



In re Estate of Bonphantry Masinde (Deceased) (Miscellaneous Succession Application E001 of 2024) [2024] KEHC 15601 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS SUCCESSION APPLICATION E001 OF 2024**

**DK KEMEL, J
DECEMBER 6, 2024**

BETWEEN

**BENEDICT JUMA MASINDE 1ST PROTESTOR
WEKESA MASINDE MAREBA 2ND PROTESTOR
PRISCILLA NAFUNA WANGILA 3RD PROTESTOR
BIBIANA NABWILE SITUMA 4TH PROTESTOR
JOSEPH WANJALA MASINDE 5TH PROTESTOR**

AND

**SYLVESTER SITUMA MASINDE 1ST PETITIONER
IGNATIUS SIFUNA MASINDE 2ND PETITIONER**

RULING

1. Vide an application dated 30th January 2024, the Protestors herein sought orders that:
 - a. The proceedings in the CMC Succession Cause No. 227/2022 be stayed pending the hearing and determination of this application.
 - b. The status quo be maintained.
 - c. The CMC Succession Cause No. 227/2022 be transferred to another Court of competent jurisdiction.
 - d. Orders appointing Petitioners herein and issuing of grant of letters of administration be set aside.
 - e. Costs be issued to the Protestors.



2. The application was premised on grounds on the face of it and the supporting affidavit sworn on an even date by Benedict Juma Masinde, 1st Protestor herein.
3. According to the Protestors, the Succession Cause No. 227/2022 is marred by false information, forgery, mistakes, intermeddling and unprocedural actions by the previous and present Petitioners. That the learned magistrate in the absence of a formal application and without the consent of family members of the estate of the deceased herein proceeded to appoint fresh Petitioners and that was prior to him dispensing with their filed affidavit of protest dated 7th August 2023.
4. It was averred that most of the beneficiaries to the estate of the deceased did not file any consent form, form P&A 38, approving the institution of the contentious succession proceedings.
5. It was averred that vide the agreement dated 8th August 2009, the beneficiaries to the estate of the deceased stipulated the mode of distribution of the parcel measuring 15.5 HA when the estate of the deceased comprised of land parcel No. W. Bukusu/S. Mateka/302 measuring 6.2 HA only and that the said agreement was a forgery.
6. It was averred that the selling off of portions of the estate of the deceased was done prior to the institution of the succession cause prompting them to file the affidavit of protest dated 7th August 2023.
7. In response to the application, the Petitioners herein swore a replying affidavit on 13th February 2024, wherein they averred that the application dated 30th January 2024 lacks merit, is frivolous and an abuse of Court process.
8. According to the Petitioners, the Succession Petition dated 22nd August 2022, was filed by the respective widows of the deceased herein and prior to its institution, consent was duly sought from all the beneficiaries thus the allegations of forgery, mistakes and intermeddling lack legal founding. They averred that the Protestors have failed to demonstrate to this Court their specific grievances and prayers. They averred that the acreage of the deceased's land parcel is well ascertained by the official certificate of search and that no evidence has been availed on the allegation of intermeddling.
9. It was averred that the affidavit of protest dated 7th August 2023, was dispensed with by the learned magistrate as the Court issued a ruling that effected the appointment of the Petitioners herein and that the said orders were never appealed and reviewed. He referred the Court to the ruling annexed to the replying affidavit and marked as SSM 3(a).
10. It was averred that the Protestors herein were privy to the making of the agreement dated 8th August 2009 and that the same was adopted as the mode of distribution of the estate of the deceased herein by the Court. Further, as per the certificate of official search dated 1st September 2022, annexed and marked as SSM 5, the proper measurement of land parcel No. W. Bukusu/S. Mateka/302 is 6.2 HA and that the Protestors have misinterpreted the whole issue of the land acreage.
11. It was averred that the mode of distribution was mutually agreed upon by all the beneficiaries and that the Petitioners have never been charged in any Court of law for forgery nor did the Protestors conduct any forensic examination disputing the legitimacy of the signatures on record. Further, no official report has been made by Samuel Barasa Kwoba reporting the forgery as alleged.
12. It was averred that the Petitioners never intermeddled with the estate of the deceased as alleged by the Protestors and that the Protestors failure to avail any evidence in Court to substantiate their claims simply means that they are dishonest litigants aiming to frustrate the administration process of the estate of the deceased herein.



