



REPUBLIC OF KENYA



In re Estate of Michael Onditi Nyariki (Deceased) (Succession Cause E035 of 2025) [2025] KEHC 13677 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE E035 OF 2025**

RC RUTTO, J

SEPTEMBER 30, 2025

IN THE MATTER OF THE ESTATE OF MICHAEL ONDITI NYARIKI (DECEASED)

BETWEEN

**GRACE MORAA ONDITI 1ST APPLICANT
MOSES NYABARO ONDITI 2ND APPLICANT**

AND

**GLADYS MUENI OBARE 1ST RESPONDENT
ISAAC OSIEMO OBARE 2ND RESPONDENT
TREE TOP AUCTIONEERS 3RD RESPONDENT**

RULING

1. Before this court for determination is a Notice of Motion Application filed under Certificate of Urgency dated 9th April 2025. The Applicants seeks the following orders: -
 - a. Spent
 - b. Spent
 - c. That this Honourable be pleased to order that Motor Vehicle Registration Number KCV XXXB forms part of the estate of the deceased herein
 - d. That this Honourable be pleased to order the intended auction and sale of Motor Vehicle Registration Number KCV XXXB amounts to intermeddling with the estate of the deceased herein and as such it is void ab initio.
 - e. That this Honourable be pleased to issue orders that any sale through auction or otherwise of Motor Vehicle Registration Number KCV XXXB, forming part of the Estate of the deceased



herein is irregular, unprocedural, illegal and amounts to intermeddling with the estate of the deceased herein and as such, it is void ab initio;

- f. That this Honourable court be pleased to issue orders for restitution of Motor Vehicle Registration Number KCV XXXB to the estate of the deceased herein through forced transfer or otherwise as may be required by circumstances;
 - g. That this Honourable court be pleased to issue an order that 3rd Respondent herein as agent of the 1st and 2nd Respondent herein, return Motor Vehicle Registration Number KCV XXXB to the Applicants herein on behalf of the estate of the deceased herein in the condition and the state the said motor vehicle was at the time of attachment.
 - h. That the costs of the instant application be borne by the Respondents herein
2. The grounds on the face of the application are that the Applicants, being the wife and son of the deceased, were issued with a grant of administration ad litem for purposes of prosecuting the instant application against the Respondents. They aver that in Chief Magistrate's Court Milimani Commercial Case No. 8547 of 2019, Gladys Mueni Obare & Another v John Anyonga Anduso, Michael Onditi Nyariki, John Mondari Ochwangi & Family Bank Limited, judgment was entered on 9th November 2022 against the deceased, Michael Onditi Nyariki, together with others, in the sum of Kshs. 3,162,477.23 plus costs and interest.
 3. The Applicants further aver that the deceased passed away on 10th April 2021 and that the suit therefore proceeded to hearing and judgment without the estate of the deceased being notified, served, or enjoined and without a citation being issued against the beneficiaries of the estate. They state that the 1st and 2nd Respondents, through the 3rd Respondent, obtained warrants of attachment and sale, proceeded to proclaim against the deceased's property, Motor Vehicle Registration No. KCV XXXB ("the subject property"), which they forcibly removed from the Applicants on 28th October 2024 and are in the process of irregularly selling by public auction.
 4. The Applicants contend that it was only upon the proclamation and attachment of the subject property that they became aware of the said suit. They now face the imminent threat of execution and sale of the subject property, which remains registered in the name of the deceased. Thus, they seek orders declaring the attachment and intended sale amounts to intermeddling with the deceased's estate. They further aver that, in any event, and pursuant to Order 24 Rule 4(3) of the Civil Procedure Rules, the suit against the deceased had abated by reason of the failure of the 1st and 2nd Respondents to apply to substitute or enjoin the estate or legal representative of the deceased.
 5. In response, to the application, the Respondents filed Grounds of Opposition dated 26th May 2025 and a Replying Affidavit sworn on 11th May 2025. They contended that the issues raised in the application had already been litigated between the same parties in a civil suit at Milimani, which was determined by the ruling delivered on 2nd April 2025. On that basis they urged that the matter is res judicata and should be dismissed.
 6. The Respondents further submitted that the application is improperly anchored on the *Civil Procedure Act* and Rules, despite being a succession matter governed by distinct statutory provisions. As such they claimed that the application incompetent and undeserving courts consideration. They also alleged that the application is brought in bad faith, aimed solely at frustrating their efforts to enjoy the fruits of their judgment, which stands unchallenged as no appeal has been filed. They asserted that they are bona fide creditors of the estate of the deceased and are entitled to be recognized as such.



