



REPUBLIC OF KENYA



In re Estate of Benson Ng'ang'a Ndirangu (Deceased) (Succession Cause E003 of 2024) [2024] KEHC 11374 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE E003 OF 2024
WM MUSYOKA, J
SEPTEMBER 30, 2024
SUCCESSION CAUSE NO. E003 OF 2024
IN THE MATTER OF THE ESTATE OF BENSON NG'ANG'A NDIRANGU
(DECEASED)**

RULING

1. The deceased herein, Benson Ng'ang'a Ndirangu, died on 1st January 2024. A letter from the office of the Chief of Township Location, Busia County, dated 6th March 2024, indicates that he was survived by a widow and 9 daughters and 1 son, being Margaret Wangoi Ng'ang'a, Lillian Wanjiku Karanja, Esther Njeri Ng'ang'a, Annastarcia Wanjiru Ng'ang'a, Mary Wamboi Ng'ang'a, Jane Wairimu Ng'ang'a, Pauline Wanjeri Ng'ang'a, Esther Wamboi Ng'ang'a, Esther Wanjiku Ng'ang'a and James Ndirangu Ng'ang'a. He was said to have had operated bank accounts in 13 banks, had shares in Bennandira Limited, and to have been the registered owner of Busia Municipality BM/h2 (R61), Busia Municipality BM/h3 (CR62), Bukhayo/Mundika/6236 and Bukhayo/Mundika/6240.
2. Representation was sought in the estate by the widow, Margaret Wangoi Ng'ang'a, in Busia CMCS No E99 of 2024, and letters of administration intestate were duly made to her, on 6th May 2024, and a grant was duly issued, bearing an even date. I shall refer to Margaret Wangoi Ng'ang'a, hereafter, as the administratrix. A summons for confirmation of grant, dated 1st July 2024, was subsequently filed, proposing that Busia Municipality BM/h2 (R61), Busia Municipality BM/h3 (CR62), Bukhayo/Mundika/6236 and Bukhayo/Mundika/6240 be devolved wholly upon the administratrix. The grant is yet to be confirmed.
3. The succession cause, in Busia CMCS No E99 of 2024, was subsequently transferred to the High Court, and has become the instant cause, Busia HCSC No E003 of 2024.
4. Other than the instant succession cause, several other causes and suits have been initiated, with respect to assets of the estate of the deceased, being Busia HC Misc. Civil Application No E065 of 2024, Busia HC Misc. Criminal Application No E029 of 2024 and Busia HC Family Misc. No E002 of 2024.



