



**In re Estate of Daniel Ndemaki Marango (Deceased) (Probate & Administration
E005 of 2021) [2023] KEHC 449 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION E005 OF 2021**

**DK KEMEL, J
JANUARY 26, 2023**

BETWEEN

MOSES WAMALWA MUKHAMARI APPLICANT

AND

JOHN MUNGANI NDEMAKI 1ST PETITIONER

JOAN MASABA NDEMAKI 2ND PETITIONER

AND

WYCLIFFE BIKOKWA NDEMAKI INTERESTED PARTY

RULING

1. The applicant herein filed an application dated October 21, 2022 under section 49 of the *Law of Succession Act* seeking for an order that he be enjoined on the grant of letters of administration intestate issued on September 1, 2022 to the two administrators herein and further that he be listed as a beneficiary/creditor in the estate.
2. The application is supported by the affidavit of the applicant sworn on even date. The applicant's gravamen is that he is a creditor to the estate by virtue of the fact that he had purchased a portion of land measuring 0.1 Ha from one Wycliffe Bikokwa Ndemaki a son of the deceased who is a beneficiary and entitled to a share in parcel number Bokoli/Kituni/133. It is the applicant's case that by virtue of being a creditor on the estate, he should be enjoined on the grant as he waits for confirmation of the grant. It is further his case that his interest should be listed as a liability in the estate of the deceased.
3. The application was opposed. The 2nd petitioner herein swore a replying affidavit dated November 21, 2022, wherein he deposed inter alia; that the applicant is neither a beneficiary nor a dependant of the estate of the deceased; that the purported sale agreement with the alleged interested party was made on 6.11.2021 during the pendency of these procedures and that no leave or permission or consent was



obtained from the court; that the citation lodged in Webuye court against the alleged interested party was dismissed on August 17, 2022; that the applicant is an intermeddler by dint of section 45 (1) of the *Law of Succession Act*.

4. The application was canvassed orally.
5. The applicant submitted that he had bought land from one of the beneficiaries by the name Wycliffe Bikokwa Ndemaki on November 6, 2021 which agreement was witnessed by the 1st petitioner. He submitted that he wants to be enjoined as administrator so as to take care of his interest. He added that a restriction was entered in the register in 2012 by one of the purchasers and that the beneficiaries have sold to over one hundred buyers despite the existence of the said restriction. He was of the view that the restriction will make it difficult for the petitioners to give him his portion and hence the present application.
6. Mr Murunga for the petitioners submitted that the purported sale transaction by the applicant and a beneficiary took place while these proceedings were ongoing and that there has been no order made by the court enjoining one Wycliffe Bikokwa Ndemaki who had no capacity to sell land to the applicant herein as the same is still registered in the name of the deceased and is subject to these proceedings. It was submitted that section 45(1)(2) of the *Law of Succession Act* forbids any intermeddling with the property of a deceased person and that it is a criminal offence to intermeddle with property of a deceased person. Reliance was also placed on section 29 of the *Law of Succession Act* which classifies the category of beneficiaries and those vested with power to obtain letters of grant. It was submitted that the applicant does not fall in that category. It was finally submitted that the applicant who is an intermeddler has no right to claim the property of the deceased. Learned counsel sought for the dismissal of the application with costs.
7. I have given due consideration to the application, rival affidavits and the oral submissions. The issue for determination is whether the applicant is a beneficiary of the estate of the deceased.
8. To start with, the duty of a probate court is to distribute the properties of a deceased person to his dependants. Once a person dies without writing a will (intestate), his properties must be distributed by a probate court to his or her progeny. The court has to scrutinize and identify the rightful dependants who are to inherit or share in the wealth of the deceased. It is appropriate to have a look at the relevant provisions of the *Law of Succession Act* which touch on the Applicant's application.

Section 29 for the purpose of this part, "dependent" means

- (a) the wife or wives or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents grand- children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Section 66 when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference.

