



**Karago t/a Apiclamed Limited v Sige & another; Apicalmed Limited (Interested Party)  
(Succession Cause 56 of 2012) [2024] KEHC 3536 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3536 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 56 OF 2012  
JRA WANANDA, J  
MARCH 22, 2024**

**IN THE MATTER OF THE ESTATE OF ISAAC KIPCHUMBA MAIYO (DECEASED)**

**BETWEEN**

**WILSON KARAGO T/A APICLAMED LIMITED ..... APPLICANT**

**AND**

**PRISCA SIGE ..... 1<sup>ST</sup> RESPONDENT**

**LENAH JERONO ROTICH ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**APICALMED LIMITED ..... INTERESTED PARTY**

**RULING**

1. This Ruling is in respect to the Notice of Motion dated 10/03/2023 filed by the Applicant seeking to be joined to this Cause as an interested party.
2. This Succession Cause relates to the estate of the late Isaac Kipchumba Maiyo who died on 31/10/2011 at the age of 71 years. On 4/05/2012, the 2<sup>nd</sup> Respondent, in the declared capacity of a widow, filed the Petition dated 16/02/2012 seeking Grant of Letters of Administration over the estate of the deceased. Apart from herself, the 2<sup>nd</sup> Respondent listed 8 children as survivors of the estate. Several parcels of land and one bank Account were listed as the assets left behind by the deceased. The Petition was duly gazetted on 11/05/2012.
3. However, before the Grant could be issued, on 25/05/2012, the 1<sup>st</sup> Respondent filed an objection challenging the Petition. She claimed to also be a widow of the deceased but that the 2<sup>nd</sup> Respondent had, in the Petition, failed to name the 1<sup>st</sup> Respondent and her children as dependents and survivors. She also, on 17/10/2012, filed a Cross-Petition of her own seeking to be appointed the Administrator.



Since then, there has been a series of interlocutory Applications and counter-Applications which explains the delay to dispose of this Cause.

4. The present Application is filed through Messrs Kinuthia Kahindi & Co. Advocates and is expressed to be brought under Order 1 Rule 10 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act.
5. The grounds of the Application are as appears on the face thereof and it is supported by the Affidavit of the Applicant, Wilson Karago. In the Affidavit, he depones that he has a beneficial interest on 1 acre portion of the property known as Kitale Municipality Block 12 Koitogos/1679 which is still a title under the deceased's estate, that the vendor, one Abraham Kipkoech Limo purchased 3 acres of the said property from the deceased before re-selling it to the Applicant, that he has exhibited a copy of the Sale Agreement between him and the said Abraham Kipkoech Limo dated 26/12/2022 confirming the sale, that he has also exhibited a copy of the Sale Agreement between the deceased and the said Abraham Kipkoech Limo, that he wishes to be joined to this matter as an interested party to protect his interest as a bona fide purchaser, and that his joinder as an interested party will not prejudice the parties herein or delay the disposal of this matter.

### **1<sup>st</sup> Respondent's Response**

6. In opposing the Application, the 1<sup>st</sup> Respondent, through Messrs Chebii Cherop & Co. Advocates filed Grounds of Opposition on 29/05/2023. It is stated therein that the Application is premature, that the Applicant is a stranger to the estate, that the Application is bad in law, incompetent, fatally defective, misplaced, and lacks merit.

### **2<sup>nd</sup> Respondent's Replying Affidavit**

7. The 2<sup>nd</sup> Respondent, vide her Affidavit filed on 23/05/2023 through her Advocates, Messrs Z.K.Yego Law Offices, also opposed the Application. She deponed that the deceased entered into a Sale Agreement with the said Abraham Kipkoech Limo on 19/07/2011 for sale of the property, Kitale Municipality Block 12 Koitogos/1679, measuring approximately 3 acres, that the deceased died on 31/10/2011 and on 22/05/2012, the 1<sup>st</sup> Respondent filed the Petition for Letters of Administration as his surviving spouse, that the 1<sup>st</sup> Respondent filed an Objection on 25/05/2022 on the ground that the 2<sup>nd</sup> Respondent failed to name her and her children as dependents of the deceased, that at the time of his death, the deceased had not effected the transfer of title documents to the said Abraham Kipkoech Limo and therefore the parcel of land is listed in the Petition as part of the assets of the deceased, that Abraham Kipkoech Limo intermeddled with the property of the deceased as he did not have title to enter into a Sale Agreement with the Applicant for sale of 1 acre of the land before transfer thereof to him was complete. She deponed that the Civil Procedure Act which the Applicant relies on does not apply in this matter as the Applicant is neither a dependent nor a beneficiary of the deceased, that accordingly, the Applicant is not a necessary party, that being an alleged creditor the Applicant ought to wait for the dependents or beneficiaries of the deceased to obtain a grant of Letters of Administration after which he can lay his claim to the Administrators and join himself into this Succession Cause.

