



**In re Estate of Wesley Kipsang Koech (Deceased) (Succession Cause E007 of 2022) [2023] KEHC 3501 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3501 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
SUCCESSION CAUSE E007 OF 2022**

**JK SERGON, J**

**APRIL 24, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE WESLEY  
KIPSANG KOECH (DECEASED)**

**BETWEEN**

**RAEL CHEBORE KOECH ..... 1<sup>ST</sup> PETITIONER**

**PATRICK KIPROTICH SANG ..... 2<sup>ND</sup> PETITIONER**

**DENNIS KIPKIRUI SANG ..... 3<sup>RD</sup> PETITIONER**

**CHERONO WINNY ..... 4<sup>TH</sup> PETITIONER**

**AND**

**BENJAMIN MALAKWEN KOECH ..... PROTESTOR**

**RULING**

1. The Application coming for consideration for ruling is the one dated June 22, 2022 seeking the following prayers;
  - (i) Spent.
  - (ii) That the Respondent/Intermeddler herein, be restrained from further intermeddling, wasting, disposing off and/or in any other manner interfering with assets that form part of the deceased's estate hereof.
  - (iii) That the Respondent be ordered to file in Court within Seven (7) Days Bank Statements for a period covering the last one year and an Inventory of Assets (Moveable and Immovable) held in the name of Kericho Guest Enterprises Limited, Assets that are in Joint Names of the Respondent and the Late Wesley



Kipsang Koech, Business Till/Paybill and all the M-Pesa Transactions for the last one year.

- (iv) That in the alternative and without prejudice to prayer (3) herein above, the Court does appoint a duly qualified Auditor and as the case may be an Accountant who will carry out a forensic Audit/Account of the Businesses, Bank Statements, Till, Paybill and M-Pesa Transaction therein with a view to establish the extent of the wastage that the Respondent has visited upon the Estate of the late Wesley Kipsang Koech.
- (v) That the costs of this Application be borne by the Respondent/Intermeddler.

2. It is supported by a Supporting Affidavit sworn by Dennis Kipkirui Sang, the 3<sup>rd</sup> Petitioner/Applicant, he avers that his co-petitioners have given him consent to make and swear the affidavit herein.
3. The 3<sup>rd</sup> Petitioner/Applicant avers that the Respondent herein and his father now deceased were jointly engaged in various business ventures and further that following the demise of his father the Respondent refused to cooperate with the administrators of the subject estate by neglecting and/or renegeing in releasing vital documents that are necessary to collect, prevent wastage, secure and manage the subject estate as required by law. He further avers that the Respondent has entirely frustrated the succession process in respect of the estate of the late Wesley Kipsang Koech.
4. The 3<sup>rd</sup> Petitioner/Applicant avers that the actions of the Respondent were tantamount to intermeddling with the property of the subject estate.
5. Benjamin Malakwen Koech the Respondent herein opposed the application and filed a Replying Affidavit sworn on September 28, 2022.
6. The Respondent avers that the deceased was his brother and business partner with respect to businesses conducted under the company known as Kericho Guest Enterprises, Soda Connect Distributors and Kongonyot Millers.
7. The Respondent avers that the sole business he undertook with the deceased under Kericho Guest Enterprises Limited was distribution of products of Kenya Breweries Limited (KBL), however, the business terminated after KBL terminated the distributorship agreement, which matter was still pending determination in court.
8. The Respondent avers that Kongonyot Millers collapsed sometime before the death of the deceased in September, 2021 with a working capital of Kshs 920,482/= out of which Kshs 582, 595/= was applied to settle the deceased's hospital bill incurred at Siloam Hospital.
9. The Respondent avers that Soda Connect was essentially a distributorship business that ceased on carrying business after the demise of the deceased after accruing losses.
10. The Respondent avers that there are several properties acquired jointly between himself and the deceased and registered in their common names which he sought to have subdivided equally between them.
11. The Respondent avers that the proceeds from the said properties held in common between September 2021 and September 2022 ought to be divided equally between them taking into account the amount of Kshs 997,065/= incurred by the deceased's estate to cover his funeral expenses and other attendant expenses.



12. The Respondent avers that all income accruing from the aforesaid businesses have been credited to Kongonyot Millers Bank account held at DTB Kericho Branch.
13. The Respondent avers that the petitioners' allegations in the circumstances were unjustified and ought to be dismissed.
14. The 3<sup>rd</sup> Petitioner/Applicant in response to the contents of replying affidavit dated September 28, 2022 filed a further affidavit in which he avers that since the demise of their father the Respondent has carried on the joint businesses solely to his benefit which has been detrimental to some dependents of the deceased's estate who were in dire need of school fees and upkeep.
15. The 3<sup>rd</sup> Petitioner/Applicant avers that the Respondent did not assist in offsetting the hospital and funeral expenses.
16. The 3<sup>rd</sup> Petitioner/Applicant avers that the subject motor vehicle KAQ 204 M was an asset for use in running the joint chain of businesses.
17. I have considered the application, supporting affidavit, further affidavit and the replying affidavit in opposition to the application. The parties were directed to file written submissions. The parties complied and filed written submissions, upon consideration of rival submissions I find that the issues for determination in this application are as follows;
  - (i) Whether the Respondent is an intermeddler in the deceased's estate
  - (ii) Whether the Court has jurisdiction to hear and determine the issues pertaining to the properties held in common between the deceased and the Respondent
18. The Petitioners in their submissions reiterated that the Respondent had been in exclusive control and possession of all the properties and/or businesses owned by the deceased to the exclusion of the 1<sup>st</sup> Petitioner/Applicant and her children and continued to do so to their detriment, which actions were tantamount to intermeddling contrary to section 45 for the *Law of Succession*. The Petitioner cited the cases of *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR & *In Re Estate of M'Ngarithi M'Miriti* [2017] eKLR.
19. The Petitioners faulted the Respondent for failing to avail the vital documents, original title deeds, log books, bank accounts and/or banking slips and statements with respect to the operations of the estate's assets.
20. The Petitioners contended that the Respondent had engaged in fraudulent activities with regards to the estate to wit banking of proceeds of the estate since the demise of Wesley Kipsang Koech, withholding and/or failing to render a true and just account of the proceeds of the assets of the estate and selling motor vehicle registration number KAQ 204 M.
21. The Petitioners reiterated that they were apprehensive that if the Respondent was not stopped, they would be disinherited.
22. The Petitioners maintained that they suffered and continued to suffer irreparable loss, wastage and damages in the hands of the Respondents unless he be restrained by an order of the court from further siphoning the properties of the estate of the late Wesley Kipsang Koech.
23. The Respondent in his submissions contended that the businesses in question had collapsed and save for allegations that he had committed acts of intermeddling over the deceased's property, the Petitioners neither particularized such acts nor submitted evidence in support of their allegations.



