REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 265 OF 2004

IN THE MATTER OF THE ESTATE OF BETH MUTHEI MULILI (DECEASED)

MUNYASYA MULILI

PHILIP MULILI MUTETI

KATUMBI MULILI

MALINDA MULILI.....PETITIONERS

VERSUS

SAMMY MUTETI MULILI.....PROTESTOR

AND

VIRGINIA MBITHE.....1ST APPLICANT

PAUL MUINDI.....2ND APPLICANT

CATHERINE WANJIKU.....3RD APPLICANT

EDWARD OMBUNA.....4TH APPLICANT

RULING

1. By summons dated 3rd July, 2018, the applicants herein seek the following orders:

1. Spent.

2. THAT the applicants be enjoined in this suit as interested parties.

3. THAT there be a stay of execution of the orders made vide the ruling delivered on the 2nd May, 2017 by Lady Justice P. Nyamweya and all consequential orders in relation of the property known as Mavoko Town Block 3/1966 pending the hearing and determination of this application.

4. THAT there be a stay of execution of the orders made vide the ruling delivered on the 2nd May, 2017 by Lady Justice P. Nyamweya and all consequential orders in relation of the property known as Mavoko Town Block 3/1966 pending the hearing and determination of the Applicant's intended suit in the Environment and Land Court against the administrators of the Estate herein.

5. THAT the ruling delivered on the 2nd May, 2017 by Lady Justice P. Nyamweya be reviewed and all consequential orders in relation to the property known as Mavoko Town Block 3/1966 be set aside.

6. THAT the costs of this application be provided for.

2. According to the applicants, they are bona fide purchasers for value without notice of various parcels of land subdivision in the aforementioned property. Following the registration of the said parcel of land in the name of the 2nd petitioner, the petitioners engaged a surveyor who proceeded to subdivide the said property into 21 portions one of which was parcel no. 7929 which was further subdivided into parcel numbers 10375 and 10376.

3. Prior to purchasing the said property, the applicants contended that they conducted searches and general due diligence and the administrators were also involved in the sale and transfer processes and assured them that the Protestors' share of the land had been set aside, being parcel no. 7909.

4. They averred that upon the said subdivisions, the 2nd petitioner applied for the consent of the Land Control Board for the various parcels which consent was granted after which the applicants presented the duly signed transfer forms and consents to the Land Registrar, Machakos and were duly issued with respective title deeds. They accordingly contended that they followed all the requisite procedures before acquiring titles to their properties and proceeded to settle thereon.

5. However, by the ruling delivered on 2nd May, 2017, **Nyamweya, J** directed *inter alia* for the revocation of the applicants' titles which orders have irreparably and negatively affected and continue to affect the rights to ownership of the applicants' property wherein the applicants have built permanent residents and have lived there for more than fourteen (14) years and their families have no other known places of abode. Further, the applicants, who have titles to their respective parcels have charged the same while some of them have resold their parcels and are now being accused by the buyers of having fraudulently sold the same hence exposing them to litigation from the said buyers and the banks.

6. The applicants however contended that the petitioners never informed them of any protest lodged in this succession cause and they therefore did not get an opportunity to be joined to these proceedings to explain their interests. It was for the same reason that they were not unable to make this application promptly. They only became aware of the cause and the ruling in question when various people purporting to be surveyors visited them around 20th June, 2018.

7. The applicants therefore averred that it is in the interest of justice that the subject property be preserved to avoid the application being rendered nugatory since they have a legitimate interest to be joined in this suit so that specific concerns related to the applicants can be put into consideration. It was further their belief that the review, setting aside and staying execution of the ruling delivered will not occasion any prejudice to the petitioners and the protestor herein.

8. In a further affidavit sworn on 11th September, 2018, the applicants confirmed that they had in fact filed a suit before the ELC being Suit No. 166 of 2018 at Machakos High Court.

9. In response to the application, the 1st, 2nd, and 4th administrators relied on a replying affidavit sworn by **Sammy Muteti Mulili**, a son of the deceased herein. According to him the petitioners are his siblings and he was authorised by the said administrators to swear the affidavit.

10. In his view, these applicants' application is misplaced, a non-starter, incompetent and a gross abuse of the process of the court. It was his view that this court is functus officio and that the applicants are divested of capacity to move this court for any orders in respect of the estate herein hence the court lacks jurisdiction to entertain the said application.