### **Applicant's Supplementary Affidavit**

8. With leave of the Court, on 17/11/2023, the Applicant filed the Supplementary Affidavit. He deponed that the Respondent has not denied that the parcel of land was already sold to the said Abraham Kipkoech Limo before the demise of the deceased, that the Respondent has admitted that the deceased died before transfer of the parcel of land into the name of Abraham Kipkoech Limo, that it is also not denied that Abraham Kipkoech Limo having a beneficial interest, made an Agreement of Sale of the



parcel of land to the Applicant, that the Applicant is not disputing that the property is still part of the estate of the deceased, that the Applicant is aware that the property cannot devolve to him before the succession process is complete and that the transfer would be after the succession is completed, that the Applicant only wishes to keep track of the succession process and to make it known to the beneficiaries that the parcel of land should be transferred to the lawful purchaser during distribution, that neither Abraham Kipkoech Limo nor the Applicant wish to intermeddle with the estate as insinuated, and that the Applicant only wishes to be joined in the proceedings as an interested party to maintain an eye on its progress so as to defend his rights.

### Hearing of the Application

9. It was then agreed and directed that the Application be canvassed by way of written Submissions. Pursuant thereto, the Applicant filed his Submissions on 17/11/2023, the 1<sup>st</sup> Respondent filed hers earlier on 2/10/2023 and the 2<sup>nd</sup> Respondent filed on 19/10/2023.

### Applicants' Submissions

10. Counsel for the Applicant submitted that the Black's Law Dictionary, 9<sup>th</sup> Edition defines an "interested party" as a party who has a recognizable stake and standing in a matter. He also submitted that Rule 2 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Procedure Rules, 2013 (Mutunga Rules) defines an "interested party" as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation.
11. He submitted further that the Applicant is an interested party due to the fact that he has an identifiable stake or legal interest in the proceedings herein even though he cannot be said to be entirely involved in the proceedings, that the connection between the Applicant and the estate herein only concerns the property named above on which he lays claim and has a purchaser's interest over, that it is agreed that in Succession Causes, persons who would be outrightly interested parties are beneficiaries, spouses, children, creditors and any other person who has a legal claim to the estate. He cited the case of *AMM v JMN* [2019] eKLR and submitted further that Section 76 of the *Law of Succession Act* recognizes an interested party and that where a Grant has been confirmed, allows such person to file an Application to revoke the Grant upon demonstrating an interest capable of being recognized by law, that it is safe to let the Applicant in as an interested party so as to avoid situations where the Grant would be revoked over issues that the Court would have canvassed and given directions on prior to distribution of the estate.

### 1<sup>st</sup> Respondents' Submissions

12. Counsel for the 1<sup>st</sup> Respondent submitted that the right to be joined as a party to proceedings is not automatic and that in this case, the interested party is not the direct purchaser from the estate of the deceased rather, that he purchased the land from one Abraham Kipkoech Limo who purchased the same from the deceased, that the said Abraham Kipkoech Limo has not raised any complaint. He submitted further that the threshold to be met by a party before being joined to proceedings as an interested was set out in the case of *Skov Estate Limited & 5 Others v Agricultural Development Corporation & Another* [2015] eKLR and that from the holding made therein, when applied to the present context, begs the question of what benefit would it derive by joinder of the Applicant as an interested party herein.
13. Counsel added that there is a dispute on whether a sale occurred or whether the agreement for sale needs to be enforced, that the Applicant's claim is one over title to land which is outside the jurisdiction



of this Court and must be left to fall for determination by the competent Court, that in any event, distribution of the estate is yet to be done, the Cause is still at the preliminary stages, that if the Applicant is aggrieved, he has the option of seeking recourse by filing a suit in the Environment and Land Court (ELC) and pursue the vendor who sold the land to him, that the Applicant was aware of the existence of this Cause before purchasing the land from the said Abraham Kipkoech Limo, that if anyone were to file an Application to be joined herein, it would have been the said Abraham Kipkoech Limo as he is the one rightfully positioned to benefit, rather than the Applicant, that this Court would lack jurisdiction in the event of dispute over the enforceability of the agreement, that the Applicant's participation herein will not provide any assistance to the Court in resolving the disputes in question, and that the Applicant is therefore not a proper party.

14. Counsel also submitted that the Application is fatally defective since in Succession matters, Applications are brought by way of Chamber Summons and Notice of Motion, that the provisions under which such Applications are brought are also spelt out in the [Law of Succession Act](#).

