



**Multhoff-Sama v Registrar of Lands Mombasa Land Registry (Environmental and Land Originating Summons E008 of 2023) [2024] KEELC 5679 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5679 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023  
FM NJOROGE, J  
JULY 31, 2024**

**BETWEEN**

**ELIZABETH JORAM WILLIAM MULTHOFF-SAMA ..... APPLICANT**

**AND**

**REGISTRAR OF LANDS MOMBASA LAND REGISTRY ..... RESPONDENT**

**RULING**

1. The Originating Summons subject matter of this ruling is dated 24<sup>th</sup> February 2023. It was first filed in Mombasa Environment and land court on 27/2/2023 by Kedeki & Co Advocates. A reply was filed by the respondent in May of the same year. Submissions were filed by the applicant only. On 26/9/2023 the ELC Mombasa gave a ruling that had the effect of transferring the matter to the Malindi Environment and Land Court. It first came up for a scheduled pre-trial conference for 29/1/2024.
2. The Originating Summons has been brought under Sections 5 and 6 of the *Foreign Judgments (Reciprocal Enforcement) Act*, Section 77 of the *Probate Act* (sic) Cap 160, Section 3 and 3A of the *Civil Procedure Act* and Rule 42(1) of the *Probate and Administration Rules* and it seeks the following orders:
  1. That the decision by the Local Court of Kassel, in the Republic of Germany in Probate Court File No: 791 VI 2573/11 M, appointing Solicitor Holger Adolph, Friedrich-Ebert-Strasse 127, 34119 Kassel as the Administrator of the estate of Hardy Multhoff (Deceased) be received, accepted and recognized in the Republic of Kenya and be issued by this Court as an Order made by the Kenyan Court
  2. That the Purchase Agreement in respect of residential property on Portion No: 2549(original No: 1935/387), Malindi Central, Kilifi County within the Republic of Kenya registered with Lands Registry Mombasa in Vol. L. T 21, Folio 500/1, File 4767 be also received, accepted and recognized by the Kenyan Court as valid and proper agreement.



3. That the Registrar of Lands, Mombasa Lands office do register transfer instruments in respect of property on Portion No: 2549(original No: 1935/387), Malindi Central, Kilifi County within the Republic of Kenya registered with Lands Registry Mombasa in vol. L.T 21, Folio 500/1, File 4767 unto MS. Elizabeth Joram William Multhoff-Sama.
3. The application is premised on the grounds set out on its face and the supporting affidavit of the applicant who deponed as follows: the suit property herein is known as Portion No 2459(Original No 1935/387) Malindi Central, Kilifi County registered at the land registry in Mombasa in Vol LT 21 Folio 500/1 File 4767. The same is registered in the joint names of the applicant and her late husband one Hardy Multhoff (Deceased) in equal shares. The applicant and Hardy got married in Arusha in 1983, acquired the suit property and then divorced, and during their marriage they never had any issue and Hardy never remarried or got any issue after divorce; as such there were no heirs or beneficiaries to Hardy's estate; Hardy passed on sometime between 1<sup>st</sup> September 2011 and 3<sup>rd</sup> September 2011 at Fuldal in the Republic of Germany (Germany) whereupon the local court of Kassel in Germany appointed a solicitor (Holger Adolph) as administrator of his estate for the unknown heirs or beneficiaries.
4. The applicant came to Kenya in January 2023. She visited the area chief. The chief confirmed having known Hardy; he also confirmed that even in Kenya there were no known heirs or beneficiaries of the estate of the deceased; upon realizing this the applicant decided to purchase the half share of the deceased in the suit property. A notary in Germany prepared a purchase agreement in respect of the property; the consideration was Euro 4174.87 only; pursuant to the terms of the sale agreement the applicant was given entitlement to solely execute and take personal charge of the transfer of the property at the lands registry without the assistance of the seller Solicitor Holger, or the Notary. The local court of Kassel in Germany approved of the sale.
5. Attached to the OS are copies of the following documents: passport issued on 27/8/2015 to Elizabeth Multhoff-Sama a Dutch, resident in Berlin (Exh 1); indenture of the year 1988 between the applicant and Hardy on the one hand as purchasers and one Fakhrudin Nuroodin Gulamhussein Adamjee as seller of the other hand (Exh 2); certificate of marriage contracted between the applicant and Hardy at Arusha sometime in 1983 (Exh3); a certificate of postal search on the suit property (Exh 3(b)); a death certificate and its translation (Exh 4); a letter from the office of the Chief Malindi (Exh 5); a deed of sale in a foreign language dated 4/6/2015 between the applicant and solicitor Holger (and its translation into English)(Exh 6); a decision in a foreign language (and its translation into English) (Exh 7).