7. The Respondents further stated that in Chief Magistrate’s Court Milimani Commercial Case No. 854 of 2019, Gladys Mueni Obare & Another v John Anyonga Anduso, Michael Onditi Nyariki, John Mondari Ochwangi & Family Bank Limited, the defendants, including the deceased herein, were represented by the firm of Omondwe Ondegwe & Company Advocates, through counsel Mr. Opiyo Ondegwe. The plaintiffs were instructed to serve documents upon that advocate. According to the respondents, affidavits of service on record confirm that pleadings and summons were duly served but the defendants failed to enter appearance, prompting the matter to proceed to hearing and judgment.
8. They urged that it was the responsibility of the defendants’ advocate to notify the Court of the death of one of the defendants, and not the plaintiffs’ duty to investigate the defendant’s whereabouts.
9. The Respondents also contended that the Applicants, not being parties to the Milimani suit, are ill-placed to comment on the conduct of those proceedings leading to judgment. They claimed that any evidence offered by the Applicants in this regard amounts to hearsay and is inadmissible. They further noted that execution of the judgment is at an advanced stage, with the subject property already proclaimed and advertised for auction. The auctioneer, acting under the Magistrate’s Court orders, has incurred substantial costs, including storage charges, proclamation fees, and advertisement expenses, which the respondent seeks the court’s leave to recover.
10. In reply, the Applicants filed a Further Affidavit sworn on 12th June 2025. They maintained that the present application has been properly filed before a court with jurisdiction as it concerns property registered in the name of the deceased. They explained that on 8th April 2025, they lodged a petition for letters of administration intestate using the deceased’s death certificate serial number, which is a mandatory requirement under the Judiciary e-filing system.
11. On 9th April 2025, they attempted to file a petition for letters of administration ad litem but the system rejected it due to duplication of the death certificate serial number. The Applicants averred that, on 10th April 2025, and upon the advice of the Machakos High Court Family Registry, they filed the petition for letters of administration ad litem within the present cause rather than as a stand-alone application, in order to avoid rejection by the e-filing system on account of duplication of the death certificate serial number.
12. The Applicants denied allegations of forum shopping, clarifying that their earlier application dated 29th October 2024 in Chief Magistrate’s Court Milimani Commercial Case No. 8547 of 2019, Gladys Mueni Obare & Another v John Anyonga Anduso, Michael Onditi Nyariki, John Mondari Ochwangi & Family Bank Limited, was never determined on its merits. They explained that the ruling delivered on 2nd April 2025 dismissed that application purely on a technicality, namely, lack of locus standi as they had not yet obtained a limited grant ad litem. It was for this reason, that they subsequently filed the present application, where they are now undertaking succession proceedings for the deceased’s estate.
13. The Applicants reiterated that the lower court suit abated pursuant to Order 24 Rule 4(3) of the Civil Procedure Rules, as the Respondents’ failed to apply for substitution or joinder of the deceased’s estate following his death on 10th April 2021. They pointed out that judgment was entered on 9th November 2022, more than one year after the death, and therefore proceeded in the absence of the deceased.
14. The Applicants emphasized that the judgment of 9th November 2022 was not solely against the deceased alone, but was entered jointly and severally against other defendants, namely James Anyonga Anduso, John Mondari Ochwangi, and Family Bank Limited, who are still alive and who, in fact, had sole ownership of Motor Vehicle Registration No. KCF XXXN, the vehicle alleged to have caused the accident that gave rise to the claim in the lower court. They expressed concern that the respondents had chosen to target the deceased property instead of pursuing execution against the surviving defendants.



