



**Muchiri v Muchiri & another (Succession Cause E2540 of 2021)
[2024] KEHC 12887 (KLR) (Family) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE E2540 OF 2021

PM NYAUNDI, J

OCTOBER 24, 2024

IN THE MATTER OF THE ESTATE OF DAVID KAMANDE MUCHIRI (DECEASED)

BETWEEN

KELLEN MUTHONI MUCHIRI APPLICANT

AND

GEORGE MATHARI MUCHIRI 1ST RESPONDENT

MARY ANNE WANJIRU IHURA 2ND RESPONDENT

RULING

1. This ruling relates to two Preliminary Objections raised by the Respondents, George Mathari Muchiri and Mary Anne Wanjiru Ihura (the Respondents) opposing the Applicant's Notice of Motion dated 15th March 2023.
2. David Kamande Muchiri (the deceased) died on 16th October 2021. George Mathari Muchiri and Kellen Muthoni Mbogo in their capacity as son and wife of the deceased petitioned for grant of letters of administration intestate. The grant was issued on 14th April 2022 and confirmed on 21st June 2022.
3. Kellen Muthoni Muchiri (the applicant) filed a Notice of Motion dated 15th March 2023 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That the Respondents are ordered to give an account of proceeds forming part of the deceased's estate being the following bank accounts numbers:



- a. Account No. 0260292XXXX71 held with Equity Bank (K) Limited under the name of SnowBall Kenya Limited.
 - b. Account No. 03500XXXXX13 held with Family Bank Limited under the name of SnowBall Kenya Limited.
 - c. Account No. 1006XXXX47 held with NCBA Bank Limited under the name of SnowBall Kenya Limited.
 - d. Account No. 007010XXXXX27 and 00702XXXXX62 held with Access Bank (K) Limited
4. That in default of compliance with Order 3 above, the Respondents George Mathari Muchiri and Mary Anne Wanjiru Ihura be held in contempt and committed to civil jail for such term as this Honourable Court shall deem fair and just for disobeying the orders of this Honourable Court and the Respondent; George Mathari Muchiri be removed as the administrator to the estate.
5. That further, in default of compliance with Order 3 above, the Director of Criminal Investigations (DCI) be and is hereby ordered to conduct thorough and/or comprehensive criminal investigations over the following bank accounts:
- a. Account No. 0260292XXXX71 held with Equity Bank (K) Limited under the name of SnowBall Kenya Limited.
 - b. Account No. 03500XXXXX13 held with Family Bank Limited under the name of SnowBall Kenya Limited.
 - c. Account No. 1006XXXX47 held with NCBA Bank Limited under the name of SnowBall Kenya Limited.
 - d. Account No. 007010XXXXX27 and 00702XXXXX62 held with Access Bank (K) Limited.
- And upon conclusion of the said investigations to compile a comprehensive report including preferring criminal charges against any culpable party or parties and to table the same before the Honourable Court within sixty (60) days from the date hereof.
6. That costs of this application be provided for.
4. Before the Application could be heard and determined, the Respondents filed the present Notices of Preliminary Objections dated 19th July 2023 and 25th August 2023.

Preliminary Objection Dated 19th July 2023 is framed as follows-

1. That the Honourable Court under the *Law of Succession Act* and Probate and Administration Rules lacks jurisdiction to entertain this summons/application to determine disputes on company accounts a preserve of the commercial division of this court.
2. The court lacks jurisdiction to issue injunctive orders against the company bank accounts.
3. The summons has been brought in contravention of several provisions of the Company's Act, 2015.



4. The application offends known principal of law on the difference between shares held by a shareholder and assets or property of the company as the common law principal in the case of *Salomon vs. A. Salomon & Co Limited* (1896) UKHL 1, (1897) AC 32, that “a limited liability company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued. And it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders.”
5. The company is not a party to the succession cause herein.
6. That the summons dated 15th March 2023 is prematurely filed, incompetent, misconceived, offends the provisions of the law, misplaced, fatally defective in substance, law and facts, frivolous, and an abuse of the court process hence should be dismissed with costs to the 1st respondent

Preliminary Objection Dated 25th August 2023 is framed as follows-

1. That this Honourable Court lacks jurisdiction to entertain the summons application dated 15th March 2023 and grant the orders sought therein.
 2. That this Honourable Court lacks jurisdiction under the *Law of Succession Act* and Probate Administration Rules to determine civil disputes relating to commercial transaction with regard to company affairs.
 3. That the summons application is incurably defective, bad in law, incompetent, frivolous, vexatious and an abuse of the Court process and ought to be dismissed with costs to the 2nd Respondent.
5. The court directed that the Preliminary Objections be heard first. The applicant filed written submissions were dated 27th May 2024 those of the 1st Respondent were dated 25th June 2023 whilst those of the 2nd Respondent are dated 25th August 2023.

Applicant’s Submissions.

