



REPUBLIC OF KENYA



**In re Estate of Stephen Nzau Koka (Deceased) (Succession Cause  
582 of 2008) [2024] KEHC 1873 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1873 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 582 OF 2008**

**FR OLEL, J**

**FEBRUARY 27, 2024**

**IN THE MATTER OF THE ESTATE OF STEPHEN NZAU  
KOKA (DECEASED)**

**BETWEEN**

**TAVITHA WANZA NZAU ..... 1<sup>ST</sup> PETITIONER**

**JOSIAH KIILU NZAU ..... 2<sup>ND</sup> PETITIONER**

**AND**

**JOHN NZIOKI NZAU ..... 1<sup>ST</sup> OBJECTOR**

**MUKULU NZAU KOKA ..... 2<sup>ND</sup> OBJECTOR**

**AND**

**VERONICA SYOMITI KIILU ..... APPLICANT**

**RULING**

**A. Introduction**

1. Before court for determination is the summons dated 5<sup>th</sup> May 2022 and filed under Section 47,76 of the *Law of Succession Act*, Rule 44, 73 of the *Probate & Administration Rules*; Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 45 of the *Civil Procedure Rules* 2010 and any other enabling provision of law. The applicant seeks for prayers that;
  - a. That this honorable court be pleased to grant leave to the applicant herein Veronica Syomiti Kiilu to be enjoined in these proceedings.
  - b. That pending hearings and determination of this application, this honorable court be pleased to issue a stay of implementation of the orders issued on 22<sup>nd</sup> November 2021.



- c. That the grant of letters of administration estate issued by this honourable court jointly to Josiah Kiilu Nzau and John Nzau Nzioki on 6<sup>th</sup> May 2014 be revoked and/or annulled.
  - d. That his honourable court be pleased to review and set aside the orders issued on 22<sup>nd</sup> November 2021 to the extent that a declaration be and is hereby issued that the survey undertaken on 18<sup>th</sup> February 2022 was done un-procedurally and illegally in breach of the honourable court's orders dated 22<sup>nd</sup> November 2021 and the survey report dated 5<sup>th</sup> April 2022 is therefore inconsequential, illegal and null and void abinitio.
  - e. That a fresh grant of letters of administration intestate of the deceased estate be issued jointly in the name of John Nzau Nzioki and Veronica Syomite Kiilu.
  - f. That this honorable court be pleased to have the matter herein listed for fresh directions on priority basis.
  - g. Any other order this honourable court deems fit to grant in the circumstances.
  - h. That costs of this application be provided for.
2. The said application is supported by the grounds on the face of the said application and supporting affidavit of the applicant dated 5<sup>th</sup> May 2022 and her further affidavit dated 20<sup>th</sup> June 2022. This application was opposed by the 1<sup>st</sup> objector/respondent who filed his Replying Affidavit dated 6<sup>th</sup> May 2022.

## **B. The Pleadings**

3. The applicant Veronica Syomiti Kiilu did depose that she was the wife of one Josiah Kiilu Nzau who was the 2<sup>nd</sup> Petitioner/Administrator herein. The said Josiah Kiilu Nzau had unfortunately died on 9<sup>th</sup> June 2021 and in his absence and in the absence of any member of the 1<sup>st</sup> family of the late Stephen Nzau Koka, the court had gone ahead and issued an order dated 22<sup>nd</sup> November 2021 directing that a joint survey of the deceased estate be undertaken by Machakos County Surveyor in the presence of all parties for purposes of implementing of the judgment herein dated 10<sup>th</sup> December 2019, which survey would finalize distribution of the estate property amongst the family/beneficiaries herein.
4. Upon receipt of the order, the Machakos County Surveyor did communicate to the family vide a letter dated 15<sup>th</sup> December 2021, that the court ordered survey would be conducted on 21<sup>st</sup> December 2021 whereupon through her advocate, she did write to the said office informing them that her husband was deceased and requested them to hold the said exercise in abeyance as she worked on logistics of formally substituting him in these proceedings. No withstanding the foregoing, the said survey work was undertaken on 18<sup>th</sup> February 2022 without her involvement and in clear breach of the court orders dated 22.11.2021, which had directed that the said survey exercise be carried out in the presence of all beneficiaries. The 1<sup>st</sup> Objector/Respondent was attempting to steal a match on the 1<sup>st</sup> family by seeking to have the illegally conducted survey report adopted as an order of this court to her loss and detriment.
5. The Applicant further averred that is was within the knowledge of the Respondent that the 2<sup>nd</sup> Petitioner had died but they did not bring this to the attention of the court to her detriment. She too was completely unaware of the ongoing court proceedings as previously it was her husband following up on this cause and it is only after getting the surveyors letter, did she become aware that the court case was still proceeding. She did visit her husband's advocate office and advised them that her husband had died and there was need for substitution to be done. It was therefore in the interest of justice to allow



the orders sought and have a fresh resurvey conducted in the presence of all parties as earlier directed. This application was made in good faith and would not prejudice the Respondent.