15. In the Applicants' view, if the Respondents have a legitimate claim against the estate of the deceased, the proper course would be to seek recognition as creditors within the succession proceedings, rather than intermeddling with the estate property. They argued that allowing the present application would not prejudice the Respondents, who retain the option of executing the judgment against the other surviving defendants or filing a claim in the succession cause as creditors of the deceased's estate.
16. The present application was canvassed by way of written submissions. The Applicant's submissions are dated 9th June, 2025 while the Respondent's submissions are dated 29th July, 2025.

Applicant's Submissions

17. The Applicants began their submissions with a brief introduction of the application and the orders sought. They identified the following issues for determination (a) whether Motor Vehicle Registration Number KCV XXXB forms part of the estate of the deceased; (b) whether the intended auction and sale of Motor Vehicle Registration Number KCV XXXV amounts to intermeddling with the deceased's estate and is therefore void ab initio; (c) Whether this Honourable court should issue orders for restitution of Motor Vehicle Registration Number KCV XXXV, to the deceased estate through forced transfer or otherwise as may be required by circumstances in the condition and the state the said Motor Vehicle was at the time of attachment; (d) whether the 1st and 2nd Respondents herein will be prejudiced if the application is allowed and (e) which party should bear the costs of the application.
18. On the first issue, the Applicants submitted that it is undisputed that Motor Vehicle Registration No. KCV XXXV is currently registered in the name of the deceased, as evidenced by the logbook which lists the deceased as the legal owner. They cited section 3(1) of the [Law of Succession Act](#), which defines "estate" to mean the free property of a deceased person, and urged that the said vehicle therefore forms part of the deceased's estate.
19. Regarding the second issue, the Applicants contended that the proposed auction and sale of the vehicle constitute intermeddling with the estate, as defined under section 45 of the [Law of succession Act](#). They emphasized that the respondents are not administrators of the estate and have not sought recognition as creditors in the succession proceedings. Therefore, their act of attaching the vehicle without proper authority amounts to unlawful interference. In support, they cited *In Re the Estate of David Julius Nturibi M'ithinji (Deceased)* [2012] eKLR, where the Court held that interference with estate property by persons lacking authority amounts to intermeddling within the meaning of section 45.
20. With respect to the third issue, the Applicants submitted that, given the Respondents' intermeddling, the court should issue an order of restitution. They requested that Motor Vehicle Registration No. KCV XXXV be returned to the estate in the same condition it was in at the time of attachment, notwithstanding the forced transfer that has already occurred.
21. Addressing the fourth issue, the Applicants argued that the Respondents would not suffer any prejudice if the orders sought are granted. They maintained that the execution of the judgment of the lower court delivered on 9th November 2022, specifically the attachment of Motor Vehicle Registration No. KCV XXXV, is void ab initio, as the suit had abated as against the deceased. They stated that the deceased passed away on 10th April 2021, and by operation of Order 24 Rule 4(1) and Rule 4(3) of the Civil Procedure Rules, the suit abated one year after his death, due to respondent's failure to apply for substitution. They relied on *John Muthee Matumo v Thomas Gerishon & 4 Others* [2022] eKLR, where the Court affirmed that proceedings taken after a suit has abated are null and void against the deceased.



22. On the issue of costs, the Applicants submitted that the same should be awarded in their favour, having demonstrated the merit of the application dated 9th April 2025. In conclusion, the Applicants urged the Court to allow the application as prayed.

