



REPUBLIC OF KENYA



**In re Estate of Simon Ndungu Thumbi (Deceased) (Succession Cause E040 of 2020) [2022] KEHC 11173 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE E040 OF 2020  
CM KARIUKI, J  
JULY 29, 2022**

**IN THE MATTER OF THE ESTATE OF SIMON NDUNGU THUMBI (DECEASED)**

**BETWEEN**

**JOSEPH NDERITO NDUNGU ..... 1<sup>ST</sup> PETITIONER  
ESTHER WANIKU NDUNGU ..... 2<sup>ND</sup> PETITIONER**

**AND**

**GABRIEL THUMBI NDUNGU ..... 1<sup>ST</sup> RESPONDENT  
CHARLES MUTAHI NDUNGU ..... 2<sup>ND</sup> RESPONDENT  
ELIZABETH WANGUI GACHUIRI ..... 3<sup>RD</sup> RESPONDENT  
LYDIA WANJIRU KAMWARO ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**CECILIA MUTHONI NDUNGU ..... BENEFICIARY  
LUCY KAGURE NDUNGU ..... BENEFICIARY  
LYDIA WAMBUI NDUNGU ..... BENEFICIARY**

**RULING**

- I. The Petitioners/ Applicants filed an application dated 10<sup>th</sup> February 2022 under Section 45 and 47 of the Law of Succession Act Cap 160 Laws of Kenya Rules 73 of the Probate and Administration Rules and all other enabling provisions of the law seeking the following orders: -
- II. Spent.
- III. That pending the hearing and determination of this succession cause this honourable court be pleased to make the following orders:-



- IV. That a joint account be opened in the names of Joseph Nderito Ndungu and Esther Wanjiku Ndungu for purposes of collection of rental income of all those properties of the deceased generating rental income and business income as well as draw out funds for purposes of outgoings and manage the estate in accordance with the law.
- V. That the Respondents be compelled to render just, true and fair accounts of all monies collected from the estate since 10.9.2006. Further, the Respondents to surrender and/or hand over all title documents/title deeds for all the estate of the deceased to the Applicants.
- VI. That the Respondents to allow access and use of the said family home, the farmlands and all property of the deceased by all children of the deceased at all times.
- VII. That preservatory orders do issue restraining the Respondents either by themselves, their servants or any other person acting from their authorization or control be restrained from intermeddling with the estate by demolishing the buildings, constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties or undertaking or continuing to carry out any further development in all the properties of the deceased, pending the hearing and determination of this application and/or succession cause.
- VIII. That preservatory orders do issue restraining and/or stopping the Respondents either by themselves, their servants, or any other person acting from their authorization or control from intermeddling with the estate or utilizing the estate to the disadvantage of other lawful beneficiaries of the estate.
- IX. Any other order that may be just and in the interest of preservation of the estate or properties of the deceased.

That the costs of this application be in the cause.

1. Which application is supported by the affidavit of Joseph Nderito Ndungu and Esther Wanjiku Ndungu and on the following grounds:-
  - i. That since the deceased died on 10/9/2006, the Respondents have been in exclusive use and control of all the deceased's assets in exclusion of other lawful beneficiaries and have been intermeddling with the free assets of the deceased by applying the proceeds of rental income to their own use.
  - ii. That the estate is in ruins due to years of neglect, mismanagement and misappropriation.
  - iii. That it is in the interest of the estate that the orders sought be allowed.
2. On the other hand, the Respondents responded to the application herein *vide* their replying affidavits.

### **3. Petitioner/Applicant's Submissions**

4. The Applicants submitted that they were the best persons to be issued with the grant of letters of administration following the ruling delivered on 21/10/2021 which no appeal has been preferred against.
5. On whether the Applicants have established a *prima facie* case for the grant of preservatory orders and whether this honourable court has powers to grant the same, they relied on Section 47 of the *Law of Succession Act*, Rule 73 of the *Probate and Administration Rules*, *Millicent Mbatia Mulavu & Another v Annah Ndunge Mulavu & 3 Others* [2018] eKLR, *Law of Succession, Law Africa* 2006, Page 115, *Floris Piezzo & Another vs Giancarlo Falasconi* [2014] eKLR; on the jurisdiction of the high court



to issue orders against the wrongful disposal, construction, wasting, alienation and/or intermeddling with the estate of the deceased.

6. It was stated that what is in dispute is the 1<sup>st</sup> Respondent's action to construct permanent structure on the suit property prior to the subdivision of the deceased's estate. They stated that the continued construction is highly disputed as the other beneficiaries will incur great loss in demolishing structures in the event they and on the portion being constructed on. Further, the 1<sup>st</sup> Respondent has deliberately denied the rest of the beneficiaries access to the home left by their parents and they have resorted to camping in hotels whenever they come home.
7. Further, the Applicants stated that the Horizon Hotel in Nanyuki is in exclusive possession of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who since 2006 have solely benefited from proceeds generated by the hotel. It was their submission that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should account for this and that a bank account should be opened for the purposes of collecting the proceeds of rental and business income and payouts. The account holders will periodically render a just and true account for purposes of accountability.
8. In regards to the property in the hands of the 4<sup>th</sup> Respondent and any other party, the Applicant suggest that all the property belonging to the deceased be surrendered back to the estate and during the distribution stage, the same be distributed to all the rightful beneficiaries in accordance with the [Law of Succession Act](#).
9. It was their view that status quo be maintained in do far as farming of the suit property is concerned pending the hearing and determination of the succession cause.

