



REPUBLIC OF KENYA



**Kimongo v Peter (Miscellaneous Appeal 2 of 2022)  
[2023] KEHC 20104 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20104 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
MISCELLANEOUS APPEAL 2 OF 2022**

**TM MATHEKA, J**

**JULY 10, 2023**

**BETWEEN**

**DOMINIC NZEI KIMONGO ..... APPLICANT**

**AND**

**MARY MUENI PETER ..... RESPONDENT**

**RULING**

1. That Kimongo Mbovu died intestate is not in dispute. The date was not available in the record as I did not see a certificate of death in the record.
2. The record shows that there was a citation before the subordinate MKN CM. Succession Cause No E049 of 2020.
3. On August 27, 2021 the court made the order as follows:  

That upon hearing both counsel for the Citee and the Citor: The Citor is granted 30 days to take out letters administration.
4. The Citor Mary Mueni Peter proceeded to file Makueni CM Succession Cause no E226/2021 in the Estate of Kimongo Mbovu Katumo alias Kimongo Mbovu (deceased) on August 31, 2021.
5. She obtained the letters of administration intestate on January 14, 2022. A Certificate of Confirmation of grant was issued on October 27, 2022 – whereby 3 acres out of Ukia/Utaati/3 was to be registered in the name of Mary Mueni Peter – and the remainder – in the names of Titus Katumo Mwanzilo, Urbanus Mwangangi Nyamai, Thomas Mutunga Mulwa and Dominic Nzei Kimongo.
6. There is an Affidavit of Protest filed on 3/10/2022 against the confirmation of grant by Titus Katumo Mwanzilo together with Urbanus Mwangangi Nyamai, Thomas Mutunga Mulwa.



7. It appears that Dominic Nzei Kimongo filed an application under Rules 16 and 77 of the PE&A Rules, and section 67 of the Law of Succession Act. He sought two orders: that the objection he had filed be deemed as properly, and the Petitioner be stopped from administering the estate. The learned trial magistrate vide a ruling dated 12/4/2022 dismissed the application on the ground that the objection ought to have been filed in the citation proceedings – and the orders sought against the petitioner could not be granted because the petitioner had obtained the orders to file the petition properly. The application by Dominic Nzei Kimongo was dismissed.
8. The appellant Dominic Nzei Kimongo then filed Notice of Motion dated 9/6/2022 seeking orders *inter alia* three orders; that the order dated 12/4/2022 be set aside until the appeal is heard; the applicant be granted leave to appeal out of time and the administration of the estate be stayed until the appeal is heard and determined.
9. Five main grounds for the application are that; in his life time the deceased did not create any liability with respect to his estate; that the petitioner had no basis upon which to obtain letters of administration and the certificate of confirmation of the grant; that the learned trial magistrate had no jurisdiction to grant the orders it did to Mary Peter; that learned trial magistrate overlooked the objection raised by the applicant and that the order for 3 ½ acres to be taken from the estate of the deceased was not supported by any evidence sufficient to warrant the orders cited.
10. The application is supported by the affidavit of Dominic Nzei Kimongo which reiterates the grounds on the face of the application. He has annexed the memorandum of appeal, the proceedings before the subordinate court in Succession Cause No E236/2021 the ruling by Hon Sagero SRM and the documents filed by the petitioner in support of her citation.
11. There is a replying affidavit by Mary Mutheu Peter sworn on 9/11/2022. She depones that she cited Dominic Nzei Kimongo because he sold approximately 3 acres of land to her late husband out of Ukia/Utaati/03 registered in the name of the his father now deceased.
12. That when the matter came for hearing on 11/8/2021 the applicant was not willing to take out letters of administration on behalf of the estate of the deceased and the court granted her the go ahead to obtain the letters of administration. That the applicant did not challenge the jurisdiction of the court in dealing with the matter.
13. That after she obtained letters of administration the applicant filed objection proceedings, which was dismissed by the trial court.
14. That on October 25, 2022 the protesters who include the said Domini Nzei Kimongo agreed that she should get 3 acres from the said parcel of land.
15. That the application has been overtaken by events.
16. Parties filed written submissions; for the applicant through Paul Kisongoa & Co advocates and for the respondent – by CM Muthiani advocates.
17. I must admit that I have struggled over the applicant’s submissions due the manner in which they were drafted but - what I gather is that the applicants submit that that the petitioner did not establish her claim against the estate of the deceased to warrant all the orders that she obtained from the learned trial magistrates’ court and the learned magistrate ought to have heard the objection by the applicant.
18. For the respondent it is argued that the applicant has not established the grounds required under section 79G of the Civil Procedure Act to warrant the extension of time sought. The respondent relies on Mombasa County Government –vs- Kenya Ferry Services and Anor (2019) eKLR where the court



cited the Supreme Court – to the effect that extension of time to file an appeal out of time is not a right but an equitable remedy. That the ruling the applicant seeks to appeal against was delivered on 12/4/2022 and the present application was filed on 13/6/2022. That this delay is not explained.

