



In re Estate of Ernest Kimaiyo (Deceased) (Succession Cause E150 of 2023) [2024] KEHC 9227 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E150 OF 2023
JRA WANANDA, J
JULY 31, 2024**

IN THE MATTER OF THE ESTATE OF ERNEST KIMAIYO (DECEASED)

BETWEEN

PHILIP KIPTOO MAIYO 1ST APPLICANT

SUSAN JEPCHIRCHIR MAIYO 2ND APPLICANT

AND

TERESIA CHEBICHII RUTO RESPONDENT

AND

THE LANDS REGISTRAR UASIN GISHU COUNTY INTERESTED PARTY

RULING

1. The background of this matter is that the deceased, Ernest Kimaiyo, died intestate on 8/07/1975. 48 years later on 20/11/2023, through Messrs Angu Kitgin & Co. Advocates, the Applicants, as widow and son, respectively, of the deceased, petitioned for a Grant of Letters of Administration over the estate. Apart from the 2 of them, they also listed the Respondent, Teresiah Chebichii Ruto and one Tecla Cherono Ruto (daughters) as survivors and beneficiaries. Only one property, namely, Eldoret Municipality Block 22 (Kingongo) 5518 was listed as comprising the estate.
2. It is also not in dispute that in earlier separate proceedings, namely, Eldoret High Court Ad Litem Cause No. 131 of 2013, the 1st Respondent, (the 1st Applicant's elder sister), applied for and on 23/09/2013 obtained Limited Letters of Administration Ad Litem for purposes of filing a suit against her uncle, one Talalei Kiptenai, on behalf of the estate of the deceased and in respect to ownership of the property Eldoret Municipality Block 21/1, a portion whereof, it was claimed belonged to the deceased. It is also not in dispute that the suit, namely, ELC Case No. 515 of 2013, was filed and concluded and that in its Judgment, the ELC granted the orders sought and thereby restored a portion of the said



property to the estate of the deceased. There is also no dispute that the said Judgment was challenged at the Court of Appeal in Court of Appeal Civil Appeal No. 88 of 2016, and that the Judgment was upheld although with a slight variation in terms of a reduction of the portion restored the estate of the deceased.

3. Before the Petition filed in this Cause could be processed, the Petitioners filed the Summons dated and filed on 21/11/2023, the subject of this Ruling. The same seeks orders as follows;
 - i. [.....] Spent.
 - ii. That the Honourable Court do issue conservatory order restraining the Respondent either by herself, her servants, agents, or any other person acting from her authorization or control, intermeddling with the estate by either annexing, leasing, selling, transferring, working, charging or parting with interest in the estate property.
 - iii. That the Honourable Court do issue prohibition order restraining the Respondent and Uasin Gishu Lands Registrar, their servants, agents, employees or assignees in making entries and or dealing on the resultant titles of the estate sub-divided into the following portions;
 - a. Eldoret Municipality Block 21 (King'ong'o)/5571
 - b. Eldoret Municipality Block 21 (King'ong'o)/5572,
 - c. Eldoret Municipality Block 21 (King'ong'o)/5573,
 - d. Eldoret Municipality Block 21 (King'ong'o)/5574,
 - e. Eldoret Municipality Block 21 (King'ong'o)/5575,
 - f. Eldoret Municipality Block 21 (King'ong'o)/5576,
 - g. Eldoret Municipality Block 21 (King'ong'o)/5577,
 - h. Eldoret Municipality Block 21 (King'ong'o)/5578,
 - i. Eldoret Municipality Block 21 (King'ong'o)/5579,
 - j. Eldoret Municipality Block 21 (King'ong'o)/5580,
 - k. Eldoret Municipality Block 21 (King'ong'o)/5581, and
 - l. Eldoret Municipality Block 21 (King'ong'o)/5582
 - iv. That the Honourable Court do issue an order of mandamus to Uasin Gishu County Registrar to cancel resultant titles of the estate of Ernest Kimaiyo deceased asset Eldoret Municipality Block 21 (King'ong'o)/5518, measuring approximately 28.325 acres registered in the name of the Respondent and joint names of heirs without any grant and the registration of the title revert back to the original owner Ernest Kimaiyo according to the decree of the Environment and Land Court and order of Court of Appeal.
 - v. That costs of this application be provided for.
4. The Application is expressed to be brought under the provisions of Article 159(2) of *the Constitution*, Sections 45, 46 and 47 of the *Law of Succession Act*, Rules 49 and 73 of the Probate and Administration Rules and “all other enabling provisions”. It is then premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the 1st Applicant, Philip Kiptoo Maiyo.



