



In re Estate of Julius Mutiso Mulili (Deceased) (Succession Cause 9 of 2021) [2023] KEHC 24154 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
SUCCESSION CAUSE 9 OF 2021
GMA DULU, J
OCTOBER 9, 2023
IN THE MATTER OF ESTATE OF JULIUS MUTISO MULILI (DECEASED)**

BETWEEN

JOSHUA MANTHI MUTISO APPLICANT

AND

ESTHER MUTHEI MUTISO (DECEASED) 1ST RESPONDENT

RICHARD KIEMA MUTISO 2ND RESPONDENT

RULING

1. This is a succession matter in which proceedings were initially filed in Machakos High Court, but later the file transmitted to the Makueni High Court.
2. What is before me for decision today, is a Notice of Motion dated 25th May 2021 filed by Joshua Manthi Mutiso through Counsel O. N. Makau & Company and has the following prayers:-
 1. That this court can be pleased to transfer this succession cause to the Makueni Chief Magistrate's Court.
 2. That the court be pleased to appoint Joshua Manthi Mutiso, Catherine Wayua Mutiso and Fredrik Musyoki Mutiso as administrators of the estate.
 3. That the costs of the application be paid from the estate.
3. The application has grounds on the face of the Notice of Motion that the applicant is a legal beneficiary of the estate of Julius Mutiso Mulili, that the 2nd respondent initiated this succession cause without the knowledge of the other beneficiaries and has never acted in the interests of the estate, that the cause was dismissed on 15th July 2015, and that it was only when the applicant filed a citation in



Makueni Succession Cause No. E034 of 2020 that the matter was revived, and that the beneficiaries have consented to having their appointed administrators.

4. I see no supporting affidavit filed with the application, though there is filed a copy of a Chief's letter dated 5th February 2019, copy of burial permit for Esther Muthei Mutiso, and copy of written consent by seven (7) people which is neither dated nor commissioned by a Commissioner for Oaths as intended.
5. The application is opposed, through a replying affidavit sworn on 9th July 2021 by Richard Kiema Mutiso the 2nd respondent who describes himself as 2nd Administrator of the estate and refers to a piece of land Makueni/Kivauni/271 57.84hectares of total value of Kshs. 20million, and depones that the succession matter should be transferred to the Makueni High Court. He annexes a number of documents including a consent signed by five (5) people in a succession cause at Machakos High Court of 2009 but whose case number is not indicated. I note however, that in documents filed herein, there is disclosure that the Machakos High Court Succession Cause was No. 714 of 2009.
6. In response to the replying affidavit, Joshua Manthi Mutiso filed a further affidavit he swore on 8th February 2022 claiming that there was no evidence of alleged intermeddling by himself, and that the Machakos Succession Cause was dismissed on 15th July 2015 owing to laxity on the part of the administrators.
7. The second respondent Richard Muema Mutiso filed a supplementary affidavit he swore on 26th May 2022 contending that the applicant was untruthful and malicious in filing a citation knowing fully well that succession proceedings have been filed and that no prejudice has been shown by the applicant if he is not included as a beneficiary. It is also deponed that the applicant had signed a sale agreement.
8. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by O. N. Makau & Mulei Advocates for the applicant and Kyalo Muia Advocate for the respondents.
9. I note that both counsel for the parties have dwelt at length on intermeddling with the assets of the estate by the applicants. The other issue they have addressed is whether this court should grant the orders sought.
10. This is an application seeking transfer of the succession cause to Makueni Chief Magistrate's Court and for appointment of three (3) named persons as administrators.
11. The issue of intermeddling, though it arose in the response to the application herein, was not the main issue, but it would ultimately influence the court's decision whether the applicant is a fit and proper person to be appointed as an administrator. For the avoidance of doubt, the applicant is only one person Joshua Manthi Mutiso, though he has proposed appointment of himself and two others as administrators.
12. I note that in Machakos High Court Succession Cause No. 714 of 2009 the applicant in an application by way of chamber summons dated 6th August 2012 was Fredrick Musyoka Mutiso, who alleged intermeddling by Esther Muthei Mutiso and Richard Kiema Mutiso. Thus the contest in the intermeddling allegation related to totally different persons from the contestant in the present application.
13. Indeed under Section 45 of the *Law of Succession Act* (Cap.160), the law prohibits sale, disposal or intermeddling with a deceased's estate assets, contrary to the provisions of the Act. Thus proof of intermeddling is a strong factor to be taken by the court in determining whom to appoint as an administrator.



14. Coming now to the prayers sought in the present application, none of the counsel for the parties herein has pursued the first prayer for transfer for this matter to the Makueni Chief Magistrate's Court. That being so, and there being no consent to transfer the matter to the Makueni Chief Magistrate's I hold that the High Court at Makueni having jurisdiction will still proceed with the matter, unless the Judge presiding over the matter hereafter directs otherwise.
15. With regard to the appointment of administrators, Section 56 of the Law of Succession Act provides that grants shall not be made to minors, people of unsound mind or people who are bankrupt. No grant shall be issued to more than four (4) persons in respect of the same property. No grant shall be issued to a body corporate other than the Public Trustee or a trust corporation.
16. Section 66 of the Law of Succession Act gives a list of preferences of persons to whom a grant of letters of administration can be issued. The list is not exhaustive and the court can issue a grant to qualified persons who are not in the list.
17. All the contestants herein appear to have sufficient connection with the deceased, and in my view, they may be appointed as administrators herein, subject to the maximum of four (4) administrators. I find no persuasive reason disclosed to me to disqualify any of them for appointment as administrators.
18. That said however, the law is very clear on the court process and procedure for appointment of administrators. It cannot be done through filing a Notice of Motion the way the applicant has come to this court. Section 51 of the Law of Succession Act is clear on this and is mandatory. It states as follows:-

51 (1) An application for grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.
19. The prescribed form recognised under the Act is in the form of a petition provided for under Forms 78 – 83, 85 – 97A of the Subsidiary Legislation to the Act.
20. Thus this application is misconceived, incompetent and cannot be salvaged, and I will strike it out. However, I note that a petition for letters of administration herein dated 28th August 2009 was filed in Machakos High Court Succession Cause No. 714 of 2009 and is still on record and pending, and the same can be progressed with or without amendment.
21. To conclude, I find the application by way of Notice of Motion herein as misadvised and order as follows:-
 - i. The Notice of Motion herein dated 25th May 2021 is incompetent and irredeemable and I strike it out.
 - ii. This succession matter will proceed at Makueni High Court on the basis of the petition for letters of administration dated 8th August 2009 herein, with or without amendments.
 - iii. Parties will bear their respective costs of the present application, as this is a family succession matter.
 - iv. This matter will be mentioned before the Deputy Registrar of the Makueni High Court on 25th October 2023 for directions and placing the file before the High Court Judge at Makueni for further progress.
 - v. The Deputy Registrar of this court will transmit the file to the Deputy Registrar Makueni High Court.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2023
VIRTUALLY AT VOI.**

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Ms. Mboya holding brief for Mr. Kithuka for applicant

Mr. Hassan for respondent

