



**In re Estate of Michael Tendwa Said (Deceased) (Probate & Administration  
5 of 2013) [2023] KEHC 318 (KLR) (23 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
PROBATE & ADMINISTRATION 5 OF 2013**

**KW KIARIE, J**

**JANUARY 23, 2023**

**N THE MATTER OF THE ESTATE OF:**

**MICHAEL TENDWA SAID ..... DECEASED**

**BETWEEN**

**YUDA KENGERWA TENDWA ..... 1<sup>ST</sup> ADMINISTRATOR**

**PATRICK MICHAEL SAID ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**ROSE EVERLINE TENDWA ..... APPLICANT**

**RULING**

1. Rose Everline Tendwa the applicant herein, moved the court by way of notice of motion dated July 28, 2022 under order 42 rule 6 and order 51 rule 1 of the [Civil Procedure Rules](#). The applicant is seeking the following orders:
  - a) The honourable court be pleased to certify this application as urgent.[Spent]
  - b) That the honourable court be pleased to issue an interim order of stay of execution of the order of this court issued on the July 13, 2022 pending the hearing and determination of this application.
  - c) The honourable court be pleased to issue an interim order of injunction to restraint the respondents from trespassing onto, alienating by sale or in any way dealing with Land Parcel No xxxx in a manner adverse to my use and occupation thereof pending the hearing and determination of this application.
  - d) The honorable court be pleased to order of stay of execution of the order of this court issued on the July 13, 2022 pending the hearing and determination of the appeal.



- e) The honourable court be pleased to issue an interim order of injunction to restrain the respondents from trespassing onto, alienating by sale or in any way dealing with Land Parcel No xxxx in a manner adverse to my use and occupation thereof pending the hearing and determination of the appeal.
  - f) The costs of this application be costs in this cause.
2. The application is premised on the following grounds:
- a) That the applicant is currently residing on and operating small business on Land Parcel number xxxx where she gets her livelihood for her support and that of her grandchild.
  - b) The respondents have on diverse dated prior to this application trespassed onto her place of work and entered into her house threatening to dispossess her or forcibly evict her therefrom.
  - c) The application has been made expeditiously without undue delay and in the earliest opportunity.
  - d) No prejudice shall be occasioned to the parties if the application is allowed.
3. The application was opposed on the following grounds:
- a) The instant notice of motion application is pre-mature, mischievous, misconceived and otherwise bad in law.
  - b) The notice application lodged in court on the July 27, 2022 upon which the instant application is grounded on, was lodged without leave of the honorable court hence same is defective thus rendering the instant application otiose.
  - c) The honorable court has no jurisdiction to issue an order of injunction pursuant to rule 63 of the *Probate and administration Rules*.
  - d) The applicant herein has not shown and or established sufficient cause and or basis, to warrant the orders of stay of execution sought, whatsoever and/or howsoever.
  - e) At any rate, the notice of appeal on record, is pre-mature and otherwise invalid.
  - f) Besides, the instant application does not capture and/or satisfy the requisite conditions under the provisions of order 42 rule 6 of the *Civil Procedure Rules, 2010*.
  - g) The applicant has not shown and or established any evidence of substantial loss, whatsoever and/or howsoever, to warrant granting the orders of stay of execution.
  - h) On the other hand, the instant application is based and or pegged on apprehension with regards to the applicant's safety which has not established that the petitioners respondents herein threatened and/or harmed the applicant. Besides, same have not been arrested and/or charged in a court of law in regards to the said allegations.
  - i) The applicant has continued to derive rent income from LR number xxxx to the detriment of other beneficiaries of the estate of the deceased thus the orders sought will aid in the furtherance of the applicant's intention to intermeddle in the estate of the deceased.
  - j) The instant application constitutes and/or amounts to an abuse of the due process of court.
  - k) In the circumstances, the instant application is otherwise devoid of merits, whatsoever.



4. Rule 63 of the *Probate and Administration Rules* provides:

"(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (cap 21, Sub Leg), together with the High Court (Practice and Procedure) Rules (cap 8, Sub Leg), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules."

5. In the case of *Priscilla Vugutsa Kamaliki vs Mary Runyanyi Ochieng* [2016] eKLR Judge Nekoye Sitati said the following:

"The first issue for this court to determine is whether the instant application is properly before the court. The application is expressed to be brought under section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, order 40 rule 4 and order 51 rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out."

6. In the instant case, order 42 and order 51, under which the present application is brought, have not been imported into the *Law of Succession Act*. This therefore means that the application cannot stand. I accordingly strike it out with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 23<sup>RD</sup> DAY OF JANUARY, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

