



**Masila v Gatungo & another (Succession Cause 407 of 2019)
[2023] KEHC 21859 (KLR) (Family) (22 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 407 OF 2019
PM NYAUNDI, J
AUGUST 22, 2023**

BETWEEN

DOMINIC MASILA APPLICANT

AND

LISA WANGU GATUNGO 1ST RESPONDENT

AIKA NYANGARA GATUNGO 2ND RESPONDENT

RULING

Introduction

1. By Notice of Motion dated July 28, 2023 presented Under Section 47 of the [Law of Succession Act](#) the Applicant seeks the following orders -
 1. Spent
 2. That this Honorable Court be pleased to issue conservatory orders of stay against the DCIO Kiambu or any other persons, agencies, department from investigating any issues in respect to the matters, properties relating the current matter before the Honourable Court.
 3. That this Honorable Court be pleased to issue an order of stay of the proceedings in Kiambu Chief Magistrate in Kiambu Misc E266 OF 2023 pending the hearing and determination of this Summons and Succession Cause
2. The Application is supported by the Affidavit of Seth Ojienda Advocate sworn on the July 28, 2023. Annexed to the Affidavit is the *Ex Parte* Notice of Motion presented by the DCIO seeking specified documents from Bank Accounts held at Equity Bank, Cooperative Bank and Kenya Commercial Bank



in respect to transaction specified under paragraph 4,5 and 6 of the Supporting Affidavit of PC Agnes Wamugi.

3. The Application is opposed by Daniel Mutie Musyoki an objector and beneficiary of the Estate of deceased by Replying Affidavit sworn on August 11, 2023 and Grounds of Opposition dated August 8, 2023.
4. The 1st and 2nd Respondents herein have also sworn an Affidavit in opposition on August 18, 2023 in which they aver that the Applicant has entered into agreements for sale in respect of deceased's properties as enumerated in paragraph 10 of the Affidavit.
5. The Application proceeded by way of oral arguments on August 21, 2023 on the virtual teams platform.
6. The substance of the Applicant's submissions is that an Administrator cannot meddle with an estate as provided for under Section 45 of the Law of Succession Act and that the actions of an Administrator can only be challenged under Section 82 of the Law of Succession Act.
7. Further the Applicants challenge the Locus of the Respondents to interfere with the estate as their Application for revocation for grant is yet to be determined.
8. The Respondents in response state that as children of the deceased they have the locus to challenge the actions of the Applicant and further the actions under investigation are criminal in nature. Finally, it is contended that the probate court is not vested with the requisite jurisdiction to grant conservatory orders as the Application sought can only be presented under Article 22 of the Constitution.

Analysis And Determination

9. Having carefully reviewed the Pleadings filed herein alongside the Affidavits, submissions, authorities cited and the relevant law I frame the following as the issues for determination
 - a. Whether this court is clothed with the requisite jurisdiction to adjudicate over the application
 - b. If (a) is answered in the affirmative whether the Court should bar investigations by the DCIO Kiambu pending the hearing and determination of the summons and the succession cause

Whether the Court is clothed with requisite jurisdiction

10. The Respondents challenge the jurisdiction of the Court on the basis that the Applicant seeks conservatory orders which can only issue under Article 23 in response to a Petition for enforcement of Bill of Rights presented under Article 22 of the Constitution.
11. If I were to accept this interpretation of the law by the Respondent it would mean that the reliefs enumerated in Articles 23 (3) (a-f) are only available with regard to Constitutional petitions, This is a misinterpretation of the law. I therefore concur with the Applicant that under Section 47 of the Act, the Court may issue the order sought herein, if merited.

On whether the Application Is Merited

12. It is not disputed that the investigations by the DCIO Kiambu are in response to the complaints lodged by the Respondents herein. The Applicant takes issue and argues that the Respondents lack locus as they are yet to validate their interest in the estate since the summons for revocation is pending hearing. In Re Estate of Benson Maingi Mulwa [2021] eKLR, the Court observed that since even administrators can be guilty of intermeddling any person interested in the estate of a deceased person as a beneficiary



or otherwise is entitled to move the court to seek orders to preserve the estate and prevent waste. The challenge by the Applicant on this ground therefore fails.