5. In the Affidavit, the 1st Applicant deponed that he is an heir of the estate of the deceased, that he obtained a copy of the title for the estate property, Eldoret Municipality Block 21 (King'ong'o)/5518, at the Uasin Gishu County Lands Registry and noticed that it had been registered in the joint names of heirs without a Grant from Court. He deponed further that recently he received a list of proposed sub-division and map of the property initiated by the Respondent for 12 portions to be demarcated and the Respondent to retain in her name 7 of the portions as listed in the Summons, without a Grant and an order of distribution, and which may change proprietorship yet a Grant has not been issued.
6. He further deponed that the Respondent being his elder sister, obtained interim orders of Administration on 23/9/2013, for purposes of filing a suit at the Environment and Land Court (ELC) against his said uncle, that in the proceedings so filed, namely, ELC Case No. 515 of 2013, the Court declared that the uncle held in trust for the heirs, ½ share (36 acres) of the parcel of the property Eldoret Municipality Block 21 (King'ong'o)/1, that the suit land was to be shared equally between the family of the deceased and the uncle, and that this was also to enable them proceed and file Letters of Administration. He added that upon realizing that the estate is at risk, they instructed their Advocates to apply to the Court to stop the intermeddling of the estate pending further orders of the Court and to stop the change of ownership to third parties. He added that the assets of the deceased cannot be subdivided, sold or transferred without a Grant of Letters of Administration and an order of distribution issued by the Court, and that the papers used by the Respondent to change ownership of the assets were the decree of the ELC Case No. 515 of 2013 and the order of the Court of Appeal.
7. The 1st Applicant deponed further that the Respondent is in the process of leasing and/or disposing of the estate properties registered in her name without a Grant of Letters of Administration, or consent or authority of the Applicants. He contended that the limited Grant given to the Respondent was only for purposes of filing the suit against their said uncle, that the Respondent, as a representative of the estate, had limited powers only for purposes of filing the suit until further representation was granted by the Court, and that neither he nor other heirs were involved in the process of registration and subdivisions. According to him, the Respondent is currently in the process of disposing of some of the sub-divided portions. He deponed further that the ELC declared that their uncle had infringed on their rights as beneficiaries of the estate and awarded them ½ share (36 acres) of the property, that their uncle appealed to the Court of Appeal upon which the holding of the ½ share (36 acres) by their uncle in trust for the heirs was substituted to a reduced portion of 28 acres. According to the 1st Applicant, it is only fair and just that the Court do nullify the subdivision of the property and restore proprietorship to the name of the deceased to enable proper distribution to be undertaken.

Replying Affidavit

8. In opposing the Application, the Respondent, through Messrs Anassi Momanyi & Co. Advocates, filed the Replying Affidavit filed on 28/11/2023.
9. She deponed that her late father (the deceased) died in 1975 without any property registered in his name. She then stated that she has no intent of defrauding the estate or denying the heirs their entitlement, and that she has not secretly transferred any land belonging to the estate. She deponed that upon conclusion of the said Eldoret ELC Case No. 515 of 2013 and Court of Appeal Civil Appeal No. 88 of 2016, the acreage awarded to her and her siblings was transferred into the name of Teresia Chebichii Ruto (herself), Philip Kiptoo Maiyo (1st Applicant) and their sister, Tekla Cheronu, that upon the properties being transferred as aforesaid as per the Court's decree and Order, the parties agreed on how the property was to be shared and upon such agreement, the property, Eldoret Municipality Block 21 (King'ong'o) 5518, was subdivided and transfers done. She therefore maintained that the sharing of the property was done with the full participation of the 1st Applicant



