



**In re Estate of Musau Maundu alias Musau Maundu Yumbya (Deceased)  
(Succession Cause 20 of 2017) [2023] KEHC 20164 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20164 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
SUCCESSION CAUSE 20 OF 2017  
GMA DULU, J  
JULY 13, 2023  
(FORMERLY MACHAKOS SUCCESSION CAUSE NO. 913 OF 2010)  
IN THE MATTER OF THIS ESTATE OF MUSAU MAUNDU ALIAS MUSAU  
MAUNDU YUMBYA (DECEASED)**

**BETWEEN**

**JOSEPHINE KAVOO NYAGHA ..... ADMINISTRATOR**

**AND**

**BENSON MAKULA MUTHWII ..... 1<sup>ST</sup> RESPONDENT**

**SERAH ALPHONSE MWANGANGI ..... 2<sup>ND</sup> RESPONDENT**

**SELLAR NDUNGE VONZO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me are two applications for determination in this same ruling.
2. The first application is a summons dated January 28, 2021 filed by B. M. Mutuku & Company Advocates for the 2<sup>nd</sup> Administrator Josephine Kavoo Nyagha. The respondents are Benson Makula Muthwii and Serah Alphonse Mwangangi.
3. The application has been brought under section 45 and 47 of the *Law of Succession Act* (cap 160), and rule 49 of the *Probate and Administration Rules* and has the following prayers:-
  1. (spent).
  2. That preservation and protection orders do issue that the respondents whether by themselves or through their servants, agents and/or employees or any other person whomsoever claiming under them or through them be restrained from selling, trespassing intermeddling or interfering in any way with parcel of land No Ukia/utaati/1176 and any other assets of



the deceased herein or from doing any other prejudicial act thereon pending hearing and determination of this application.

3. That the respondents whether by themselves, or through their servants, agents and/or through them be permanently restrained from selling, trespassing, intermeddling or interfering in any way with parcel of land No Ukia/utaati/1176 and any other assets of the deceased herein or from doing any other prejudicial act thereon.
  4. That the Officer Commanding Station, Mukuyuni Police Station do ensure compliance with prayers 2 and 3.
  5. That the respondents be cited for intermeddling with the free property of the deceased herein, that is, parcel of land No Ukia/utaati/1176 and this court be pleased to grant any other orders that it may deem just and expedient to meet the ends of justice including punishment of the respondents and any other person whosoever interfering with the estate of the deceased herein.
  6. That the costs of the application be provided for.
4. The application has grounds on the face of the summons that the court rendered rulings on 30<sup>th</sup> February 2018 and May 3, 2019 settling the issues of the alleged claims by the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent's deceased husband and issued a certificate of confirmed grant on June 11, 2019, that since then the respondents had vowed to disregard the court verdict and intermeddled and trespassed into the suit property cultivating and purporting to do construction works thereon, that the issue of distribution of the deceased's estate was determined with finality and no appeal filed, and that the beneficiaries of the deceased suffer and will continue to suffer irreparable harm should the respondents continue to intermeddle with the suit land.
  5. The application was filed with a supporting affidavit sworn by the applicant on January 28, 2021 amplifying the grounds of the application and annexing inter alia, copy of certificate of confirmed grant for letters of administration, and photographs of the land in dispute showing physical structures and planted trees.
  6. The application is opposed through a replying affidavit sworn on May 7, 2021 by Sellar Ndunge Vonzon in which it was deponed that her husband paid Kshs 400,000/= on the basis of a contract of sale dated May 29, 2010 for 0.203 acres of Ukia/utaati/1176 which agreement was with the 2<sup>nd</sup> administrator, and that she and her family had lived on the land from 2010 and built and farmed on the land. It is also deponed that she instructed her lawyer to file a case in the ELC Court to determine the proprietary rights.
  7. The second application is a notice of motion dated September 20, 2021 filed by Benson Makula and Sellar Ndunge Vonzon through Counsel M/s O. N Makau Advocates. The respondent is Josephine Kavoo Nyagha.
  8. This application was filed under section 47 of the *Law of Succession Act* (cap 160) and rule 73 of the *Probate and Administration Rules*, and order 51 of the *Civil Procedure Rules 2010*, as well as section 1A, 1B and 3A of the *Civil Procedure Act* (cap 21), and seeks the following orders:-
    - a. That there be a stay of proceedings of the cause herein pending the hearing and determination of Makueni CC ELC E017 of 2021 which suit involves the parties herein and relates to the same subject property being land parcel No Ukia/utaati/1176.
    - b. That the costs of this application be in the cause.



