



REPUBLIC OF KENYA



**Masuu v Mulandi & 4 others (Succession Cause 1 of 2019)
[2022] KEHC 11637 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
SUCCESSION CAUSE 1 OF 2019**

GMA DULU, J

MAY 24, 2022

BETWEEN

FAUSTINA NGINA MASUU PETITIONER

AND

ELIZABETH MUKULU MULANDI 1ST OBJECTOR

MARY MANZE MULANDI 2ND OBJECTOR

ANASTACIA NDETO MULANDI 3RD OBJECTOR

EDWARD MULANDI 4TH OBJECTOR

MILLICENT MUTILE MULANDI 5TH OBJECTOR

RULING

1. Before me is a notice of motion dated June 16, 2021 filed by Faustine Ngina Musuu under order 40 rule 1(a &b), rule 3(3) of the *Civil Procedure Rules* and section 1A, 1B and 3A of the *Civil Procedure Act* (Cap.21), as well as section 45(1)(2) a &b and section 47 and section 65 of the *Law of Succession Act* (Cap. 160).
2. The application has seven (7) prayers, some of which have been spent as follows –
 - 1) (Spent)
 - 2) Spent)
 - 3) Pending the hearing and determination of this succession cause No. 1 of 2019, this court be pleased to grant temporary injunction and any such interlocutory orders as it may deem fit restraining the objectors, either by themselves or their agents, servants, employees or any other person acting or through them in any way whatsoever, from harassing the petitioner (Faustine Ngina Masuu) and her family or encroaching or intermeddling with any part of the



property known as Plot Nos 1520, 1567 and 1873 situated at Ngandani Settlement Scheme in Kikumbulyu Division of Kibwezi Sub County Makuni County.

- 4) That this Honourable court do direct the Office Commanding Police Division (OCPD), Kibwezi Police Division and the Officer Commanding Station (OCS) Kibwezi Police Station to strictly enforce such orders and directions as the court shall issue to preserve the safety of both the petitioner and her children as well as her assets and property.
 - 5) That this court do grant such orders appropriate in preserving the entire estate of the deceased, including the lives of the petitioner (Faustine Ngina Masuu) and her family.
 - 6) That this court be pleased to make any order that it deems just and lawful, pending the hearing of the succession cause and the instant application.
 - 7) That the objectors be condemned to pay the costs of this application.
3. The application has grounds on the face of the notice of motion that the objectors and others have been visiting the widow in her residence and threatening her and her children, that the objectors and DCI Officers at Kibwezi had charged the widow with trumped up charges, that the said Kibwezi DCI Officers also charged the area chief who was performing his administrative duties in respect of the estate, and that the applicant and her children were living in fear that they may lose their property and lives.
 4. The application was filed with a supporting affidavit sworn on June 16, 2021 by the applicant which amplified the grounds of the application and annexes several documents including a copy of a newspaper obituary and death certificate of the deceased herein.
 5. The application is opposed through a replying affidavit sworn on July 26, 2021 by Elizabeth Mukulu Mulandi, in which it was deponed that the applicant was a stranger and intermeddler to the estate and that Plot No 1520, 1567 and 1873 belonged to the deceased and that Plot No 1520 was the home of her co-wife the late Patricia Ndunge Mulandi. It was also deponed that the applicant was merely a paid employee of the deceased and that it was not true that she had children with the deceased. The affidavit annexed a number of documents, including a ruling in Makueni Succession cause No 135 of 2017 involving both the applicant herein and Elizabeth Mulandi, in which, on 4th October 2018 the parties were ordered by the court to maintain the status quo prevailing at the moment and in which Elizabeth Mulandi and Edward Mulandi were allowed by the court to withdraw the citation dated July 23, 2013.
 6. In response to the replying affidavit, the applicant filed a supplementary affidavit in which she stated that Plot No 1520 and developments thereon were her matrimonial home, and that her co-wife Patricia Ndunge had her home at Mtwapa where she lived with her children, and that she (Patricia) moved to Plot No 1520 during her sickness and that the deponent took care of Patricia Ndunge until she died. She denied that there was nullification of her marriage at Makindu Law Courts.
 7. It was further deponed in the affidavit that the ruling in Makueni Succession Cause No P&A 135 of 2017 only restrained her from destroying trees and vegetation, and did not determine whether she was married to the deceased, and that Machakos Succession Cause No 14 of 2014 was transferred to Makueni and became P&A No 1 of 2019 the present case.
 8. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by Mbalu & Associates for the applicant, and Naikuni Ngaah & Miencha advocates for the objectors. I note that in the submissions of the applicant's counsel, emphasis was put on the jurisdiction of this court to entertain such applications and issue appropriate orders under article 47 of the *Law of Succession Act*. Counsel maintained that this court should grant the