11. According to the deponent, all title deeds which were unlawfully and fraudulently mutated from Mavoko Town Block 3/1996 were cancelled pursuant to the order of this court and after the said cancellation, the said titles, some of which had been obtained by the applicants were collapsed into one and reverted to the name of the deceased herein. According to the deponent, the interested parties' remedy, if any lies elsewhere but not before this court.

12. In support of the prayer for joinder the applicants relied on Supreme Court decision in the case of **Francis Karioki Muruatetu & Another vs. Republic & 5 Others [2016] eKLR.** Guided by the above authority, it was submitted that the Applicants have demonstrated that they have a personal stake in this case since their Title Deeds were revoked without giving them a chance to be heard; the Applicants feel that their interests will not be well articulated unless they appear in the proceedings and champion their cause since going by the affidavit of **Sammy Muteti Mulili**, the Protestor and the Petitioners of the estate are now on the same page and thus no person has an interest similar to that of the Applicants; the prejudice to be suffered by the intended interested parties in the event of non-joinder is the same one they continue to suffer now by being affected by adverse orders which cancelled titles issued to them without giving them the a chance to be heard since the Applicants are likely to lose their homes as a result of the said Ruling delivered without involving them first in the proceedings preceding it. It was further submitted that the court has powers to add the Applicants herein in the cause notwithstanding the fact that the cause has been finalized. In support of this contention, the applicants relied on the case of **J M K vs. M W M & Another [2015] eKLR.**

13. The Applicants have therefore met the conditions to be enjoined into this cause as interested parties.

14. It was submitted that the prayer for review and setting aside of the orders of this court made on the 2nd May 2017 is based on Section 80 of the ***Civil Procedure Act***. Since Rule 63 of the ***Probate and Administration Rules*** incorporates the application of specific orders of the ***Civil Procedure Rules*** to applications under the ***Law of Succession Act*** and the ***Probate and Administration Rules***, Order XLIV *(now Order 45 of the Civil Procedure Rules 2010)* is one of the orders applied to applications thereunder. According to the applicants, guidance on the jurisdiction of the court to review its decisions can be found in the Court of Appeal case of **V R M vs. M R M & Another [2006] eKLR.**

15. According to the applicants, there are sufficient reasons to review and set aside the Ruling of the court delivered on the 2nd May 2017. In the present case the court in making its ruling did not hear the Applicants who were ultimately affected by cancellation of their Title Deeds. From the evidence presented before the court it was not brought to the attention of the court that third parties who included the Applicants

were in occupation of the property and have built permanent structures having lived on the property for more than 14 years. Based on the case of **J M K vs. M W M & Another [2015] eKLR,** it was submitted that a party who was to be affected by the decision of a court should be allowed to be heard first before the decision is made and that giving effect to the right to be heard constituted sufficient reason to review a judgment.

16. Based on Order 45 Rule 5 of the ***Civil Procedure Rules,*** it was submitted that the court has power to review its decision and also make orders of re-hearing of the cause. In this case, it was the Petitioners and the Protestor did not controvert the existence of the said structures and for the period aforesaid of at least 14 years. It was therefore contended that if all the facts regarding occupation of the property by the Applicants and other third parties could have been brought to the attention of the court, it would have considered the principle of equity in making its final orders which not only went to revoking Title Deeds of third parties not before the court but simultaneously also distributing the same land to beneficiaries of the estate notwithstanding the fact that the said land was not in its original form and was in fact occupied by third parties for several years. The Applicants thus not only lost their titles without being given a chance to be heard but also had the subject matter in the intended suit against the administrators completely eroded since it was distributed by the court immediately to other people notwithstanding the fact that the applicants were unaware of the same. According to the applicants, the misfortune of the Applicants in this case is in tandem with the reasoning of **Gikonyo, J** in **Simon Kamundi vs. Tabitha Gatiria Maingi & 3 Others [2016] eKLR**.

17. Relying on the cases cited above, the applicants prayed that the court prevents irreparable damage from being occasioned to the Applicants by setting aside the order revoking their Title Deeds without their participation and most importantly for the order distributing the property among the beneficiaries of the estate to be set aside. They submitted that this court under Section 47 of the ***Law of Succession Act*** is clothed with inherent jurisdiction to preserve the property pending the filing of the Applicants' suit in the Environment and Land Court.

