



In re Estate of Joseph King’oo Kyema (Deceased) (Succession Cause E893 of 2021) [2023] KEHC 17458 (KLR) (Family) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 17458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE E893 OF 2021

MA ODERO, J

APRIL 28, 2023

IN THE MATTER OF THE ESTATE OF JOSEPH KING’OO KYEMA (DECEASED)

BETWEEN

PETER KIOKO KING’OO 1ST APPLICANT

CHARLES MUINDE KING’OO 2ND APPLICANT

AND

GEORGE MWASYA KING’OO 1ST RESPONDENT

MARGARET KING’OO THACKURDIN 2ND RESPONDENT

JUDGMENT

1. Before this Court for is the summons for Revocation of Grant dated 3rd June 2021 by which the Applicants Peter Kioko King’oo and Charles Muinde King’oo seeks the following orders:-

- “1. Spent.
2. That this Honourable court revoke the Limited Grant of Letters of Administration *Ad Litem* issued to George Muasya King’oo and Margaret King’oo Thackurdin in respect of the Estate of Joseph King’oo Kyemwa(Deceased) issued on 19th May 2021.
3. That this Honourable court do restrain the Respondents from intermeddling with the estate of the deceased particularly with reference to plot No 442 whose mother title is LR No 209/18288.
4. That this Honourable court do register an inhibition on Plot No 442 (Mother Title 209/18288) .



5. That the costs of this Application be provided for.”
2. The summons was premised upon Section 76 (a), (b) (c) and (d) of the Law of Succession Act, Rules 44 and 73 of the Probate and Administration Rules Cap 160 Laws of Kenya, and was supported by the Affidavit of even date sworn by the 1st Applicant and a Further Affidavit dated 27th April 2022 sworn by the 2nd Applicant, and the Further Affidavit dated 27th April 2022 sworn by Elijah Maweu.
3. The Respondents George Mwasya King’oo And Margaret King’oo Thackurdin opposed the summons, through the Replying Affidavit dated 26th August 2021 sworn by the 1st Respondent the Replying Affidavit dated 26th August 2021 sworn by the 2nd Respondent.

Background

4. This Succession Cause relates to the estate of the late Joseph King’oo Kyemwa (hereinafter ‘the Deceased’) who died on 4th April 2021 at the Karen Hospital in Nairobi.
5. Vide a letter 7th May 2021 written by the Chief of Dandora ‘A’ Location the Deceased was said to be survived by the following persons:-
 - (1) Margaret King’oo Thackurdin - Daughter
 - (2) Peter Kioko King’oo - Son
 - (3) Charles Muinde King’oo - Son
 - (4) Rose Wanza King’oo - Daughter
 - (5) Marion King’oo - Daughter
6. The estate of the Deceased comprised the following assets:-
 - a) Plot No 165 measuring 52 ft by 27 ft situated in Dandora Phase 1 – Canaan – Nairobi.
 - b) Plot No 203 measuring 30 ft by 47 ft situated in Dandora Phase 1 – Canaan – Nairobi.
 - c) Plot No 53 situated in Matuu - Machakos measuring 20 ft by 100ft.
 - d) Land Parcel No Mbinuni/Katitu/1098 situated in Mwala -Katititu Section situated in Machakos County measuring 2.5 acres.
 - e) Parcel of land known as Matuu/Nggararia situated in Matuu-Machakos County measuring 5 acres.
 - f) Plot No 442 in Danadora from Dandora Jua Kali Association.
 - g) Plot No 519 situated in Dandora from Dandora Jua Kali Association.
 - h) Motor Vehicle Reg. No KBB 162 W – Toyota Corolla.

Liabilities

 - a. Loan from Faulu Bank Ltd estimated to be Kshs 1,160,000/=.
 - b. Loan of Kshs 1,190,000/= being amount borrowed from Monicah Wanjau Muthama and Peter Kariuki Rufis for settlement of medical bills at Karen Hospital.
 - c. Legal fees of Kshs 40,000/= for drafting and commissioning of borrowing agreements of Kshs 1,900,000/= on behalf of the estate.



