



REPUBLIC OF KENYA



In re Estate of the Late Laban Mutua Mulwa (Deceased) (Succession Cause 836 of 2009) [2023] KEHC 18817 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 836 OF 2009**

MW MUIGAI, J

MAY 31, 2023

IN THE MATTER OF THE ESTATE OF THE LATE LABAN MUTUA MULWA (DECEASED)

BETWEEN

**NGONYO LABAN MUTUA 1ST PETITIONER
FREDRICK MWAKA MUTUA 2ND PETITIONER
RICHARD MUTHUI MUTUA 3RD PETITIONER**

AND

**MADGALENE MWENDE MUTUA 1ST OBJECTOR
BENEDICT MBITHI MUTUA 2ND OBJECTOR
WINFRED NDUKU NZAU 3RD OBJECTOR
ANTONY MUNUVE MUTUA 4TH OBJECTOR
ROBERT MUOKI MUTUA 5TH OBJECTOR
MUTUKU MUTETI 6TH OBJECTOR
MONICA NDITI 7TH OBJECTOR
CATHERINE WAVINYA 8TH OBJECTOR
WINFRED MWIKALI 9TH OBJECTOR**

AND

BONIFACE MUTUA MBITHI INTERMEDDLER



RULING

Summons Dated 29.11.2022

1. The Applicant filed an application under section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration rules* seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this succession an order do issue restraining the intermeddler either by himself, his authorized agent, servant, employees and/or any person acting under his authority from further constructing a house on all that parcel of land known as Mavoko Town Block 3/2652.
2. The same is supported by the affidavit of Anthony Munuve Mutua stated the deceased herein was his father and left behind the following beneficiaries;
 - a. Ngonyo Raban - wife
 - b. Richard Muthui Mutua - son
 - c. Nicholas Mutua - son
 - d. Francis Mutie Mutua - son
 - e. Madgalene Mwendu Mutua - daughter
 - f. Benedict Mbithi Mutua - son
 - g. Winfred Nduku Nzau - daughter
 - h. Antony Munuve Mutua - son
 - i. Robert Muoki Mutua - son
 - j. Mutuku Muteti - son
 - k. Monica Nditi - daughter
 - l. Catherine Wavinya - daughter
 - m. Winfred Mwikali - daughter of Fredrick Mwakavi (deceased)
3. He deposed that the Petitioners fraudulently obtained a confirmed grant without involving the other beneficiaries but the same was revoked by Ruling delivered by Hon. Lady Justice Nyamweya (as she then was) on 21.3.2018 and fresh distribution ordered. Status quo was to remain until the Succession Cause is heard and determined but the intermeddler who is not a beneficiary and had been sued at the time the ruling was delivered, has moved into the land parcel Mavoko Town Block 3/2652 (hereinafter referred to as the “suit property”) dug foundation and began construction despite objections from beneficiaries in violation of the said Court orders.
4. The Applicant stated that he and the other objectors had filed their protest as directed by the court and were waiting for a hearing date. It was averred that the intermeddler is in collusion with his father Benedict Mbithi Mutua and the construction is expansionist in nature aimed at grabbing the biggest



chunk of the suit property so that when the time of distribution comes, he claims to be the one in occupation and thus entitled to the same. The intermeddler has blocked the Applicant from accessing some parts of his portion of the land which has brought a lot of strain in the family. The Applicant stated that the dispute was first reported to the Chief and the County Commissioner but reconciliation was not successful because they failed to attend the meeting(s) thus necessitating the application.

Replying Affidavit

5. The intermeddler in opposition of the Application filed an affidavit on 13.12.2022 and stated that the deceased herein was his grandfather and averred that the applicant had no locus standi to file and prosecute the instant summons as he is not an administrator of the estate herein. He deposed that the threshold for grant of a restraining order was not met and urged the court to dismiss the summons with costs. He denied undertaking any construction on the suit property and averred that it was his father who was constructing in his own compound and stated that his claim to the estate was through his father.
6. He swore that he was not in violation of the orders of status quo issued by the Honourable court neither has he intermeddled with the estate of the deceased he contended that the summons were an afterthought intended to delay this Succession Cause, it was not true that the objectors were waiting for a hearing date as their Protest was filed away in 2019 and that distribution of the estate shall not be as per occupation as purported by the Applicant but as per rightful entitlement.