### **Disposition.**

6. I have considered the originating summons and the reply by the respondent as well as the submissions of the applicant. The originating summons seeks the principal order that the decision by the local court of Kassel in the Republic of Germany appointing solicitor Holger Adolph as the administrator of the estate of Hardy be received, accepted, and recognized in the Republic of Kenya and be issued by this court as an order made by the Kenyan court. The other prayers sought are purely supplementary. They would only issue upon the grant of that principal prayer.
7. The issues that arise for determination in this case are whether there is a judgment that may be enforced under the *Foreign Judgments (Reciprocal Enforcement) Act* and if so whether the orders sought in the originating summons ought to be granted.
8. The first question that arises is whether there is a judgment. It is clear from the provisions of Section 17 of *the Act* that proceedings other than proceedings by way of judgment are excluded by *the Act*. That section provides as follows:



17. Exclusion of certain proceedings
- (1) No proceedings, other than proceedings by way of a judgment or by way of execution of a judgment so registered, shall be entertained by any court in Kenya which are brought by a judgment creditor to recover a sum of money payable or an item of movable property deliverable under a judgment to which this Act applies and which is registrable.
  - (2) No proceedings shall be entertained by any court in Kenya which are brought by a judgment debtor for the recovery of a sum payable under a judgment of a court outside Kenya to the extent to which it is a judgment for exemplary, punitive or multiple damages.
9. This court has considered the cases of *In Re Haile Michael Desta Malu* 2017 eKLR NBI HC Misc. 85 Of 2017 and *ABSA Bank Uganda Limited (Formerly Known as Barclays Bank of Uganda Limited) v Uchumi Supermarkets PLC* (Civil Case E316 of 2020) [2021] KEHC 14 (KLR) (Commercial and Tax) (Ruling).
10. In the *Haile Michael case* (supra) the applicant was a next of kin, the deceased's father and had a grant of letters of administration obtained in an Eritrean Court. The court in that case observed that inheritance of the estate of Isaiyas Haile Michael Desta (deceased) had been issued to the appellant jointly with his wife Tebern Kidane Welday by the communal court of May Temenay P. Tsaserat Asmara in Eritrea on 7<sup>th</sup> December, 2016 hence there was a solid foreign court decision going deep into the merits of the case that the court in Kenya relied on in the proceedings.
11. In *ABSA Bank Uganda Limited* (supra) there was a judgment issued by a Ugandan court. The counsel appearing in the Ugandan case in which it was obtained had given detailed affidavits of their involvement in the proceedings that gave rise to that judgment. Therefore, there was a judgment that clearly determined the rights of the parties in the Absa Bank Uganda Ltd case.
12. This court must examine the decision that it has been asked to receive, accept and recognize, and determine if it amounts to a judgment or order within the definition of such in *the Act*. That decision is attached to the supporting affidavit as Exh 7. It reads as follows, verbatim:

“ 14.08.2016 Local Court of Kassel Legal effect

Probation Court Kassel 22 Octo 2015

791 VI 2573/II M Signature Klaube

Seal Partly Illegible Court Clerk of the Registry

23 Oct, 2016 of the Local Court

Decision

In the Probate Court Matter

Hardy Multhoff

Born on 05.07.1956 in Holziminden

Deceased between 01. And 03.09/2011 Fuldatal,

Last residing in 34233 Fuldatal, Bergammanstrasse 1C

1. Holger Adolp, Friedrich- Ebert Strasse 127. 34119 Kassel



- Administrator of the estate of the deceased

2. Luise Hermann Zurn Heisterhagen 43 34225 Baunatal

- Procedure Curator

The statements of Solicitor Holger Adoph as administrator of the estate of the deceased in the notarial deed dated 04.06.2015 of the Notary Jorg -Peter Jerratsch in Berlin (deed roll number 112/2015 concerning the sale of the following property Residential Property on Portion No. 2549 (ORIG. No. 1935/387) Malindi Central Kilifi County, Republic of Kenya registered with Lands Registry Mombasa in Vol L.T. 21 Folio 500/1, File 4767 are approved by the Probate Court.

This decision shall only become effective if it enters into *res judicata* (Article 40 para 2 FarmFG; Act on Procedure in Family Matters.)

Reasons:

The approved legal transaction is the economic interest of the unknown heirs. It is suited for averting damage from the inheritance estate.”

13. That is the decision relied on by the applicant, which this court is being asked to receive, accept and recognize. It is not a court judgment for a sum of money or for the delivery of any property to the applicant. It is not a merit based decision that awards the suit land to the applicant. It turns out that the respondent in these proceedings is not the respondent in the proceedings abroad and has no knowledge whatsoever of those proceedings. It is apparent that the exhibited decision purports to approve a prior decision by a solicitor named Holger to sell the suit property to the applicant herein. The decision by Holger is clearly not a decision by a court of law. Also, from what is presented by the applicant before this court, it is not a court of law that ordered Holger to dispose of the deceased’s share of the suit land. The proceedings only state that the court “approved” of the sale. I find that the purported decision presented before this court is not a judgment within the meaning of the Act and for that reason it is not sufficient to warrant the grant of the prayers sought.
14. However, the seriousness of the defect in the present OS does not only lie in the fact that the foreign court merely approved of a premeditated sale; it lies in that though prayer no 1 of the OS seeks that “the decision by that foreign court appointing solicitor Holger as the administrator of the estate of Hardy Multhoff (deceased) be received accepted and recognized”, no such appointing decision is exhibited in the OS. I must state that even by the greatest stretch of imagination the decision set out verbatim herein above would not meet that requirement. The applicant herein has not established how a solicitor was appointed as administrator to the estate of the deceased. The document granting that solicitor authority is not part of the exhibits attached to the supporting affidavit. This court has no material placed before it on the succession law or procedure employed in the foreign country from which the decision set out herein above emanates, or proof that it is the compliance with such law and procedure that led to, if at all, the appointment of a solicitor as administrator of the deceased’s estate. As there is no decision of a foreign court appointing Holger as administrator of the Estate of Hardy Multhoff, and the principal prayer no 1 in the OS is predicated on the existence of that decision, I find that the OS is fatally defective.
15. It is apparent from the foregoing provisions that even where it is established that there is a judgment, it must be from a designated court. The provisions of the Act envisage that a foreign judgment that can be enforced in Kenya must be a judgment from a designated court in a reciprocating country. A designated court according to the Act is:



- a. a superior court of a reciprocating country which is a Commonwealth country;
- b. a superior court of any other reciprocating country which is specified in an order made under section 13;
- c. a subordinate court of a reciprocating country which is specified in an order made under section 13.

16. Section 13 of *the Act* provides as follows:

“ 13. Extension of Act

- (1) Where the Cabinet Secretary is satisfied that provisions which are substantially reciprocal will be or have been made by a country outside Kenya for the enforcement therein of judgments given by the superior courts in Kenya, he may, by order, declare that country to be a reciprocating country for the purposes of this Act and that this Act shall apply with respect to judgments given by the superior courts of that country.
- (2) An order made under subsection (1) shall, where the reciprocating country is not a Commonwealth country, specify the courts which are deemed to be the superior courts of that country for the purposes of this Act.
- (3) Where the Cabinet Secretary is satisfied that provisions which are substantially reciprocal will be or have been made by a country outside Kenya for the enforcement therein of judgments given by subordinate courts in Kenya, he may, by order, declare that this Act shall apply with respect to judgments of the subordinate courts of that country and the order shall specify the courts in that country which are deemed to be subordinate courts for the purposes of this Act.”