- (a) Surviving spouse or spouses with or without association of other beneficiaries;



- (b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interest as provided by part v;
- (c) The public trustee; and
- (d) Creditors.

Provided that, when there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Section 45 (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 property of a deceased person.

- (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 right executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the course of administration.

9. Being guided by the above provisions, it is quite clear that the applicant herein who had purported to enter into an agreement of sale of land belonging to the deceased from one of the sons of the deceased is not a dependant of the deceased in any way. Indeed, the applicant confirmed that he had earlier cited the said seller (beneficiary) in Webuye law courts which citation was subsequently dismissed. The applicant is just a purchaser of land from one of the beneficiaries of the estate of the deceased and hence he has to wait for the confirmation of the grant to take place before he can then pursue for his interest against the concerned beneficiary. The applicant's interest does not rank in priority over those of the children of the deceased and hence he has to wait for the confirmation to be concluded and thereafter pursue the seller.
10. On the question whether the applicant is a creditor to the estate and entitled to apply for grant of letters of administration or be made one of the administrators, it has emerged that he had allegedly bought land from one of the beneficiaries and not the deceased himself. Had he bought from the deceased, then he would have been a creditor under section 66 of the *Law of Succession Act* and that his interest would have been taken as a liability on the estate of the deceased. As the applicant is not a creditor contemplated in section 66 of the Act, his quest to be made one of the administrators lacks any basis and is thus unmerited and must be rejected. Similarly, the applicant's pleadings purporting to refer to the beneficiary who sold land to him as an interested party are flawed since there have been no proceedings sanctioning the said Wycliffe Bikokwa Ndemaki as an interested party. Hence, the applicant has baptized the seller as an interested party without the requisite leave of the court.
11. On the question whether the applicant is an intermeddler in the estate of the deceased, the provisions of section 45(1) and (2) of the *Law of Succession Act* are couched in mandatory terms. Any interference with the property of a deceased person before the grant is confirmed is deemed as intermeddling. It is not in dispute that the grant issued to the petitioners herein is yet to be confirmed. The grant was made on August 30, 2022 and issued on September 15, 2022 to the petitioners. The sale agreement between the applicant and one of the beneficiaries is dated November 6, 2021 which is way back even before the grant was even issued. As long as the grant has not been confirmed, any dealing with the deceased's parcel of land namely Bokoli/Kituni/133 amounted to intermeddling with the said property



which is forbidden by section 45 (1)(2) of the Act. The term intermeddling refers to any 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. In the present circumstances, the applicant entered into a sale transaction with one of the beneficiaries yet the grant had not been confirmed so as to give the seller the requisite capacity to enter into the deal with the Applicant. Further, the matter was and is still pending determination and that no authority was obtained from the probate court. It is trite that the property of a deceased person vest in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have the authority to deal with the estate of the deceased in accordance with the grant or authority of the written law or order of the court and hence any act done contrary to the said guideline amounts to intermeddling. Hence, the transaction entered between the applicant and one Wycliffe Bikokwa Ndemaki was in contravention of the Law of Succession Act and is invalid , null and void. These state of affairs were succinctly put by Musyoka J in Veronica Njoki Wakagoto (Deceased)[2013]eklr when he held thus;

“The effect of section 45 of the Law of Succession Act 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.”

12. As has been noted above, that the applicant is neither a beneficiary nor a creditor to the estate of the deceased and hence his move to be made a beneficiary cum administrator or a creditor of the estate has come a cropper. Again, the applicant having been found to be an intermeddler, his hands are soiled and that he has come to a court of equity with unclean hands. He is not deserving of the orders sought.
13. In the result, it is my finding that the applicant’s application dated October 21, 2022 lacks merit. The same is dismissed with costs to the petitioners.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JANUARY, 2023

D. KEMEI

JUDGE

In the presence of:

Moses Wamalwa Mukhamari for Applicant

Masengeli for Murunga for petitioners

Kizito Court Assistant

