



REPUBLIC OF KENYA



**In re Estate of King'ong'o Gachagua (Deceased) (Probate & Administration
564 of 2006) [2024] KEHC 13035 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION 564 OF 2006
MA ODERO, J
OCTOBER 25, 2024**

IN THE MATTER OF THE ESTATE OF KING'ONG'O GACHAGUA (DECEASED)

RULING

1. Before this Court for determination is the Summons dated 26th October, 2023 by which the Applicant/Administrator Edwin Waruru King'ong'o seeks the following orders:-
 - “1. Spent
 2. Spent
 3. Spent
 4. That pending conclusion of this Succession cause and/or distribution and transmission of the estate of the deceased to the beneficiary thereof the Honourable court be pleased to grant an order of injunction restraining the respondents herein Charles Maina King'ong'o and David Gachagua King'ong'o from farming, initializing, occupying, intermeddling with and/or trespassing upon land Parcel Number Nyeri/Lusoi/32
 5. That the costs of this application be provided for”
2. The application which was premised upon Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administrative Rules was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondents Charles Maina King'ong'o and David Gachagua King'ong'o filed Grounds of opposition dated 16th April 2024 which raised the following grounds:-
 - “(i) That the applicant has no locus standi to prosecute the instant application.
 - (ii) That the application's otherwise frivolous and an abuse of court process.



4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 25th July 2024 whilst the Respondents did not file any written submissions.

Background

5. This matter relates to the estate of the late King'ong'o Gachagua (hereinafter 'the Deceased') who died on 1st June 2006. A copy of the Death Certificate Serial Number 911037 was filed in court on 14th November 2006. The Deceased was said to have died testate having left behind a written will dated 17th January 2006. Vide a judgment delivered by Hon. Justice Wakiaga on 27th April 2015 the Court upheld the validity of the written will and directed that the estate be distributed in accordance with the written will. Thereafter a rectified Certificate of Grant dated 14th October 2021 was issued to Jacob Mwangi Muturi.
6. The Applicant is one of the sons of the Deceased whilst the Respondents are also sons of the Deceased.
7. The Applicant contends that vide the written will dated 17th January 2006, the Deceased bequeathed the parcel of land known as Nyeri/Lusoi/32 (hereinafter 'Lusoi Plot 32') to the following persons
 - (a) Agnes Wairimu King'ong'o - Deceased
 - (b) Jane Wangari Maina
 - (c) Grace Wambui King'ong'o
 - (d) John Kamau King'ong'o
 - (e) Edwin Waruru Kungori
 - (f) Catherine Waringa King'ong'o
 - (g) Wanjiru King'ong'o
 - (h) Felix Mungai King'ong'o
 - (i) Carolyne Wanjiku King'ong'o
 - (j) Gerald Munage King'ong'o
8. That during his lifetime the Deceased had given and transferred to the two Respondents the parcel of land known as NYERI/WARAZA/106 measuring approximately thirty (30) acres.
9. The Applicant asserts that the Respondents do not have any share in Lusoi Plot No 32. He accuses the Respondents of intermeddling with that parcel of land by utilizing and farming on the same to the prejudice of the other beneficiaries. The Applicant therefore seeks injunctive orders to prevent any further intermeddling into the estate by the Respondents pending the conclusion of this Succession cause and final distribution of the estate.
10. As stated earlier the application for injunctive orders was opposed.

Analysis And Determination

11. I have carefully considered the application before this court, the Grounds of opposition filed by the Respondents as well as the written submissions on record.
12. In opposing the application the Respondents contended that the Applicant has no locus standi to prosecute this application. Nothing could be further from the truth.



13. Locus Standi is a latin term which literally means ‘place of standing.’ It refers to the right of an individual and/or party to appear in a particular case.

14. It is trite law that pleadings filed by a person who has no Locus Standi are void ab initio. In Ibrahim - vs- Hassan & Charles Kimenyi Macharia [2009] eKLR it was stated as follows:-

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, it means that party cannot be heard despite whether or not he has a case worth listening to. The issue herein is whether the Applicant lacks the requisite Locus Standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view issues regarding locus standi are critical preliminary issues which must be dealt with and settled before delving into other substantive issues. [own emphasis]

15. This court is sitting as a Probate Court with the mandate to supervise and oversee the distribution of the estate to the genuine heirs. In Re Estate Of GKK (Deceased) [2017] eKLR the court observed that

“The primary functions of a Probate Court is distribution of the estate of a dead person.”

16. In a Succession Cause therefore the persons who have locus standi are the beneficiaries/heirs of the estate and any dependants of the Deceased.

17. The fact that the Applicant is a son of the Deceased who was named in the written will dated 17th January 2006 is not in any doubt. The Applicant is also named as a beneficiary of the estate in the Rectified Certificate of Confirmation of Grant dated 14th October 2021.

