



**In re Estate of Timothy Mwandi Muumbo (Deceased) (Succession Cause
1673 of 2015) [2024] KEHC 14610 (KLR) (Family) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1673 OF 2015
PM NYAUNDI, J
NOVEMBER 21, 2024
IN THE MATTER OF THE ESTATE OF TIMOTHY MWANDI MUUMBO (DECEASED)**

RULING

1. By Petition dated 13th February 2024, the Petitioners seek that Grant of Letters administration ad litem to issue limited for the purpose of prosecuting suit. The parties state that the Petition is presented in their capacity as Son and Daughter of the deceased and that they have no powers to distribute the estate under the grant. The Petition is said to be presented under Section 67 of the Succession Act and rule 12 of the Probate and administration rules.
2. The Application is supported by the affidavit sworn jointly by the Applicants on 7th June 2024 and further affidavit in response to the replies by the respondents sworn by Carolyne Kalunde Muumbo on 12th June 2024.
3. The Applicants seek Grant of Letters Ad Litem to issue to enable them prosecute ELCLC No. 10 of 2023 which they have initiated as Plaintiffs. They state that in the suits they seek to recover 2 parcels of land namely, L. R. No. 209/3271/7 and LR No. 36/11/115 situated in Pangani and Eastleigh. It is stated that the assets belong to the estate.
4. The Application is opposed. Mwinzi Muumbo, Billy Mbuvi and Mark Muumbo have sworn a joint affidavit on 23rd May 2024. Pertinent to the application for grant of letters of administration ad litem, it is averred that a grant of letters of administration ad litem cannot issue to recover property that does not belong to the estate.
5. It is further contended that the matter is res judicata as a similar application dated 29th August 2016 wherein the applicants sought a grant of letters of Administration ad colligenda was determined by Hon. Muigai J.
6. It is further averred that the Applicants in presenting the Petition did not comply with a directive of the presiding Judge, Family Division on 22nd March 2000 that required that applications of this nature



be accompanied by consents from other beneficiaries. It is submitted that the current application is mischievous and intended to 'cause chaos among the beneficiaries.

7. It is contended that there is an existing duly appointed executor who has not renounced his executorship and that therefore no letters can issue to another person. It is averred that the Petition is a back handed attempt to revoke the will. The deponents take issue with the averment by the Petitioners that the respondent died intestate.
8. Johnstone Kassim Muumbo has also sworn an affidavit in opposition on 14th May 2024. He avers that the suit was filed by the Petitioners in their own capacity. That his cross petition in the main Petition addresses the issues raised by the Petitioners in the ELCLC No. 10 of 2023. He avers that he was not consulted in the filing of the Petition and he is a beneficiary of the estate.
9. He avers that apart from the properties cited in the ELC matter there are other assets that have been interfered with and it is therefore prudent that an administrator be appointed. That the suit as presented by the Applicants is defective for want of capacity.
10. It is contended that the assets belong to a company and that therefore it is only the directors of the company who are mandated to defend the same. He asks that the Petition be dismissed and his cross Petition be prioritized.
11. David Nyenge, the executor in the impugned will has sworn affidavit on 21st May 2024 in opposition. He also is of the view that the issues in the current application were addressed in ruling of the Court in relation to application dated 29th August 2016. It is contended that the Petitioners have made 2 other applications for appointment as administrator, which applications have been turned down in the decisions of Justice Musyoka and Justice Thande. The first such application was dismissed by Justice Muigai.
12. He is also of the view that the main Petition should be prioritized. He contends that as the nominated executor he is best placed to institute suit if necessary. It is submitted that the assets are not part of the estate property as it is common ground that they belong to the Company whose registration is in dispute.
13. In response the 2nd Petitioner contends that consents were obtained from Susan Kamene Muumbo, Grace Kakali Muumbo, Jacqueline Mutethya Muumbo and Edwin Mwandu Munyoki as per consents presented to Court.
14. It is submitted that the protestation by Johnstone Kassim Muumbo have been overtaken by events as he successfully applied to be enjoined as an interested party in the ELC matter.
15. It is submitted that David Nyenge is ill suited to oppose the Application because as appointed executor he has not acted to protect the estate. It is contended that it is his inaction that has facilitated the fraud that the Petitioners now seek to reverse.
16. With regard to the affidavit sworn by Billy Mbuvi, Mwinzi Muumbo and Mark Musembi the applicants asserts that their opposition is mainly intended to ensure they are not held accountable for their actions of intermeddling. It is submitted that it is the ELC Court that is best suited to decide on the ownership of the property in question.
17. The Petitioners reiterate that it is in the interests of justice that the properties be reinstated to the estate of the deceased. Further the Petitioners challenge the validity of the affidavit especially with regard to Mark Muumbo whom they state none of the averments in the affidavit can be assigned to him and his Jurat is on a separate page from that of the other deponents.