- who duly signed the Application for consent and the transfer forms, and that the registration in the names of the 3 of them was undertaken in line with the Judgment and Decree issued in the said Eldoret ELC No. 515 of 2013. She contended that even in the Court of Appeal's Judgment, the land was awarded to the 3 of them, and that nowhere in both judgments was it directed that the property be registered in the name of the deceased. According to her, the property was specifically given to her and her siblings by both Courts. She deponed further that their mother (2nd Applicant) is not an Applicant herein as she (mother) confirmed this to her (Respondent).
10. The Respondent then alleged that the transfer documents, copies whereof she exhibited, had been endorsed by both the 1st Applicant and the said Tecla Cheronno Ruto, that all 3 of them had also entered into Sale Agreements with purchasers for sale thereof, and that the 1st Applicant is also one of the beneficiaries of the portions transferred. She added that several of the plots have since been subdivided and titles issued and that the 1st Applicant cannot participate in the transfers, some to his name, and subdivision processes and then thereafter challenge the same in Court. According to her, the 1st Applicant has already in conjunction with others or alone disposed of the same properties that he seeks to be transferred to the name of deceased and that the orders sought by the 1st Applicant will adversely affect the interests of 3rd parties to whom he has sold land. She contended that some of the plots have since been subdivided into smaller portions as demonstrated from the exhibited copies of the registers, and some have already been transferred to 3rd parties and the proceeds thereof will be utilized to settle legal fees, auctioneers' fees and other expenses.
 11. The Respondent added that the registration of the property Eldoret Municipality Block 21 (King'ong'o) 5518, was pursuant to the orders of the ELC and the Court of Appeal and not the limited Grant, that the property Eldoret Municipality Block 21 (King'ong'o)1 did not belong to the deceased and that the limited Grant was only used to file the suit in the ELC and to challenge the appeal in the Court of Appeal. She contended that the 1st Applicant seems to be challenging the decision of the ELC and the Court of Appeal through these proceedings which is not the appropriate forum. She reiterated that the 1st Applicant was involved in the acquisition of the property Eldoret Municipality Block 21 (King'ong'o) 5518 and the subsequent subdivision and transfer of the resultant parcels number 5571 to 5582 which are no longer trust property as each of the beneficiaries and/or siblings has received his entitlement except for those held under a tenancy in common. She also reiterated that the property has already been subdivided and distributed with the concurrence of all the beneficiaries, including the 1st Applicant, and that Courts of competent jurisdiction, equivalent and superior, have pronounced themselves on who are the owners of the said Eldoret Municipality Block 21 (King'ong'o) 5518 and by necessary implication, the resultant parcels of land, and that therefore the estate of the deceased has no property which can form the subject of Succession proceedings.

Applicant's Supplementary Affidavit

12. In a rejoinder, the 1st Applicant swore the Supplementary Affidavit filed on 28/12/2023. He deponed that the Replying Affidavit is full of falsehoods, that the Respondent has all along been using schemes to prevent them from enjoying the fruits of the Decree issued by the ELC and Court of Appeal, that when instituting the ELC suit, it was done on behalf of the estate of the deceased and that therefore, there was an estate to be administered. He deponed further that the Respondent, in the last quarter of 2019, after the orders of the Court of Appeal were issued, informed them that the Application for Letters of Administration would be filed and that the only challenge was finances, that she then brought several individuals whom she indicated, were willing to finance the process of applying for Letters of Administration and after obtaining the Grant would be refunded the expenses incurred or be listed as creditors. He alleged that Agreements were then entered into with "shylocks" to advance



money and that it was indicated in the Agreements that the “shylocks” were purchasers of the land, that the money indicated on the Agreement was inclusive of the interest levied by the “shylocks”, but that however, to date, none of the “shylocks” has title deeds issued in his names. He contended further that all the monies received from the sale transactions was directed into one bank account held at Kenya Commercial Bank (KCB) in the sole name of the Respondent, and that no green cards or searches for the alleged plots have been exhibited by the Respondent to confirm the allegations of sale/transfer.

Respondent’s Further Affidavits

13. The Respondent, on 01/12/2023, filed two Further Affidavits, one sworn by herself and one sworn by the 2nd Applicant (their mother). I cannot however find any evidence that leave was sought or obtained to file these two Affidavits. A perusal of the Affidavits reveals that they introduce new matters and new documents which the Applicant will not have a chance to comment on. In view thereof and since I have no way of confirming whether the same were even served upon the Applicants and what therefore the Applicants’ response on them would be, I find it unsafe to admit the two Affidavits as, in my view, admitting the Affidavits is likely to prejudice the Applicants’ case. I therefore expunge both Affidavits from the record and decline to consider them.