18. However, on without prejudice it was submitted that the court, if not inclined to set aside the said orders should make orders which include stay of execution of the said orders particularly subdivision of the land to effect the distribution in line with the aforesaid Ruling. In absence of orders to stay the orders issued by the court on the 2nd of May 2017, there is nothing preventing the beneficiaries of the estate herein from disposing off the property and if that happens, the Applicants will end up litigating without the subject matter. In support of their submissions the applicants relied on **In re estate of P N N (Deceased) [2017] eKLR, Raphael Muriithi Ngugi vs. Paul Thuo Kimani [2017] eKLR**, **Re The Estate of Kipyego Chepsiror Kolil [2007] eKLR,** and **Charity Mworia M'iwathuku vs. Charity Kairigo & 2 Others [2017] eKLR** and concluded that considering the facts, law and authorities cited above, prayers 2, 4 and/or 5 of the Applicants' application dated 3rd July 2018 should be allowed.

19. On behalf of the Respondents, they reiterated the contents of their replying affidavit and submitted that the provisions of the law under which the Applicants' Summons is filed do not donate power to this court to disturb the grant as well as the Certificate of Confirmation hereof. Accordingly, the Court is divested of jurisdiction to entertain the present Summons. Again, this cause was finalised when the deceased's estate was distributed pursuant to the ruling of **Nyamweya, J** on 2nd May, 2017 hence the Applicants are asking the Court to act in vain as far as prayer 2 of their application is concerned.

20. It was further submitted that the said orders are incapable of being stayed. According to the respondents, all the properties of the estate which the 2nd Petitioner (**Philip Mulili Muteti**) had fraudulently registered as his and unlawfully sold to third parties reverted to the deceased's name. One such property is Title Number Mavoko Town Block 3/1966 which is now registered in the name of the deceased as evidenced by a copy of the Certificate of Official Search is annexed to the affidavit sworn by **Sammy Mulili**.

21. According to the Respondent, this Court dealt with and concluded the cause hereof in accordance with the ***Law of Succession Act*** Cap 160 Laws of Kenya. The jurisdiction to distribute a deceased's estate is given by Cap 160. If the Applicants desire to move to the Environment and Land Court for whatever orders, nothing would have been easier than for them to invoke the Act of Parliament under which the said Court is established. By coming to this Court, the Applicants are playing lottery with the judicial process hence this court has no jurisdiction to grant prayer 4 of the Summons.

22. With respect to prayer 5 it was submitted that the orders sought to be reviewed have already been executed. There is absolutely nothing to stay. Those orders have never been challenged by any of the beneficiaries herein. In other words, the orders have taken effect.

Determination

23. I have considered the application, the affidavits both in support of and in opposition to the application herein.

24. With respect to the prayer for joinder of the interested parties, I associate myself with the opinion of the Supreme Court decision in the case of **Francis Karioki Muruatetu & Another vs. Republic & 5 Others [2016] eKLR** that:

> **"…These legal provisions have been considered by the Court in *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others,* Supreme Court Petition No. 12 of 2013, [2014] eKLR (an application by the Law Society of Kenya). In this case, the Law Society of Kenya (LSK) sought to be enjoined in the proceedings as an interested party, but leave was denied. The Court observed that [paragraphs 13-15]:**
>
> > ***"[13] While the Rules have a definition of who an amicus is, there is no definition attributed to 'Intervener' or 'Interested Party'. However, from Rule 25 above, one is allowed to apply to be enjoined any time in the course of the proceedings.***
> >
> > ***"[14] Black's Law Dictionary, 9th Edition, defines "intervener" (at page 897) thus:***

> ***"One who voluntarily enters a pending lawsuit because of a personal stake in it"***
>
> ***and defines 'Interested Party' (at p.1232) thus:***
>
> ***"A party who has a recognizable stake (and therefore standing) in a matter".***
>
> ***"[15] On the other hand, an amicus is defined in Black's Law Dictionary thus:***
>
> ***'A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter'."***

[34] With that definition of "interested party," the Court proceeded to hold further [paragraphs 17-18]:

> ***"[17] Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.***
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> ***"[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"***

[35] This Supreme Court decision was cited by the High Court in *Judicial Service Commission v. Speaker of The National Assembly & 8 Others, [2014] eKLR*. The High Court also cited the definition of 'interested party' in: *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereafter the "*Mutunga Rules*") thus:

> ***"Rule 2 of the Mutunga Rules defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation."***

[36] Once again in the said High Court matter, the LSK was denied admission as an interested party because, in the perception of the Court, it could not show an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if not enjoined as a party.