## 2<sup>nd</sup> Respondents' Submissions

15. On his part, Counsel for the 2<sup>nd</sup> Respondent submitted that the parties who would be outright interested parties in a succession suit are beneficiaries, spouses, children, creditors and any other person with a legal claim to an estate of a deceased as was held in the case of [re Estate of Kungu Waigi](#) (Deceased) [2020] eKLR. He submitted further that the Applicant is not an outright interested party in this suit as he is neither a beneficiary nor a creditor of the deceased but a creditor of Abraham Kipkoech Limo who purchased the parcel of land from the deceased, that he is therefore a stranger to the estate herein. He also cited the case of [In re Estate of Nzioki Mwatu](#) (Deceased) [2019] and stated further the Applicant has no interest in the property as the Agreement for sale between him and the said Abraham Kipkoech Limo was entered into before a grant of letters of administration was issued to enable the property be transferred, and that as a matter of fact, the Applicant intermeddled with the estate of the deceased contrary to Section 45 of the [Law of Succession Act](#).
16. Counsel further submitted that joinder in a suit is not a right as it is done at the Court's discretion once the Court is satisfied that sufficient grounds have been proved to justify the joinder. He cited the case of Skov Estate Limited (supra) and submitted that the Applicant ought to have proved that his joinder will aid the Court in settling questions arising in the suit, that the issue arising for determination is whether the grant of letters of administration intestate should be granted to the 2<sup>nd</sup> Respondent or not, that the Applicant failed to demonstrate that his joinder in the suit will assist the Court in settling that issue and that the Applicant therefore has no identifiable stake in the proceedings, that the Applicant has not proved that he has a claim of his own that needs to be tried alongside the claims raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, that he merely claims that he has a purchaser's interest which is not sufficient for joinder in the suit, that his claim ought to be against the said Abraham Kipkoech Limo and not against the estate of the deceased, that the claim ought to be instituted in a Court with jurisdiction, and not the probate Court.
17. He then cited the case of [Judicial Service Commission v Speaker of the National Assembly & 8 Others](#) [2014] eKLR and submitted that the Applicant has not proved that he will suffer any prejudice if the Application is not granted, he has also not proved that the doors of justice will be forever shut in his face in respect to his interest over the parcel of land if the Application for joinder is not allowed, that the Applicant walked into his own predicament with his eyes wide open as he was aware that the property was still registered in the name of the deceased and was part of Succession proceedings but opted to continue with purchase thereof.



## Determination

18. Upon examination of the Application, the pleadings filed, including the Affidavits and respective parties' Submissions, I find the issues that arise for determination to be as follows:
- i. Whether the Application is fatally defective insofar as it has been brought under provisions of the Civil Procedure Act, and also by way of a Notice of Motion.
  - ii. Whether the Applicant should be joined to this Cause as an interested party.
19. I now proceed to analyze and determine the said issues.

### i. Whether the Application is fatally defective

20. It is evident that although evidently a Succession matter, the Application is brought entirely under the Civil Procedure Act and Rules. It is important for litigants to appreciate that Succession matters are to be handled strictly under the Law of Succession Act, Cap 160 which is a self-regulatory statute and only the specified provisions of the Civil Procedure Rules are imported into it. On this point, I cite Rule 63 of the Probate and Administration Rules, which provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”

21. In John Mundia Njoroge & 9 Others v. Cecilia Muthoni Njoroge & Another [2016] eKLR, Hon. Justice J. Mativo (as he then was) while analyzing the application of Rule 63 of the Probate and Administration Rules, stated as follows:

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. ....”

22. The Application has also been brought by way of Notice of Motion and no provision of the Law of Succession Act has been cited as basis thereof. However, Rule 49 of the Probate and Administration Rules provides as follows:

“a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file summons supported if necessary by affidavit.”

23. It is therefore true that, on the two grounds cited above, the Application is defective. Is it however irredeemably defective? In other words, is the Application fatally defective? I do not think so. Considering the nature and circumstances of this matter, in my view, the lapse in citing the correct provisions of law should not lead to striking out of the Application.
24. I am of the view that the overriding objective in litigation is a policy issue which the Court invokes to obviate hardship, expense and delay and instead, places focus on substantive justice. Apart from



the Court's inherent powers, there is also Article 159(2)(d) of the Constitution of Kenya, 2010, whose introduction changed the way in which Courts operate. I believe that by introducing the overriding objective principle, the Court is now mandated to consider aspects like the delay likely to be occasioned and the cost and prejudice to the parties when called upon to summarily reject actions. In short, the Court has to weigh one position against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2)(d) also makes it clear that the Court ought to render justice "without undue regard to technicalities of procedure". Of course, this does not mean that procedural lapses should be ignored at will. What it means is that the Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party before sending away a litigant from the seat of justice without hearing him on merits. This is how a Court is enjoined to exercise its judicial discretion.