6. This application was opposed by the 1<sup>st</sup> objector/respondent through his Replying Affidavit dated 16<sup>th</sup> May 2022. He stated that he was jointly appointed as co-administrator with Josiah Kiilu Nzau (deceased) on 06.05.2014 and all issues with respect of this estate had been determined save for the issue of joint survey to be undertaken by the Machakos County Surveyor for purposes of implementing the judgment dated 10.12.2019 and ruling delivered on 23.02.2021. It was true that his co-administrator Josiah Kiilu Nzau had died on 09.06.2021 but as at 20.12.2021 his advocate was aware and consented to the orders issued on the said date directing the Machakos County Surveyor to visit the estate property and file his report to enable the court confirm grant. The said order could not be said to have been issued exparte to the applicant's detriment, as she was represented by her counsel.
7. The Respondent further did expressly state that he was not opposed to the applicant substituting her late husband Josiah Kiilu Nzau and a fresh grant be issued in the joint name of John Nzau Nzioki and Veronica Syomiti Kiilu . The grant issued herein did not become inoperative simply because one administrator had died and therefore there was no need for the same to be revoked as prayed for by the applicant. The Respondent further emphasized that after the initial notice by the surveyor that he would visit the suit parcels on 21.12.2022, the applicant through her advocate protested over the same and new dates were issued through notices dated 05.01.2022 and 14.02.2022 to have the exercise carried out on initially on 14.01.2022 and 18.02.2022. The applicant did not follow up on the issues they were raising and the final notice to carry out the survey was issued on 21.02.2022 for the exercise to be done on 24.02.2022, when it was finally carried out.
8. During the survey exercise, the house of the 1<sup>st</sup> administrator was represented by one Annastacia Kanini Mutua who was a child of Patrick Mutua Nzau a brother to Joseph Kiilu Nzau. The applicant too was present during the exercise and did not complain. After completion of the survey work and placement of bacons, the applicant approached the Respondent concerning land parcel no. Mitaboni/Mutituni/205 and requested that since she had sold the said parcel of land, she gives the respondent a similar plot measuring size 50ft by 100ft of her share in Mitaboni/Mutituni/1867, which belonged to her. This was agreed upon and they did signed an agreement to that effect. This showed that she had accepted the survey report and the same should therefore not be interfered with.
9. There was therefore no reason as to why the survey report should be declared illegal. In the alternative if the court was inclined to allow this application it should direct that the applicant bear full cost of the resurvey work/exercise as she had not contributed to the 1<sup>st</sup> exercise undertaken. The Respondent also denied harassing the appellant or attempting to evict her and therefore prayed that this court adopts as survey report as an order of this court.
10. For the above reasons the Respondent prayed that this application be dismissed with costs.

### **C. Determination**

11. I have reviewed all the pleadings filed in support of the application, the affidavits in support and in opposition thereto and submissions filed by the parties and do find that there is consensus between the applicant and the respondent that, the applicant Veronica Syomiti Kiilu, could be enjoined in these proceedings and a new grant could be issued in their joint names since one of the co administrator namely Josiah Kiilu Nzau was deceased. The only issue then that remains for determination is whether the court ordered survey work undertaken on the Estate properties by the Machakos county surveyor was illegal and in breach of this court orders dated 22<sup>nd</sup> November 2021 and if as a result the survey report dated 5<sup>th</sup> April 2022 is therefore inconsequential, illegal and null and void.



12. By a ruling dated 10<sup>th</sup> December 2019, Justice G.V Odunga (As he was then) did rule on distribution of the Estate herein and did direct that in the first instance, each house will continue to occupy and use the properties which are in their occupation and use. However, a valuation of the same is to be undertaken with a view to determine their true value for purposes of distribution. Once undertaken, the house that has an upper hand in terms of the valuation shall compensate the other house either through payment of the value to its advantage or by transfer of land commensurate with the said value.
13. Further by the said ruling the Honourable Judge, did also direct that the other properties of the estate which are not in occupation of either house including the shares shall be distributed equally. Once distribution is done, the beneficiaries of each house shall be entitled to equal share of what belongs to their house including daughters. Following this ruling, the parties advocate did enter into a consent on 22<sup>nd</sup> November 2021, where they did agree that;

