bireururi/950 and LR. Njia/Bireururi/1904.
7. From the evidence on record, I have deduced the two issues for determination. The first issue is whether the construct of the Law of Succession Act (LSA) gives this court the jurisdiction to declare the Interested Party a bona fide purchaser with a right over deceased’s estate.
8. It is then important to look into the provision of Section 2 of LSA which deals with the application of the Act. It provides as follows:

Section 2 Application of Act

- (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

9. The Court of Appeal had a chance to examine this section in the case of Mose v Kirwa (Civil Appeal 125 of 2018) [2022] KECA 730 (KLR) and Kiage JA stated as follows:

I am persuaded by the dicta of W. Musyoka in *I Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR where he articulated the jurisdiction of the LSA, as follows; 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.”

From the foregoing decisions, it is clear to me that for a matter to fall within the purview of the *LSA* it must; concern itself with the determination of the assets of a deceased, the survivors of the deceased and persons with beneficial interest; involve itself with the distribution of the assets of a deceased among the survivors and any persons with beneficial interest. Those people do not include creditors, purchasers, or such other third parties.

10. From the foregoing, it is apparent that the applicability of the *LSA* is limited to cases concerning the intestate or testamentary succession of the estate of a deceased, in other words, inheritance issues. It therefore goes without say that anything outside of this does not fall within the purview of the *LSA*.

11. Consequently, I have come to the conclusion that this court lacks the requisite jurisdiction to determine the Interested Party’s purchaser’s right. I echo Nyarangi JA in the case of *The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited* (1989) KLR 1 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”.

12. The second issue for determination is how the deceased’s estate ought to be distributed.

13. As stated at paragraph 5 above, the children of the deceased are Petitioner and M’Arimba M’Kaibuala aka Mutuma M’Kaibuala alias Mutuma M’Arimba.

14. Section 38 of the *Law of Succession Act* which is applicable to this cause where only the deceased’s children are left provides that:

“Where an intestate has left a surviving child or children but no spouse the net estate shall subject to the provisions of Section 41 and 42 devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.”

15. It is on record that Petitioner’s brother M’Arimba M’Kaibuala aka Mutuma M’Kaibuala alias Mutuma M’Arimba is deceased.

16. Section 41 of the *Law of Success Act* provides as follows:

Property devolving upon child to be held in trust



Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

17. My understanding of this section is that it is permissible for grandchildren to inherit directly from their grandparents where their parents who are the children of the deceased are themselves deceased.
18. In this matter however, it has not been disclosed that the children named in the supporting affidavit are the only beneficiaries of the deceased's son M'Arimba M'Kaibuala aka Mutuma M'Kaibuala alias Mutuma M'Arimba (deceased).
19. From the foregoing, I find that it would be in the interest of justice to devolve the share for M'Arimba M'Kaibuala aka Mutuma M'Kaibuala alias Mutuma M'Arimba (deceased) to his estate so that his family can then apply for distribution of their entitlement to the respective family members.
20. In the end, the summons for confirmation dated 05th October, 2023 is determined as follows:
 1. Summons for confirmation dated 05th October, 2023 which was filed while a similar one dated 02nd July, 2020 by the Interested Party was still pending is an abuse of the court process and it is struck out
 2. The estate of the deceased shall be distributed as follows:
 - i. LR. Njia/Bireururi/950 shall be distributed in equal shares to John Mwongela M'Kaibuala and the estate of M'Arimba M'Kaibuala aka Mutuma M'Kaibuala alias Mutuma M'Arimba.
 - ii. LR. Njia/Bireururi/1904 shall be distributed in equal shares to John Mwongela M'Kaibuala and the estate of M'Arimba M'Kaibuala aka Mutuma M'Kaibuala alias Mutuma M'Arimba.
 - iii. Certificate of Confirmation of Grant shall issue
 - iv. Mention on 17th October, 2024 to confirm transmission

DELIVERED AT MERU THIS 23RD DAY OF MAY 2024

WAMAE. T. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Petitioner - Mr. Omari for Kaberia Arimba Advocates

For Interested Party - N/A for Maitai Rimita & Co. Advocates