19. The respondent concedes that the orders sought are dependent on the jurisdiction of the court.
20. I have considered the rival submissions by counsel. I have considered the record from the subordinate court. The issue would be whether the application for extension of time is tenable in this case.

Section 79G of the [CPA](#) provides:

“Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

21. I have carefully considered the application and clearly it was filed out of time. The applicant’s affidavit speaks of delay in obtaining proceedings as the reason for the delay. Considering the nature and the circumstances of the case I do not consider the delay to be inordinate.
22. This is because of paramount importance to this court is the interest of justice. Rule 73 of the [PE&A Rules](#) provides that

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the end of justice or prevent abuse of the process of court”. In addition, section 76 of the Law of Succession Act provides that “A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides either on application by any interested party or of its own motion” (emphasis added.)

23. There is no doubt that the applicant has come before me seeking the order for extension of time to appeal against the ruling of the learned trial magistrate dated 12/4/2022 – where the magistrate rejected the applicant’s objection proceedings.
24. However, the proceedings of this case in the subordinate court are calling out for this court to exercise its inherent jurisdiction in the interest of justice. This is because of the manner in which the grant was issued to the respondent and the manner in which it was subsequently confirmed.
25. Here is why; The deceased herein is Kimongo Mbovu Katumo. Before the learned trial court the respondent filed an affidavit sworn on 19/11/2020 where she deponed that the deceased was the owner of LR Ukia/Utaata/03. That she purchased 3 ¼ acres out of that title from Dominic Nzei Kimongo. She annexed a copy of a sale agreement
26. Further in her replying affidavit she annexed the citation proceedings where it demonstrated that she had cited only the said Dominic Nzei Kimongo. It is from these proceedings that she proceeded to obtain the grant of letters of administration of the grant. She also filed the petition on 31/8/2021 where she listed 14 persons as those who survived the deceased in the petition she states that she filed it as the purchaser of the deceased’s estate and states that “every person having an equal/power right to the grant of representation herein has consented hereto”.
27. There is no consent from any of the 14 beneficiaries she has listed – Neither has she annexed the summons for confirmation of the grant or the consent to the distribution of the estate’



28. All through the Petitioner Respondent says she bought the land from one Dominic Nzei Kimongo. She is not saying that she purchased the land from the deceased – the owner of the property. Clearly any claim that she bought the deceased’s property from any other person other than the deceased would not give her any claim to the estate of Kimongo Mbovu Katumo.
29. Hence the most important thing here is that the petitioner respondent did not establish any claim against the estate of the deceased as a purchaser. The respective claim cannot be against the estate of Kimongo Mbovu(deceased) but against one Dominic Nzei Kimongo
30. It is clear, on the face of the record that the grant issued to the respondent was obtained in proceedings, that were defective in substance – the claim that she was a beneficiary of the estate is false because she did not purchase the land from the deceased – the fact that she alleges to have bought land from an alleged beneficiary of the estate does not bring anywhere near section 66 of the Law of Succession Act. This is not a position that can be allowed to stand.
31. It is my view that the provisions of section 76 of the Law of Succession Act which grants this court the powers to suo motu – revoke a grant were intended to protect the estates of deceased persons from actions such as these.
32. In the circumstances, this court is bound to protect and ensure the preservation of the estate of the deceased Kimongo Mbovu Katumo. The respondent through her own evidence states she never at any time engaged the deceased, from her own affidavits she is not a beneficiary or creditor of the estate. That grant she obtained cannot be allowed to stand.
33. In the circumstances the grant issued to Mary Mutheu Peter on 14/1/2022 and confirmed on October 25, 2020 be and is hereby revoked and all transactions pursuant to that grant are set aside.
34. Orders accordingly!

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF JULY 2023**

.....

**MUMBUA T. MATHEKA**

**JUDGE**

Court Assistant Mwiwa

For the applicant : Paul Kisongoa & Co Advocates

For the Respondent : CM Muthiani Advocates