13. On perusal of the challenged *ex parte* motion, I note that the same is presented by the DCIO and not the respondents. The Applicant in essence is seeking to stop a criminal investigation. The Respondents are not the ones that will undertake the investigation. In my view there is no utility in the court issuing the orders against the 1st and 2nd Respondents as the DCIO is an independent agency.
14. The Applicant argues that it is only the Court that can decide on whether or not there has been intermeddling. This is not a correct interpretation of Section 45. The probate court's jurisdiction is limited to distributing the free estate of a deceased person. Section 45 creates an offence of intermeddling, which is squarely in the jurisdiction of the DCI. This was the opinion of Musyoka J *in Veronica Njoki Wakagoto (Deceased)* [2013] eKLR. I therefore find that Section 45 of the *Law of Succession Act* is not the exclusive jurisdiction of the Probate Court, and the DCI does have the mandate to investigate the whether or not an offence has been committed.
15. It is the Applicants position that an Administrator cannot be guilty of intermeddling. In my view, Section 45 only shields the Administrator where the dealings are 'expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act.' In the current case what is under investigation is whether the Administrator is disposing of properties of the estate prior to confirmation of the grant and therefore in contravention of Section 82.
16. If the Administrator's actions are in contravention of Section 82 he will be intermeddling with the estate, I refer to the decision of Hon. S Mutuku LJ *in re Estate of Lawrence Nginyo Kariuki (Deceased)* [2021] eKLR where she reiterated that an Administrator must always act within the confines of the law, otherwise they run afoul of Section 45.
17. The Applicant claims that they will be prejudiced if the criminal investigations are allowed to proceed. It is well settled by judicial precedent that Civil proceedings will not necessarily be a bar to criminal proceedings. The criteria to determine whether the Probate Court should halt criminal proceedings was laid out in the *re Estate of SLBT (Deceased)* [2021] eKLR where the court held that:

“Normally, stay is granted in the interests of expedient justice when there are two proceedings for which the subject matter is similar. Stay will be granted to avoid the potential of having conflicting decisions touching on the same property. . . this Court is alive to the fact that the jurisdiction of the criminal courts handling those two cases is separate and distinct from the jurisdiction of the instant succession (Civil) Court.... The other instance when such criminal cases are stayed is through a constitutional reference where the Petitioner would be claiming that the prosecution is an abuse of process, done to achieve some nefarious ends other than pursuing justice. A probate and administration court would not be the proper forum to raise such constitutional issues. This Court will not therefore stay the criminal proceedings.”

18. In *Raymond Kipchirchir Cheruiyot & Anor v Republic* [2021] eKLR the court in almost similar circumstances as the instant case held;

However, looking at the subject matter of the Succession proceedings referred to being revocation of grant and the criminal charges brought against the Applicants being intermeddling with deceased's estate and fraudulent procurement of title, it is clear that the prosecution was within the public interest. It is the criminal court that is best placed to try the alleged offences. Further, having considered the opposing arguments I am not persuaded that the Applicants rights will be prejudices in the trial..



It is therefore not automatic that where there are concurrent criminal and civil proceedings, that one should first be stayed.

19. I take note that the Applicant has not challenged the allegation that the assets of the estate are being disposed of in the absence of a confirmed grant. It is counsel on record who states that his firm will be prejudiced as his client accounts will be frozen and he runs the risk of not meeting his obligations to his clients. I have looked at the ex parte motion and there is no request to freeze the accounts or otherwise interfere with the operations of the account that would expose the Counsel to this risk.
20. I adopt the reasoning of the Court in the decision in *Kuria & 3 Others vs Attorney General* [2002] 2 KLR 69 where it was stated that:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.”
21. The Court takes a serious view of intermeddling. I am not persuaded that the investigations if allowed to proceed would amount to an illegality, an abuse of process and a travesty of justice. There are in existence constitutional safeguards at the disposal of the Applicant and his counsel to ensure that at every turn they are protected from an infringement of their rights.
22. For the reasons stated above I will dismiss that Application dated July 28, 2023 with costs to the 1st and 2nd Respondent.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF AUGUST, 2023.

P M NYAUNDI

JUDGE

In the presence of:

Ojienda Advocate for the Administrator /Applicant

Ms Rotich h/b for Mr. Kibet for Respondent

Isaac Rene for 1st and 2nd Respondent

Sylvia Court Assistant