7. Following the demise of the Deceased the Respondents filed in the High Court a Petition dated 10th March 2021 seeking letters of Administration Ad Colligenda Bona to enable them collect and preserve the estate of the Deceased so as to protect the estate from illegal alienation waste and loss. On 19th May 2021 a Limited Grant *Ad Litem* was issued to the Respondents.
8. Thereafter the Respondents on 25th May 2021 filed a Petition seeking Grant of letters of Administration in respect of the Estate of the Deceased. A Grant dated 29th September 2021 was issued to the Applicants. That Grant is yet to be confirmed.
9. The Applicants who are the brothers of the Respondents (and sons of the Deceased) then filed this summons seeking revocation of the Grant *Ad Litem* issued to the Respondents on grounds that the same was obtained fraudulently and without full disclosure to the court.
10. The Applicants complain that the Respondents failed to include them in the Petition yet they are the sons of the Deceased and beneficiaries to the estate. The Applicants further allege that the Respondents intermeddled in the estate and illegally entered into an Agreement to sell plot No 442 belonging to the estate of the Deceased.
11. The summons was canvassed by way of *vive voce* evidence. The Applicants called three (3) witnesses in support of their case whilst the Respondents called two (2) witnesses.

The Evidence

12. The Applicants Peter Kioko King'oo and Charles Muinde King'oo both testified on their own behalf. They stated that they are both the biological sons of the Deceased and thus beneficiaries to his estate. The Applicants confirmed that the Respondents were their siblings and were also the children of the Deceased.
13. The Applicants complain that they were not consulted and were in fact excluded by the Respondents when filing the Petition for Grant *Ad Litem*. They further claim that the Respondents proceeded to sell Plot No 442 an asset belonging to the estate illegally without the authority of the court and without consulting the Applicants. That the proceeds of sale for that property have not been accounted for.
14. The Applicant further contend that Plot No 235 Dandora which forms part of the estate the Deceased has been omitted from the list of Assets presented to court by the Respondents. That the Respondents also failed to include a cow left behind by the Deceased.
15. The Applicants accuse the Respondents of intermeddling in the estate of the Deceased by collecting and utilizing the rental income from Plot No 235 and by selling off a cow belonging to the estate for a sum of Kshs 22,000.
16. The Applicants admit that the Deceased left arrears on a loan at Faulu Bank but claim that the Bank waived the arrears. They state that the Deceased was a member of the Dandora Jua Kali Association. The 1st Applicant admits that he is currently in possession of Plot 203 Dandora which he claims the Deceased allowed him to develop. That he has been collecting rental income from three (3) rooms since June 2020 which rent is utilized to maintain the plot and for payment of utilities like water and electricity.
17. The Applicants state it is the two of them who lived with and cared for the Deceased during his long illness. That the Respondents who both reside in the United States of America are not the best placed persons to administer the estate of the Deceased whose assets are in Kenya. They categorically deny



- the allegations by the Respondents that the Deceased left a valid Will. The Applicants claim that the Respondents have been hostile towards them and have abused and threatened them.
18. In conclusion the Applicants pray that the Grant *Ad Litem* issued to the Respondents be revoked and that they be included in the Administration of the estate.
 19. PW3 Geoffrey Maxwell Muinde told the court that he was Pastor who has known the Deceased and his family for several years. PW3 stated that he was infact an in-law to the deceased as the Deceased was married to his sister.
 20. PW3 told the court that the Deceased did not leave a written Will. He states that he is aware of the dispute between the children of the Deceased over the estate and asks the court to distribute the estate to all the children of the Deceased.
 21. The 1st Respondent George Mwasya King'oo and the 2nd Respondent Margaret King'oo Thackurdin both testified before the court. They confirmed that they are both the biological children of the Deceased and further confirmed that the Applicants who are both their brothers were also children of the Deceased.
 22. The Respondents confirm that following the demise of the Deceased they Petitioned for and obtained letters of Administration *Ad Colligenda Bona* in respect of the estate of the Deceased which Grant was issued in their names on 19th May 2021.
 23. The Applicants admit that using the Grant issued to them they did sell the Plot 442. The Respondent deny that the loan left behind by the Deceased was waived by Faulu Bank. They state that out of the proceeds of sale of the said plot Kshs 800,000/= was used to clear an outstanding loan which the Deceased had with Faulu Bank whilst Kshs 1,934,217.06 was utilized to pay an outstanding medical bill left by the Deceased at the Karen Hospital in Nairobi. That the remaining money was used to pay Advocates fees and the balance of was placed in an account held at Equity Bank.
 24. The Respondent accuse the Applicants of intermeddling with the estate of the Deceased by cleaning out the Deceased's bank account and of collecting and utilizing rental income derived from the properties belonging to the estate.
 25. The 1st Respondent George Mwasya King'oo insists that Plot 235 Dandora belongs to him and does not form part of the Estate. He states that the said property was sold to him by the Deceased over ten (10) years ago. That he has been the one collecting the rental income from Plot 235 even when the Deceased was still alive. He states that his wife and children who reside in Kenya currently occupy the property.
 26. The 2nd Respondent Margaret King'oo Thackurdin asserts that the Deceased left a Will written in 2004 and prays that said will be given effect by the court. She states that the Applicants were deliberately left out of the Will because they are irresponsible and are not capable of managing anything.
 27. The 2nd Respondent states that she is not interested in any of the properties left behind by the Deceased.
 28. Finally the Applicants deny having intermeddled with the estate of the Deceased. They urge the court to dismiss in its entirety this summons for revocation of Grant.
 29. Upon conclusion of oral evidence the parties were invited to file and exchange their written submissions. The Applicants filed the written submissions dated 13th December 2022 whilst the Respondents relied upon their written submissions dated 23rd January 2023.



