



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 405 OF 2020**

**IN THE MATTER OF THE ESTATE OF DANIEL TOROITICH ARAP MOI (DECEASED)**

**MAESTRO CONNECTIONS HEALTH SYSTEMS LTD....APPLICANT**

**VERSUS**

**ZHRABANU JANMOHAMED.....EXECUTRIX**

**RULING**

1. H.E. Daniel Toroitch Arap Moi died on 4<sup>th</sup> February 2020 at the Nairobi Hospital. He left a written Will dated 15<sup>th</sup> November 2005 and Codicil dated 30<sup>th</sup> March 2010. In the Will he left LR No. 24480/2 comprising of about 931 Hectares which he instructed that it be held by the Trustees of Kabarak University in trust for the benefit of his five sons (Jonathan Kipkemboi Moi, Raymond Moi, John Mark Moi, Philip Moi and Gideon Moi) equally during their lifetime and upon their death for the benefit of their progeny. In the Codicil he gave Kshs.100,000,000/= to each of his daughters Jenifer Chemutai Moi, Doris Chekorir Moi and June Chebet Moi.
2. The deceased appointed Zehrabanu Janmohamed as the executrix and trustee of the Will. On 18<sup>th</sup> August 2020 the executrix (the respondent) petitioned this court for the grant of probate of written Will. The grant was issued on 9<sup>th</sup> October 2020.
3. The applicant Maestro Connections Health Systems Ltd filed the instant summons dated 23<sup>rd</sup> April 2021 under **rule 49** of the **Probate and Administration Rules** and **Article 162(2)** of the Constitution seeking the following orders:-

**“2) That pending the hearing and determination of this application, this Honourable Court do issue orders restraining the Respondent, her agents or anyone for or on her behalf or through her from distributing, transferring, allocating, charging, leasing or any other way implementing the contents of the will in relation to the property known as L.R 12422/19;**

**3) That pending the hearing and determination of this application, this Honourable Court do issue orders compelling the Respondent to set aside from the estate and deposit the sum of Kshs. 2,500,000,000/= in court or an interest earning account of the advocates of the Applicant and the executrix, being the amount currently being claimed by the Applicant;**

**4) That pending the inter parties hearing and determination of these summons, this Honourable Court do issue orders compelling the Respondent to disclose to the Applicant whether the said suit property is listed in the list of the properties of the deceased and allow the counsels of the applicant to verify the same by perusal of the will in the Court on a date to be allocated by the Honourable Court;**

**5) That upon the hearing and determination of this application, this Honourable Court do issue orders restraining the Respondent, her agents or anyone acting for or on her behalf or through her from distributing, transferring, allocating, charging, leasing or in any other way implementing the contents of the will in relation to the property known as L.R 12422/19. This is until the determination of ELC Case No. 771 of 2016.**

**6) That upon the hearing and determination of this application, this Honourable Court do issue orders compelling the Respondent to set aside and deposit the sum of Kshs. 2,500,000,000/= in Court or in an interest earning account of the advocates of the Applicant and the executrix, being the amount currently that is being claimed by the applicant. This is until the determination of the ELC Case No. 771 of 2016;**

7) That pending the hearing and determination of ELC No. 771 of 2016 and ELC 840 of 2016, this Honourable Court do issue an Order suspending the distribution of the estate of the deceased;

8) That this Honourable Court be pleased to issue any other orders it may deem just and fit.”

4. In the grounds and supporting affidavit sworn by Dr. George Kiongera, the managing director of the applicant company, it was evident that in **Environment and Land Court Case No. 771 of 2016** at Nairobi the applicant had sued the deceased and other people over parcel of land LR No. 12422/19 (IR 36415) situate at Muthaiga North, off Thika Road, measuring about 8.071 Hectares. The applicant’s case was that in 2016 it had bought the parcel of land from the deceased, it had paid the purchase price and the property eventually registered in its name. In the transaction the deceased had been represented by Trippleoklaw LLP whom the applicant has also sued in the same course. It turned out that Muthaiga Luxury Homes Limited and United States International University were each separately claiming to have bought the same parcel from the deceased. Each of them had separately sued the deceased at the Environment and Land Court. In each of the three instances, the applicant stated, the deceased had denied having sold the parcel of land, or having instructed the above law firm to act for him in any transaction over the parcel. In paragraphs 7 and 8 of the supporting affidavit by the applicant, it was deponed as follows:-

“7. THAT the deceased has however denied having sold the suit property to the claimants thus putting the question as to who the legitimate legal owner of the suit property is .....

8. THAT upon the deceased’s demise, the respondent, being his executrix, applied to be enjoined to the suits and was successfully enjoined .....

5. The applicant stated that the purchase price was Kshs.500,000,000/= but that there had been other payments and expenses. It was stated that the current market value was Kshs.1,600,000,000/=, but that given incidental damages and costs, the claim was worth Kshs.2,500,000,000/=. The applicant sought in the present application that the court compels the respondent to set aside from the estate that amount to be deposited into court or in interest earning account in the name of its advocates and the respondent until the determination to the Environment and Land Court (ELC) case. Lastly, that pending the hearing of the ELC cases this court suspends the distribution of the estate of the deceased.

