



REPUBLIC OF KENYA



**In re Estate of Philip Mutuku Sila (Deceased) (Succession Cause E129 of 2020) [2023] KEMC 255 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEMC 255 (KLR)

**REPUBLIC OF KENYA  
IN THE MACHAKOS LAW COURTS  
SUCCESSION CAUSE E129 OF 2020  
CN ONDIEKI, PM  
NOVEMBER 30, 2023  
IN THE MATTER OF THE ESTATE OF PHILIP MUTUKU SILA {DECEASED}**

**BETWEEN**

**BRIGIDA MUENI PHILIP ..... PROSECUTOR**

**AND**

**ANNAH MUSILI MUTUKU ..... 1<sup>ST</sup> ADMINISTRATRIX**

**ESTHER NZULA PHILIP ..... 2<sup>ND</sup> ADMINISTRATRIX**

**RULING**

1. Before this Court is an Affidavit of protest to the confirmation of grant which was issued to the Administrators on 2<sup>nd</sup> June 2021.
2. The basis of the Affidavit of Protest is that although the protestor signed the consent in support of the Summons for Confirmation of Grant, she opposes the proposed mode of distribution set out in the Summons for Confirmation of Grant dated 17<sup>th</sup> August 2022 and filed on 19<sup>th</sup> August 2022, on grounds of non-disclosure of the mode of distribution of the deceased's assets and non-disclosure of the some of deceased's properties.
3. In particular, the protestor deposes that one such property is registered in the name of her step-mother, Annah Musili Mutuku. The protestor argues that although the said land is registered in the name of her step-mother, it belongs to the estate of the deceased. It is deposed that the deceased left a will intimating as much and, on this basis, the family agreed that confirmation shall be put on hold until this issue is settled.
4. The protestor has exhibited a copy of the alleged will marked BMP1; measurements of the property marked BMP2; and a copy of the alleged family meeting dated 1<sup>st</sup> October 2022, marked BMP3.



## **Part II: The 1<sup>st</sup> Administratrix/respondent's Case**

5. In her Affidavit of Reply, the 1<sup>st</sup> Administratrix/Respondent in the Summons for Confirmation for Grant, a full disclosure has been made to the effect that the deceased's estate comprises only two properties namely Muputi/Kiima Kimwe/3462; and Mumbuni/Kasinga/307 and that the protestor signed the consent to distribution of the two properties. It is deposed that the protestor has adduced no evidence to support her assertion.

## **Part III: The Protestor's Further Affidavit**

6. In her Further Affidavit dated 21<sup>st</sup> August 2023, the Protestor deposes that the property which was undisclosed in the said Summons for Confirmation of Grant was bought by the deceased and not the 1<sup>st</sup> Administratrix and that the 1<sup>st</sup> Administratrix was merely a witness to the sale as demonstrated in the Sale Agreement. In this regard, the protestor has exhibited a copy of Sale Agreement marked BMP1.

## **Part IV: Submissions**

7. Both parties filed written submissions. The protestor filed submissions dated 14<sup>th</sup> September 2023 and the 1<sup>st</sup> Administratrix filed written submissions dated 24<sup>th</sup> August 2023 and filed on 25<sup>th</sup> August 2023. Both submissions have rehashed the substance of their respective positions.
8. In her submissions, the protestor argues that the land was transferred to the name of the 1<sup>st</sup> Administratrix fraudulently, staking this proposition in Lawrence Muriithi Mbabu vs. District Land Registrar, Nyeri & another [2019] eKLR.

## **Part V: Issues For Determination**

9. Gleaning from the Protest and the response thereto, this Court has distilled two questions for determination as follows:
  - i. First, whether a Court sitting in its succession jurisdiction is clothed with the requisite jurisdiction to determine ownership of land in circumstances where a Protestor asserts that a certain parcel of land registered in the name of a Petitioner, belonged to the deceased.
  - ii. Second, who should bear the costs of this Protest?

## **Part VI: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination**

10. This Court now embarks on analysis of the law, examination of facts, evaluation of evidence and determination of each of the two questions, seriatim.
11. This Court has noted departure from the procedure and form of an Affidavit of Protest. However, guided by Article 159(2)(D) of *the Constitution* which regards such as an undue technicality, this Court has elected to focus on substance of the dispute.

### **Whether a Court sitting in its succession jurisdiction is clothed with the requisite jurisdiction to determine ownership of land in circumstances where a Protestor asserts that a certain parcel of land registered in the name of a Petitioner, belonged to the deceased**

12. There is no universally accepted definition of jurisdiction. Broadly speaking, jurisdiction is the authority or power granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. In the context of Kenya, jurisdiction of a Court is the authority or power granted to a Court to admit,



consider and determine a legal matter on an area of responsibility defined by the Constitution and/or Act of Parliament and more particularly, the power reposed in a Court to interpret and apply the laws contemplated by Article 2 of the Constitution of Kenya and those set out under section 3 of the Judicature Act. See the locus classicus on this subject namely the Court of Appeal decision in Owners of Motor Vessel “Lillian S” vs. Caltex Oil (K) Ltd [1989] KLR 1, per Nyarangi, JA.

