



**In re Estate of Stephen Mbugua Murihia (Succession Cause 2605 of 2001)
[2024] KEHC 16274 (KLR) (Family) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2605 OF 2001
EKO OGOLA, J
DECEMBER 20, 2024
IN THE MATTER OF THE ESTATE OF STEPHEN MBUGUA MURIHIA**

BETWEEN

**JOSEPH MBACIA MBUGUA 1ST APPLICANT
LEAH WARUCHU MIRACHO 2ND APPLICANT
ESTHER WANJIRU MIRACHO 3RD APPLICANT**

AND

**MBICHI MBOROKI 1ST RESPONDENT
NANCY WAMBUI 2ND RESPONDENT
MASTERWAYS PROPERTIES LIMITED 3RD RESPONDENT**

RULING

1. There are three applications before this court. The first is dated 9th May 2018. The 1st applicant prays for the following:-
 - a. That this court be pleased to interpret the Will and testament of the late Stephen Mbugua Murihia dated 26th January 2001 and find that the words as contained in clause 25 of the Will to wit: “I bequeath and devise my interest and Title in six plots situated in Embakasi and held with the Embakasi scheme being six (6) plots to my sons and one to my wife as hereunder a) Peter Nga’nga one (1) plot; b) Meja Waihumba one (1) plot; c) Samuel Munyua one (1) plot; Njenga Mbogua one (1) plot; e) Suzan Nyakibia one (1) plot” erroneously and mistakenly omitted the name of Joseph Mbacia Mbugua as one of the sons and beneficiaries entitled to the said bequest and devise.



- b. That an order do issue directing that the one plot remaining under clause 25 of the Will and testament of the late Stephen Mbugua Murihia dated 26th January 2001 be transferred to the name Joseph Mbackia Mbugua.
 - c. That the costs herein be borne by the estate.
 2. The application was supported by the grounds set therein and the 1st applicant's supporting affidavit. The 1st applicant deposed that as per Clause 25 of the Will, there were six plots to be distributed to the deceased sons and widow. However, his name was erroneously left out and one plot undistributed. According to the 1st applicant, this undistributed plot should be bequeathed to him as that was the wish of the deceased from the language of Clause 25.
 3. The 2nd respondent opposed the application vide a Replying affidavit. He deposed that as an executor of the Will, he is bound by the terms of the Will which was the wishes of the deceased and the confirmation of grant of probate issued by the court.
 4. The second application filed by the 1st applicant is dated 18th December 2020. The 1st applicant prays for the following orders:-
 - a. Spent
 - b. That the honorable court be pleased to issue a temporary injunction restraining the 3rd respondent by themselves, their agents, employees, servants, or assigns from paying/refunding Kshs. 320,000/- being the alleged fees paid to the 1st respondent and Kshs. 720,000/- being rent arrears for Juja Road main house (147) to Peter Nganga Mbugua, Wilson Njenga Mbugua, James Waihumba Mbugua, and Samuel Munyua Mbugua pending hearing and determination of this application.
 - c. That the court order that the administrators/ trustees convene a meeting with all the beneficiaries of the estate of deceased to deliberate of the distribution of Kshs. 320,000/- allegedly paid to the 1st respondent and Kshs. 720,000/- being the alleged rent arrears of the juja road house and further payment.
 - d. That this honorable court to be pleased to issue an order that the 3rd respondent shall only act on instructions with the express concurrence of at least one representative from each of the deceased houses.
 - e. That the honorable court should also make an order directing, the executors, of the estate to bring the administration of the estate to a finality and file accounts in compliance with the provision of the Law of Succession.
 - f. That the costs herein be borne by the estate
 5. The application was based on the grounds set out therein and the 1st applicant's supporting affidavit. The 1st applicant deposed that his four brothers without him wrote to the 3rd applicant requesting a refund of Kshs. 320,000 and rent arrears of Kshs. 720,000 and further payment of monthly rent for the house beginning December 2020. The 1st applicant deposed that this request was followed by an instruction letter from the 1st respondent to the 3rd respondent giving a go-ahead for disbursement of the said monies.
 6. According to the 1st applicant, he was neither consulted nor did he give his consent to the disbursement of the money from the estate account thus leading to the mismanagement of the estate. The 1st applicant stated that the 1st and 2nd respondents have refused to fully execute the Will and administer



the estate thereby antagonizing the family and giving preferential treatment to some beneficiaries to the exclusion of others.

