



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of John Jamin Musundi (Deceased) (Succession Cause
12 of 2017) [2024] KEHC 4844 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 12 OF 2017**

AC MRIMA, J

APRIL 25, 2024

BETWEEN

PHILIP MATANDA MUSUNDI & 3 OTHERS & 3 OTHERS PETITIONER

AND

ONESMUS NAKHAIMS MUSUNDI & 3 OTHERS & 3 OTHERS APPLICANT

RULING

1. The application subject of this ruling is the Summons dated 5th June, 2023. It was jointly taken out by the Applicants herein.
2. The prayers sought in the Summons were as follows: -
 - a. That the application herein be certified urgent and the same be heard on priority basis.
 - b. That pending the inter partes hearing of this application there be a stay of implementation of the Grant of Letters of Administration as confirmed on the 23rd July 2019 and the judgment of the Court delivered on 23rd July 2019.
 - c. That the appointment of Stephen Francis Musundi as one of the administrators for the Estate of John Jamin Musundi be revoked and the Grant of Letters of Administration issued on 2nd May 2018 and Certificate of Confirmation issued on 23rd July 2019 be amended accordingly.
 - d. That the said Stephen Francis Musundi be restrained from interfering with or further intermeddling in the estate of the late John Jamin Musundi, including by cutting trees, unilaterally creating boundaries, demolishing structures and/or doing any other unlawful acts that may amount to intermeddling with the said estate.
 - e. That orders issued pursuant to prayer (d) above be supervised by the Officer In Charge Kiungani Police Station.



- f. That there be issued any other and/or further orders as the justice of the case may demand.
3. The application was supported by two Affidavits sworn by Dorothy Lusike Muyera who is one of the Applicants. The Affidavits were also sworn on behalf of the rest of the Applicants. The Affidavits were a Supporting Affidavit deposited to on 25th May, 2023 and a Supplementary Affidavit deposited to on 18th August 2023.
 4. The Petitioners through the two Affidavits sworn by Stephen Francis Musundi vehemently opposed the application. The Affidavits are a Replying Affidavit sworn on 29th June, 2023 and a Further Affidavit in response to the Supplementary Affidavit deposited to on 27th October, 2023.
 5. On the directions of this Court, the application was disposed of by way of written submissions. Both parties duly complied and referred to several decisions in support of their rival positions.
 6. To enable this Court deal with this matter with ease, a brief background to the application becomes imperative.
 7. Philip Matanda Musundi, the 1st Petitioner herein, petitioned for the administration of the estate. An objection was lodged and after its hearing, a Grant of Letters of Administration Intestate was jointly issued to Philip Matanda Musundi, Stephen Francis Musundi, Joyce Sikhoya Barasa and David Biketi Musundi on 2nd May, 2018.
 8. On 23rd July 2019, this Court (Chemitei, J.) rendered a judgment on how the estate was to be distributed to the beneficiaries. The Grant was confirmed and a Certificate of Confirmation issued.
 9. Dissatisfied with the decision, Joyce Sikhoya Barasa, Dorothy Lusike Muyera and Esther Matingi Wesonga, preferred an appeal to the Court of Appeal. They, through their then Counsel, filed a Notice of Appeal dated 23rd July, 2019.
 10. Pending the determination of the appeal aforesaid, the Applicants herein filed an application dated 26th July, 2019 before this Court seeking a stay of execution of the judgment and that the Petitioners be restrained from felling and selling trees on the farm forming part of the estate and/or from leasing the land to any third parties.
 11. In a ruling delivered on 18th December 2019, the Court made the following orders: -
 - a. The parties be at liberty to carry out the subdivision of the estate as per the confirmed grant dated 23rd July, 2019.
 - b. Each of the beneficiaries be at liberty to utilize but not to sell or dispose the suit premises granted pending the determination of the intended appeal.
 - c. No titles shall be processed and issued to any beneficiary pending the determination of the intended appeal before the Court of Appeal.
 - d. Each party shall meet their respective costs.
 12. On 5th May 2020, the Court granted leave to Dorothy Lusike Muyera to lodge an appeal before the Court of Appeal against its impugned judgment. Subsequently, the time to lodge the appeal was duly extended.
 13. Stephen Francis Musundi and Joel Lumbasi Musundi then challenged the Notice of Appeal dated 23rd July, 2019. It was vide an application dated 12th August, 2021. That was in the Court of Appeal at Kisumu Civil Application No E121 of 2021.



