



**In re Estate of Francis M’Murithi (Deceased) (Succession Cause  
102 of 1998) [2023] KEHC 2553 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 102 OF 1998  
EM MURIITHI, J  
MARCH 28, 2023**

**IN THE MATTER OF THE ESTATE OF FRANCIS M’MURITHI ALIAS FRANCIS  
MURITHI ALIAS FRANCIS M’MURITHI M’ITIRITHIA ALIAS MURITHI ITIRITHIA  
ALIAS FRANCIS MURITHI M’ITIRITHIA (DECEASED)**

**BETWEEN**

**KENNETH KIMATHI ..... 1<sup>ST</sup> APPLICANT  
CATHERINE MURIITHI ..... 2<sup>ND</sup> APPLICANT  
MARTHA NTAARA MURIITHI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**NAFTALLY MWITI M’IRUKI ..... RESPONDENT**

**RULING**

1. By notice of motion dated January 17, 2022 pursuant to sections 45 and 47 of the *Law of Succession Act*, sections 1A, 1B and 3A of the *Civil Procedure Act*, order 1 rule 10 (2), 4 and 15(1)(c) and order 51 rule 1 of the *Civil Procedure Rules* and any other enabling provisions of the law, the applicants seeks that:
  - 1) This honorable court be pleased to issue orders of permanent injunction to restrain the respondents by himself, his agents, servants, employees or anybody else whatsoever acting under his directives, name or instructions from intermeddling with Plot Number Meru Municipality Block 11/4XX belonging to the estate of the deceased herein.
  - 2) This honorable court be pleased to issue orders of eviction against the respondent by himself, his agents, servants, employees or anybody else whatsoever acting under his directives, name or instructions from plot number



Meru Municipality Block 11/4XX belonging to the estate of the deceased herein.

- 3) This honorable court be pleased to issue any further or better orders as it may deem fit and just to meet the ends of justice.
  - 4) Costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Martha Ntaara Muriithi, one of the applicants herein, sworn on even date. She accuses the respondent of occupying plot number Meru Municipality Block 11/4XX (henceforth called the suit land) under unclear circumstances, even after being served with a notice to vacate the suit land so that it can be distributed to the beneficiaries. The respondent's response to the notice to vacate was that he has a binding lease/tenancy agreement with their brother Luka Kiumbe, who has since passed on. She has been advised that since Luka Kiumbe was not an administrator of the deceased estate, he could not validly enter into any lease/tenancy agreement with the property of the deceased. The agreement between the respondent and Luka Kiumbe is not binding to the estate of the deceased since the said Luka Kiumbe entered into the same without any legal authority to do so. It is in the interest of justice that the application is allowed, because the respondent has refused, neglected or failed to vacate the suit land, even after being given enough time to do so.
3. The respondent opposed the application vide his replying affidavit filed on 29/3/2022. He avers that he is a tenant having leased the suit land for business from Luke Kiumbe in 2018. The terms of the lease were well stipulated that the tenancy period was to end on 5/12/2023 having paid the total amount for the 5 years' lease term. He uses the property for business purposes having leased it for garage business as stipulated under paragraph 7 of the lease agreement. After the death of Luke Kiumbe, his wife and children continued to receive rent through their respective Mpesa numbers. On 7/1/2020, he sent Ksh 150,000 to Martha Ntaara Murithi in exchange for an extension of the lease agreement for the suit land. He avers that the applicants have always been aware that he is a tenant and the lease period was extended through a mutual agreement with the applicants by 50 months from December 2023 and the rent fully paid. He took the 3<sup>rd</sup> applicant to the business rent tribunal and an order was issued prohibiting the applicants from interfering with his peaceful use and occupation on the suit land, pending the determination of that case. He accuses the applicants of coming to court with unclean hands, because instead of defending the issue of controlled tenancy and after taking his Ksh 350,000, they filled this application. According to him, the application is sub judice because it is being dealt with by another court with competent jurisdiction. He avers that the estate of Luke Murithi is aware of the existence of the lease, and he urges the court not to evict him before the expiry of the lease.

### Submissions

4. The applicants urge that the law on intermeddling with the deceased estate is clearly set out under section 45 of the *Law of Succession Act*, and cite *Mwari Thurania v Purity Nkirote Thurania* [2017] eKLR, *Gitau & 2 Others v Wandai & 5 Others* [1989] KLR 23, *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR and *re Estate of M'Ngarithi M'Miriti* [2017] eKLR. They urge that the said Luke Kiumbe did not have authority to lease the suit land, as he was not an administrator of the estate, and the respondent cannot be said to be a proper tenant.
5. The respondent urges that the applicants have always been aware that he is a tenant and the lease period was extended through mutual agreement with them by 50 months from December 2023 and the rent fully paid. He urges that he filed tribunal case no e016 of 2021 and obtained temporary orders stopping the applicants from evicting him pending the hearing of that case. He urges that the



application offends the doctrine of sub judice, as there pends a similar case before the rent tribunal, and cites the Supreme Court case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)*[2020]eKLR. He urges that the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as abuse of the court process. He urges that the application presents a sad scenario of not having parallel proceedings on the same issues involving the same parties but also a great risk of coordinate courts granting conflicting orders.

### **Analysis and determination**

6. The twin issues for determination are (a) whether the application is sub judice and (b) whether the lease agreement is valid.
7. The rule against sub judice is provided for under section 6 of the *Civil Procedure Act* as follows:
  - “6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
8. The respondent contends that the application is sub judice because there pends for determination a similar application before the Business Rent Tribunal, case No E016/2021 where interim orders staying his eviction from the suit land have already been issued.
9. The court laments in the words of the court (John M.Matavo J as he then was) in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR that:-
  - “This suit presents a sad scenario of not only having parallel proceedings on the same issues involving the same parties but also a great risk of coordinate courts granting conflicting orders. Similarly, this court is being invited to determine substantially similar issues pending before the court. The applicant did not disclose in its pleadings the existence of the earlier suit.”
10. This court finds that the application must fail because it is sub judice.
11. Whereas the respondent contends that he is in occupation of the suit land by virtue of a lease agreement entered between himself and one Luke Kiumbe (now deceased), the applicants contend that the said lease agreement is void as the said Luke Kiumbe had no authority to deal with the suit land because he was not a legal representative.
12. Section 45 of the *Law of Succession Act* provides that:
  - “(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 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 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.”

13. This court notes the observations made by the court (Gikonyo J.) in *Mwari Thurania v Purity Nkirote Thurania* (2017) eKLR, which has been quoted by the applicants, that:

“It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court....Under section 80 (2) *Law of Succession Act*, cap 160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity.”

14. There is no dispute that Luke Kiumbe was just a son of the deceased and not an administrator thereof. Therefore, his act of purporting to enter into a lease agreement with the respondent is a nullity. The said Luke Kiumbe had no legal authority to contract on behalf of the deceased herein. He had nothing to lease to the respondent, because the suit land did not belong to him.

#### **Orders**

15. Accordingly, for the reasons set out above, this court finds that the application dated 17/1/2022 is without merit and it is dismissed.

16. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED ON THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

**Mr. Muriungi Advocate for the Applicant.**

**Ms. Aketch Advocate for the Respondent.**