7. The third application filed by the 2nd and 3rd applicants is dated 22nd January 2021. They pray for the following orders:-
- a. That the respondents do file in court a statement of accounts in respect of the commercial properties listed under Clause 31 of the Will showing the number of tenants therein, the monthly rental income being paid by each of the tenants, total rental income from each of the houses as well as the sum total of the rental income from 10th August 2011 to date.
 - b. That the respondents be ordered to file a statement of account on how the balance of money in the deceased bank account which was distributed to them in trust for the grandchildren and great grandchildren in the rectified Certificate of Confirmation of Grant dated 22nd October 2007 was utilized.
 - c. That the respondents be ordered to file record of account in respect of the commercial properties showing how rental income being generated from the said properties has been utilized with respect to each of the grandchildren of the deceased since his demise.
 - d. That the respondents be ordered to file audited accounts of the income generated and collected from the commercial properties from the date of issuance of limited grant of letters of administration ad colligenda bona dated 5th November 2001 to date.
 - e. That the respondents be directed to file a statement of accounts of the proceeds of sale in respect of the property known as land reference No. 57/862 unlawfully and irregularly sold by them and how the same was shared with the grandchildren if at all.
 - f. That the respondent be directed to file current official searches in respect of the commercial properties listed under Clause 31 of the Will confirming the status of the commercial properties.
 - g. That this honorable court be pleased to interpret the last Will and testament of the deceased herein dated 26th January 2001 and find that the words as contained in Clause 30 of the Will which states as follows: "I DIRECT that the following commercial properties shall not be sold during the lifetime of my wives or my immediate family of my children but shall be held by my trustees upon trust by my grandchildren until they obtain the age of forty (40) years and apply the same in their absolute discretion to invest, raise funds, and to retain the income thereof and to apply the same in their absolute discretion." Means that the trustees should handover the commercial properties to the deceased grandchildren who have attained the age of 40 years to manage the same on their behalf and on the behalf of the beneficiaries who are yet to attain the age of 40 years in terms of Clause (i) to (v) thereunder.
 - h. That the respondents be removed as trustees in respect of the commercial properties and new trustees be appointed from the deceased grandchildren who have attained the age of 40 years.
 - i. That the costs of this application be paid out of the estate.
8. The application was based on the grounds set out therein and the 2nd applicant's supporting affidavit. The 2nd and 3rd applicants are the deceased grandchildren and the 1st and 2nd respondents were appointed as executors and trustees of the will. Clause 30 of the Will stated that some commercial properties were never to be sold during the lifetime of his wife and his children but shall be held in trust for his grandchildren until they obtain the age of forty years old. The Will listed the properties



and how the funds should be applied by the trustees. According to the 2nd applicant, the trustees have mismanaged the estate.

9. Parties canvassed the applications by way of written submissions which I have read and submitted.

Determination

10. I have considered the parties' pleadings and the entire court record. The first issue concerns the interpretation of the Will. Any issue surrounding the interpretation of clauses in a Will is to be resolved by the court through the construction of the provisions, not invalidation. The *Law of Succession Act* carries elaborate provisions, in the First Schedule, on the construction of wills. There is also a wealth of case law.
11. The position when interpreting a Will is essentially the same as when interpreting a contract. One seeks the intention of the testator by identifying the meaning of the relevant words in light of: the natural and ordinary meaning of those words; the overall purpose of the Will; any other provisions of the Will; the facts known or assumed by the testator at the time the Will was executed; and common sense. The 'armchair principle', by which the court is entitled to put itself in the position of the testator, and to declare what is the intention evidenced by those words with reference to the facts or circumstances which were (or ought to have been) in the mind of the testator when he used those words, was also considered.
12. The deceased in his Will stated as follows: "I bequeath and devise my interest and Title in six plots situated in Embakasi and held with the Embakasi scheme being six (6) plots to my sons and one to my wife as hereunder a) Peter Nga'nga one (1) plot; b) Meja Waihumba one (1) plot; c) Samuel Munyua one (1) plot; Njenga Mbogua one (1) plot; e) Suzan Nyakibia one (1) plot" The deceased in the Will had listed five of his sons to include Joseph Mbackia Mbugua. Therefore, it is just to say that while writing the will, the deceased was aware that there were six plots, one wife, and five sons. In my view, the name Joseph Mbackia Mbugua was erroneously omitted. This is because the deceased did not bequeath the remaining plot to anyone.
13. The second application prays for orders of injunction. It is common ground that for an injunction to be issued, the applicant must satisfy the three requirements settled in *Giella v Cassman Brown* [1973] EA 348 where the court held that an applicant must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in their favour.
14. Furthermore, in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (supra) and further clarified that the conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. Consequently, if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.