18. The Petition was canvassed via written Submissions. The Submissions of the Petitioner are dated 7th June 2024. The Petitioners contend that by virtue of Section 67 of the Law of Succession Act and Rule 12 of the Probate and Administration rules, it was not necessary for the Petitioners to give notice to the other beneficiaries in the estate. That notwithstanding they have the consent of 4 beneficiaries. They reiterate the averments in their affidavits, so I need not repeat the same here, having summarized the same above.
19. The submissions of Billy Mbuvi Muumbo, Mwinzi Muumbo and David Nyenge are dated 23rd May 2024. They identify 2 issues for determination
 - a. Whether the Court can appoint an administrator prior to invalidation of the will
 - b. Whether the issue before the Court is Res judicata
20. On the 1st issue it is submitted that there are pending Objection proceedings and before this is determined the Court cannot appoint another administrator as there is an administrator appointed by will. Reference is made to Section 80 of the Law of Succession Act and the decision on Katheri vs Qureshi and Anor EALR (1967) on the distinction between Executors and Administrators.
21. Further reference is made to the decision in re Estate of Henry Kithia Mwitari on the limits of a Grant Ad Litem. It is submitted that the orders sought are not fit for purpose and reference made to the decision re Estate of Thiongo Nginyau Muthiora (Deceased) [2013] eKLR
22. Further it is submitted that the matter is res Judicata

ANALYSIS AND DETERMINATION

23. Having considered the pleadings and rival submissions I discern the following to be the issues for determination-
 - a. Whether the Petition herein is competent and consequently whether the Court should issue the Grant Ad Litem
 - b. Who should pay costs?
24. On the 1st issue, the Petitioners succinctly state that they seek Grant of administration ad litem limited for the purpose of prosecuting suit. The Suit in question is ELCLC No. 10 of 2023. The suit was initiated by the Petitioners vide plaint dated 5th December 2023.
25. The Prayers sought therein are
 - a. That, the 7th defendant be ordered to restore and or reinstate company known as Mwingi View Point Company Limited C. 44843 and all record thereto with original shareholding of the company.
 - b. That the 7th defendant be summoned to Court to produce files for companies registered as
 - i. CR NO 2015/87394 Mwingi View Point Lodge Limited and
 - ii. CR.NO: C:44843 Mwingi View Point Company Limited together with all documents applied to enable registration of the 2 companies.
 - c. That the 7th defendant be ordered to cancel the Company known as Mwingi View Point Lodge Limited registered in April 2015 and reinstate the company Mwingi View Point Company Limited.



- d. That, the 7th defendant be ordered to cancel and or expunge all records of the 1st defendant from record.
 - e. That the 8th defendant be summoned to Court to produce to Court all record of land parcel numbers:-
 - i. L.R. NO. 209/3271/7 and
 - ii. 36/11/115
 - f. That, the 5th and 6th defendants be ordered to produce and submit to Court original title documents to L.R. NO. 209/3271/7 and 36/11/115 respectively.
 - ii). That the original title documents to parcels in f(i)above be surrendered to the 8th defendant for needful action and reinstatement of proprietorship of the parcels to the company known as Mwingi View Point Company Limited.
 - g. That the Court do order the 8th defendant to cancel all entries on the 2 titles cited in (e) above and restore ownership of the properties to Mwingi View Point Company Limited, the bonafide owner of the 2 properties
 - h. That the 2nd to 4th defendants be ordered to reimburse all money procured from the 5th and 6th defendants as consideration for fraudulent sale of property that they lacked capacity to sell.
 - i. That, the estate of the late Timothy Mwandu Muumbo be paid mesne profits by the 2nd to 6th defendants for lack of use of properties at (e) above from the year 2015 until orders are issued in this suit.
 - i. That, the costs of this suit be awarded the plaintiffs.
 - j. Any other or further orders that the court may deem fit to serve the cause of justice.
26. The substantive order in the suit is captured in prayer (g) which is that ‘the Court do order the 8th defendant to cancel all entries on the 2 titles cited in (e) above and restore ownership of the properties to Mwingi View Point Company Limited, the bonafide owner of the 2 properties. (Emphasis mine).
27. Parties are bound by pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as follows;
- [11]. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined



and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

28. The Petitioners have argued forcefully that they should be granted the Grant Ad Litem to enable them recover property that belongs to the estate of the deceased. However, this averment is not supported by the prayers that are sought in the plaint.
29. The question that begs is whether the Petition as presented is competent. It is not disputed that the deceased was a director in the Company and the manner in which his company was subsumed by the Company registered by the defendants in the plaint is a triable issue. The issue is whether the Petitioners should be adorned with grant ad litem as they prosecute that suit.
30. The Court can only issue a grant ad Litem with respect to property or assets that it is contended belong to the deceased. In the instant case the Petitioners in their plaint assert the assets they wish to recover belongs to a limited liability company. In Estate of Eliud Kipchirchir Yego (Deceased) [2017] eKLR the Court restated the well settled principle, that a duly incorporated company is a separate and distinct legal entity different from its shareholders and directors. In that case the Court observed that having confirmed that assets were registered in the name of a company in which the deceased was a shareholder, the deceased (his estate) was only entitled to the share or shares he held and not the assets of the company. The court stated-
 - [11] ...The shares of a company are different or are not synonymous with the assets owned by the company as insinuated by the objectors in their submissions.
 - [13] ...The suit properties belonged to the company and not the deceased. They did not form part of his estate and were consequently not liable to distribution to his beneficiaries...
31. On account of the foregoing I am compelled to find that the Petition as presented is incompetent and defective and must fail for the reason that the Petitioners seek a grant in respect of assets that by their own pleadings do not belong to the deceased. Accordingly, the Application is dismissed in its entirety.
32. On account of the relationship between the parties there shall be no order as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.

P M NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

Advocate for Applicant