5. Busia HC Misc. Civil Application No E065 of 2024 was brought at the instance of the administratrix herein, jointly with 2 daughters of the deceased, namely Miriam Wacuka Ng'ang'a and Pauline Wanjeri Ng'ang'a, against the son of the deceased, James Ndirangu Ng'ang'a, who I shall refer hereto after, for the purpose of all these proceedings, as the respondent. The pleadings were an originating Notice of Motion, dated 28th May 2024, brought under the *Companies Act*, Cap 486, Laws of Kenya, being for leave to bring a derivative suit on behalf of Bennandira Limited, hereafter referred to as the company. A number of allegations were made in that cause, against the respondent, including that the administratrix had been appointed a director of the company without her consent, the company was being run negligently and recklessly, the respondent had increased his shareholding in the company in violation of the rules of the company, the respondent had appointed a non-shareholder as a director of the company, and the respondent was withdrawing funds from the company which he was not accounting for. The respondent filed his responses to the application, and the matter is due for mention on 17th October 2024, when further directions shall be given in the matter, when all the other files, relating to the company, are due to be placed before the Judge.
6. Busia HC Misc. Criminal Application No E029 of 2024 was initiated by the company, against the directorate of criminal investigations, where the company, the respondent and a number of banks are named as interested parties. The originating Motion, dated 5th September 2024, seeks a number of orders which touch on a matter pending at the Chief Magistrate's Court, being Busia CMC Misc. Appli. No E135 of 2024. It is sought that orders made in that cause be set aside and the said file be brought up to the High Court, for the purpose of revision and dismissal of the said cause. Annexed to the affidavit in support of the Motion, is an order, made in that cause, on 3rd September 2024, authorising the police to carry out investigations on the accounts of the company, inclusive of compelling the banks named as respondents, the Busia County Land Registrar, the Registrar of Companies and tenants to do or refrain from doing certain things. That matter was due for hearing on 11th September 2024, by the Recess Judge, when stay orders were granted, and the cause was fixed for mention on 30th September 2024.
7. Busia HC Family Misc. No E002 of 2024 was a summons, dated 24th July 2024, which sought transfer of the cause Busia CMCSC No E99 of 2024 to the High Court, and an order to that effect was made on 31st July 2024. The claim was that the assets of the estate far exceeded the jurisdiction of the court where the cause had been initiated.
8. The background given above brings out the fact that, despite the deceased having died less than a year ago, there is heavy-duty litigation over the assets, spread over several suits and causes, initiated both here and at the court below.
9. What has now been placed before me, in the instant cause, is a Motion, dated 23rd August 2024, which seeks temporary and permanent injunctions, against the respondent, to restrain him from intermeddling with the estate of the deceased herein; from collecting rents from Busia/Municipality/532, 533 and 535; from interfering with the duties of the administratrix of collecting rental income from and managing Busia/Municipality/532, 533 and 535; and from interfering with the administratrix's access to and dealing with Busia/Municipality/532, 533 and 535. It also seeks orders that all tenants on Busia/Municipality/532, 533 and 535 be ordered to pay rents into an estate account managed by the administratrix, specified banks and financial institutions to furnish the administratrix with statements of accounts held by the respondent and the company for the period running between 1st January 2024 and 22nd August 2024, and to cease effecting withdrawals from those accounts without leave of court.



10. The said application is at the instance of the administratrix, who gives a background to the succession cause. She avers that the family of the deceased held a post-burial meeting, over the affairs of the estate of the deceased, on 6th February 2024, attended by, among others, the respondent, where the list of the survivors of the deceased was agreed upon, together with the inventory of properties and assets of the deceased. She avers that the said meeting nominated her to apply for representation to the estate of the deceased, and, upon her appointment as administratrix by the court, she was placed in charge of the administration of the assets of the estate, including that of the company. She asserts that the directors of the said company were to operate under her. She avers that after the said meeting, the respondent instructed the then family Advocates to exclude Busia/Municipality/532, 533 and 535 from the schedule of the assets of the estate. She further avers that she has established that the formation of the said company was fraudulent and criminal, as it was incorporated using forged signatures of the deceased, forged minutes of a purported family meeting that never took place, and a forged Memorandum of Association. She further avers that on 16th March 2022 Busia/Municipality/532, 533 and 535 were fraudulently transferred from the name of the deceased to the said company, using forged signatures of the deceased. She claims that after the death of the deceased, the respondent started to withdraw monies from the bank accounts of the company, and to fraudulently force all the tenants, occupying the rental properties of the estate, to be paying rent to him, and that he was running accounts of the company alone, and he has been prohibiting her from managing the estate properties.
11. When the matter was initially placed before me, on 2nd September 2024, I directed that the application be served on all the affected parties, and that the same be mentioned on 18th September 2024, for directions on its disposal.
12. When the matter came up on 18th September 2024, the administratrix indicated that she had served the respondent with the application, and that he had failed to file replies, 14 days after service, and insisted on addressing the court, due to what she described as the urgency of the matter. Her Advocate, Mr. Gatundu, informed the court that there was intermeddling with the estate by the respondent, as he was siphoning out the proceeds of the estate. He further argued that the administratrix was being prevented from discharging her duties, of collecting rents, among others, yet the estate was vested in her. He asserted that, in the minutes of a family meeting, annexed to the affidavit in support of the application, the assets of the deceased had been identified, and Busia/Municipality/532, 533 and 535 were among them. He argued that the corporate veil, over the company, had been lifted, in that family meeting, by consent, and the family had agreed that the tenants should pay rent to an estate account, operated by the administratrix. He claimed that the company was formed fraudulently. He argued that if the prayer for injunction was not granted, there would be nothing left to be distributed.
13. Mr. Otieno, for the respondent, submitted that the administratrix was forum-shopping. He stated that she, in her supporting affidavit, acknowledged that the assets, in question, Busia/Municipality/532, 533 and 535, belonged to the company, and that the money, in question, was in the account of the company. He argued that no bank account, in the name of the respondent, had been disclosed. He further argued that the minutes, relied upon by the administratrix, recognized the building, known as Benna Plaza, as a property under the company.
14. The first thing I would like to address is that parties ought to remove emotions from these matters, and should strive to prosecute them as dispassionately as possible. That is particularly important of the Advocates who represent them. I say so because the Advocates, who handled this matter before me, displayed a lot of raw emotions. Yet, representing parties in a dispute in court is designed to take away the emotions, so that the matter is handled with as much sobriety as possible. It is the *raison d'être* of having Advocates in a matter. When Advocates bring a lot of emotion into a matter, they make it unnecessarily charged, and objectivity is very often lost as a result. The stunt that Mr. Gatundu tried to