[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

> ***One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:***
>
> **i.** ***The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.***
>
> **ii.** ***The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.***
>
> **iii.** ***Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."***

25. In this case the applicants' case is that their titles to the suit properties were revoked without them being afforded an opportunity of being heard. The right to a hearing is fundamental right that cannot be taken away. That the decision to revoke their titles was bound to and clearly adversely affected their interests in the suit properties cannot be denied. In the premises I agree that the Applicants have demonstrated that they have a personal stake in this case. In the circumstances of this case I further agree that their interests cannot be well articulated unless they appear in the proceedings and champion their cause since the other parties to the suit seem to have taken a diametrically opposed position to theirs. I further agree that the denial of their prayer to be joined is bound to be prejudicial to their interests taking into consideration their unchallenged contention that they have developed their respective portions of the suit property. It was further submitted that the court has powers to add the Applicants herein in the cause notwithstanding the fact that the cause has been finalized. Although the Respondents contend that this court is functus officio I agree with the position adopted in **J M K vs. M W M & Another [2015] eKLR,** that:

> **"…It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014. The appellant however had not applied solely to be added as a party to the suit; he had also applied for review and setting aside of the judgment of the court to give him an opportunity to be heard. In other words, the**

appellant was effectively applying for review and setting aside of the judgment of the Industrial Court and an order for *de novo* hearing of the suit, which would afford him an opportunity to be heard. The learned judge properly found, in our view, that the Court had jurisdiction to review and set aside its judgment."

26. Similarly, in **Aneriko M Simiyu vs. Redempta Simati Civil Appeal No. 227 of 2004,** it was held that it cannot be correct that a court of law would be said to be *functus officio* when moved to correct a mistake or mistakes on the face of the record because the ultimate result would be injustice.

27. In this case the applicants seek a review and setting aside of the decision of **Nyamweya, J**. Accordingly, I agree that in those circumstances, this court is not *funcus officio*. As will become apparent hereinbelow the grounds upon which the instant application is based do not render themselves to the application of the functus officio principle.

28. The applicants' contention that they were never heard before the decision which clearly affected their rights was made has not been seriously contested. In **Board of Education vs. Rice [1911] AC 179** in which **Lord Loreburn LC** stated that:

"…that a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is 'a duty lying upon everyone who decides anything."

29. The circumstances of this case are not too dissimilar to those which were before **Gikonyo, J** in **Simon Kamundi vs. Tabitha Gatiria Maingi & 3 Others [2016] eKLR** where he opined as that:-

"…the circumstances of this case are that the purchasers herein bought the estate property from the personal representative of the estate. Such purchasers are entitled to defend their acquisitions in this cause especially now that revocation of the grant of representation pursuant to which they were sold the land has been sought and their acquisitions are being challenged too. Accordingly, although Section 93 of the Law of Succession Act has been invoked before it is appropriately applicable, but its purport is indicative that, a purchaser of the property of the estate from a person to whom representation has been granted should, of necessity, be a party in the cause where revocation is sought and transfers of estate property to him is being questioned. A decision on revocation application will invariably be a matter of direct concern to a purchaser of a property of the estate from a person to whom representation has been granted. As a matter of substantive justice, anything short of the above will be great injustice to confront a purchaser for value of the estate property with a decree which takes away his rights without his participation. It bears repeating that each case should be decided on its merit rather than making a hard and fast rule that all claims by third parties must be litigated in separate proceedings.''

30. The necessity to afford parties the right to be heard before adverse decisions are made against them was emphasised by the Court of Appeal in the case of **J M K vs. M W M & Another [2015] eKLR** in the following words:-

"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made...And in *MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206*, at page 210, this Court stated as follows:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

……

In this appeal, the appellant was entitled to contend, as he did, that the judgment of the Industrial Court which directly affected him, was in breach, not only of the law, but also of the Constitution in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1). He was also entitled to contend that to the extent that the judgment found him guilty of sexual harassment without affording him an opportunity to be heard, that in itself constituted sufficient reason for review of the judgment."