13. In response to the replying affidavit, the Protestors swore a further affidavit on 25th March 2024, wherein it was averred that when the Bungoma CMC Succession Cause No. 227/2022 came up for hearing for confirmation of grant on 19th March 2024, the learned magistrate was informed of the application filed in the High Court and that the said confirmation of grant was not accompanied by the mode of distribution.
14. It was averred that the consent was to be signed by 15 beneficiaries but only six people signed and that the thumb print by Paustine Nafula Masinde was forged. That the consent of Paustine Nafula Masinde was obtained when she was sick and admitted in Hospital. Further, from the availed consent it was clear that one beneficiary by the name, Bridgid Auma Masinde was excluded and that the distribution manual was not fair in any manner and some people did not get any portion.
15. The protestors urged this Court to stay the proceedings in the lower Court; the Land Registrar, Surveyor and Land Control Board be restrained from implementing the grant of letters of administration and certificate of confirmation of grant; the certificate of confirmation of grant and grant of letters of administration be revoked; the Bungoma CMC Succession Cause No. 227/2022 be transferred to a Court of competent jurisdiction and that the Petitioners be removed as administrators and they be represented by two people from each household.
16. Vide Court directions issued on 15th February 2024, parties were ordered to canvass the application dated 30th January 2024 vide written submissions. Both parties complied.
17. Based on the filed affidavit in support of Petition for Letter of Administration Intestate, it is clear that the estate of the deceased after payment of liabilities estimated is valued is Kshs. 16,000,000/= . It is imperative to note that no valuation report of the said property was availed.
18. I have carefully considered the application herein, grounds and supporting affidavit as well as the replying affidavit and the respective parties' written submissions. The main issue for determination is whether this application has any merit.
19. It is noted that the application was not premised on any of the law provisions. However, what is not in dispute is that the Protestors and Petitioners herein are beneficiaries to the estate of the deceased Bonphantry Masinde Mareba. It is also not in dispute that in the said Petition wherein a Grant was issued to the widows of the deceased herein, the learned magistrate observed that they were unable to work together and proceeded to vacate their appointment on 5th December 2023. Further, the Court appointed the Petitioners herein as administrators. A fresh Grant was issued on 5th December 2023. That LR No. W. Bukusu/S. Mateka/302 was listed as the only asset comprising the estate of the deceased and which land is registered in the name of the deceased Bonphantry Masinde Mareba. It is further not in dispute that the estate has not been distributed among all the beneficiaries of the estate and as per the availed agreement dated 8th August 2009, not all the beneficiaries registered their consent on the suggested mode of distribution. Further, i observe that the Protestors have not disclosed to this Court whether the Grant of Letters of Administration Intestate issued on 5th December 2023 was confirmed and that no documents filed in that Succession Cause for Confirmation of Grant have been annexed to the affidavit in support of the application herein.
20. It is further not in dispute that the Protestors herein, while the said succession proceedings were pending before Bungoma CMC's Court, filed this application disguised as affidavit in protest to the matter being handled at the lower court vide Succession Cause No.227 of 2022 yet they had already prosecuted their said affidavit of protest and which was rejected by the learned trial magistrate.



21. Finally, it is not in dispute that there exists another affidavit of protest dated 7th August 2023, sworn by Ridar Makokha Okello, the 2nd widow to the deceased herein, which was filed in the lower Court and from my perusal of the Court record the same is yet to be dispensed with.
22. Subject to the record before me, it is evident that on 24th October 2023, the initial co-administrators, Paustina Nafula Masinde and Rider Makhokha Okello, were ordered to file Summons Confirmation of Grant and attach the agreed upon mode of distribution and if the beneficiaries contended with the said mode of distribution the Court gave them the authority to institute their respective objection proceedings. On 5th December 2023 when the parties appeared in Court, the learned magistrate observed the inability of the initial co-administrators to work in synergy and in an effort to salvage the already commenced Succession proceedings, the Court vacated their appointment as co-administrators and proceeded to appoint the Petitioners herein as the new co-administrators. Both of the Petitioners represent the two households. The learned magistrate proceeded to issue a fresh Grant to the new co-administrators and advised them to proceed to apply for the confirmation of the grant after six months.
23. As earlier noted, there is nothing on record indicating that the Petitioners herein filed the respective summons for confirmation of Grant and that the availed agreement dated 8th August 2009 was adopted by the Court as the best and fair mode of distribution of the estate of the deceased. Also, there is no document availed by the Protestors to show that they registered any objections to the alleged Summons for Confirmation of Grant. This simply means that there is no certificate of confirmation of Grant as alluded to by the Protestors herein. Hence, it would appear that the parties are yet to prosecute the matter before the trial court with a view to having the grant confirmed and a certificate of confirmation of grant to be issued thereafter.
24. On jurisdiction it should be noted that when filing succession proceedings, no valuation report is necessary. The value of the estate is usually given as an estimation which then guides the Court on jurisdiction to determine the succession proceedings.
25. However, where it becomes trite clear that the pecuniary jurisdiction of the Court is exceeded by the value of the estate, then such Court cannot determine such succession proceedings. The Court would have to down its tools as stipulated in Section 7(1) of the Magistrates' Court Act and as espoused in Motor Vessel Lilian 'S' Vs Caltex Oil Kenya Ltd [1989] KLR case where the Court of Appeal made it clear that jurisdiction is everything, without which, a Court of law acts in vain.
26. Section 48(1) reads as follows:
 48. Jurisdiction of Magistrates
 1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, ([Act No. 26 of 2015](#)).
 2. ...”
27. Section 7 (1) of the Magistrates' Courts [Act No. 26 of 2015](#) stipulates that:
 - (1) A magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—
 - (a) twenty million shillings, where the Court is presided over by a chief magistrate;