- pull, of drawing the attention of the court, to the health and physical condition of the administratrix, was uncalled for, as it pointed to trying to sway the court by sentiment and emotion, rather than by way of intellect and force of argument, founded on fact and law, based only on the documents filed in court.
15. Secondly, the directions that I gave, on 2nd September 2024, were that the matter would come up on 18th September 2024, for mention, not hearing, of the application, so that the court could give directions on its disposal. A mention and a hearing are 2 different things. A mention cannot be converted into a hearing, except by the consent of all the parties involved. See [Guyo Abdullah Omar & 99 others v Ministry of Interior and Co-ordination of National Government & 2 others](#) [2019] eKLR (W. Korir, J) and [Achesa v Radar Limited](#) [2023] KEELRC 3064 (KLR)(Gakeri, J). On 18th September 2024, it was the administratrix who was seeking to convert the mention, on that date, into a hearing, the respondent did not consent to that, and no valid hearing could possibly be conducted on that date.
 16. Thirdly, part of the reason the matter was fixed for mention, on 18th September 2024, was because the administratrix needed to regularise her position, upon the cause, in Busia CMCS No E99 of 2024, being transferred from the magistrate's court to the High Court. The grant, that she holds, was made to her, in Busia CMCS No E99 of 2024, on 6th May 2024. The order for the transfer of Busia CMCS No E99 of 2024 was made, in Busia HC Family Misc. No E002 of 2024, on 31st July 2024, and the instant cause, Busia HCSC No E003 of 2024, must have been opened thereafter. I have not seen an order to the effect that afresh grant should re-issue out of the instant cause to the administratrix, and I have not seen, in the record before me, a copy of a re-issued grant made to her out of this cause. As it is, she still holds that grant that was issued to her in Busia CMCS No E99 of 2024, on 6th May 2024. It cannot be, that she can continue prosecuting process, at the High Court, using a grant that issued out of the magistrate's court. She needed to regularise that position, hence the mention on 18th September 2024. See [Musine v Osamo \(Sued as co-administrator of the Estate of Stephen Osamo \(Deceased\)\)](#) [2023] KEHC 20217 (KLR) (Musyoka, J). She made no attempt to do so, instead she ploughed directly into arguing her application, before that was done. Maybe there could be some urgency, a need to preserve the estate. However, whatever the urgency, first things first. The record must be straightened, before the matter is handled in the earnest. Secondly, a party, against whom serious allegations have been made, bordering on criminality, is entitled to its day in court, by way of confronting those allegations, through filing a response. It is what fair hearing and natural justice are all about.
 17. For the reasons given above, the application before me was not up for hearing, on 18th September 2024, but mention, and I shall not make final orders, on the said application. Instead, I shall give directions on the way forward.
 18. The role of the succession or probate court is limited, to administration of the free property of the estate of the deceased at the time of their death. See [Gichohi Mwangi v Simon Irungu Joshua](#) [2016] eKLR (Waweru, J), [In re Estate of Alice Mumbua Mutua](#) [2017] eKLR (Musyoka, J) and [In Re Estate of Stephen Nzau Koka \(Deceased\)](#) [2019] eKLR (Odunga, J). This position is clearly provided for under section 3 of the [Law of Succession Act](#), Cap 160, Laws of Kenya, which defines free property as that which that person was legally competent freely to dispose of during his lifetime, and in respect of which his interest had not been terminated by his death. See [In re Estate of M'Ikiugu M'Mukindia \(Deceased\)](#) [2019] eKLR (Sitati, J) and [In Re Estate of Stephen Nzau Koka \(Deceased\)](#) [2019] eKLR (Odunga, J). In the present case, the administratrix has argued that the respondent is intermeddling with the estate of the deceased, by collecting rent from the properties belonging to the estate of the deceased, and barring the administratrix from performing her duties. The respondent argues that the said properties belong to the company. The question, that arises, is whether property, registered in the name of the company, is available for administration and distribution under the [Law of Succession Act](#), and whether the administratrix should be allowed to collect rent from such properties.