31. It is therefore clear that a person against whom adverse orders are made but who has not been afforded an opportunity of being heard is entitled to apply for the review of the decision. Dealing with circumstances under which review ought to be allowed, the Court of Appeal in **V R M vs. M R M & Another [2006] eKLR** opined as follows:-

"In considering the latter ground, the learned Judge stated: -

'The grounds of review under any other sufficient reason must be something which existed at the date of the decree and the rule does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event.'

With respect, we think that reasoning is restrictive of the unfettered discretion donated to the court under *section 80* of the *Civil Procedure Act* and *Order 44* of the rules. We think the correct statement of the law was that followed by this Court in Narodhco Kenya Ltd vs. Loria Michelle Civil Appeal No. 24 of 1998 (ur) when it stated: -

> **"There was nothing on record to disprove the defendant's allegations to the effect that the said new facts came to its knowledge only after the decree. The power to review is not confined to mistakes or errors in the decree. The power is given by Section 80 of the Civil Procedure Code (sic) and Order 44 of the Civil Procedure Rules as was stated by this court in the case of Shanzu Investments Limited. This court said:"**
>
> > **"In Wangechi Kimita & Another vs. Mutahi Wakabiru (C.A. No. 80 of 1985) (unreported) it was held that,**
> >
> > > **Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous. The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason."**

32. In **Peninah Wambui Mugo vs. Moses Njaramba Kamau Nakuru HCCS No. 238 of 2004 Koome, J** (as she then was) was of the following view, a view with which I respectfully associate myself:

> **"Under section 80 of the Civil Procedure Act, any person, though not a party to the suit, whose direct interest is being affected by the judgement therein is entitled to apply to a review. The words "any person" and "for any sufficient reason" used under section 80 of the Civil Procedure Act clearly are meant to include a person who has a direct interest in the litigation or its result but has been deprived of a hearing as a party in relation to his interest…Since the plaintiff and the defendant were aware of the applicant's interest in the suit property but chose not to make her a party there is merit in the application since the applicant has discovered new and important facts being that the defendant and the plaintiff failed to disclose her interest and to have her summoned to court as the person who was in occupation and who will be affected by the orders of the court".**

33. The Respondents contended that since the Court found that the disposal of the suit property was unlawful, no useful purpose would be served by allowing the instant application. However as was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*."** [Emphasis mine].

34. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

> **"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

35. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

36. Therefore, it does not matter whether the decision has been effected or not. The right to a hearing cannot be denied simply because the decision sought to be challenged has already taken place.

37. In the premises I find merit in this application. However, since from the copy of the certificate of official search exhibited, the suit parcel of land has reverted to the original owner, it would be imprudent to direct that the status quo ante be maintained. To do so would only create confusion in the records held by the Registrar of Lands. In determining what order to make I am guided by the position adopted in **In re**

estate of P N N (Deceased) [2017] eKLR, where it was held that:

> **"According to Article 162(2) of the Constitution the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the Constitution. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the Constitution, meaning that this court then, by virtue of Article 165(5) of the Constitution, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri. Under Rule 41(3) (4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.**

38. The court therefore directed that the administrator of the estate files and prosecutes a suit seeking to resolve the ownership questions at the ELC in a period of 366 days. In **Raphael Muriithi Ngugi vs. Paul Thuo Kimani [2017] eKLR,** the succession proceedings were stayed for seven months pending the determination of the proceedings before the ELC. Similar orders were made in **Re the Estate of Kipyego Chepsiror Kolil [2007] eKLR** and **Charity Mworia M'iwathuku vs. Charity Kairigo & 2 Others [2017] eKLR.**

39. In the premises the orders which commend themselves to me and which I hereby grant are as follows:

> **1) THAT there be a stay of further execution of the orders made vide the ruling delivered on the 2nd May, 2017 by Lady Justice P. Nyamweya and all consequential orders in relation to the property known as Mavoko Town Block 3/1966 pending the hearing and determination of the Applicant's intended suit in the Environment and Land Court against the administrators of the Estate herein.**
>
> **2) THAT the applicants herein are given 366 days within which to prosecute their suit pending before the ELC.**
>
> **3) THAT depending on the outcome of the said suit, parties be at liberty to apply.**
>
> **4) The Costs will be in the cause.**

40. It is so ordered.

Read, signed and delivered in open Court at Machakos this 14th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Watta for Mr Ngolya for the 1st, 3rd and 4th Administrators

Mr Mutinda for Mr Mwaniki for the interested parties/applicants

CA Geoffrey