



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO 95 OF 1995**

**(INCORPORATING HIGH COURT ELC SUIT 110 OF 2012 )**

**IN THE MATTER OF THE ESTATE OF JONATHAN MUTUA MISI (DECEASED)**

**NTHENYA MUSEMBI**

**JAPHETH MAWEU MUTUA.....APPLICANTS**

**VERSUS**

**MISI MUTUA**

**JANE MBULA MBILIKA.....RESPONDENTS**

**DIRECTIONS**

The Respondents herein petitioned for and were granted letters of Administration intestate with respect to the estate of Jonathan Mutua Nisi in Succession Cause 95 of 1995. The said grant of representation was issued to the Respondents by this Court on 22<sup>nd</sup> September 1995. The Applicants herein who claimed to be a widow and son of the deceased respectively, filed an application by way of a Chamber Summons dated 30<sup>th</sup> September 1997 in Succession Cause 95 of 1995 seeking revocation of the said grant.

The said application was heard and Mwera J. (as he then was ) who delivered a ruling on 13<sup>th</sup> December 2000 wherein he declined to revoke the grant, but ordered that the 2<sup>nd</sup> Applicant (Japheth Maweu Mutua) was a survivor and heir of the deceased, and the grant be amended to included him as such.

From the record it appears no action was taken in this regard, and the 2<sup>nd</sup> Applicant then filed another application in Succession Cause 95 of 1995 by way of Chamber Summons dated 2<sup>nd</sup> October 2001 for reasonable provision to be made for him and for withdrawal of money deposited in Standard Bank for distribution among the beneficiaries of the estate. The said application is still pending and has not been heard.

In the meantime on 11<sup>th</sup> April 2012 the 2<sup>nd</sup> Applicant then filed an Originating Summons of the same date in Machakos High Court Civil (now ELC) Suit No 110 of 2012, in which he sued the Respondents seeking a determination of the following questions:

1. What constitutes the free properties of the estate of Jonathan Mutua Misi.
2. To what is the Plaintiff entitled out of the free properties of the estate of the deceased

3. All other questions arising directly out of the administration of the estate of Jonathan Mutua Misi.

He also sought the following relief:

1. An order directing the Petitioners as administrators of the estate to distribute the free property of the deceased according to the entitlement of the respective herein including himself
2. The payment into court of the proceeds of any property belonging to the estate for eventual distribution to the rightful heirs
3. Such other orders, declarations or directions as may be just and expedient.

Directions were given in Machakos High Court ELC Suit No 110 of 2012 that the said Originating Summons was to proceed to hearing by way of *viva voce* evidence. The hearing commenced on 21<sup>st</sup> October 2014, when the 2<sup>nd</sup> Applicant who was the Plaintiff therein gave evidence as PW1. The Court (Kariuki J.) then noted that there was already a Succession Cause No 95 of 1995 filed in which distribution is yet to be done, and adjourned the hearing. Directions were given that the file for Succession Cause No 95 of 1995 be brought up. In subsequent mentions in the said suit the parties sought consolidation of Machakos High Court Civil Suit No 110 of 2012 with Succession Cause No 95 of 1995, but no directions were given in this regard.

From the foregoing record of proceedings in the two suits, it is evident that the 2<sup>nd</sup> Applicant is clearly in abuse of the process of Court in filing a suit in Machakos High Court ELC Suit No 110 of 2012 when the same issues in that suit are the same as those in Succession Cause No 95 of 1995, while the parties in the said suit are also the same parties in the successions cause, and also particularly as orders had already been given that he be included in the administration of the deceased's estate.

In addition, the procedures provided for in the Law of Succession Act as to the confirmation of grant in section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules, including the provisions for filing of affidavits of protest as provided for by Rule 40 (6) and (7) of the Probate and Administration Rules, are adequate to address the questions raised by the 2<sup>nd</sup> Applicant in his Originating Summons.

Lastly, I am in this respect guided by sections 6 of the Civil Procedure Act which prohibit a court from hearing a matter that is *sub judice* as follows:

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..... “**

I accordingly direct as follows:

1. Machakos High Court ELC Suit No. 110 of 2012 is hereby consolidated with Machakos High Court Succession Cause No. 95 of 1995 for purposes of further hearing.
2. Machakos High Court ELC Suit No. 110 of 2012 is hereby stayed pending the hearing and determination of Machakos High Court Succession Cause No. 95 of 1995.
3. The Petitioners/Respondents in Machakos High Court Succession Cause No. 95 of 1995 shall within 60 days of today's date file and serve the 2<sup>nd</sup> Applicant herein namely Japheth Maweu Mutua, with a summons for confirmation of grant, which shall include the said 2<sup>nd</sup> Applicant as a beneficiary as ordered by this Court on 13<sup>th</sup> December 2000, and shall indicate the respective shares of all persons beneficially entitled to the estate of Jonathan Mutua Nisi (deceased).

4. The said 2<sup>nd</sup> Applicant shall be at liberty to file and serve an affidavit of protest and/or distribution as the case may be within 30 days of service of the summons for confirmation of grant.

5. Machakos High Court Succession Cause No. 95 of 1995 shall thereafter be mentioned for further directions as to the hearing of the summons for Confirmation of grant and affidavit if any, filed by the 2<sup>nd</sup> Applicant.

**Dated at Machakos this 2<sup>nd</sup> day of May 2017.**

**P. NYAMWEYA**

**JUDGE**