Hearing of the Application

14. The Application was canvassed by way of written Submissions. The Applicant filed his Submissions on 12/01/2024 while the Respondent’s was filed on 17/01/2024.

Applicants’ Submissions

15. Counsel for the Applicants submitted that the claim before the ELC Court was filed in a representative capacity and that the process can only be brought to rest by obtaining further representation under the [Law of Succession Act](#). He submitted that no further representation from Court was sought or obtained by the Respondent and that instead, the Respondent purported to approach the Lands Registrar and obtained titles without a Grant of Letters of Administration. He contended that at no time has the Respondent averred that they obtained leave of Court to transfer the properties and complied with the trust position created by the ELC. He argued that the trusteeship created by the Court, unless expressed otherwise, is to be secured through wardship by Administration under the [Law of Succession Act](#). He cited Section 45 of the Act and submitted that the provision makes it an offence to intermeddle with the property of a deceased person and that a person who intermeddles is answerable to the Administrator. He also cited Rule 49 of the Probate and Administration Rules and Sections 47, 55(1) and 93(1) of the [Law of Succession Act](#).
16. Counsel submitted further that the argument by the Respondent that the ELC granted an originating power to procure and appropriate the proprietary interest into names of beneficiaries of the estate is inappropriate. He argued that the Respondent approached the ELC as a ward of the Succession Court and she cannot now violate that wardship by asserting powers of Succession which do not vest in the ELC. He argued that any beneficiary is entitled to protect his interest in the estate of a deceased person by seeking Court orders to preserve the estate. In this respect, he cited the case of *Re Estate of Benson Maingi Mulwa (Deceased) (2021) eKLR*. On intermeddling, he cited the case of *Re Estate of John Gakunga Njoroge [2015] eKLR Murithi*. He also cited the case of *Joseph Oginga Onvoni & 2 others v Attorney General & 2 others [2016] eKLR* and the case of *Estate of Isaac Kaburu Marete (Deceased); Daniel Gituma Marete vs. Frankline Mutwiri [2017] KLR*.
17. Counsel submitted that no evidence has been tendered to prove that the deceased had no estate to be managed as alluded to by the Respondent. He submitted that in fact there was such property



to be administered, and reiterated that the portions claimed to have been registered in the name of beneficiaries were so registered without a Grant. According to him therefore, the Sale Agreements are null and void for violating Section 82(b)(ii) of the *Law of Succession Act* as the Respondent and/or beneficiaries had not obtained Letters Administration at the time of the alleged transfers or sale since the property of a deceased person vests in the legal Representative and constitutes the estate of such deceased. He argued that is only the Legal representative of the estate under the authority of a written law who has the authority to deal with the estate, in accordance with the grant or authority of written law or order of the Court. He submitted that in this case, there is no Will and so the principle of relation back does not apply. He submitted that under Section 80(2) Law of the Succession Act, a grant of Letters of Administration takes effect only as from the date of issue and not otherwise, and that therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of the deceased by a person without authority of the law amounts to intermeddling, and is an illegality and a nullity.

18. He argued further that all through the ELC proceedings, the Respondent presented herself as the Administrator of the estate of the deceased, that the limited grant of Letters of Administration issued to her provided only that she was to prosecute the ELC suit, and that no further representation has been obtained. He contended further that all funds from the purported land sale transactions were channelled into one bank account held at KCB in the name of the Respondent, and that no statements of accounts have been produced by the Respondent to show how the monies were administered. He submitted that that one may ask the question how was the agreement conducted in the name of one of the estate but the money paid transferred to and received by the Respondent.

Determination

19. The question that arises for determination is “whether it was proper and/or lawful for the Respondent to have conducted the transfer, sale, subdivisions and other transactions over the property known as Eldoret Municipality Block 21(Kingongo)/5518 without a Grant of Letters of Administration and therefore, whether an order of temporary injunction should be issued to restrain further transactions or dealings with the sub-plots emanating therefrom”.
20. What the Applicants are seeking are basically orders of interlocutory injunction. It is now agreed, as was held in the case of *Floris Piezzo & Another –vs- Giancarlo Falasconi* (2014) eKLR, that a Probate Court has powers under Section 47 of the *Law of Succession Act* and also Rule 73 of the Probate and Administration Rules to grant temporary injunctions.
21. Section 47 of the *Law of Succession Act* provides as follows:

“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.”
22. On its part, Rule 73 of the Probate and Administration Rules provides as follows:

“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.”
23. The principles guiding the handling of Applications for temporary injunctions are now well settled and are as was set out in the case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 and also in



American Cyanamid Co. v Ethicom Limited (1975) A AER. Following the said cases, the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR stated as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

24. The question that therefore arises is whether the instant Application meets the threshold set for the granting of orders of temporary injunction.