9. The application has grounds on the efface of the notice of motion that the primary duty of the probate and administration court is to distribute the estate of a deceased person to the rightful beneficiaries, that the ELC court is constitutionally mandated to determine the validity and enforceability of sale agreement and specific performance arising from sale agreement, that it has been the practice by court that where there are pending proceedings between parties in the ELC court on same subject matter, the proceedings in the probate and administration cause are stayed pending the ELC court decision.
10. The application was filed with a supporting affidavit sworn on September 20, 2021 by Sellar Ndunge Vonzo which amplifies the grounds of the application and annexed a copy of pleadings and documents filed in Makueni Chief Magistrate's ELC Case No E0110 of 2021 – Sellar Ndunge Vonzo v Josephine Kavoo Nyagha and Dickson Mwanzia Musau.
11. The application is opposed through a replying affidavit sworn on June 29, 2022 by Josephine Kavoo Nyagha the 2<sup>nd</sup> administrator in which it was deponed that the application is res-judicata as a similar earlier application dated November 27, 2018 had been determined in a ruling delivered on May 3, 2019, and a final ruling on the matter delivered on July 30, 2018 (should be 2019). Copies of the said two rulings were annexed to the affidavit.
12. The two applications were canvassed through written submissions. In this regard, I have perused and considered the submissions filed on both sides.
13. I will start with the application dated September 20, 2021 for stay of the proceedings herein pending Makueni Chief Magistrate ELC E017 of 2021.
14. In this succession matter proceedings herein have already been concluded. The final decision on confirmation of grant of letters of administration has been made. The confirmed certificate of grant of letters of administration showing the distribution of the deceased's assets has also been issued.
15. What remains therefore is merely the winding up the estate, which in my view can only be stayed if there is a pending application for revocation or annulment of the confirmed letters of administration. There is no such application in the present case.
16. In my view therefore, though this court could stay proceedings herein if there were pending proceedings in the ELC Court on the same subject matter or assets for distribution, that stay of proceedings can only be granted where the probate and administration proceedings have not been finalized. As the substantive succession proceedings herein have already been finalized, this court in my view has no jurisdiction or discretion to stay the winding up of the estate because of a pending case in the ELC Court, which in any case was filed after finalization of the succession proceedings herein. Thus the application for stay of proceedings herein is for dismissal.
17. I now turn to the summons dated January 28, 2021 for restraining orders against selling, trespassing, intermeddling or in any way interfering with land parcel number Ukia/utaati/1176.
18. In my view, after the confirmation of grant of letters of administration herein, the administrators who are two, that is Grace Kavini Musau and Josephine Kavoo Nyagha were required within six (6) months from June 30, 2018 to distribute the assets and wind up the matter by filing an account in the court.
19. If there was any impediment or obstacle to the distribution or winding up of the estate, then the administrators were at liberty to come to this court for enforcement orders.
20. Instead of coming to this court for orders to enforce or implement the distribution of the assets and winding up of the estate, one of the administrators Josephine Kavoo Nyagha has come to this court



for restraining orders, and not for execution of this court's orders evidenced in the contents of the certificate of confirmed grant.

21. In my view, the complaints disclosed by the 2<sup>nd</sup> administrator in this application, do not amount to intermeddling with the assets of the estate, as the succession proceedings have already been finalized. They could amount to civil claims may be trespass, but which can only be pursued in the civil court, not in the succession court, as the succession court's jurisdiction at this stage of an already confirmed grant is only to enforce the implementation of its confirmation orders, and not to resolve unfolding disputes of a civil nature.
22. I thus find that this application is not merited and is for dismissal. However, for clarity I have to state here that the administrators or any of them is at liberty and legally entitled to apply to this court for appropriate orders to enforce the orders issued and contained in the certificate of confirmed grant of letters of administration.
23. I thus find no merits in the two applications. I dismiss both applications. I order that parties will bear their respective costs of the applications.

**DATED, SIGNED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JULY 2023 VIRTUALLY AT VOI.**

**GEORGE DULU**

**JUDGE**

**IN THE PRESENCE OF:-**

**MR. KITUKU FOR JOSEPHINE KAVOO**

**NO APPEARANCE FOR OTHER PARTIES**

**MR. OTOLO COURT ASSISTANT**