6. The Applicant submitted that this court has jurisdiction to deal with the application dated 15th March 2023 which involves a company which belongs to the estate as compared to ownership of the company which is not in issue. She argued that there was evidence of intermeddling in the deceased’s company and this can only be dealt by the Probate Court and not the commercial court. She urged the court to dismiss the Preliminary objections filed by the Respondents.

1st Respondent’s Submissions.

7. It was the 1st Respondent’s submission that this court lacks jurisdiction to entertain the application dated 15th March 2023 which deals with the management of a company. According to him, the company is a separate entity from the shareholders and that only this court should deal with the shares of the deceased and nothing else. Reliance was placed on the decisions in the Estate of Wagiko Ndibaru (Deceased) (2014) eKLR, *Pacific Frontier Seas Ltd v Kyengo & another (Civil Appeal 32 of 2018)* [2022] KECA 396 (KLR) (4 March 2022), *In re Estate of Sharriff Mohamed Noor (Deceased)* [2018] eKLR and *James Muhu Kangari -vs- Muhu Holdigs Ltd & Serah Mweru Muhu* [2019] eKLR.



2nd Respondent's Submissions.

8. The 2nd Respondent submitted that this court lacks the jurisdiction to entertain the current application relating to management of a company which according to her, should be determined by a commercial court. Relying on the decisions in *James Muhu Kangari -vs- Muhu Holdings Ltd & Serah Mweru Muhu* [2019] eKLR and *Re Estate of Sharriff Mohammed Noor (Deceased)* [2018] eKLR, she argued that a company is a separate and distinct from the estate of the deceased. In this case, the company is capable of suing or being sued without involving the estate of the deceased. that the application is fatally defective as the company is not part of the succession proceedings and has been sued.

Analysis and Determination

9. The issue for determination is whether the Preliminary Objections should be upheld. In the locus classicus case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696, the court stated on preliminary objections:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

10. This position was further elaborated in *John Musakali v Speaker County of Bungoma & 4 Others* (2015) eKLR where the court stated:

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

11. Similarly, in the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang J. (as he then was) quoted the Mukisa Biscuit Case and expressed himself thus:

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

12. The clear position appears to be that for a preliminary objection to meet the threshold, it must; be hinged to a point of law pleaded or arising from the pleadings; and must be founded on an understanding that the facts are agreed or undisputed; and that it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.



13. In this case the Respondents have argued that this court lacks jurisdiction to entertain the application dated 15th March, 2023.
14. Jurisdiction goes to the core of every proceeding that comes before a court of law. A court is required to down its tools in respect of a matter the moment it holds the opinion that it is without jurisdiction - see *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989)eKLR*.
15. To the extent that the Application seeks that the Court intervene in the management of a company's affairs, it must be pointed out that in law distinguishes between shares held by a shareholder and the assets (including Bank Accounts) and property of a company. In the celebrated case of *Salmon vs Salmon & Co Limited [1897] ACC* it was held that:

“a limited company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued, and it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders”. (own emphasis).
16. In *Victor Mabachi & Another vs Nurtun Bates Limited [2013] eKLR* , the court held that –

“This being the case Mediacom as a body corporate is a person ‘jurisica’ with separate independent identity in law; distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.
17. The Applicant is also seeking orders against SnowBall Kenya Ltd which is a limited company. A bank account constitutes the property of the company. The question is whether this Probate Court has the jurisdiction to make any orders against a Limited Liability Company.
18. Is SnowBall (Kenya) Ltd a party in this Succession Cause? In *James Muhu Kangari vs Muhu Holdings Ltd & Serah Mweru Muhu [2019] eKLR* Hon Justice Musyoka observed that: -

The said Company is not a party to the succession cause. It is in a sense an asset for distribution, to the extent that the deceased's shares in it are distributed in the will the subject of these proceedings. The Company is a separate legal entity from the persons who hold shares in it. The law which governs limited liability Companies is the *Companies Act*, Cap 486, Laws of Kenya, in terms of the formation, operations and liability of Companies. Any Orders against a limited Company by persons who claim entitlement to shares in and directorship of the Company can only be properly brought within the framework of the *Companies Act*, in proceedings properly brought before a Commercial Court as opposed to a Probate Court. I need not say more”. (Own emphasis).
19. It is also not disputed that the Grant herein was confirmed on 21st June 2022. The substratum of the Application is that the respondents have transferred shares in contravention of the agreed mode of distribution in certificate of confirmation. The mandate of the Probate Court was well articulated by Musyoka J in *Re Estate of Alice Mumbua Mutua [2017]* when he states-

Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person



ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.” (Emphasis added)

20. On account of the forgoing I will uphold both preliminary objections and strike out the Summons dated 15th March 2023 as the probate Court is not the proper forum to resolve the dispute as framed

21. Owing to the relationship between the parties there shall be no order as to costs

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024.

P M NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