25. The Court of Appeal, in the case of Mrao Ltd v First American Bank of Kenya and 2 others (2003) KLR 125, which it also cited with approval in its subsequent case of Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, defined a prima facie case as follows:

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

26. In this case, it is clear that the 1st Applicant and the Respondent are a brother and a sister. The 2nd Applicant is their mother although doubts have been raised on whether her consent was really obtained to join her in this matter as an Applicant. I will therefore limit this determination to the 1st Applicant. Be that as it may, the dispute revolves around the administration and distribution of the estate of the deceased, specifically, the parcel of land known as Eldoret Municipality Block 21 (King’ong’o)/5518 and its resultant sub-divisions, namely, Eldoret Municipality Block 21 (King’ong’o)/5571 to 5582.

27. It is not in dispute that the Respondent was issued with a special Grant in Eldoret High Court Ad Litem Cause No. 131 of 2013 limited only for the purpose of representing the estate in the filing of



a suit against their uncle at the Environment and Land Court (ELC). Regarding issuance of limited Grants, Section 54 of the [Law of Succession Act](#) provides as follows:

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.”

28. The Fifth Schedule (14) to the Act referred to above then provides as follows:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.

29. On its, part, Section 55 (1) of the Act provides as follows:

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.”

30. In expounding on the above provisions, Hon. D.K. Kemei J in the case of Winrose Emmah Ndinda Kiamba v Agnes Nthambi Kasyoka [2021] eKLR, stated as follows:

“13. The above provisions are clear and that such a grant is normally issued due to the exigencies arising in relation to the estate and which could not wait for issuance of full grant through the normal way. It is also issued without prejudice to the right of any other person to apply for full grant of representation to the deceased. As such, limited grant may not be subjected to full and strict compliance with the requirements meant for, as if it is full grant of representation. Again, the person to whom the grant is so made undertakes to administer the estate according to the law but limited for the purpose for which the grant is issued until a further grant of representation is made by the court. I have perused the pleadings filed in the lower court and that the court was satisfied that the urgency warranted issuance of a limited grant which it issued on 10th July, 2020.”

31. The purpose of the suit for which the limited Grant was issued was to reclaim portions of the property Eldoret Municipality Block 21 (King’ong’o)/1, the precursor to Eldoret Municipality Block 21(Kingongo)/5518, from the uncle, which portions the family believed rightfully belonged the deceased. The suit was indeed filed as Eldoret ELC Case No. 515 of 2013 and a Judgment delivered. There is no dispute that the Judgment was favourable to the estate since the ELC indeed restored the portion of the property sought back to the estate of the deceased. Although the Judgment was appealed against and the portion restored to the estate of the deceased reduced, it was still a significant victory for the estate. The Respondent does not deny that using the ELC and the Court of Appeal decrees, she then proceeded to register the land into the names of the beneficiaries and later sub-divided it into smaller portions some of which she has already sold. The Applicant has also alleged that the Respondent is the process of disposing more of the sub-plots.