Analysis and Determination

30. I have carefully considered this summons for revocation of Grant, the Replies filed thereto the evidence adduced in court as well as the written submissions filed by the parties. The following are the issues for determination.
- (i) Whether the Deceased left a valid Written Will;
 - (ii) Whether Plot No 235 Dandora forms part of the estate of the Deceased.
 - (iii) Whether the sale of Plot No 442 was valid;
 - (iv) Whether the Grant Ad Collegenda issued to the Respondents ought to be revoked.

(i) Validity of the Written Will

31. It is common ground that the Deceased herein passed away on 4th April 2021. It is also not in dispute that the Applicants and the Respondents are all biological children of the Deceased and are therefore beneficiaries to his estate.
32. The Applicants assert that the Deceased died intestate thus his estate ought to be distributed according to the laws of Intestacy. The Respondents on the other hand allege that the Deceased died testate having left behind an undated written Will. A copy of the alleged Will appears as Annexure GMK “4” to the Respondent supporting Affidavit dated 10th May 2021.
33. The Respondents therefore insist that the estate of the Deceased ought to be distributed in accordance with his will. The Applicants object to the Will as they allege that the same does not make adequate provision for themselves.
34. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:-

“Burden of Proof

1. Whoever desires any court to give judgement as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”

35. Section 11 of the *Law of Succession Act* Cap 160 Laws of Kenya provides as follows:-

“No written will shall be valid unless:-

- a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
- b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;
- c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or



have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form to attestation shall be necessary.”

36. I have carefully perused the alleged Will said to have been left by the Deceased. Firstly the Respondents claim that the Will left behind by the Deceased was a handwritten document. The document produced in court (Annexure GMK “4”) is a typed document. It is not handwritten. Therefore the document exhibited in court cannot be the same document left behind by the Deceased. Secondly the document is not dated. The only date appearing on the document is 30th January 2020 the date when the same was signed (witnessed) on behalf of Musungu and Company Advocates.
37. Thirdly the Will was not witnessed by two (2) witnesses as required by Section 11 (a) of the Act. It is not clear whether the person who signed for Musungu and Company Advocates was a witness as the person’s full names are not indicated in the space for witnesses. In any event the law requires that a Will be witnessed by not less than two (2) persons.
38. I find that the document purported to be the Will of the Deceased does not comply with Section 11 of the *Law of Succession Act*. I therefore find that this document is not valid and cannot be said to be the last Will of the Deceased.
39. The fact that the Applicants Petitioned for Grant of Letters of Administration Intestate amounts to a tacit admission by themselves that the Deceased died intestate thereby confirming the findings of this court. In the circumstances I find that the Deceased died intestate.
40. I note that the Applicants herein did later file a Petition for Grant of letters of Administration Intestate on 25th May 2021. They were duly issued with the Grant on 29th September 2021 which Grant is yet to be confirmed.

(ii) Whether the sale of Plot No 442 was valid?

41. . The Applicants claim that following the issuance of the Grant *Ad Litem* to themselves the Respondents proceeded to dispose of estate property. Particularly that the Respondent sold off Plot No 442 Dandora and have not accounted for the proceeds of sale.
42. The Respondents in their evidence readily concede that they did sell Plot 442 which was listed as one of the assets belonging to the Deceased. Annexed to the supporting Affidavit dated 3rd June 2021 is a copy of a Sale Agreement dated 26th May 2021 (Annexure PKK “1”). In his evidence the 1st Respondent states:-

“I do confirm that Plot No 442 belonging to the Deceased was sold for Kshs 4.0 Million...”

