



In re Estate of Moses Kirimi Mbogori (Deceased) (Succession Cause 22 of 2019) [2023] KEHC 408 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEHC 408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 22 OF 2019
EM MURIITHI, J
JANUARY 30, 2023**

BETWEEN

TABITHA GACHERI KIRIMI 1ST PETITIONER

ERIC MURIUNGI KIRIMI 2ND PETITIONER

AND

PAULINE MUTHONI LABAN OBJECTOR

RULING

1. By chamber summons dated March 10, 2022, the applicant invokes section 47 of the [Law of Succession Act](#) to move the court for the orders as follows:-

“That pending hearing and determination of this cause, the honorable court be and is hereby pleased to issue an order that all the rental income derived from rental units/houses in Plot No:

- a) Meru Municipality Block XX/XXX
- b) 50% Share of Meru Municipality Block XX/XXX
- c) Meru Municipality Block XX/XXX
- d) Meru Municipality LR N0 2XXX0/XX
- e) Meru Municipality block XX/XXX
- f) Residential plot No XXX Kulamawe Isiolo
- g) Residential plot No XXX Kulamawe Isiolo and any other income derived from the estate of the deceased collected by the petitioner and/or any other person under her instructions



or any other instructions be deposited to a joint account that is to be opened in my name of the applicant Pauline Muthoni Laban and the petitioner."

2. The grounds of the applicant are set out in the application as follows:-

- " 1) That the deceased built rental units/houses in Plot No:
 - a) Meru Municipality Block XX/XXX
 - b) 50% Share of Meru Municipality Block XX/XXX
 - c) Meru Municipality Block XX/XXX
 - d) Meru Municipality LR No2XXX0/XX
 - e) Meru Municipality block XX/XXX
 - f) Residential plot No XXX Kulamawe Isiolo
 - g) Residential plot No XXX Kulamawe Isiolo among other houses as part of the estate.
- 2) That the said units have been occupied by the tenants all along, yet the rental income is not accounted for since October 1, 2018 to date yet the same is being collected by the petitioner herein.
- 3) No administrator of the estate has ever been appointed by the court to administer the estate.
- 4) That the applicant, though a wife and a dependant of the estate has never received any disbursements from the estate after the death of the her late husband, the deceased herein.
- 5) The estate is wasting away under the mismanagement of the etitioner, and will make it impossible for the other beneficiaries to get their rightful share of the estate by the time this cause is concluded.
- 6) Proceeds from the state have not been accounted for by the petitioner since pt of October 2018 and any person receiving the funds as his agent if at all."

3. The application is opposed by the petitioner upon grounds of opposition dated December 19, 2022 and replying affidavit sworn by the 1st petitioner on the same date. The respondent asserts a right of sole spouse of the deceased and questions the right of the applicant both to sue and to inherit the deceased, based upon the grounds of opposition as follows:

"Grounds of opposition

Take notice that the petitioners herein; shall raise grounds of opposition to the sustainability of the chamber summons dated March 10, 2022 in its entirety on the following grounds: 1. That the applicant is a stranger of the estate and lacks *locus standi* to bring this application. 2. That the application is premature and far-fetched as the issue whether the objector is a beneficiary of the estate has not been heard and determined. 3. That the applicant has not discharged the evidentiary burden required under section 107 (1) of the *Evidence Act* as the application lodged is not supported by any piece of evidence, supporting documentation or annexure thereto and the assertions therein are baseless and pure surmise."



4. Oral arguments made by the counsel for the parties raise the question of the status of the applicant as a “wife” of the deceased and, therefore, right to inherit the deceased. The applicant asserts customary law marriage and the respondent a statutory marriage with deceased.
5. Although the counsel for the parties made respective submissions on these, such issues of marriage both of the applicant and the 1st petitioner to the deceased and or status of the applicant as beneficiary or “dependant” of the deceased are for final determination of the objection to the making of the grant to the petitioner. They are matters which require oral evidence or testimony at full hearing of the dispute.
6. In the meantime, the applicant urges the court to preserve the estate by the order for deposit of rental income in a joint account of the applicant and the petitioner. The respondent opposes the application on the ground of lack of *locus standi* of the applicant as aforesaid, and contends that it should await the determination of applicant as beneficiary of the estate.
7. The court was invited by the applicant to consider its role to preserve the estate, citing *Re Joseph Kamau Kaniaru* [2022] eKLR as the rightful owner is not available to protect it.
8. Section 47 of the [Law of Succession Act](#) is in the following terms:-