“ The applicant and Respondent do conduct a joint survey by the Machakos county surveyor within 30 days to implement the judgement and orders of 10<sup>th</sup> December 2019 and pursuant to Judgement of Hon G.V Odunga and the survey report be filed in court to enable confirmed grant to issue.”
14. It is the applicant’s contention that she was completely unaware of this consent until 15<sup>th</sup> December 2021, when she received a letter from the Machakos County survey office indicating that, they would visit the estate properties and implement the court orders dated 30<sup>th</sup> November 2021. This prompted her to visit their advocates’ office and informed them that the 1<sup>st</sup> petitioner/Respondent Josiah Kiilu Nzau was deceased and consequently it would be unfair to schedule the survey exercise in absence of his estate’s legal representative. The said advocate wrote to the county surveyor and requested that the survey slated for 21.12.2021 be held in abeyance pending substitution of their deceased client. Subsequent notices were then issued in January and February 2022 and eventually the survey work was carried out in their absence on 18<sup>th</sup> February 2022. This was contrary to the court order issued. Specifically, she faulted the process for lack of their participation and sought to have the report issued pursuant thereto dated 5<sup>th</sup> April 2022, to be declared null and void.
15. Specifically, with respect to the applicant prayer to have the resurvey work redone, it was the respondent’s contention that the Machakos county surveyor did give the respondent ample time and several notices that he would effect the court order and eventually the said exercise was carried out on 24.02. 2022. The 1<sup>st</sup> house was represented by one Annastacia Kanini Mutua, who was a child of Patrick Mutua Nzau, a brother to Josiah Kiilu Nzau (deceased). It was his further contention that the applicant too was present and did not protest about the exercise. There was therefore no reason as to why the survey report should be declared un-procedural and/or illegal. In the alternative if the court were to grant the orders sought, the respondent urged the court to order the applicant to bear the costs of the new survey.
16. It is my finding based on analysis of the facts herein that indeed the applicant was given enough time and notice for the impending survey work to be carried out as directed by court. She did confirm that indeed she received the several notices sent by the Machakos county surveyor, who had been directed to implement the court order dated 22.11 2022. while it is true that by then her husband was deceased, this was only a legal handicap but in practical terms would not be a genuine basis upon which the survey work was to be stopped. Both families have beneficiaries/heirs who stay on the respective suit parcels of land and identification of the said parcels and letting the surveyor measure and sub divide them equally could have gone on, even as the applicant sought to be substituted in place of her deceased husband Josiah Kiilu Nzau.



17. I do therefore find that the survey work carried out on 24<sup>th</sup> and 25<sup>th</sup> February 2022, was not illegal nor was it done in breach of the court order issue don 21.11.2021. The applicant had notice of the same and for reasons best known to her did not take part in the said exercise. Further in both the supporting and further affidavit filed she has not point out any significant error in the actual survey work done or the findings of the said surveyor. Be that as it may this is a long-drawn succession matter and it is in the interest of justice to put all issues to rest especially given the fact that parties are on the tail end of the distribution process.
18. Though the appellant has not laid a good basis for re survey work to be done, according to the current jurisprudential trend the right to fair hearing/administrative action is now not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.
19. I do therefore find that, though the respondent and the Machakos county surveyor cannot be faulted for the work done, it is in the greater interest of justice to allow, the applicant to have a resurvey done in her presence, than to completely lock her out of this process, the prejudice caused to the respondent notwithstanding. This order is made in the greater interest of concluding this long-standing matter and allowing for confirmation of grant.

#### **D. Disposition**

20. Having considered all the issues herein, I do orders as follows;
  - a. That the grant of letters of administration intestate issue herein and dated 6<sup>th</sup> May 2014 in the joint name of Josiah Kiilu Nzau & John Nzau Nzioki is hereby revoked and a fresh grant of letter of administration intestate is issued in the joint names of John Nzau Nzioki And Veronica Syomiti Kiilu.
  - b. In the interest of Justice, I do direct that the applicant (Veronica Syomiti Kiilu) at her own cost, be allowed to recall the Machakos county surveyor to revisit the estate property and verify the work done earlier on 24<sup>th</sup> and 25<sup>th</sup> February 2022. This will be done in the presence of the local administration and the respondent and/or his representative.
  - c. The Machakos county surveyor will file his/her report within the next 90 days detailing the areas of concurrence and/or disagreement noted by the parties, but the said survey work will be undertaken in strict terms of this court orders dated 10<sup>th</sup> December 2019
21. Given that the respondent is not at fault, I do direct the applicant to pay the respondent costs of this application, assessed at 25,000/= within the next 30 days.
22. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 27<sup>H</sup> DAY O FEBRUARY, 2024.**

In the presence of;



Mr Morgan for Applicant

Mr. M Kimeu for Respondent

Sam - Court Assistant