### **1st Respondent's Submissions**

10. The 1<sup>st</sup> Respondent submitted that it is a misconception that they were automatically appointed as administrators as the court only gave directions as to which parties will lead the process of petitioning for the grant.
11. It was stated that there were no rental units on the commercial plot at mairo4 but wooden structures which as a result of age got dilapidated and consequently, he built permanent buildings on the said plot. He asserted that none of the beneficiaries ever raised complaints and since he is equally a beneficiary of the estate and considering that he is actually improving on the value of the estate he should not be enjoined from utilizing the same. He stated that he would only have been obligated to surrender the rental income from houses and or buildings that had been erected and were generating income prior to the demise of their father.
12. The 1<sup>st</sup> Respondent submitted that the activities he has been carrying out on the parents' home relate to renovations and stated that he will not claim any reimbursements from the estate for the same and that the renovations were complete by the time the court made orders of *status quo*. He stated that he has not denied any beneficiary access to their parent's home.
13. It was argued that the Applicants were seeking to have orders of mandatory injunction to remove the 1<sup>st</sup> Respondent from their parents' homestead.
14. The 1<sup>st</sup> Respondent contended that the Applicants have not been appointed as administrators and therefore have no locus standi to bring the instant application and to have bank accounts opened in their names.



## 15. 2nd Respondent's Submissions

16. On whether the Applicants should be confirmed as administrators, it was stated that the Applicants during the hearing of Citations 2 and 3 of 2021, demonstrated to be people of sober mind and displayed characteristics of good leaders however the moment they were proposed to be administrators, they displayed their true colours. That they maliciously omitted the names of the 4<sup>th</sup> Respondent and their step sister from the list of beneficiaries when petitioning the court for letters of administration with the intention of disinheriting them in total ignorance of Section 76 of the [Law of Succession Act](#).
17. The 2nd Respondent submitted that the Applicants kept the copies of the gazette to themselves and out of reach of the parties to prevent them from filing cross petitions and that they included properties that were jointly owned by the deceased and some that he did not own at all and cannot therefore render a true and current status of the properties.
18. It was asserted that confirming the Applicants to be administrators would be a wrong move that will not only expose the state to a total menace but also expose other lawfully entitled beneficiaries to injustice.
19. The 2<sup>nd</sup> Respondent averred that the application was premature and that their step mother and sister were not included as beneficiaries of the estate of the deceased in the Applicants' petition.

## 20. 3rd Respondent's Submissions

21. The 3<sup>rd</sup> Respondent asserted that no objection has been filed for the issuance of the grant of letters of administration to the Applicants and herself and therefore the grant of letters of administration should be issued first and thereafter a joint account opened for the purpose of rental deposit and the same should not be withdrawn unless the same is authorized by the court or in agreement of the beneficiaries.
22. She averred that she had started the process of filing a petition but only one of the beneficiaries had signed consent which she forwarded to the court. That the rest of the beneficiaries wanted to disinherit their stepmother and step sister.
23. It was contended that the Applicants have been signatories of the Horizon Hotel since 2006 and Esther Wanjiku has been a key figure in running of the hotel and they have never accounted for the hotel profits neither have they been given dividends.
24. She also asserted that she has never run the hotel, or have access to any estate buildings and she does not occupy any of the premises and that the Applicants only want to tarnish her name.
25. The 3<sup>rd</sup> Respondent requested that an independent auditor be appointed to account for the state of the deceased and file a comprehensive report so that all the deceased assets are administered properly and that the Applicants and she be appointed as joint administrators of the estate.

## 26. 4th Respondent's Submissions

27. It was submitted that the 4<sup>th</sup> Respondent is the only surviving wife of the deceased and that they had a daughter as confirmed in the birth certificate marked "LWK1". That they were left out in the petition by the Applicants in order to disinherit them but she was enjoined in this application, where she appears to have been assigned responsibilities of managing the deceased property after his death. Therefore, the question that begs is how a stranger to the estate who was known to the deceased and who had no relations with the deceased was assigned the responsibility of managing the Kiracha business 10 days after the deceased demise if the Applicants are to be believed?