18. The persons who are deemed to have locus standi in a succession cause would be the Executors or Administrators of the estate as well as the genuine beneficiaries to the estate. There has been no allegation that the Applicant is not a genuine beneficiary to the estate of the Deceased. In this capacity the Applicant has a legitimate right and interest in the estate. I find and hold that the Applicant does have the requisite locus standi to prosecute this application.

19. The next issue to be determined is whether the prayer seeking injunctive orders is merited. The question of whether a court has jurisdiction to issue injunctive orders in a Succession Cause was settled in the case of Floris Piezzo & Another -vs- Giancarlo Falasconi (2014) eKLR where the court of appeal while considering whether an injunction can issue in a succession cause expressed itself as follows:-

“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause.

The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the *Law of Succession Act* gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be



expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders." [own emphasis]

20. The grounds upon which an interlocutory injunction may be granted were set out in the case of *Giella -vs- Caman Brown* [1973] EA as follows.

"The conditions for the grant of an interlocutory injunction are well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide on application on the balance of convenience."

21. The definition of a Prima Facie Case was given in the case of *Mrao Ltd -vs- First American Bank Of Kenya Ltd & 2 Others* [2003] eKLR as follows:-

"In Civil Cases a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. This is clearly a standard which is higher than an arguable case."

22. As stated earlier this Court is sitting as a probate court, whose mandate is to supervise the distribution of the estate of the Deceased to the genuine beneficiaries. In order to carry out this mandate the law provides that probate court may make such orders as may be necessary to protect and conserve the estate of the Deceased.

23. Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules and Section 47 of the *Law of Succession Act* provides:-

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.

24. Similarly Rule 73 of the Probate and Administration Rules provides that:-

"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."

25. In the case of *Millicent Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others* [2018] eKLR the court affirmed that the above provisions grant the High Court powers to issue protective measures including issuing injunctions for purpose of preserving the estate of a deceased person. The High Court has jurisdiction to issue all manner of orders including the issuance of conservatory and/or injunctive orders where appropriate in order to preserve and safeguard the estate of a deceased person.



26. The Applicant has accused the Respondents of intermeddling with the estate by dealing with and utilizing Lusoi Plot 52 notwithstanding the fact that the estate has not been fully distributed.
27. To prove this claim the Applicant has produced eight (8) photographs showing that the land in question has been farmed and that agricultural activities are ongoing thereon.
28. The Respondents did not file a Replying Affidavit and as such did not counter and/or controvert the allegations made by the Applicant.
29. The Applicants are genuine beneficiaries of the estate. According to the written will dated 17th January 2006 (which will was upheld by the High Court), the Applicant was allocated a share in the suit land being Lusoi No. 32.
30. The activities of the Respondents on this parcel of land amounts to intermeddling which is outlawed by section 45 of the *Law of Succession Act*.
31. In the case of Benson Mutuma Muriungi -vs- C.E.O Kenya Police Sacco & Another (2016) eKLR and re Estate of M’Ngarithi M’ Miriti [2017] eKLR the court defined intermeddling 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 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.” [own emphasis]

32. There is no doubt that the land in question belongs to the deceased person and therefore forms part of the estate of the deceased. The official search certificate dated the 20th May 2014 as regards NYERI/LUSOI/32 shows that it is registered in the name of the deceased as the absolute owner and measures 25.5 hectares. I hold the view that the ploughing of the parcel of land and building of structures by the respondents amounts to intermeddling as defined by Section 45 of the *Law of Succession Act*. In particular, Section 45 provides that no person should handle, take possession, dispose off, or otherwise intermeddle with the free property of a deceased person unless authorized to do so or by a grant of representation. Section 45 (2) (a) makes it a criminal offence to intermeddle with the option of punishment by a fine, imprisonment or both.
32. Section 45 of the *Law of Succession Act* provides 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 persons.
 - (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.

33. Musyoka, J in Veronica Njoki Wakagoto (Deceased) [2013] eKLR held that:

“The effect of [section 45]... is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.” [own emphasis]

34. Therefore any illegal and/or unprocedural activities in said parcel of land will directly prejudice the Applicant. Accordingly I am satisfied that the Applicant has established a prima facie case.

35. I therefore find that the present application has merit and this court allows the application and makes the following orders

- (1) Pending the conclusion of this Succession Cause and/or the distribution and transmission of the estate to the named beneficiaries an order of injunction be and is hereby issued restraining the Respondents Charles Maina King’ong’o and David Gachagua from farming, utilizing, occupying, residing on, entering upon, trespassing or in any other manner whatsoever meddling with land Parcel Number NYERI/LUSOI/32
- (2) This being a family matter each side will bear their own costs.

DATED IN NYERI THIS 25TH DAY OF OCTOBER, 2024

MAUREEN A. ODERO

JUDGE