15. What then constitutes a prima facie case? The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it 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.”
16. Therefore, a prima facie case is not frivolous but one which is easily discernable from the pleadings even before the party is heard as it will show a right exists which may be infringed if an injunction is not issued and the onus of establishing the existence of a prima facie case lies with the applicant.
17. In this instant application, the 1st applicant prays that the 3rd respondent be restricted from refunding Kshs. 320,000/- being the alleged fees paid to the 1st respondent and Kshs. 720,000/- being rent arrears for Juja Road main house (147) to Peter Nganga Mbugua, Wilson Njenga Mbugua, James Waihumba Mbugua, and Samuel Munyua Mbugua. The 1st applicant further prays that the beneficiaries should hold a meeting to determine how the said funds is to be distributed. If these orders are not granted, then according to the 1st applicant, there will be a mismanagement of the estate and some beneficiaries will be disinherited.
18. I am satisfied that the applicant has established a prima facie case that if orders sought are not granted, she is likely to suffer harm and loss that cannot be compensated by damages.
19. In the third application, the 2nd applicant prays for orders that the trustees file an audited inventory and statement of accounts for all the properties since the death of the deceased, for the interpretation of Clause 30, and for the removal of the trustees.
20. Section 83(h) of the *Law of Succession Act* on the duties of a personal representative stipulates as follows:-

“to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;”
21. From the aforementioned provision, the executor has a duty to file in court an inventory of accounts of the assets, liabilities, and dealings of the estate.
22. On the interpretation of Clause 30, using the ‘armchair rule’ aforementioned, it is my view that the deceased intended that the trustees hold the properties on behalf of the grandchildren. The said properties were to be handed over by the trustees to the grandchildren once they turned forty years old. For the grandchildren who are yet to turn forty years old, the trustees were to continue holding the said properties on their behalf. It is also my considered view that since not all grandchildren turn forty at the same time, the older ones will join the trustees and invest, raise funds, and retain the income thereof and apply the same in their absolute discretion. Whatever profit or proceeds that come out of the investments, the same shall be equally distributed to the grandchildren. For those who are yet to turn forty years, their share would be held by the trustees.
23. So should the trustees be removed? From the averments of the 2nd applicant, there are some grandchildren who are yet to turn forty years. Therefore, there trustees still have a duty under the Will.
24. From the foregoing, I make the following orders:-



- a. The first application dated 9th May 2018 is allowed. The remaining plot in the Embakasi Scheme to be transferred to Joseph Mbackia Mbugua.
- b. The second application is allowed.
- c. The third application is partially allowed.
 - i. Prayer (a)-(f) is allowed. The trustees to file full and accurate inventory of accounts from the date of death of deceased to date.
 - ii. Prayer (g) on the interpretation of the Will is allowed.
 - iii. Prayer (h) is dismissed
- d. Costs be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024

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E.K. OGOLA

JUDGE

In the presence of:

Mr. Kinyua for the Executor

Ms. Achele for the 2nd Respondent

Ms. Akonja for the 2nd house

Mr. Mugambi for the Applicant

Mr. Kihanda h/b for Mr. Sasira for the beneficiaries

Gisiele Muthoni Court Assistant