19. It is trite, that a company is a legal entity, capable of suing and being sued, of owning property, and of perpetual existence or succession, hence it is an independent person in law. In *Salmon v Salmon* (1897) AC 22 (Lords Macnaghten, Halsbury & Herschell), it was held that a distinction must be drawn between the company and its directors and shareholders, as the company is a separate legal entity from its promoters. The jurisdiction of the succession or probate court is limited to distribution of the shares of the company, where it is established that the said shares form part of the estate of the deceased. See *In re Estate of Shabid Pervez Butt (deceased)* [2022] eKLR (Ogola, N Mwangi & PJ Otieno, JJ) and *In re Estate of Jaswant Singh Boor Dhanjal (Deceased)* [2024] KEHC 4912 (KLR)(Onyiego, J). When a dispute, over the affairs of a company, veers towards distribution of the assets of the company, as appears to be the case here, it is better settled before a commercial court, and not within a succession or probate cause. See *John Mubu Kangari v Mubu Holdings & Serah Mweru Mubu* [2019] eKLR (Musyoka, J) and *Pacific Frontier Seas Ltd v Kyengo & another* [2022] KECA 396 (KLR) (M'Inoti, J Mohammed & Kantai, JJA). It should be clear, therefore, from the above, that succession or probate courts do not have jurisdiction to determine disputes which go beyond distribution of shares in a company. See also *Romana Chepkemboi Yego & another v Jane Njuguna & another* [2017] eKLR (Githua, J) and *In re Estate of Boniface Mutinda Kabaka (Deceased)* [2022] KEHC 12031 (Odero, J).
20. In *In re Estates of Gitere Kabura & another (Both Deceased)* [2018] eKLR (Musyoka, J), it was stated that:
- “The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company, for their sole interest in the company were the shares. It is the said shares that are available for distribution herein amongst the survivors of the deceased. Should the survivors have no interest in continuing to have the company exist, then it is up to them to wind it up or to liquidate it, so as to have access to its assets. However, that cannot happen until after the shares in the company have been distributed to the beneficiaries. The jurisdiction of the probate court lies with distribution of the shares, but not the liquidation of the company or the distribution of its assets.”
21. One point that emerges, from *In re Estate of Boniface Mutinda Kabaka (Deceased)* [2022] KEHC 12031 (Odero, J), is that the mere fact that one was a widow of the deceased did not entitle such person to involve herself in the affairs of the company, with relation to its management and administration. A related point was made in *In Re Kabawa Sukari Ltd* [2004] 2 EA 93 (Ringera, J), with regard to the administrator of an estate, that the holder of a full grant, who is truly the personal representative of the deceased, cannot be treated as a member of the company, unless he fully satisfies certain requirements of the *Companies Act* relating to membership.
22. The administratrix appears to be well aware of the legal position, stated in the foregoing paragraphs of this ruling, hence her argument that the company was formed as part of a fraud, to direct the prime assets of the estate to the respondent. That comes out very clearly in the affidavit sworn in support of the instant application, and also in the papers filed in Busia CMC Misc. Appli. No E135 of 2024. However, going by *John Mubu Kangari v Mubu Holdings & Serah Mweru Mubu* [2019] eKLR (Musyoka, J) and *Pacific Frontier Seas Ltd v Kyengo & another* [2022] KECA 396 (KLR) (M'Inoti, J Mohammed & Kantai, JJA), whether the company was formed fraudulently, with an ulterior motive, or was formed using forged documents, is not a matter which the succession or probate court has jurisdiction to determine. The decision, around the legality or validity of the process that brought the said company into existence or being, lies with another court or other courts.