24. The Respondent asserted that motor vehicle registration KAQ 204 M was his exclusive property as evidenced by a copy of the motor vehicle's logbook annexure marked "BMK7".
25. The Respondent conceded that they were various properties held in common that ought to be divided between him and the deceased and referred to a copy of the schedule detailing the said properties and proof of ownership as annexure marked "BMK8"
26. The Respondent conceded that with respect to income earned they were accumulated proceeds of Kshs 1,418,426/= that ought to be subdivided between him and the estate of the deceased taking into account Kshs 997,061/= applied to settle the deceased's hospital bill.
27. The Respondent contended that the court ought to take cognizance of the fact that he had a bona fide stake in the properties admitted to have been acquired with the deceased, he therefore urged the court not to unduly dispose of his right to use and occupy the said properties under the guise that he was intermeddling. He cited the findings of the court *in Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR in support of his assertions.
28. The Respondent contended that the court sitting as a probate and administration court lacked the jurisdiction to hear and determine issues pertaining to properties held in common with third parties or proceeds of businesses operated by the deceased with third parties.
29. The Respondent reiterated that the court should restrict itself to the free/exclusive property of the deceased. The Respondent cited the findings of the court *In Re Estate of Robert Wachira Paul (Deceased)* [2021] eKLR.
30. The Respondent maintained that immovable property held in common with the deceased, and questions arising from severance of tenancies and other issues arising are the sole preserve of the environment and land court. The Respondent cited the case of *Joseph Kaberia Kumari v Tony Mwendu Muthuara* [2021] eKLR.
31. Grant of Letters of Administration were issued by this Court on May 26, 2022 appointing Rael Chebore Koech, Patrick Kiprotich Sang, Dennis Kipkirui Sang and Cheron Winy as joint administrators of the deceased's estate.
32. Notably, the duties and responsibilities of personal representatives and administrators are fiduciary in nature and they have been laid out in Section 83 of the *Law of Succession Act* as follows;

"Personal representatives shall have the following duties—

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;



- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

33. [\*In Re Estate of Makokha Idris Khasabuli \(Deceased\)\*](#) [2019] eKLR Musyoka J highlighted the duties of administrators as follows; “The primary roles of administrators are several. The first is collection or gathering or getting in of the assets of the estate. The second role is the protection or preservation of the assets collected or gathered or gotten in. The third one is payment of debts and liabilities of the estate from the assets gathered and preserved. Finally, is the distribution of the estate after all the debts and liabilities have been settled. Collection or gathering or getting in of assets may require filing of suits to recover estate property. Payment of debts would include clearing any loans the deceased had with any banks or other persons, and where assets are encumbered by charges and mortgages, by having such encumbrances removed through settlement of debts and liabilities, for such encumbered assets cannot possibly be distributed at confirmation before the encumbrances have been cleared.”
34. I have considered the grounds stated on application, the, the facts deponed in the rivalaffidavit plus the written submissions by the parties and I find that the Respondent herein is not an intermeddler as set out in section 45 of the [\*Law of Succession Act\*](#) The Respondent has conceded that he and the deceased carried on joint businesses and have several properties in common with the deceased. The Respondent has a bona fide stake in the properties admitted to have been acquired with the deceased and therefore the court cannot unduly dispossess him of his right to use and occupy the said properties under the guise that he was intermeddling.
35. I concur with the Respondents that the scope of the probate court is limited to the free and exclusive property of the deceased and therefore lacks the jurisdiction to hear and determine issues pertaining properties held in common with third parties or proceeds of businesses operated by the deceased with third parties. I concur with the sentiments in the court [\*in Re Estate of Alice Mumbua Mutua \(Deceased\)\*](#) [2017] eKLR whereby the court stated as follows;
- “...The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially



interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators (emphasis mine).

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3). Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above."

36. Accordingly, I hereby dismiss the application dated June 22, 2022, and direct each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 24<sup>TH</sup> DAY OF APRIL, 2023.**

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**J.K. SERGON**

**JUDGE**

**In the presence of:**

**C/Assistant - Rutoh**

**Sigira for the Petitioners**

**Miruka for the Respondents**