25. Recourse may also be made to the provisions of Section 47 of the Law of Succession Act and also Rule 73 of the Probate and Administration Rules which provide as follows, respectively:

Section 47 of the Law of Succession Act

"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient."

Rule 73 of the Probate and Administration Rules

"73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

26. The two provisions clearly cloth the Courts with wide discretion to do what is necessary to ensure that the ends of justice are met (see decision of C. Kariuki J in the case of Millicent Mbatha Mulavu & another v Annab Ndunge Mulavu & 3 others [2018] eKLR).

## **ii. Whether the Applicant should be joined to this Cause as an interested party**

27. As aforesaid, the Applicant claims that he has a beneficial interest on 1 acre portion of the property known as Kitale Municipality Block 12 Koitogos/1679 which, he recognizes, is still under the estate of the deceased. He alleges that one Abraham Kipkoech Limo purchased 3 acres of that property from the deceased before later re-selling it to the Applicant. The Applicant now wishes to be joined to this matter as an interested party to protect his interest as a purchaser of part of the property.
28. In respect to allegations of the nature cited by the Applicant, I refer to the decision of Musyoka J in the case of In the matter of the Estate of Stone Kakhuli Muinde (Deceased) [2016] eKLR. As herein, the case involved an Application by third parties for joinder into a Succession Cause. In dismissing the Application, the Judge stated as follows:

"24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.



25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.
  26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.
  27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.
  28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.
  29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.”
29. There is also the case of *In Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, in which again, W. Musyoka J, held as follows:

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *law of succession Act* is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land court. Consequently, and for the reasons



above stated, I wish to find and hold that this court has no mandate to resolve the proprietary interest on land based on the alleged trust”.

30. Similarly, in the case of *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 through 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”.

31. I fully associate myself with the views expressed in the said decisions. I am satisfied that the claims made by the Applicant are matters that are squarely within the province of the Environment & Land Court and not this High Court. Article 162(b) of the *Constitution* gives to the Environment and Land Court the sole mandate and jurisdiction to determine issues of ownership, use and occupation of land.
32. I agree with the Respondents that that the parties who would be outright interested parties in a succession suit are beneficiaries, spouses and children. Creditors and any other persons with proven legal claims against the estate can also be admitted as interested parties. In this case, the Applicant cannot be said to be an interested party as he is neither a beneficiary nor a creditor of the deceased, but a creditor of Abraham Kipkoech Limo who allegedly purchased the property from the deceased then subsequently sold a portion thereof to the Applicant. The Applicant is therefore a stranger to the estate.
33. On a different point, as aforesaid, the Applicant claims that he purchased 1 acre portion of the said parcel of land from one Abraham Kipkoech Limo who had allegedly earlier purchased 3 acres thereof from the deceased. It is however not in dispute that the entire property is still in the name of the deceased and therefore still part of the estate. The exhibited copy of the Sale Agreement between the said Abraham Kipkoech Limo and the deceased is dated 19/07/2011. The deceased, Isaac Kipchumba Maiyo, then died on 31/10/2011. The copy of the exhibited Sale Agreement between the said Abraham Kipkoech Limo and the Applicant is then dated 26/12/2022. The deceased having died in the year 2011 and the Applicant having purportedly purchased the property in the year 2022, it means that the Applicant purchased the same 11 years after the death of the deceased. It is also evident that he purchased the property from a third party, a stranger to the estate, and even before a Grant of Letters of Administration has been issued by a probate Court.
34. Since the estate has not yet been distributed, the Applicant (as purchaser) together with the said one Abraham Kipkoech Limo (as vendor), appear to have probably committed the offence of



“intermeddling” with the property of a deceased person contrary to the provisions of Section 45 of the Law of Succession Act which stipulates as follows:

- “(1) 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.
- (2) Any person who contravenes the provisions of this section shall—
  - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
  - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

35. Regarding this issue of “intermeddling”, Gikonyo J, in the case of Re Estate of M’Ngarithi M’Miriti [2017] eKLR, stated as follows:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

36. In view of the foregoing, and particularly on the ground of lack of jurisdiction, I decline to entertain the present Application nor allow joinder of the Applicant to this Cause as an interested party. The Applicant’s remedy or recourse is in another forum, not this probate Court.

### **Final Orders**

72. The upshot of the above is that the Notice of Motion dated 10/03/2023 is hereby dismissed with costs to the Respondents.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 22<sup>ND</sup> DAY OF MARCH 2024**

.....

**WANANDA J. R. ANURO**

**JUDGE**