23. On the issue of lifting the veil of the incorporation of the company, the administratrix argues that the family lifted the corporate veil, at their meeting of 6th February 2024. At that alleged meeting, it was revealed that the respondent and the deceased were directors of the company, and the administratrix was appointed a director of the said company at that meeting. The administratrix now argues that she was made a director of the company without her knowledge and consent, and that, in any event, the company was formed as part of a process or in perpetuation of fraud. The respondent has argued that the corporate veil cannot be lifted in a family meeting, convened to discuss an estate, instead of in a properly convened company meeting.
24. The circumstances, under which a court will be entitled to lift the corporate veil, is discussed at paragraph 402 of *Halsbury's Laws of England* 4th Edition Vol. 7(1), where it is stated:
- “... the court will ‘pierce (or lift) the corporate veil’, not because it considers it just to do so but because special circumstances exist indicating that it is a mere façade concealing the true facts. In identifying what is a mere façade, the motive of those behind the company will be relevant. The court will go behind the status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. The device of a corporate structure will often have been used to evade limitations imposed on conduct by law and rights of relief which third parties already possess against a defendant, so justifying the court’s ‘piercing’ (or ‘lifting’) the veil.”
25. There is jurisdiction for courts to lift the corporate veil, under certain circumstances. Emphasis is on the court, not individuals, lifting or piercing the corporate veil. The corporate veil cannot be pierced in a succession cause, or at a family meeting. The principles, stated in *John Mubu Kangari v Mubu Holdings & Serah Mweru Mubu* [2019] eKLR (Musyoka, J) and *Pacific Frontier Seas Ltd v Kyengo & another* [2022] KECA 396 (KLR) (M’Inoti, J Mohammed & Kantai, JJA), would apply. It was pointed out, in *Michael Kyambati v Principal Magistrate, Milimani Commercial Courts, Nairobi & another* [2016] eKLR (Odunga, J), *Lucy Mukembura Kimani v Nzuri Feeds Suppliers Ltd* [2021] eKLR (J. Ngugi, J), *Ganesh Engineering Works Limited & 3 others v Yamini Builders Limited* [2021] eKLR (Chitembwe, J) and *Jepkemoi v Zaburi Enterprises Company Ltd & 2 others* [2024] KEHC 2343 (KLR) (Wananda, J), that lifting the corporate veil is an extra-ordinary relief, which should not be resorted to lightly, but only in special circumstances, and it involves examination of the directors of the company by or in court.
26. On the registration of the company being fraudulent, as the signatures of the administratrix and of the deceased had allegedly been forged, the administratrix has attached a report from a forensic document analyst, who allegedly examined the impugned documents, and found material that suggested forgery. Again, the succession or probate court is not the right forum for the administratrix to raise issues about fraudulent registration of a company. The commercial court would be a better forum to address such allegations, or any other issues that touch on matters governed by the *Companies Act*.
27. The issue as to whether or not the respondent has intermeddled with the estate is governed by the *Law of Succession Act*. It would be within the jurisdiction of the succession or probate court. However, I will not determine it, at this stage, in this ruling, given that there was not supposed to be a hearing on 18th September 2024, for the matter was up for mention only, and the administratrix could not possibly prosecute the application based on a grant from a magistrate’s court. There will be need to regularise the position, to bring propriety to the proceedings, before the administratrix can be heard on her plea



for injunctive relief. This is also a family matter, and some latitude would usually be allowed, to enable all the parties have a chance to ventilate their respective cases.