“ 47. Jurisdiction of High Court

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:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

[Act No 8 of 1976, s 10A, Act No 16 of 1977, Sch]”

9. With respect, the court considers that the [Law of Succession Act](#) gives the High Court wide powers to protect the estate of a deceased person, and it may make such orders as are appropriate in the circumstance of the case for the protection of the estate on application or on its own motion in matter it is seized of, and the object is to ensure that the Estate is preserved in the interests of the eventual beneficiaries and dependants of the deceased persons as may be adjudged by the court upon full hearing.
10. The need to protect the estate of a deceased person was highlighted by the [Commission on the Law of Succession Report 1968](#) in justifying the intervention by the sub-chief, police and administration officers at the local level as eventually provided for under section 46 of the [Law of Succession Act](#) which has a marginal note “duties of officers in relation to protection, etc., of deceased's property.” The Commission at paragraph 167 observed:

“ 167. It has been forcibly brought home’ to us that, apart, from any control by courts of the actual administration of estates of deceased persons, there is increasing need to provide for protection of such estates immediately after death against the depredations of unauthorized persons. We have received a considerable amount ‘of evidence that nowadays death is only t60 often regarded as an opportunity for relatives and even strangers to help themselves out of whatever tangible and, movable property the deceased-has left behind ‘him. Also, it has been emphasized, by witnesses that those who may have the responsibility of administering estates according to new law will need early guidance, both as to



the formalities of applying for grants probate or letters of administration and as to the irresponsibilities of administration according to that law."

Application for preservation of Estate

11. In the respectful view of this court, on an application for preservation of an estate, the applicant should satisfy the court of the existence of the following conditions:-

1. An interest in the estate.
2. Risk of wastage of the estate assets before appointment of legal representative.
3. Non-existence of a person appointed by will or order of the court as an executor or administrator of the estate.
4. Urgency of the matter to justify an order before the full or other grant of representation may be made.

These are conditions similar to the requirements under an application for grant of letters of administration *ad colligenda bona*.

12. As regards the applicants' interest, there had not been a determination that the applicant is an heir. But it is sufficient that an applicant seeks to preserve the estate for the interest of herself, her children or other person who claims to be a dependant in the estate. In other words, the applicant who seeks to be appointed an administrator or to be declared to have an interest as a beneficiary or dependant is not barred for presenting the case thereof because she has not been so declared.

13. The objector/applicant herein is, in the respectful view of this court, entitled to pursue an order for preservation of the estate to which she has filed an objection and seeks to inherit as an heir in her capacity as "wife" or for the benefit of any children of the deceased.

Is there a risk of wastage of the Estate?

14. There is no evidence of ownership of the assets set out in this application. Although the assets are part of the list of assets filed by the petitioner in the affidavit in support of the petition, the applicant who seeks specific orders in respect to the deceased's properties has a duty in evidence to prove that the assets are registered in the name of the deceased and also importantly that there is rental income generated by these assets, which she seeks to have deposited in a joint account in the name of herself and the petitioner. In the absence of such evidence the court cannot find that there is risk of the estate assets or income being wasted, and, therefore, the 2nd test for the grant of an order for preservation of an estate is not satisfied. There is similarly no urgency shown if it cannot be shown that there exists such properties with income at the risk of waste.

15. In addition, the court has power to order an account on the handling of estate assets at any time, when satisfied that it is necessary to do so. The court may at the appointment of the administrator make an order for account by the person who hitherto has dealt with the estate to account to the person or persons who are in the end appointed administrators.

16. It is not in dispute that there is no executor or administrator appointed under any will on order of court. In the circumstances of this case, where there is no administrator/executor to the estate, the protection of the estate lies with expeditious disposal of the dispute so that an administrator is appointed and the threat, if any, of wastage of the estate is removed. The court also notes that there has not been filed any application for a limited grant *ad colligenda bona*, or otherwise.



Orders

17. Accordingly, from the reasons set out above, the court makes the following orders:

1. The application by chamber summons dated March 10, 2022 is declined.
2. The matter shall proceed expeditiously to the hearing and determination of the objection proceedings herein on a date to be fixed.

18. There shall be no order as to costs.

Order accordingly

DATED AND DELIVERED THIS 30TH DAY OF JANUARY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Mr. Anyoka Moturi, Advocate for the Applicant.

Mr. Mwirigi B., Advocate for the Respondent.