32. From my consideration of the above facts, I have little hesitation in finding that the limited Grant issued to the Respondent was specific and temporary and was to be in place only pending further representation as would be subsequently determined by the Succession Court. The moment the ELC declared that the portion of the property belonged to the deceased, the property automatically devolved to the estate of the deceased to be governed under the provisions of the [Law of Succession Act](#). What the Respondent should therefore have done was to file a Succession Cause in respect to the estate of the deceased and now seek a full grant of the Letters of Administration. She would then also present to the Succession Court the orders or Decree of the ELC and the Court of Appeal and move the Succession Court to use the same to distribute the property among the beneficiaries. Instead of following this procedure, the Respondent used a short-cut in that she proceeded to the Lands office and directly registered the property in the names of beneficiaries as determined by herself without seeking and obtaining the authority of the Court on administration and distribution.
33. The Respondent seems to have forgotten that all that she had been allowed by the Succession Court to do by dint of the limited Grant ad Litem was limited and was strictly on behalf of and for the estate, not in her own personal or individual capacity and not for her own benefit. Whatever order she obtained in the ELC where the Succession Court had allowed her to go and litigate on behalf of the estate was to be returned to the Succession Court for implementation under the provisions of the Law of Succession. The orders or Decrees that she obtained from the ELC and the Court of Appeal were simply Court declarations and by themselves were incapable of being implemented at the Lands offices as extracted before obtaining a full Grant and before shares of the beneficiaries had been identified and distributed among them by the Succession Court.
34. To make matters worse, the Respondent, acting as though she had already been granted full Letters of Administration, went ahead and sub-divided the property into 12 sub-plots some of which she has already purported to sell. Allowing the Respondent to continue with these actions will mean allowing her to continue dealing with the estate in a unilateral manner, haphazardly and in an unstructured manner without accounting or being answerable to anyone. This is exactly what the [Law of Succession Act](#) was enacted to cure. The 1st Applicant is therefore right in contending that the Respondent unlawfully registered the property before a Grant was issued, before an Administrator was appointed and before distribution made.
35. In her response, the Respondent has argued that the 1st Applicant was fully involved and actively participated in the registration of the property, sub-division and sale of the portions and that as such the Application is an abuse of Court process since everything was done with the 1st Applicant's concurrence. In my view, it does not matter that or whether the 1st Applicant acquiesced in the illegality. In law, no person has the mandate to authorize or consent to the commission of an illegality. Such consent, even if voluntarily given, is a complete nullity and of no consequence. If whatever was done was unlawful, it remains just that, void ab initio, an illegality, and no amount of acquiescence can cure it.
36. The Respondent also contends that the orders sought, if granted, will adversely affect the interests of 3rd parties who have purchased some of the sub-plots. This cannot be a reason for tolerating the illegality committed by the Respondent. There is no illegality that cannot be undone by the Court if it is found to have been done against the law. Prejudice, inconvenience or the high cost of undoing an unlawful act are not considerations to be taken into account when faced with a situation of this nature.



37. In fact, the Respondent's actions may be deemed to amount to "intermeddling" with the estate which is prohibited under Section 45 of the [Law of Succession Act](#). In respect thereto, Gikonyo J in the case of *Re Estate of M'Ngarithi M'Miriti* [2017] eKLR, described "intermeddling" in the following terms:

"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."

38. In light of the foregoing, since no Grant has been issued and no distribution made by the Court so far, the estate is yet to vest unto any person, not even the Respondent. Until then, all parties have the duty and obligation to preserve the estate and to protect it from waste. The parties must therefore ensure that they do not engage in any acts that could be deemed to amount to "intermeddling". Any party is however at liberty at any time to move the Court accordingly for permission to carry out any substantive or necessary action that may need to be undertaken for the benefit of or to protect or to preserve the estate.
39. In light of the matters and circumstances recounted above, I find that the 1st Applicant has sufficiently established a prima facie case within the meaning ascribed in the case of *Giella v Cassman Brown* (supra).
40. As regards the second condition for grant of a temporary injunction, namely, whether the 1st Applicant stands to suffer "irreparable injury" "loss" or "harm" that cannot be easily compensated in any alternative manner, including by damages, the test is set out in *Halsbury's Laws of England*, Third Edition, Volume 21, page 352 as follows:

"Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first that the injury is irreparable and second that it is continuous. By irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter."

41. As aforesaid, the Respondent does not deny that using the ELC and the Court of Appeal decrees, she proceeded to register the property into the names of beneficiaries, and later sub-divided it into smaller portions some of which she has already sold to third parties. The 1st Applicant has also alleged that the Respondent is in the process of disposing of more of the sub-plots. This, too, the Respondent has not



denied. Further, the 1st Applicant has argued that the Respondent has not accounted for the proceeds of the previous sales which the purchasers have been depositing a bank account in the sole name of the Respondent. This, too, has not been denied. In the circumstances, I agree with the 1st Applicant that further sale of additional plots is likely to jeopardize the respective beneficiaries' share of their inheritance. "Irreparable loss" has therefore been demonstrated.