6. The respondent filed grounds of opposition and a replying affidavit. Her case was that LR No. 12422/19 was not one of the properties in the deceased’s Will, and neither was it one of the properties in the petition. She stated that the property was the subject of various suits as shown in the supporting affidavit. Those suits, she deponed, had not been heard and determined by the respective courts. Regarding the request that she indicates whether this property forms part of the Will of the deceased, she responded that the request was speculative and a fishing expedition which should not be allowed. She further deponed that neither the applicant nor its directors were beneficiaries or dependants of the estate of the deceased, and therefore could not stop the confirmation of the grant of probate and the distribution of the estate of the deceased. Lastly, now that the applicants were not creditors of the estate of the deceased they could not seek orders in respect of the alleged Kshs.2,500,000,000/=.

7. Mr. Okatch for the applicant and M/s Janmohamed for the respondent filed written submission on the summons. I have considered them.

8. It is clear from the applicant’s supporting affidavit and from its written submissions that it was not known whether LR No. 12422/19 was listed as one of the properties of the deceased in the petition. The respondent categorically stated that the property was not mentioned in the Will or Codicil, and that it was not one of the properties subject of the petition. If that is the case, then there is no connection between the ELC cases and the on-going succession cause in respect of the estate of the deceased. If it turns out that LR No. 12422/19 was the deceased’s property, and it was not mentioned in the Will or Codicil, then it will be the subject of the intestate succession.

9. The applicant’s written submissions raised the question, whether this court has jurisdiction to distribute the suit property if it is listed among the estate of the deceased. First, the property has not been listed among the estate of the deceased. But more important, what is the jurisdiction of this succession court in relation to the pending ELC suits over LR No. 12422/19?

10. The Supreme Court in **Samuel Kamau Macharia & Another –v- KCB & 2 Others [2012]eKLR** determined that the jurisdiction of a court originates from the Constitution, statute or both; and that the court should only exercise its jurisdiction within such bounds as has been allowed by the law. Because jurisdiction is the basis of the court’s authority to hear and determine a matter, if the court determines that it has no jurisdiction then it has to down its pen (**Owners of Motor Vessel “Lilian S” –v- Caltex Oil (Kenya) Ltd [1989]eKLR**).

11. Both sides agree that the jurisdiction of a succession court under the **Law of Succession Act (Cap 160)** and **Probate and Administration Rules** is limited to determining the assets that constitute the estate of the deceased person, identifying the persons who are beneficially entitled to the estate, and distributing the estate to the persons, while making provision for any creditors or debtors. **Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** cited by the respondent and **The Estate of Martinus Okore & 2 Others (All Deceased) [2019]eKLR** cited by the applicant’s counsel agree on this point. Both courts further agreed that when there is a dispute as to the ownership of a parcel of land subject to the estate of the deceased, then that dispute ought to be referred to the Environment and Land Court set up under **Article 165(5)** of the Constitution and **section 13** of the **Environment and Land Court Act of 2011** to establish the ownership of the parcel. If the parcel is found to belong to the deceased, then it will be distributed to the beneficiaries in accordance with the **Law of Succession Act**.

12. I have indicated in the foregoing that, as far as this petition stands, LR No. 12422/19 is not one of the properties subject of the estate of the deceased. This is because it was not mentioned in the Will or Codicil, and it was not mentioned in the petition. Now that there is a question in **ELC No. 771 of 2016** regarding the ownership of the parcel, whether or not it belonged to the deceased, that question rightly belongs to that court. The court will hear and determine it. I have also indicated that if it turns out that it belonged to the deceased, and it was not part of this probate petition, it will be the subject of intestate succession. Until then, this court cannot be asked to set aside the Kshs.2,500,000,000/= or any amount related to the dispute in the ELC court, in the instant petition. This court cannot be asked, as it were, to

anticipate the outcome of the ELC Court over the dispute. That dispute includes the purchase price and the present value of the property.

13. Similarly, the applicant cannot by this application halt the process of the distribution of the estate of the deceased which he provided for in the Will and Codicil. This is because the applicant has not been determined by the ELC Court to be owed LR 12422/19, or its price or value, by the deceased. The applicant has at this point not been shown to be a creditor to the estate of the deceased, to be able to participate in the distribution of the estate of the deceased.

14. There is the protest dated 26<sup>th</sup> April 2021 by David K. Chelugui through Mr. Arusei Advocate. The protest indicated that it was against the confirmation of the grant. David K. Chelugui stated in his affidavit that he obtained a judgment of Kshs.1,060,000,000/= in **ELC Court No. 9 of 2014** at Eldoret against the deceased. The deceased filed an appeal at the Court of Appeal at Kisumu. He asked that until the appeal is heard and determined the grant issued to the respondent should not be confirmed. The response by the respondent was that she has not sought the confirmation of the grant of probate and that, in any case, the issue whether or not the protester is a creditor to the estate of the deceased will finally be settled by the Court of Appeal.

15. All that I would like to say at this stage is that, when the respondent will seek the confirmation of that grant of probate she will serve the protester who will formally file his protest to the application. At that stage the court will deal with the protest.

16. In conclusion, I dismiss with costs the summons dated 23<sup>rd</sup> April 2021 by the applicant.

**DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2021.**

**A.O. MUCHELULE**

**JUDGE**