Preliminary Objection

7. The intermeddler filed a Notice of Preliminary objection dated 13.12.2022 on the ground that;
 - a. The applicant lacks locus standi to file and prosecute the summons as he is not an administrator of the estate of the deceased.
8. The Petitioners and the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th and 9th Objectors did not respond to the Application.
9. The Summons and notice of preliminary objection were canvassed together by way of written submissions.

4th Objector/Applicant's Submissions

10. The same was filed on 9.2.2023 in which whilst relying on Section 47 of the Act and section 73 of the *Probate and Administration Rules* it was submitted that the court had jurisdiction in granting protective powers for the purposes of safeguarding the estate of a deceased person. The Applicant submitted that the intermeddler had blocked all the beneficiaries from accessing the said property and this has cause a lot of detriment to them and opined that he had attached evidentiary evidence in the form of photographs that show that the intermeddler is in the process of construction despite his denial.
11. It was submitted that the intermeddler had informed the court that it was his father undertaking the construction and there is a concession that there is development of the subject property by the intermeddler or his family without any lawful authority and before confirmation of the grant.
12. There is a protest filed on 28.2.2019 that is yet to be determined. The Court was urged to grant the orders sought as a permanent building or structure would pose a great risk if the same was to be subdivided equally and render some of the beneficiaries' irreparable loss. Counsel cited the case of



Veronica Njoki Wakagoto (deceased) [2013] eKLR, *Re estate of M'Ngarithi M'Miriti* [2017], *Re Estate of Kitur Chepsungulgei (deceased)* [2021] eKLR.

Intermeddler/ Respondent's Submissions

13. The intermeddler filed submissions on 12.01.2023 and whilst relying on the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* (1969) on the definition of a preliminary objection and the case of *Re estate of Joseph Mutiso Kithome, Panfield investment Limited (New Eldoret total service station Limited) v Sisibo Luxury Shuttle Limited* [2018] eKLR, *Ibrahim v Hassan & Charles Kimenyi Macharia* [2019] eKLR and *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* (2014) eKLR, It was submitted that the Applicant had no locus standi in this matter as he was not an administrator even though he was a beneficiary and the court was urged to dismiss the summons in limine.
14. It was submitted that the elements of grant of an injunction were discussed in the case of *Giella v Cassman Brown* (1973) EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR. On establishment of a prima facie case, it was submitted that no evidence had been tendered to prove that the property in question is in danger of either being wasted, damaged or alienated. Further, that the contents of the Replying Affidavit had not been rebutted and this should be treated as a joinder of issues by the applicant with the intermeddler.
15. As to whether the applicant will suffer irreparable injury that cannot be compensated by an award of damages, it was submitted in the negative for reasons that the ongoing construction is being undertaken by a beneficiary of the estate of the deceased in his own compound while observing the orders of status quo issued by the court, the alleged intermeddling is a bait targeted to settle scores between the applicant and his siblings as there has been no intermeddling. In addition, the Protest pending in court since 2019 does not hold any water as it has not been prosecuted and distribution of the estate will not be based as per occupation but per rightful entitlement.
16. It was also submitted that the balance of convenience tilts in favor of the intermeddler. That the Applicant is guilty of misinterpretation and concealment of material facts and as such is not entitled to the equitable relief sought.

Determination

17. I have considered the summons, the affidavits in support and in opposition of the summons, the preliminary objection, evidence presented, the court record as well the submission of the parties.
18. It is not in contention that the intermeddler is the grandson of the deceased herein and the son of Benedict Mbithi Mutua, a son of the deceased herein. It is also not in contention that there is construction going on or has been going on or was undertaken on the suit property after the Ruling of this court delivered on 21.3.2018. Further, that there is a pending summons dated 25.2.2019 pending hearing and determination before the Court. There then remain two issues for determination;
 - a. Whether the Applicant has locus standi to file the summons herein
 - b. Whether the Applicant is entitled to the orders of injunction sought.