42. Regarding "balance of convenience", I refer to the holding of A. Ombwayo J in the case of Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR where he stated as follows:

"The meaning of "balance of convenience" in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

43. In light of my earlier findings above, I am also satisfied that the "balance of convenience" tilts in favour of granting the orders of injunction since clearly there is need to preserve the estate. This is the only way to ensure that no further sub-divisions and/or sale takes place. From the evidence presented, it is highly likely that the estate may be dissipated if preservatory orders are not issued. Should such dissipation and wastage take place, the stake of the beneficiaries in the estate is likely to be adversely affected. I am therefore satisfied that refusal to grant the injunction is likely to cause greater harm to the 1st Applicant than it will cause the Respondent.
44. I therefore find that the Petitioner has satisfied all the three conditions necessary for the grant of a temporary injunction. I am therefore satisfied that the 1st Applicant has made out a case to warrant the granting of orders for protection and/or preservation of the estate pending the appointment of an Administrator, issuance of the Grant of Letters of Administration, distribution of the estate amongst the beneficiaries and confirmation of the Grant.
45. The Applicant has also asked the Court to order the Uasin Gishu County Lands Register to cancel the titles that were or have been issued as a result of sub-division of the mother title, Eldoret Municipality Block 21 (Kingongo)/5518. I would not at this stage nullify the sub-titles or order the Lands Registrar to cancel them but since by dint of the Court's findings, I believe that the parties are now well guided, I will first give them a chance to go for Court annexed mediation for the purposes of exploring their own home-negotiated amicable settlement, including agreeing on the person or persons to be appointed as the Administrator or Administrators. In arriving at this option, I have also considered that the 1st Applicant, too, seems to have knowingly participated or been involved in the irregular registration of the mother property and its sub-division and possibly even the subsequent sales to third parties without a Grant since his name also appears as one of the title holders. He has not therefore been entirely candid and forthright before this Court.

Final Orders

46. In the end, I hereby order as follows;



- a. Pending the determination of this Succession Cause, orders of injunction are hereby issued restraining and/or prohibiting the parties herein, including the Registrar of Lands, Uasin Gishu County, either by themselves, their servants, or agents, from intermeddling with the estate of the deceased herein (Ernest Kimaiyo) by either sub-dividing, charging, selling, transferring, or in any other manner parting with the interest in or ownership of any of the estate properties, including the following sub-plots emanating from sub-division of the original/mother title known as Eldoret Municipality Block 21(Kin'gon'go)/5518:
- i. Eldoret Municipality Block 21 (King'ong'o)/5571
 - ii. Eldoret Municipality Block 21 (King'ong'o)/5572,
 - iii. Eldoret Municipality Block 21 (King'ong'o)/5573,
 - iv. Eldoret Municipality Block 21 (King'ong'o)/5574,
 - v. Eldoret Municipality Block 21 (King'ong'o)/5575,
 - vi. Eldoret Municipality Block 21 (King'ong'o)/5576,
 - vii. Eldoret Municipality Block 21 (King'ong'o)/5577,
 - viii. Eldoret Municipality Block 21 (King'ong'o)/5578,
 - ix. Eldoret Municipality Block 21 (King'ong'o)/5579,
 - x. Eldoret Municipality Block 21 (King'ong'o)/5580,
 - xi. Eldoret Municipality Block 21 (King'ong'o)/5581, and
 - xii. Eldoret Municipality Block 21 (King'ong'o)/5582
- b. Pending the determination of this Succession Cause, an order of prohibition is also issued restraining the Respondent and the Lands Registrar, Uasin Gishu County, their servants, agents, employees or assignees from registering or making any entries of or in the nature of transfers, charges, sale and/or transfers in respect to the titles listed in (a) above and emanating or arising out of sub-division of the said original/mother title known as Eldoret Municipality Block 21(Kin'gon'go)/5518.
- c. To give the parties the opportunity to discuss and amicably agree on the matters arising herein, including agreeing on the person or persons to be appointed as the Administrator or Administrators and distribution of the estate, I now refer this matter to Court annexed Mediation. In view thereof, this matter shall now be set down for Mention before this Court on a date after lapse of sixty (60) days to review progress of the Mediation.
- d. This being a family matter, I make no orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY 2024

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Angu Kitigin for Petitioners



Mr. Momanyi for 1st Respondent

Court Assistant: Brian Kimathi

Eldoret High Court Succession Cause No. E150 of 2023