17. Rule 2 of the *Foreign Judgments (Reciprocal Enforcement) (Extension of) Order* provides as follows:

- “ 2. The countries specified in the Schedule are declared to be reciprocating countries for the purposes of *the Act* and the Act shall apply with respect to judgments given by superior courts of those countries.

Schedule

1. Australia,
2. Malawi,
3. Seychelles,
4. Tanzania,
5. Uganda,
6. Zambia,
7. The United Kingdom,



8. Republic of Rwanda.”

18. Reciprocal enforcement may therefore be undertaken in respect of judgments from the superior courts of the above listed countries. It is also clear that in respect of a non-commonwealth country, the order must specify:

“ ... the courts which are deemed to be the superior courts of that country for the purposes of this Act.”
19. The *Absa Bank decision* (supra) has outlined this circumstances in which judgments may be received and confirmed and enforced in Kenya in instances where they are from countries not listed in the reciprocating schedule in the *Foreign Judgments (Reciprocal Enforcement) Act*. In the light of that decision and the foregoing provisions of *the Act*, I do not think that the applicant has established in these proceedings that the purported decision that she seeks to have enforced is from a designated court in a reciprocating country.
20. The question of jurisdiction also arises. The import of Article 162 (2) (b) and (3) of the *Constitution* as read with Section 13 (1) of the *Environment and Land Court Act* No. 9 of 2011 (ELCA) is that the Environment and Land Court (ELC) is bestowed with the jurisdiction to deal with disputes relating to environment, land use and planning, boundary disputes and any form of land dispute. There is no land dispute in this matter. The tenor of the provisions conferring on this court jurisdiction do not envisage that it should handle succession matters. This begs the question as to whether prayer no 1 in the OS should have been made in this court at all.
21. The applicant relies on the sale to him by an administrator. If the process of appointment of an administrator had been conducted in this country where the suit property is situate, it would have been expected that appropriate succession proceedings would have been instituted under the Kenyan *Law of Succession Act* in a court having jurisdiction, both territorial and pecuniary. The potential heirs or beneficiaries of the estate would have been possible beneficiaries of publication of the succession cause in a Kenya Gazette giving notice of such institution. In the absence of any objection by an interested party, or even despite such objection, a grant of letters of administration intestate would result. Such a decision would make it easy for the administrator to deal with the suit property without any further ado, including lodging such proceedings as the present. All this not being the case in respect of the deceased’s estate however, this court requires proof of a grant or its equivalent, or a competent judgment from a reciprocating country, which documents have not been made available.
22. In the *Absa Bank Case* (supra) there is an observation enforcement of foreign judgments would not cover not apply to inter alia decisions the main object of which is to determine the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses; the existence or constitution of legal persons or the powers of their officers or questions of succession.
23. Arising out of the foregoing discussion on jurisdiction, this court’s view is that since the OS seeks recognition of appointment of an administrator in respect of the estate of a deceased person and sets itself out as a succession issue, then it clearly does not fall within the jurisdiction of this court to address or determine it.
24. It is apparent from the *ABSA Bank Uganda Limited* (supra) that foreign judgments “must not be contrary to Kenyan public policy. Anything inconsistent with the Kenyan domestic laws, morality and sense of justice or national interests would be deemed contrary to Kenyan public policy.” Two observations arise with regard to the present case. First, as I have already found herein earlier, this court



has no material placed before it on the succession law or procedure employed in the foreign country from which the decision set out herein above emanates, or proof that it is the compliance with such law and procedure that led to, if at all, the appointment of a solicitor as administrator of the deceased's estate yet the suit property is situate in Kenya. This court hardly thinks that it would be in the interests of justice or public policy, or consistent with national laws to recognize a decision that has not been demonstrated to have been obtained in compliance with a law that is not inconsistent with the Kenyan domestic laws. Secondly there arises an observation about public policy. The deceased's asset is situate within Kenya and is real property. Under Kenyan law where a person dies intestate and has no heirs his assets escheat to the state. The court in *In The Matter Of The Estate Of Mariga Njuguna (Deceased)* [2013] eKLR it was stated as follows:

“Where there are no survivors of the deceased, the estate escheats upon the state in bona vacantia. There is no mention of purchasers or creditors in Part V of the Act, and therefore there was no legal basis upon which Joseph Njoka Kamau was listed as a survivor of the deceased.”

25. In *Njoki v Pussy* (Environment and Land Appeal E006 of 2022) [2023] KEELC 945 (KLR) (16 February 2023) (Judgment) the court observed as follows:

“59. Where an heir of a deceased person who owned land cannot be ascertained, such land is deemed to constitute public land. The definition of public land under article 62 (1) of the *Constitution* incorporates at (e) land in respect of which no heir can be identified by any legal process. This imports the concept of escheat into the Constitution.

60. *Black's Law Dictionary*, 10th Edition defines escheat as the reversion of land ownership back to the lord when the immediate owner dies without heirs or the reversion of property, especially real property, to the State upon the death of an owner who has neither a will nor any legal heir.

61. Under Section 8A of the repealed *Government Lands Act*, where any person in whom there was vested an estate, interest or right in or over land that was not Trust Land died intestate and without heirs, that estate, interest or right would escheat to the Government.”

26. In *In Re Estate of Elijah Okitah Mikah Tsimbwele (Deceased)* [2021] eKLR it was held as follows:

“The persons who qualify to administer estates of intestates, that is persons who die without leaving a will, like the deceased herein, are set out in order of priority in section 66 of the *Law of Succession Act*. The list in section 66 is aligned to the persons entitled to shares in the estate in intestacy under Part V of the *Law of Succession Act*. The persons entitled in intestacy are identified in Part V of the *Law of Succession Act*, sections 32 to 42. The persons listed, in order of priority, are the surviving spouse, followed by the surviving children, followed by surviving parents, followed by surviving siblings of the deceased, followed by the surviving half-siblings of the deceased, followed by other blood relatives of the deceased up to and including the sixth degree, and, if no such relatives exist, the property passes to the State in bona vacantia. Section 66 states as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate



When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors ...”

15. The provision in Part V of the *Law of Succession Act*, which is relevant to this ruling, is section 35, since the deceased was survived by a spouse and children. Section 35 says:

“ 35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) ...

(3) ...

(4) ...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

27. It has been made crystal clear by the applicant in this OS that she and Hardy divorced; that during their marriage they never had any issue and Hardy never remarried or got any issue after divorce and that as such there were no heirs or beneficiaries to his estate. It is also stated clearly that Hardy passed on sometime between 1<sup>st</sup> September 2011 and 3<sup>rd</sup> September 2011. Drawing from the case law cited above the deceased’s property in Kenya therefore became bona vacantia and escheated to the state; in



this court's view, that is an additional reason why Solicitor Holder lacked capacity to transact with the suit property.

28. Lastly, the Originating Summons has been brought under inter alia, section 5 of the *Foreign Judgments (Reciprocal Enforcement) Act*. The decision the court is asked to recognize and enforce is dated 22/10/2015. The present originating summons was lodged on 27/2/2023, more than 6 years later. Section 5 of *the Act* provides as follows:

“5. Application

- (1) Where a judgment to which this Act applies has been given in a designated court, the judgment creditor may apply to the High Court to have that judgment registered within six years of the date of the judgment or, where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.”

29. In view of the above provisions, it is therefore the case that had this court found that there was a valid judgment within the definition of the Act, the present originating summons would have been disallowed on the basis of statutory limitation.
30. For the reasons stated herein above the Originating Summons dated 24/2/2023 lacks merit and it is hereby dismissed with costs to the respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31ST DAY OF JULY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

