



**In re Estate of Reuben Kibiru Njoroge (Deceased) (Succession Cause
2790 of 2013) [2024] KEHC 13876 (KLR) (Family) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2790 OF 2013
PM NYAUNDI, J
NOVEMBER 8, 2024
IN THE MATTER OF THE ESTATE OF REUBEN KIBIRU NJOROGE (DECEASED)**

BETWEEN

JOSEPH MUCHAI KIBIRU 1ST APPLICANT

MARY WANJIRU KIBIRU 2ND APPLICANT

CHARLES NJOROGE KIBIRU 3RD APPLICANT

AND

LUCY NYAMBURA KIBIRU 1ST RESPONDENT

SIMON GITAU KIBIRU 2ND RESPONDENT

AND

SUSAN KIHAKI KIBIRU INTERESTED PARTY

MARGARET WAIRIMU KIBIRU INTERESTED PARTY

RULING

1. This ruling relates to a Preliminary Objection raised by the 1st Respondent, Lucy Nyambura Kibiru opposing the Applicants Notice of Motion dated 3rd June 2024.
2. Reuben Kibiru Njoroge (the deceased) died on 26th September 2013. Lucy Nyambura Kibiru in her capacity as wife of the deceased petitioned for grant of letters of administration intestate. The grant was issued on 7th April 2014 and confirmed on 18th December 2014.
3. The deceased was survived by the following beneficiaries;



- i. Lucy Nyambura Kibiru- wife.
- ii. Margaret Wairimu Kibiru-daughter.
- iii. Susan Mwihaki Kibiru-daughter
- iv. Mary Wanjiku Kibiru-daughter
- v. Charles Njoroge Kibiru-daughter.
- vi. Simon Gitau Kibiru-son.
- vii. Joseph Muchai Kibiru-son.

Assets.

- i. Molo South/ Langwenda Block 11/340 (Nyakinyua& Kang'ei)
- ii. Njoro/ Njoro Block 2/726(Njokerio)
- iii. Githunguri/ Githiga/T.37
- iv. Githunguri/ Githiga/757
- v. Nyandarua/ Kirima/689
- vi. Nyandarua/ Ol Bolossat/312
- vii. Land Reference Number 74/4
- viii. Subplots Known as L.R No. 74/272, L.R No. 74/275, LR No. 74/276, LR No. 74/277, L.R No. 74/278, L.R No. 74/279, LR No. 74/280, LR No. 74/281, LR No. 74/282, LR No. 74/284, LR.No.73/285, LR No. 74/286, LR No. 74/287, LR No. 74/288, LR No. 74/289, LR No. 74/291, LR No. 74/292, LR No. 74/294, LR No. 74/298, LR No. 74/299, LR No. 74/300, LR No. 74/301 and LR No. 74/4/2.
- ix. Shares Held in CDSC Account No. B12-0000002978300/L10
- x. Shares in Firestone E.A (1969) LTD
- xi. Shares in Kenya Planters Co-opertive Union Limited
- xii. Shares in Standard Chartered Bank Limited
- xiii. Motor Vehicle Registration No. KBQ 665 A
- xiv. Bank Account No. Co-opertaive Bank Ltd.
- xv. Bank Account No. Family Bank Ltd
- xvi. Bank Account No. Kenya Commercial Bank Ltd.

4. The Applicants filed a Notice of Motion dated 3rd June 2024 seeking the following orders;

1. Spent.
2. That this Honourable Court do issue an order of temporary injunction against all the beneficiaries and /or their representatives, employees or assigns, from dealing, selling, transferring, alienating and interfering in any manner with the estate of the deceased namely, MOLO South/ Langwenda Block 11/340 (Nyakinyua& Kang'ei),njoro/ Njoro Block



2/726(Njokerio), Githunguri/ Githiga/T.37,Githunguri/ Githiga/757, LR NUMBER 74/4, L.R No. 74/274,LR No. 74/277, L.R No. 74/278,LR No. 74/280,LR No. 74/281, LR No. 74/284,LR.No.73/285,LR No. 74/287,LR No. 74/288, LR No. 74/289,LR No. 74/298,LR No. 74/299, LR No. 74/300, LR No. 74/301 and LR No. 74/4/2, LR No. 74/282, LR No.74/276, Nyandarua/ Ol Bolossat/312(10 acres), LR. No. 74/275, LR.No. 74/273, LR No. 74/279, LR No. 74/293, ½ of PLOT 74/272(0.13805 Ha), LR No. 74/291, LR No. 74/272(0.13805 Ha) , Nyandarua/ Kirima/689, LR No. 74/292 pending the hearing and determination of this application inter partes.

