

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. E002 OF 2020

IN THE MATTER OF ESTATE OF DANIEL MATHIU MBITI -

DECEASED

LYDIA MBURUGU1ST

APPLICANT

MURIUNGI MATHIU JAMES 2ND

APPLICANT

-VERSUS-

KATHERINE K. MBITI1ST

RESPONDENT

KENNETH KINYUA MBAABU 2ND

RESPONDENT

KAGWIRIA MBITI 3RD

RESPONDENT

RULING

1. Coming up for determination is the application da ted 21/3/2023 which seeks the following orders:

a) That this honourable court do hereby certify this application as urgent and service be dispensed with in the first instance.

b) That this honourable court be pleased to grant an order of temporary injunction restraining the respondents, their agents, servants and/ or employees or anybody else claiming under them from disposing off or in any other manner interfering with property of the deceased estate Title No. NTIRIMITI S/S/244 and any of the deceased's estate pending hearing and determination of this application,

AND IN the alternative this honourable court grant order of status quo (No further transfer or entry to the said land or establishment, physical putting of boundaries, beacon, or eviction) pending the hearing and determination of this application.

c) That this honourable court be pleased to grant an order of temporary injunction restraining the

respondents, their agents, servants and/ or employees or anybody else claiming under them from disposing off or in any other manner interfering with listed property of the deceased estate title No. NTIRIMITI S/S/244 and any of the deceased's estate pending confirmation of grant.

d) That costs be provided for.

2. The application is supported by the grounds set out on its face and the affidavit of the 1st applicant sworn on even date.
3. It is the applicants' case that they are the joint administrators of the estate of the deceased. That land parcel No. Ntirimiti/S/S/244 was listed as property of the deceased as it was registered in the joint names of the deceased and the 1st respondent who was the deceased's former wife.
4. The applicants further state that the said property was under auction by the Consolidated Bank of Kenya and the deceased filed suit to stop the intended sale. That subsequently the deceased entered into a consent with the

bank on 18/12/2018. That the deceased died shortly, thereafter on 31/12/2018.

5. It is further averred that thereafter, the 1st respondent attempted to challenge the consent filed between the deceased and the said bank. The applicant's view is that the said challenge, filed after the deceased had redeemed the property was intended to defraud the estate of the deceased, after the 1st applicant had put in her own resources for that cause.
6. It is further averred that later, the applicants came to learn that there were agents who were selling the property in question. That upon making enquiries, they came to learn that the property had been illegally transferred to the sole name of the 1st respondent and had been subdivided into 3 portions; Nos. Ntirimiti/S/S 3039, 3060 and 3061. That she further discovered that one subdivision, parcel No. 3059 subsequently registered in the name of the advocate of the 1st respondent herein.
7. The applicants term the transfer of the land as an unlawful act which ought to be stopped.

8. The respondents opposed the application. In a nutshell, it is their case that the land parcel in question was registered in the joint names of the deceased and the 1st respondent. That upon the death of the deceased, then by law, the 1st respondent became the sole proprietor of the land. That as such the parcel of land does not form part of the estate of the deceased.
9. The 1st respondent further avers that she came to learn of the case filed by the deceased against the bank and sought to be joined therein and was allowed. That she was actively involved in the negotiations that led to the discharge of the property and the title deed was released to her. That it was then that she applied to be registered as the sole proprietor of the land in question.
10. Parties filed submissions which I have duly considered and will refer to them when necessary.
11. Although the respondents filed a Notice of Preliminary Objection, the same was not specific on the grounds it was based on save that it disclosed no cause of action against the 3rd respondent.

12. The ground alone cannot lead to striking out the application, since it also affects the other two respondents. If the court is to agree that there is no cause of action disclosed against the 3rd respondent, then it is only the said respondent who will be removed from the proceedings.
13. I think that the best way is to look at the application as a whole and include the objections part of the ground opposing the application.
14. The application filed by the applicants is in respect to the land parcel Ntirimiti/S/S/244. From the material placed before the court and this is admitted by all the parties, the land was registered in the names of the deceased and the 1st respondent. The 1st respondent is a former wife of the deceased.
15. In addressing the application, the crucial issue to address is the nature of ownership of the land as between the deceased and the 1st respondent. This is a dispute between two land owners, save for the fact that one owner is deceased and administrators have stepped into his shoes.

16. Having said that, it is my view that the resolution of that issue does not lie in a Succession Court but rather the court mandated by law to handle Environment and Land Matters – the ELC.
17. A succession court deals with matters regarding the distribution of the estate of a deceased person. Where there is a dispute with a third party over whether a particular property belongs to the deceased or not, then that dispute ought to be resolved elsewhere first. Until then, the said property is not free for distribution by this court.
18. In **re estate of Solomon Mwangi Waweru (deceased) (2018) eKLR**, A.K. Ndungu J remarked as follows:

“Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and

not thru an objection like the one before Court.."

It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land Court. The succession Court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit".

19. The converse of the above is true. If an administrator to an estate has a dispute over any part of the estate as against a third party, that dispute is not one envisioned to be resolved by the succession court. This was the position that was reiterated **In re Estate of Alice Mumbua Mutua (Deceased) [2017] KEHC 8289 (KLR)** where the Court stated;

“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 are 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...”

Clearly, disputes as between the estate and third parties need not be determined within the succession cause.... 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."

20. I am thus of the view that the applicants ought to approach the right court in order to determine the nature of the land tenure in regard to parcel No. Ntirimiti/S/S/244. This court is not seized of the jurisdiction to determine that issue.
21. Jurisdiction is everything and without it, a court cannot take any further step in a matter. In Owners **of the Motor**

Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1)

the Court of Appeal held as follows;

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

22. Having found that this court lacks jurisdiction to determine the dispute over this property in question, I will proceed to down my tools but only in respect to the property in question. Any other property that is not in dispute and is in the name of the deceased shall be dealt with as part of the estate.

23. In conclusion, the application dated 21/3/2023 is dismissed.

24. There shall be no orders as to costs.

**Dated, signed and delivered at Meru this 19th day of
January 2026.**

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H. M. NYAGA

JUDGE