The 2nd Respondent similarly admits under in her evidence that:-

“ We sold Plot 442 and we have fully accounted for the sale proceeds.”

43. In conceding to having sold off this plot the Respondent argue that the proceeds of sale were properly utilized for purposes of paying off the medical Bill of the Deceased, paying off an outstanding loan which the Deceased had with Faulu Bank and to cater for funeral and other Miscellaneous costs.



44. The issue here is not whether the proceeds of sale were properly utilized. The key question is whether the Respondents in the first place had the legal authority to dispose of estate assets in the manner in which they did.
45. Section 54 of The [Law of Succession Act](#) lists the purposes for which a court may issue a Limited Grant as follows:-
- “ 54 A court may according to the circumstances of each case limit a grant of representation which it has jurisdiction to make, in any of the forms prescribed in the Fifth Schedule.”
46. Limited Grants *Ad Litem* fall under paragraph 14 of the Fifth Schedule of the [Law of Succession Act](#) which paragraph is specific that the grant of administration *Ad Litem* is limited to filing suit. Paragraph 14 states that:-
- “When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”
47. Therefore it is clear that a Grant *Ad Litem* is issued only for a specific, limited and finite purpose. Once the purpose for which such Grant is issued is achieved then the Grant is exhausted and becomes obsolete. More pertinently a Grant *Ad Litem* cannot be used to distribute the estate of the Deceased.
48. It is trite law that only a holder of “Confirmed Grant” may dispose of estate assets by way of sale, transfer or otherwise. At the time Plot No 442 was being sold in May 2021 the Respondents only held a Grant *Ad Colligenda Bona* which had been issued to them on 19th May 2021. They did not hold (and still do not hold) a confirmed Grant in respect of the estate.
49. I have carefully perused the Grant *Ad Colligenda Bona* which was issued to the Respondents on 19th May 2021. The limited Grant obtained by the Respondents was issued solely for the purposes collecting and preserving the estate of the Deceased. That Grant was limited in scope. The Respondents did not obtain a full grant until 29th September 2021. In the circumstances I find that the Respondent had no legal authority to sell off the assets belonging to the estate of the Deceased.
50. The Sale Agreement indicated that the Respondents were selling the property as ‘Administrators *Ad Litem*’ of the estate. This is illegal as the holder of a limited Grant has no legal authority to sell assets. I note that the sale Agreement was drawn and witnessed by an Advocate. Why did the Advocate not first confirm if the Respondents had obtained a confirmed Grant giving them legal authority to dispose Deceased’s assets. Any lawyer worth his salt would have warned the Respondents against proceeding with such a blatantly illegal act.
51. It may well have been that there was a genuine need to sell the plot in order to cater for the various bills and costs accrued by the Deceased prior to his death. However the proper procedure would have been for the Respondents to approach the court to seek authority to dispose of the same. The Applicants also were required to obtain the consent of all the beneficiaries before disposing of an asset belonging to the estate. They failed to act in accordance with the law.



52. In selling of estate property as they did, without the authority of law and without first obtaining consent from the other beneficiaries or from the court the Respondents are clearly guilty of intermeddling in the estate of the Deceased.
53. The law regarding intermeddling with the estate of a deceased person is codified in the [Law of Succession Act](#). Section 45 of the said Act provides as follows:-
- (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 persons 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.
54. According to Musyoka, J in [Veronica Njoki Wakagoto \(Deceased\)](#) [2013] eKLR:
- “The effect of [section 45]... 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 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.” [own emphasis]
55. [In re Estate of M’Ngarithi M’Miriti](#) [2017] eKLR it was held that:
- “Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or 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. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating of, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the [Law of Succession Act](#). I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the [Law of Succession Act](#). That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.” [own emphasis]
56. The Respondents testified that they disposed off disposed of Plot No 442 and used the proceeds to settle debts due to the estate. The fact that they had been granted letters of Administration *Ad Litem* did not in any way give the Applicants the right to dispose the deceased’s property before a confirmed



Grant Administration intestate was issued to them. There was no written consent from the other beneficiaries for the sale of this property nor was any authority obtained from the court, to sell the said property.