Respondents' Submissions

23. The Respondents commenced their submissions with an introduction and a brief overview of the facts. They stated that the underlying suit arose from a fatal accident that occurred on 2nd January 2018, involving Haron Obare Osiemo (deceased), who was riding his motorcycle along Outering Road near Donholm. According to the respondents, John Anyonga Anduso (the 1st Defendant in the lower court suit), acting as the servant or agent of the 2nd Defendant, was in control of a minibus, registration number KCF XXXN, belonging to the 2nd Defendant, and caused or permitted the same to violently collide with the deceased's motorcycle.
24. They further submitted that, upon obtaining a grant, the Respondents, through their advocates, instituted a suit against the 1st, 2nd, 3rd and 4th Defendants. The suit against the 4th Defendant, who was merely a financier, was later withdrawn by consent. The firm of Omondi, Ondego & Company Advocates then came on record for the 1st, 2nd and 3rd Defendants. However, the matter proceeded to hearing and judgment in default was entered in default due to the Defendants' failure to appear.
25. The Respondents identified four issues for determination, namely: (i) whether the suit against the 2nd Defendant abated; (ii) whether their actions amount to intermeddling; (iii) whether the 1st and 2nd Respondents will be prejudiced if the instant application is allowed; and (iv) the issue of costs.
26. On the first issue, the Respondents submitted that counsel on record for the Defendants bore the duty to the Court and to opposing counsel to communicate material facts, including the death of the 2nd Defendant. They maintained that any failure or lack of diligence on the part of defence counsel ought not to be visited upon them as decree-holders. They asserted that they only became aware of the death upon being served with the Applicants' application dated 29th October 2024. Throughout the proceedings, counsel on record for the Defendants continued to accept service of pleadings and never indicated that he lacked instructions, or that one of the Defendants had passed away.
27. On the second issue, the Respondents relied on section 45 of the *Law of Succession Act* and the case of *Benson Mutuma Muriungi v CEO Kenya Police Sacco & Another* [2016] eKLR. They submitted that intermeddled with a deceased's estate only occurs if a person is aware of the death and acts without authorisation by any written law or a grant of representation. They emphasized that the trial court had rendered judgment on 9th November 2022, from which they obtained a decree. As decree-holders, they applied for execution through warrants of attachment and sale of the movable property of the judgment-debtors, to be executed by the 3rd Respondent. They argued that their actions were expressly authorised by law, and cannot be construed as intermeddled with the estate of the deceased.
28. On the third issue, the Respondents submitted that the 3rd Respondent was executing the judgment under lawful instructions and that the process had reached an advanced stage. They noted that since the issuance of stay orders, the 3rd Respondent has continued to incur substantial costs, including storage charges, proclamation expenses, and advertisement fees. Citing section 66 of the *Law of Succession Act*, the Respondents asserts that they are decree-holders of a valid judgment that has not been reviewed, appealed or set aside. Accordingly, they argued that they are entitled to enjoy the fruits of their judgment and should be recognised as creditors within the meaning of section 66(d) of the Act.
29. In conclusion, the Respondents urged the Court to dismiss the application with costs.



Analysis and Determination

30. I have carefully considered averments by all parties and submissions filed. In summary, the Applicants, being the widow and son of the deceased, have approached this Court seeking orders to restrain the Respondents from selling Motor Vehicle Registration No. KCV XXXB, which they assert forms part of the estate of the late Michael Onditi Nyariki. The vehicle was proclaimed and seized by the 3rd Respondent, an auctioneer, in purported execution of a decree issued in Nairobi CMCC No. 8547 of 2019 at the instance of the 1st and 2nd Respondents. The Applicants contend that the said attachment amounts to unlawful intermeddling with the deceased estate, as the decree was obtained and executed against a party who was already deceased.
31. The Respondents, on their part, argue that they are bona fide decree-holders who lawfully obtained judgment in CMCC No. 8547 of 2019, and proceeded with execution in accordance with law. They maintained that they were not aware of the death of the deceased's death at the time judgment was rendered. They submit that their actions cannot be construed as intermeddling but rather as legitimate steps to enforce a valid decree. They further contend that a similar application was previously dismissed by the lower court rendering the Applicants' motion *res judicata*.
32. Based on the documents filed before this Court, the following issues arise for determination;
 - a. Whether Motor Vehicle Registration No. KCV XXXB forms part of the estate of the deceased.
 - b. Whether the attachment and intended sale of Motor Vehicle Registration No. KCV XXXB amounts to intermeddling with the estate of the deceased.

Whether Motor Vehicle Registration No. KCV XXXB forms part of the estate of the deceased.