3. That pending the hearing and determination of this application, a temporary injunction do issue to restrain and prevent the beneficiaries by themselves and/or through agents, servants, employees, assigns or otherwise howsoever from interfering, selling, transferring or alienating in any manner the estate of the deceased (all the above named properties) until a new or fresh mode of distribution is issued.
 4. That the distribution of the estate of the deceased among beneficiaries as indicated in the Certificate of Confirmation of grant dated 18th December 2014 be reviewed accordingly and the certificates of confirmation of grant be amended and a fresh one be issued in accordance with Section 35 of the Law of Succession Act.
 5. That this Honourable Court do issue such other orders as the court may deem just and expedient for the ends of justice to be met.
 6. That The costs of this application be provided for.
 7. That costs of this application be provided for.
5. In response, the 1st Respondent filed a Replying Affidavit sworn on 21st June 2024 and a Preliminary Objection dated 24th June 2024. She raised the following grounds of opposition;
1. The court is functus officio upon confirmation of the Grant on 18th December 2014.
 2. The court does not have jurisdiction to hear and determine the Notice of Motion dated 3rd June 2024.
 3. The Notice of Motion should be struck out.
6. The court directed that the Preliminary Objection be heard first. The Preliminary Objection was canvassed by way of written submissions.

Applicant's Submissions.

7. In regards to ground number one of the preliminary objection, the Applicants cited the case of Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR where the court held that the functus officio doctrine prevents the reopening of a matter before a court that rendered the final decision thereon.
8. The applicants associated themselves with the above holding and argued that their application seeks a review of the confirmation of grant on the ground that that property known as LR No. 74/273 was disposed by the deceased and is therefore not available for distribution.

1st Respondent's Submissions.

9. The 1st Respondent submitted that once a probate court issues an order for confirmation of grant the court becomes functus officio. She cited the decision in the case of re Estate of Juma Shitseswa Linani



(Deceased) 2021 eKLR where the court held that after the confirmation stage, the court becomes functus officio and where a party is aggrieved by the confirmation orders, he should file an appeal against the said orders. The 1st Respondent stated that in this case, the applicants should have filed an application for review as was held in the decision of ICEA Lion Insurance Co. Ltd v Julius Nyaga Chomba [2020] eKLR.

10. She further submitted that once transmission of the estate to the beneficiaries has begun, this court ceases to have jurisdiction over the properties in dispute. That the Land Court has jurisdiction to deal with the dispute. She cited the case of Re Estate of Reuben Mugesani Bulimu (Deceased) [2020] eKLR and Re Estate of Daniel Khasievera Anusu (Deceased) [2022] eKLR.

Analysis and Determination

11. Does the preliminary objection meet the legal threshold? 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”.

12. The Court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, in the case of Hassan Ali Jobo & Another v. Suleiman Said Shabbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –v.- West End Distributors (1969) EA 696: ‘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 ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion

13. The clear position appears to be that for a preliminary objection to meet the legal threshold, it must be: 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.
14. In this case, the issue arising here is on jurisdiction. The 1st Respondents has argued that this court lacks jurisdiction to entertain the application dated 3rd June 2024. The 1st Respondent argued that this court lacks jurisdiction to entertain the Applicant’s application because the court became functus officio after confirming the grant.
15. 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 as stated in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989)eKLR.



16. The argument on jurisdiction is based on the doctrine of *functus officio*.
17. *Functus officio* is a principle of law that prevents the reopening of a matter before the same Court that rendered the final decision. If a party establishes that the court is *functus officio*, the court will have no business determining the matter further. Thus, the doctrine of *functus officio* can also at a preliminary point, dispose of an application/suit.
18. Blacks Dictionary defines *functus officio* as having performed his or her office without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.
19. The Supreme Court of Kenya in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads: -

The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.

20. In *Jersey Evening Post Ltd v Ai Thani* (2002) JLR 542 at 550, it was held thus:

A Court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus* when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.

21. As per the decision of the Court of Appeal in *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, the *functus officio* doctrine does not allow “a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”
22. In this case, the applicants argue that they realised that the deceased disposed of some properties when he was alive hence they are not available for distribution. The 1st Respondent does not deny this allegation. Instead, she argues that the court is *functus officio* and the only remedy available for the applicants is review.
23. The argument about the Court being *functus officio* post issuance of a Certificate of Grant of Confirmation of Letters of Administration is, patently, unsustainable. A Probate Court is never truly *functus officio*. It can always entertain any applications necessary for the efficacious administration of the estate of the Deceased both before and after a grant of representation. Indeed, section 47 of the *Law of Succession Act* explicitly envisages these kinds of applications.
24. For this reason, I find that the court is not *functus officio*. As long as issues regarding the estate that remain outstanding the court retains jurisdiction. In certain circumstances, a probate matter is not concluded at the point of confirmation of grant. This was the holding In *re Estate of Yawaya Shitanda*



Nyatati (Deceased) (Succession Cause 88 of 2002) [2022] KEHC 11430 (KLR). It remains alive and the beneficiaries are entitled to move court thereafter.

25. The upshot is that the preliminary objection dated 24th June 2024 lacks merit and is hereby dismissed. The applicants are granted leave to file a further affidavit in which they will propose a new mode of distribution within 7 days. The Respondent is granted corresponding leave to file her response to that proposal within 7 days of service. The matter will be mentioned on 29th January 2025 to take further directions.

It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

M NYAUNDI

JUDGE

In the presence of:

Kamau Muturi Advocates for the Applicant

Kariuki Advocates for the 2nd Respondent

Munguti h/b for Anzala for 1st Respondent

Fardosa Court Assistant

