



**In re Estate of Joshua Mwanzia Muviti (Deceased) (Miscellaneous Application E066 of 2023) [2024] KEHC 12552 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12552 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
MISCELLANEOUS APPLICATION E066 OF 2023**

**RK LIMO, J**

**OCTOBER 2, 2024**

**IN THE MATTER OF THE ESTATE OF JOSHUA MWANZIA MUVITI**

**BETWEEN**

**VYONE VAATI MWANIA & OTHERS ..... APPLICANT**

**AND**

**ELIJAH MWANZIA MUVITI ..... RESPONDENT**

**AND**

**DOMINIC NDAMBUKI MUSYOKA ..... INTERESTED PARTY**

**RULING**

1. This court has considered the two Preliminary Objections raised by interested party and the response made by the Applicants through counsel.
2. A Preliminary Objection should be arrived to matter of law only. Any issue touching on facts should be canvassed in through the main hearing or trial. The interested party has raised two issues in the Preliminary Objections raised;
  1. That this court lacks jurisdiction to cancel title because that jurisdiction in his view is a preserve of ELC Court as stipulated under Article 162 (2) of *the Constitution* of Kenya. To that extent, the interested party argues that this court is not clothed with requisite jurisdiction to entertain prayer 5 of the S.R.G dated 22/11/23.
  2. The Applicants on the other hand contend that this court is seized with the jurisdiction because the issue raised does not touch on ownership but that the applicants fault the process of acquisition of that title through succession and that the person who sold the plot to the interested party did not have the right to sell the property.



3. This court will start with that limb of the Preliminary Objection raised i.e. Whether this court is seized with jurisdiction to entertain prayer 5 of the SRG dated 22/11/23.
4. Prayer 5 of the said application seeks to inter alia cancel any transfer, disposal of the properties comprised in the estate of the late Joshua Mwanzia Mwiti (deceased) and cancellation or revocation titles issues in Succession Cause No. 99 of 2015.
5. The jurisdiction of this court to handle probate matters is donated by the Law of Succession Act (Cap 80). Section 47 thereof gives this court power to entertain any application and determine any dispute under the Law of Succession Act. The SRG dated 22.11.24 is asking this court to revoke the grant issued in Kitui PMCC Succession No. 99/2015. That saw the respondent acquire some assets comprising the estate. the dispute before me does not touch on ownership of the parcel of land Parcel but the process of succession proceedings in Kitui CMs Court Succ No. 99/15. The ELC Court is not seized with the jurisdiction to determine probate issues or matters touching on succession. This court is well seized with the necessary jurisdiction and to that extent the first limb of the Preliminary Objection is overruled and or dismissed.
6. On the 2nd limb i.e. Whether the SRG dated 22.11.2023 is res-judicata in view of a ruling in succession Cause No. 99/2015, this court finds that the issues raised are matters of fact which would require parties to table evidence showing that the applicants herein had been heard over the same issue and a court rendered itself. That notwithstanding, the interested party has raised an interesting point i.e that the principle of re judicata binds family members and that because the mother of the applicants had been heard, then the daughters cannot raise same or any issue because of res judicata. That contention is incorrect because in probate matters each member of the family is distinct and has his/her rights over the estate. The principle of res-judicata only binds parties who were heard. This court has not been told that the applicants appeared in the lower court P&A 99/15 and were heard. The doctrine of resjudicata cannot therefore apply against them.
7. In the premises, both preliminary objections dated 29/5/24 and 1/10/24 are without merit and or are hereby overruled and dismissed. In any event, the interested party is not a member of the family of the deceased. He is here as an interested party and cannot act like he wants to frustrate the applicants who claim to be children of the deceased in this cause.
8. The role of the interested party in this matter is only to limited to purchaser's interests but the differences in the family if at all are issues outside his perview.
9. I direct that the SRG dated 2.11.23 be heard and determined o the merits.

**HON. R. LIMO - JUDGE**

**KAIMU**

We seek directions that we proceed by way of viva vore evidence. We have cites statements.

**AMIHANDA**

We can have vica voce evidence. We seek leave to put in additional.

**Court-**

This matter will be mentioned on 18.10.24. The respondent is granted to file further affidavit and should do so within 7 days from today.

I direct the Deputy Registrar to avail the lower court file. I also direct counsels to try and enforce settlement in this matter because the matter involves family members.



Mention 18.10.24 for directions. Lower court file to be availed.

**HON. JUSTICE R. LIMO**

**JUDGE**

**2.10.2024**