33. Section 3 of the *Law of Succession Act* defines "estate" as "the free property of a deceased person". Section 45 of the Act protects such property by prohibiting any intermeddling unless expressly authorised by law or by a grant of representation. Specifically, Section 45 of the *Law of Succession Act* provides that;
 - “45. No intermeddling with property of deceased person
 - (13) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
34. In the present case, the logbook annexed at the affidavit in support of the application clearly shows that Motor Vehicle Registration No. KCV XXXB is registered in the name of the deceased. The respondent do not refute this assertion. Further, no material evidence has been presented to demonstrate that ownership of the motor vehicle was transferred to any other person prior to the deceased's demise.
35. Accordingly, I find as a matter of fact and law that the subject motor vehicle forms part of the free property of the deceased and therefore belongs to the estate. It follows that the property is subject to the protection of this Court under the *Law of Succession Act*.



Whether the attachment and intended sale of Motor Vehicle Registration No. KCV XXXB amounts to intermeddling with the estate of the deceased.

36. The Applicants rely on section 45 of the *Law of Succession Act* to urge that the seizure of estate property without grant or leave amounts to unlawful intermeddling. They contend that Motor Vehicle Registration No. KCV XXXB, registered in the name of the deceased, was attached and proclaimed by the 3rd Respondent in execution of a decree obtained in CMCC No. 8547 of 2019, despite the fact that the deceased had passed away prior to judgment.
37. The Respondents maintain that they were executing a valid decree issued in their favour by a competent court and acted in good faith, unaware of the deceased's death at the time execution was initiated. This Court acknowledges that a decree holder has legitimate rights to realise the fruits of their judgment through execution. However, the *Civil Procedure Act* provides a clear framework for execution against a deceased judgment-debtor. Section 37 of the Act stipulates:
- “ 37. Legal representative
- (1) Where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”
38. Whether or not the decree holder was aware of the death, the law requires that estate property be dealt with only through the succession process. In *Re Estate of Washington Aggrey Jalango Olumu (Deceased) (Succession Cause E19 of 2021) [2022] KEHC 14058 (KLR) (17 October 2022) (Ruling)*, the court stated that;
- “ 30. Case law interpreting Section 37 of the *Civil procedure Act* has shown that a decree as envisaged under Section 37 of the *Civil Procedure Act* is one that can be brought before a succession court for inclusion into the liabilities of the deceased and which must be settled before distribution of the estate is done between and among beneficiaries. It is immaterial that the administrators or beneficiaries were not aware of the decree as they, in the first place, were not parties to those suits/proceedings where decrees were issued against the deceased.”
39. A decree obtained against a deceased person ought to be brought before the succession court for inclusion as liabilities of the estate and settled before distribution. It is immaterial whether the administrators or beneficiaries were aware of the decree, as they were not parties to the original proceedings. The decree remains a valid liability of the estate. In this instance since the respondent's decree is yet to be set aside and or varied, it then follows that enforcement must be pursued within the confines of succession law.
40. This court finds that the applicants have demonstrated that Motor Vehicle Registration No. KCV XXXB is estate property. Its attachment amounted to intermeddling of the estate under section 45 of the *Law of Succession Act*. While the Respondents acted in good faith, the law prohibits execution against estate property outside the succession process.
41. A balance must be struck between preserving the estate from unlawful dissipation and recognizing the rights of decree-holders. Section 66 of the *Law of Succession Act* recognizes creditors as persons entitled



to lodge claims in succession proceedings. The Respondents are at liberty to present their claim in this succession cause or to seek leave under Section 37 of the *Civil Procedure Act* to execute against the legal representatives. The appellants to have the liberty to move the court appropriately, in Nairobi CMCC No. 8547 of 2019 to challenge the validity of the judgment rendered on 9th November 2022.

42. Accordingly, I make the following orders that;
- a. Motor Vehicle Registration No. KCV XXXB forms part of the estate of the late Michael Onditi Nyariki.
 - b. The attachment and intended sale of the motor vehicle Registration No. KCV XXXB by the Respondents and/or its agents amounts to unlawful intermeddling with the estate of Michael Onditi Nyariki.
 - c. That 3rd Respondent herein as agent of the 1st and 2nd Respondent herein, shall forthwith return Motor Vehicle Registration Number KCV XXXB to the Applicants herein on behalf of the estate of the deceased in the condition and the state the said motor vehicle was at the time of attachment.
 - d. As Costs follow event, the applicants are awarded costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Selina Court Assistant