57. I therefore find and hold that the Respondents action in selling Plot No 442 to a third party was illegal and makes them guilty of intermeddling with the estate. That illegal sale cannot be sanctioned by law. I direct that the sale Plot No 442 by the Respondents to Rechel Wambui Maina be cancelled. If any transfer has occurred I direct said transfer to be cancelled and the ownership said Plot No 442 (Mother Title 209/18288) revert back into the name of the Deceased.
58. Given that this Plot No 442 was sold by the Respondents without legal authority I am satisfied that sufficient basis has been laid for an order of inhibition to issue against the Title to said property has been established. I therefore grant prayer (4) of this application.

(iii) Plot No 235 - Dandora

59. The Applicants claims that the Respondents omitted in the list of Assets Plot No 235 Dandora which this asset belonged to the Deceased and therefore forms part of his estate. They allege that the 1st Respondent is intermeddling with this property in allowing his wife to live thereon and collect rental income from the units on that plot.
60. The 1st Respondent denies that Plot No 235 forms part of the estate of the Deceased. The 1st Respondent asserts that the Deceased sold Plot No 235 to him during his life time and that the same is registered in his name. Though he asserts that Plot 442 is registered in his name the 1st Respondent did not produce to the court any Title Document or Plot card to show that the said plot was in fact transferred to him by the Deceased as he alleged.
61. It is pertinent to note that in the Petition for Grant of Letters of Ad Colligenda Bona the Applicant lists Plot 235 is listed as one of the assets left behind by the Deceased.
62. The Applicants on their part insist that the Plot 235 still belongs to the Deceased and therefore forms part of the estate. They rely on the Agency Agreement signed with Kenya Shelter Agencies Ltd. (Annexure 'CMK 7') to the Affidavit dated 2nd June 2021. In that Agency Agreement Plot 235 is listed as one of the properties to be managed.
63. An Agency Agreement does not amount to proof of 'ownership' of a property. Neither the Applicants nor the 1st Respondent have produced ownership documents relating to Plot 235. All in all I find that the true status of Plot 235 is not clear. This court cannot on the basis of the evidence before it determine whether or not the said Plot 235 forms part of the estate of the Deceased. I therefore will not make any declaration in respect of this Plot 235.
64. This court however notes that the Applicants are not the innocent bystanders that they wish to portray. They too are guilty of intermeddling with the estate. The Applicants admit that they have been farming on and leasing out the Deceased's land in the rural home in Machakos County. Under cross-examination the 1st Applicant admits that he has been collecting rental income from Plot No 203 which is listed as an asset belonging to the estate. The Applicant further admit that they have been receiving and utilizing the rental income from Plot No 165. The 1st Applicant concedes that he does not have any authority from the court to collect the rental income. The Applicants plead that due to the harsh economic times they have not deposited any of the rental income into the estate account. In collecting and utilizing this rental income without the consent of the other beneficiaries the Applicants are equally guilty of intermeddling with the estate of the Deceased.



65. What's good for the goose is good for the gander. The Applicants cannot accuse the Respondents of intermeddling when they too are actively intermeddling with the estate. It appears that as soon as the Deceased died division emerged between his children and the various factions descended on the estate utilizing the assets at will. I note that the court has not heard the views of the other two daughters of the Deceased Rose Wanza King'oo and Marion King'oo.
66. In view of the fact that the Applicants have now obtained Grant of letters of Administration, the Grant *Ad Litem* issued to them has become obsolete and the prayer seeking its revocation has therefore been overtaken by events.
67. Nevertheless this court has a duty to protect the estate of the Deceased from further intermeddling and plunder by the either parties. In the circumstances I find that both parties ought to be restrained from any further dealings with the estate pending confirmation of the Grant. In the premises this court issues the following orders:-
- (i) The sale of Plot No 442 by the Respondents is declared to be illegal and therefore a nullity.
 - (ii) Any transfer of Land Parcel No 442 be and is hereby cancelled. Title in the said Parcel of land is to revert back to the name of the deceased.
 - (iii) That all the beneficiaries do restrain from intermeddling in the Deceased's properties until further orders of the court.
 - (iv) That a temporary order of inhibition be and is hereby issued inhibiting the registration and deposition, transactions, transfer or any entries whatsoever against land parcel No Plot No 442 whose mother title is LR No 209/18288 pending confirmation of grant.
 - (v) That each party to bear its own costs of this Application.

DATED IN NAIROBI THIS 28TH DAY OF APRIL, 2023.

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MAUREEN A. ODERO
JUDGE