prayers sought, as the applicant will otherwise suffer irreparable loss and relied on the case of *Giella – vs- Cassman Brown Ltd* [1973] EA 348.

9. Counsel for the objector, on the other hand, highlighted the application and the opposition thereto and stated that the applicant was intermeddling with the property of the estate contrary to the provisions of section 45 of the *Law of Succession Act*, as her marriage to the deceased was in dispute, and relied on the same case of *Giella –vs- Cassman Brown Ltd* (supra), to say that the applicant did not have a prima facie case with probability of success and that her application should thus be dismissed. It was submitted also that the 1st objector had moved to court in another case *Makueni HC P&A Case No 135 of 2017* to stop the petitioner (applicant) from wasting the estate of the deceased.
10. This is an application for grant of interim injunctive orders. It is thus governed by the reasoning in the case of *Giella –vs- Cassman Brown Ltd* (supra), in which the court stated the parameters to be considered by the court are first – whether there is a prima facie case with probability of success, secondly, whether the applicant will suffer irreparable loss not capable of being compensated in damages if the interim injunctive orders sought are not granted, and thirdly, if the court is in doubt, it will determine the application on the balance of convenience.
11. With regard to prima facie case with probability of success, I am aware and it has been argued in this application, that there is a dispute as to whether the applicant is the wife of the deceased. It is of note however that in *P&A Cause No 135 of 2017*, the court left issue of marriage to be decided later, of course based on evidence to be tendered. In the present case, the applicant is the petitioner, and it cannot be said that she has no prima facie case with probability of success. I thus find that the applicant has a prima facie case with probability of success.
12. Will the applicant suffer irreparable loss if the injunctive orders sought are not granted? In my view, from the facts and evidence placed before me, the applicant will suffer irreparable loss if the orders sought are not granted. I note that the applicant is not seeking eviction of anybody, but merely seeking restraining orders against others harassing her and her children. It is also instructive that on October 4, 2018 this court in *P&A 135 of 2017* ordered as follows –
 - (iii) The parties are hereby ordered to maintain the status quo prevailing at the moment.”
13. I take it that what the applicant is now seeking is the maintenance of the above status quo by the temporary injunctive orders sought. I thus find that if the injunctive orders sought are not granted, the applicant will suffer irreparable loss, only with respect to Plot No 1520, as the other two Plots have no facts in their support in the present application.
14. With regard to the balance of convenience, due to my findings above, it is superfluous to delve into the balance of convenience as I am not in doubt about the above two requirements. I will thus allow the application.
15. Consequently, and for the above reasons, I allow the application in the following terms:-
 - 1) That pending the hearing and determination of this succession cause No. 1 of 2019, a temporary injunction be and is hereby issued restraining the objectors, either by themselves, or their agents, servants, employees or any other person acting for or through them in any way whatsoever from harassing the petitioner (Faustine Ngina Masuu) and her family or encroaching or intermeddling with any part of the property known as Plot No. 1520 situated at Ngandani Settlement Scheme in Kikumbulyu Division of Kibwezi Sub County Makueni County.



- 2) This court hereby directs the Officer Commanding Police Division (OCPD), Kibwezi Police Division and the Officer Commanding Station (OCS) Kibwezi Police Station to enforce the above restraining orders to preserve the safety of the petitioner and her children as well as her assets and property.
- 3) The costs of the application will be in the cause.
4. This matter will be mentioned on a date to be fixed hereafter together with P&A 135 of 2017 for further directions.

DELIVERED, SIGNED & DATED THIS 24TH DAY OF MAY, 2022, IN OPEN COURT AT MAKUENI

GEORGE DULU

JUDGE