13. Jurisdiction is not a mere procedural technicality. It flows from either the Constitution or legislation or both. See the Supreme Court decisions in Samuel Kamau Macharia vs. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR; and In the Matter of Interim Independent Electoral Commission [2011] eKLR.
14. Since Jurisdiction is everything, the Court must inquire into its jurisdiction before Judgement is rendered. Without it, a Court has no power to make one more step and should instead down tools in respect of the matter before it, the moment it holds the view that it lacks it. See the said Owners of Motor Vessel “Lillian S” case.
15. Article 2(2) of the Constitution provides that no person may claim or exercise State authority except as authorised under this Constitution. In the foregoing context, Courts and other public bodies should work within the powers expressly conferred either by statute or legislation of both, but not by implication. Power should not be expanded through judicial craft. See Geoffrey K. Sang vs. Director of Public Prosecutions & 4 others [2020] eKLR, per Odunga, J.; Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461; Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.
16. It cannot be gainsaid that the jurisdiction of a probate and administration court as defined by the Law of Succession Act is to determine assets of the deceased, survivors of the deceased and the persons with beneficial interest thereof, and finally distribute the assets amongst the survivors and the persons beneficially interested. See In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR, where W.M. Musyoka, J. held that “26... The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets. 27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who a neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators. 28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows - ‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings



under ... the Civil Procedure Rules ...' 29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above." See also *Kenya African National Traders & Farmers Union vs. Christine Mwikali Mutie & 2 others* [2017] eKLR, per Nyamweya, J.

17. And so, whenever a dispute over ownership of a parcel of land arises in a probate and administration court, a Court sitting in exercise of its probate and administration jurisdiction, lacks jurisdiction to hear and determine such a dispute. It is worse if the dispute will require cancellation of a title. In *Kenya African National Traders and Farmers Union vs. Christine Mwikali & 8 others, Nairobi Court of Appeal, Civil Appeal Number 145 of 2018*, where Omondi, Kaibuta & Ngenye, JJA, reasoned that at paragraph 28 that "What this implies is that, a party wishing that the dispute over ownership of a suit land be determined, he or she ought to file a substantive suit before the Environment and Land Court before lodging a claim over land in a probate court. At the point the party goes to a probate court, the issue of ownership of the suit land will have been substantively determined by a court of competent jurisdiction; and the probate court will then arrogate itself the rightful jurisdiction of distribution of the estate of the deceased..." See also *In re estate of Muthiani Mutule (Deceased)* [2017] eKLR, per C. Kariuki, J.; *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR; *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, per W.M. Musyoka, J.; *Monica Wangari Njiiri & 4 others vs. Eunice Wanjiru Igamba & Another* (2016) eKLR; *Kenya African National Traders & Farmers Union vs. Christine Mwikali Mutie & 2 others* [2017] eKLR, per Nyamweya, J., et alia.
18. It follows that the order of things is that a dispute on ownership is settled first before distribution is undertaken. See *Kenya African National Traders and Farmers Union vs. Christine Mwikali & 8 others, Nairobi Court of Appeal, Civil Appeal Number 145 of 2018*, per Omondi, Kaibuta & Ngenye, JJA; *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, per W.M. Musyoka, J., et alia.
19. What then is the way forward? The law contemplates two options.
20. The first option is to distribute the uncontested properties and the residual property, if any, will be distributed later, after its ownership is resolved. See *In re estate of Muthiani Mutule (Deceased)* [2017] eKLR, per C. Kariuki, J.; *In The Matter of Estate of Gachuru Kabogo Nai Succ No 2830 of 2001; Charles Murithi Kungu vs. Ann Njoki Njenga Nairobi HCCC No. 19 of 2004*, et alia.
21. The second option is to defer confirmation in toto, awaiting determination of ownership of the contested property.
22. On grounds of avoiding untidy situations in distribution and the necessity to avoid possible awkwardness including but not limited to the possible need to re-open by way of revocation of the distribution for purposes of redistribution of full estate, this is persuaded and elects the second option.



**Who should bear the costs of this Protest?**

23. Considering the family relationship of the parties, this Court has found a good cause to depart from the general proposition of law that costs follow the cause.

**Part VII: Disposition**

24. Wherefore this Court:

- i. Downs its tools for lack of jurisdiction to hear and determine the principal issue raised by the Protestor and effectively strikes out this Protest.
- ii. Directs that confirmation (distribution) of the estate of Philip Mutuku Sila [deceased] as proposed in the Summons for Confirmation of Grant dated 17<sup>th</sup> August 2022 and filed on 19<sup>th</sup> August 2022, is hereby deferred to such time when the issue of ownership of the contested parcel of land, shall be settled.
- iii. Directs that each party shall be her own costs.

25. Orders accordingly.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023**

.....

**C.N. ONDIEKI**

**PRINCIPAL MAGISTRATE**

Protestor:.....

Advocate for the 1<sup>st</sup> Administratrix:.....

2<sup>nd</sup> Administratrix:.....

Court Assistant:.....