Preliminary Objection

19. The first issue is that of the Preliminary Objection which was defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:
- “a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
20. The question that arises from the preliminary objection is whether only an administrator who can file for relief order or cite for contempt? I find the answer in the case of *In re Estate of Benson Maingi Mulwa (Deceased)* [2021] eKLR where Odunga J (as he then was) stated as follows;
- “In my view since intermeddling can be committed even by administrators, any person interested in the estate of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is property entitled to protect his or her interest in the estate.”
21. To that extent, the Preliminary objection fails and is dismissed. The objector has locus standi to raise the issues he has a beneficial interest with the estate as an interested party/beneficiary.

Injunction:

22. As regards whether the Applicant is entitled to the orders sought, this Court delivered Ruling of 21.3.2018 By Hon P. Nyamweya LJ (as she then was) who ordered as follows;
- a. The grant of letters of administration issued to Ngonyo Laban Mutua , Fredrick Mwakavi Mutua and Richard Muthai Mutua with respect to the estate of Laban Mutua Mulwa be and is hereby revoked, and a fresh grant of letters of administration shall issue to Ngonyo Laban Mutua and Richard Muthai Mutua with respect to the said estate.
 - b. The certificate of confirmation of grant issued herein to Ngonyo Laban Mutua , Fredrick Mwakavi Mutua and Richard Muthai Mutua on 14th October 2010 with respect to the estate of Laban Mutua Mulwa (deceased) be and is hereby revoked.
 - c. The petitioners shall file and serve the objectors with fresh Summons for confirmation of grant within 60 days of the date of this ruling.
 - d. The objectors shall be at liberty to file and serve an affidavit of protest within 30 days of service of the said Summons for Confirmation of Grant.
 - e. Pending the confirmation of grant, the status quo that shall obtain as regards all the remaining properties and assets belonging to the estate of the deceased including the deceased’s properties since registered in the Petitioner’s names be that the Petitioners, objectors and beneficiaries of the deceased’s estate shall continue to be in possession and occupation of the properties



and assets they currently occupy as at the date of this ruling and the Petitioner, Objector and Beneficiaries shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets.

- f. There shall be no orders as to costs
23. The Court orders have not been reviewed and are still in place. The said Benedict Mbithi Mutua is listed as the 2nd Objector and is presumed to be aware of the said orders.
24. As per the annexed search, Mavoko Town BlocK 3/2652 is estate property and there is no confirmed grant in place. Section 45 LSA provides for - No intermeddling with property of deceased person
- (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.
25. I am also persuaded by the case of *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, 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.” Emphasis added.
26. In the case of *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR, Musyoka J stated thus :
- “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 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.”



27. From the affidavit of service dated 5.12.2022, only the intermeddler was served with this Summons. The Applicant alleged that the construction was being undertaken by the Intermeddler who has denied the allegations and admitted that the construction is being done by the father in his property.
28. The Applicant, Anthony Munuve Mutua is a son of the deceased and a beneficiary of the estate of the deceased and cannot legally be not estopped from filing the application to stop a 3rd party Boniface Mutua Mbithi who is not a beneficiary of the estate of the deceased.
29. The 3rd Party is said to have moved into the suit property Mavoko Town Block 3/2652 which belongs to the estate of the deceased. The ongoing construction is said to be expansionist and hinders the Applicant's access to his portion of the land.
30. The dispute was reported and referred to the Chief & County Commissioner but reconciliation was not successful as parties refused to attend meetings as shown by documents annexed AM5 & A&5B.A search has been annexed marked AM-2 which shows the property is under the name of Mutua Mulwa (deceased).
31. The Applicant deposed the ongoing construction by the Intermeddler is an attempt to expand the occupation on the suit property by the intermeddler's father Benedict Mbithi Mutua so as to claim to be bona fide purchasers/occupiers.
32. The Applicant further alleged that the intermeddler is in collusion with one of the beneficiaries who allowed the intermeddler's father to occupy almost the entire Mavoko Town Block3/2652
33. Up until the grant is confirmed, Mavoko Town Block3/2652 belongs to the estate and any person whether a beneficiary or not cannot interfere with estate property without a confirmed grant. Such acts are illegal and the construction is illegal. There also orders of 21/5/2018 which remain in force as the said orders have not been set aside, varied reviewed or successfully appealed against.
34. The Intermeddler Benedict Mbithi Mutua is one of the beneficiaries of the estate of the deceased and son to the deceased and although his son Boniface Mutua Mbithi is deemed the Intermeddler, the one admittedly constructing is the father a son to the deceased.
35. The construction is contrary to the orders of status quo granted by the Trial Judge on 21/3/2018 that all Petitioners, Objectors and Beneficiaries shall remaining possession and occupation of the properties and assets they occupy as at the date of the Ruling pending confirmation of grant. Construction means interference with other parties occupation on the property and/or hindering access to each party's portion.
36. Maintenance of status quo was discussed in the case of *TSS Spinning & Weaving; Company Ltd v Nic Bank Limited & another* [2020] eKLR, where the court stated that the purpose of a status quo order as follows:

“In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”
37. Similarly in *Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] eKLR, where the court stated as follows;

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes



effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."

38. Until the orders of this court are overturned, they must be respected by everyone. In the case of *Hadkinson v Hadkinson* [1952] ALL ER it was held: -

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

39. The Court of Appeal in *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

40. The orders of this court are not optional and must be followed. Let the status quo be maintained by all the parties whether by beneficiaries’, Petitioners and Objectors themselves their agents, servants, employees or children until the grant is confirmed.

41. As far as grant of the order of injunction is concerned, the principles were discussed in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.”

42. What constitutes a prima facie case was elaborated by the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, where it was held as follows:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any



amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

43. In this case, it is admitted that there is construction on the suit property however the intermeddler has denied being the one constructing and said it is being done by the father. This contention has not been controverted by the Applicant who had a duty to prove his claim. The denial meant that the burden of proof shifted to him to prove that the construction was being done by the Intermeddler, his father and join him as 3rd party to these proceedings. I therefore find that a prima facie case has been established.
44. This Court finds it disturbing that since 2018 the grant is not yet confirmed or any steps taken towards administration and/or distribution of the deceased’s estate.
45. The Administrators have a statutory duty to protect and preserve the assets that comprise of the deceased’s estate vide Sections 81,82,83 of *LSA*. Yet they have not spearheaded administration and/or distribution of the deceased’s estate or preserved the estate of the deceased.
46. Since the grant is yet to be confirmed and the estate is yet to be distributed, any action against/contrary to the orders issued by the Court on maintenance of status quo is detrimental to the estate of the deceased as stated earlier.
47. The construction is by a member of the deceased’s family and complaint is raised by a member of the family clearly a simmering dispute is in place and pending resolution of the dispute, the subject matter of the estate of the deceased is to be protected.
48. The balance of convenience in this case tilts in favour of the Applicant against the Intermeddler who has stated on oath that he is not engaged in any construction on the suit property but his father is and construction is ongoing before distribution of the estate. The construction is contrary to the Ruling of this Court of 21/03/2018.

Disposition

49. In the end, this Court issues the following orders;
 - a. The Summons dated 29.11.2022 are upheld & Prayer 1 & 3 are granted.



- b. The Notice of Preliminary Objection dated 13.12.2022 is dismissed.
- c. The orders of 21.03. 2018 still remain in force and apply to ALL Parties Petitioners, Beneficiaries & Objectors including the intermeddler/father herein and their agents, servants or representation.
- d. The Court orders shall be supervised by the nearest Police Station –mavoko Police Station.
- e. Parties/Counsel may pursue Court Annexed Mediation with a view to expediting the matter and/or reach amicable settlement on distribution of deceased’s estate or confirmation of grant
- f. Thereafter the matter shall be mentioned after 45 days on 26/07/2023.
- g. There shall be no orders as to costs.

50. It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 31ST MAY, 2023
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In The Presence/absence Of:

Mr. Mung’ata For The Applicants

Mr. Nthiwa For The Respondents