28. Mr. Otieno had urged me to allow Mr. Omieri, who was present in court, to be allowed to participate in the proceedings, on behalf of the company. I declined to entertain that plea, as I wanted to peruse the files relating to this matter before deciding whether or not to admit him. My remarks above, from paragraphs 19 through to 26, of this ruling, should be clear that there would be no place for Mr. Omieri in these proceedings. He should only appear for the company in causes or suits where the company is a principal party, in proceedings properly brought under the [Companies Act](#), relating to matters touching on the formation, management and administration of the company. However, since the administratrix claims that the assets, that the company claims belong to it, are vested in her, as administratrix, and that the directors of the company were under her, so far as its management is concerned, I should allow Mr. Omieri to intervene in the succession cause, but limited to the extent of the issues raised in the application, touching on the company, and the court shall not, in these proceedings, make a determination on the status or affairs of the company, for the reasons given above.
29. The principal bone of contention is around the ownership of the assets known as Busia/Municipality/532, 533 and 535. The administratrix contends that they belong to the estate and vest in her as personal representative of the deceased, based on the grant of representation made to her. She has exhibited certificates of leases of the titles to those properties, dating back to 2015 and 2016. There were suggestions that those assets have since been transferred to the company. No material was placed before me to support that contention. Certificates of official searches of those titles, issued after 1st January 2024, would have sufficed. That information is relevant, for if they are currently registered in the name of the company, they would be property of the company, and not the estate, and the probate court may not intervene, unless it is first established that the company was a fraud, and that the transfer of the assets to it was fraudulent. For that reason, the parties will have to place on record documentation around these issues, that is to say who the registered owner of Busia/Municipality/532, 533 and 535 was as at 1st January 2024, when the deceased died, in terms of whether it was the deceased or the company, and the circumstances around the formation of the company in 2020. Of course, the issue of the status of the company cannot be resolved in this cause, going by what I have discussed above, but general information on how it was formed, would serve to illuminate whether or not a prima facie case exists for grant of the reliefs sought. It would not be just to make final orders on the injunctions prayed for before these issues are fully thrashed out.
30. One of the files that I perused relates to criminal proceedings, being Busia HC Misc. Criminal Application No E029 of 2024. I have already allocated a date for mention of that matter, when I shall give further directions on it. That date is 17th October 2024. For now, I shall refrain from making any orders relating to it.
31. The final orders and directions that ought to be made in this matter are as follows:
 - a. That all the proceedings that were conducted in Busia CM CSC No E99 of 2024 are hereby adopted, and shall, henceforth, be treated as proceedings conducted by this court;
 - b. That the Deputy Registrar is hereby directed to re-issue, out of this cause, the grant of letters of administration intestate that had been issued to the administratrix out of Busia CM CSC No E99 of 2024;
 - c. That all issues touching on the formation, management and administration of the company shall be litigated in separate proceedings, properly commenced under the [Companies Act](#), however, the company, is hereby allowed to intervene, in this cause, to the extent indicated



in paragraphs 28 and 29 hereabove, and may file responses to the instant application, to that limited extent, within 7 days of this order;

- d. That the respondent is hereby granted 7 days to file and serve a reply to the application herein, dated 23rd August 2024, with corresponding leave, of 7 days, to the administratrix, to file, if need be, and serve a further affidavit, over any new issues, as may be raised by the respondent and the company;
- e. That the said application, dated 23rd August 2024, shall be canvassed, thereafter, by way of written submissions, to be filed within 14 days of this order; and
- f. That the matter shall be mentioned on 17th October 2024, for monitoring and compliance, and allocation of a date for ruling.

DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA ON THIS 30TH DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Gatundu, instructed by Gatundu & Company, Advocates for the administratrix.

Mr. Otieno, instructed by Masiga Otieno & Associates, Advocates for the respondent.