- (b) fifteen million shillings, where the Court is presided over by a senior principal magistrate;
- (c) ten million shillings, where the Court is presided over by a principal magistrate;
- (d) seven million shillings, where the Court is presided over by a senior resident magistrate; or
- (e) five million shillings, where the Court is presided over by a resident magistrate.”

28. The jurisdiction of the High Court to transfer suits from one Court to another is provided under Section 18 of the *Civil Procedure Act* which states as follows-

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - i try or dispose of the same; or
 - ii transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - iii retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

29. In the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995, the Court had the following to say on the circumstances under which the order to transfer suits may be granted-

“Section 18(1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a well-established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of



jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused....."

30. In the present case, the Protestors position is that their consent was not sought when the Court proceeded to appoint new co-administrators and issuance of a fresh grant to the new co-administrators, Petitioners herein, prior to the dispensation of their affidavit in protest filed on 7th August 2023, implies it may not be easy for them to secure justice in the current Court. The gist of this instant application is that, the Protestors felt excluded from the initial stages of the inception of the Bungoma CMC Succession Cause No. 227 of 2022 and the subsequent appointment of new co-administrators by the Court without their input makes them believe that their quest for equal distribution of their deceased's father's estate will be elusive unless this Court proceeds to transfer this Cause before another Court of competent jurisdiction and the issuance of the Grant dated 5th December 2023, to the Petitioners herein be revoked.
31. Section 1A (1) of the *Civil Procedure Act* provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Section 1B (1) of the said Act provides as follows-
- “For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-
- (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology:”
32. It is clear from the averments of the Protestors/Applicants that they seek to avoid going back to the said court after their affidavit of protest was dismissed by the learned trial magistrate. It is instructive that the Protestors herein have not sought for review of the dismissal or lodged an appeal to the High Court if they are aggrieved over the same. It is also clear that the Protestors are out on a forum shopping as they seek to have the matter handled by another court after their protest was dismissed. The practice by parties seeking to have their cases taken elsewhere in a bid to secure favourable verdicts from other courts after their matters have been dealt with must be discouraged. It is instructive that the Protestors herein appear to have beef with the learned trial magistrate over the dismissal of their affidavit of protest. They seem to suggest that they have lost faith in the said court but again, they cannot use such a ground after their matter was dismissed on merit to move to another court for redress. The best way out is to approach the same court for review of its orders or to proceed and appeal to a higher court if aggrieved. In the least scenario, they can as well seek for the recusal of the trial magistrate if they think that he is biased against them. They have not done so. This kind of behavior cannot be countenanced by this court. The protestors must go back to the said court and proceed with the matter in view of the absence of an appeal against the dismissal of their protest. Parties should not be given the luxury of shopping for courts in their quest to get favourable verdicts. The application is meant to delay the finalization of the matter yet the beneficiaries of the estate are anxious to get their entitlement under the estate.



33. In the result, it is my finding that the Protestors application dated 30th January 2024, lacks merit. The same is dismissed with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of :

Chemao for Akenga.....for Petitioners

Absent1st Protestor

Absent.....2nd Protestor

Absent.....3rd Protestor

Absent.....4th Protestor

Absent5th Protestor

N/A HP Wamalwafor Protesters

Kizito/Ogendo.....Court Assistant