14. By a ruling of the Court of Appeal delivered on 4th November 2022, the application was allowed and the Notice of Appeal deemed as withdrawn.
15. Therefore, whereas the Notice of Appeal dated 23rd July, 2019 was deemed withdrawn as a result of the ruling of the Court of Appeal dated 4th November 2022, the leave for enlargement of time granted to Dorothy Lusike Muyera on 5th May 2020 seemed not to have been affected.
16. With such state of affairs, Joyce Sikhoya Barasa, Dorothy Lusike Muyera and Esther Matingi Wesonga filed a Notice of Motion dated 17th April, 2023 in the Court of Appeal at Kisumu Civil Application No E121 of 2021 seeking the following reliefs: -
 1. That pending the hearing and determination of this application, and for the purpose of preserving the net intestate estate of the late John Jamin Musundi, this Honourable Court be pleased to grant a stay of execution of the ruling and orders made on 4/11/2022.
 2. That this Honourable Court be pleased to review, set aside or vary the ruling delivered on 4/11/2022, deeming the Notice of Motion of Appeal, from the Judgment of the High Court of Kenya at Kitale (Chemitei J.) in Succession Cause No.12 of 2019, dated 23/7/2019 as withdrawn.
 3. That this Honourable Court be pleased to reopen the hearing of the Respondents' application dated 12/08/2021, to ascertain the completeness and accuracy of the Court of Appeal records from the time the Notice of Appeal was lodged up to the time of delivery of the ruling on 4/11/2022 in order to make a fair determination of the said application.
 4. That costs of and incidental to this application abide the result of the appeal.
17. The application is still pending before the Court of Appeal.
18. In the pendency of the above Notice of Motion dated 17th April, 2023, the instant Summons was filed. The Applicants herein also filed a Summons dated 20th March, 2024 seeking a full and accurate inventory of the Assets, Liabilities and Accounts of the estate. That application is also still pending.
19. It was on that background that the Petitioners/Respondents contended that this Court is *functus officio* and that the instant Summons/application is *res judicata*.
20. This Court has carefully considered the application in light of the responses and the written submissions.
21. The Court must state that whereas there is a judgment of this Court which is yet to be set aside and/or varied, this Court still possesses the jurisdiction to ensure that any administration of the estate is undertaken within the confines of the Constitution, the law and in tandem with the judgment or any other orders of the Court.
22. Any Administrator remains liable to removal if this Court is satisfied that sufficient cause has been demonstrated to that end. Therefore, this Court is not *functus officio* as far as the administration of the estate, the instant application and the stay orders granted on 18th December 2019 are concerned.
23. Having said as much, it also goes without say, that the instant application which principally sought the removal of Stephen Francis Musundi from the administration of the estate is not *res judicata* since no such similar application has ever been determined by this Court.



24. As to whether the said Stephen Francis Musundi variously intermeddled with the estate and ought to be removed from its administration, it was alleged that he unilaterally cut trees, created boundaries, demolished structures and committed other unlawful acts to the estate.
25. In a rejoinder, Stephen Francis Musundi denied all the averments. He contended that he, alongside the other Administrators, have only taken steps to comply with the judgment of this Court and within the stay orders granted. He denied the allegations made against him and posited that the photographs annexed to the application do not represent the correct situation on the estate.
26. The Applicants still held to the contrary.
27. In such set of circumstances, this Court cannot rely on the averments and counter averments made by the rival parties to fairly determine the application. There is need for the averments to be tested, at least, under cross-examination as to accord this Court the opportunity to decide on whether the said Administrator acted outside the legally-expected confines.
28. The foregoing, therefore, resonates with the Applicants' Summons dated 20th March, 2024 which seeks orders that the Administrators do produce accounts of the estate.
29. Drawing from the above, this Court, hence, finds that the Summons dated 5th June, 2023 is premature and unproved. As such, it is not merited, at the moment. The Applicants reserve the liberty of pursuing their intentions in a proper manner.
30. As I come to the end of this ruling, I hereby tender my sincere apologies to the parties for the late delivery of this decision. The Judge has a huge workload emanating from two High Court stations and is also engaged in a Tribunal investigating the conduct of a Judge which sits in Nairobi.
31. Having so said, the application is determined in the following manner: -
 - a. The Summons dated 5th June, 2023 is hereby struck out.
 - b. Since the dispute between the family members still subsists, each party shall bear its own costs of the application.
32. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

No appearance for Mr. Ngeiywa, Learned Counsel for the Applicants.

Miss Kilemi for Miss. Nasike for Respondents.

Chemosop/Duke – Court Assistants.