28. She averred that the plot situate at Nyahururu town referred to as Chestnut House is registered to one Solomon Kiguru Kiago (deceased) and prior to her husband's demise the two had a gentleman's agreement that the husband was to be incorporated as an owner of the plot by constructing a building on the plot where both parties would collect and share the rent equally and that he died before completing the construction and therefore the 4<sup>th</sup> Respondent took over and completed developing the plot as it had been agreed.
29. She stated that she used the rent received from Solomon to educate her daughter and for their maintenance but the same stopped in 2020 after Solomon died and his family staked a claim on the entire plot and the building thereon claiming that it belonged to Solomon and it was resolved that proceeds of rent be deposited in a joint account opened in the names of members of both families pending a resolution on ownership. That the rent was collected with the express knowledge and consent of the other beneficiaries as confirmed in the family agreement marked as annexure "LWK2" and the affidavit marked as annexure "JNN4".
30. The 4<sup>th</sup> Respondent argued that the Applicants were not stopped from taking over the management of the Kiracha and that when she was eventually unable to manage it due to stiff competition and vandalism she closed it. That she used most of the proceeds from the business to educate the deceased children and grandchildren including the 2nd Petitioner, pay debts borrowed by the deceased with other assets as security and she was not receiving a salary for the period she operated it.
31. The 4<sup>th</sup> Respondent asserted that she is opposed to the rent collected from Chestnut House being held in a joint account pending the hearing and determination of the succession cause and she undertake to keep records of the amount released to her after the dispute with the family of Solomon is resolved and account for it at the stage of distribution of the estate.

### 32. Analysis and Determination

33. The High Court is vested with wide powers under the [Law of Succession Act](#) to make such orders as may be necessary to preserve the estate pending distribution to the legitimate heirs and to ensure that the ends of justice are met.
34. Section 47 of the [Law of Succession Act](#), gives this court has power to preserve the assets of the deceased's estate if it is being wasted. The Section reads as follows:-

“The High Court shall have jurisdiction to entertain any dispute under this [Act](#) and to pronounce such decrees and make such orders therein as may be expedient, provided that the High Court may for the purpose of this Section be represented by the Resident Magistrate appointed by the Chief Justice.”

35. The above Section was considered by the Court of Appeal in [Floris Piezzo & Another vs Giancarlo](#) [2014]:-

“..... In other words, we are of the firm view that Section 47 of the [Act](#) gives the court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This Section must be read together with Rule 73 of the [Probate & Administration Rules](#) which further emboldens court's jurisdiction to make such orders as may be necessary for the ends of justice to prevent abuse of the process of court. We would imagine such orders would also include injunctive orders.”



36. Likewise, Rule 73 of the [Probate and Administration Rules](#) provides that:-
- “73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
37. (See also [Millicent Mbatia Mulavu & another v Annah Ndunge Mulavu & 3 Others](#) [2018] eKLR)
38. In [Re Estate of Simon Kimendero \(deceased\)](#) [2020] eKLR, the court noted that of specific significance to preservative order in respect of estate property is that: -The Applicant has an arguable case;The property is estate property; andThe property is likely to be dissipated or wasted away.
39. Additionally, In [Re Estate of Jeremiah Ngiri Kibati \(Deceased\)](#) [2019] eKLR and [Re Estate of Elijah Ngari \(Deceased\)](#) [2019] eKLR, the court in dealing with the issue of issuance of conservatory orders in succession matters cited with approval the decision of the court in [Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria](#) [2012] eKLR noting that an Applicant in an application for preservative orders has to satisfy the following conditions: -That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the Applicant unless preservative orders of inhibition are issued.That the refusal to grant orders of inhibition would render the Applicant's suit nugatory.That the Applicant has arguable case.
40. Accordingly, preservative orders are in essence similar to injunctive orders. [In the Matter of the Estate of Paulo Kiplagat Boiwo \(Deceased\)](#) (2012) eKLR, the court while affirming that preservative orders are similar to injunctive orders noted that Applicants have to abide by the conditions set out in the celebrated case of [Giella vs Cassman Brown \(1973\) E.A 358](#) namely the Applicant must:-Make out a prima facie case and;Show that they will suffer irreparable loss which loss cannot be compensated by damages and;Lastly that the balance of convenience should tilt in their favour where doubt exists.
41. In the present case, The Petitioners/Applicants alleged that since the deceased died on 10/9/2006, the Respondents have been in exclusive use and control of all the deceased's assets in exclusion of other lawful beneficiaries and have been intermeddling with the free assets of the deceased by applying the proceeds of rental income to their own use.
42. Particularly, they alleged that the 1<sup>st</sup> Respondent's had constructed a permanent structure on the family property prior to the subdivision of the deceased's estate and had deliberately denied the rest of the beneficiaries access to the home left by their parents claims which were rebutted by the 1<sup>st</sup> Respondent. He veered that he had only done renovations on the family homme and that he will not be claiming any reimbursements from the same. Further, he asserted that he has not denied any beneficiary access to their parent's home.
43. The applicants also alleged that the proceeds from the Horizon Hotel had not been accounted for since 2006 by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. However, the 3<sup>rd</sup> Respondent contended that the Applicants have been signatories of the Horizon Hotel since 2006 and Esther Wanjiku has been a key figure in running of the hotel and they have never accounted for the hotel profits neither have they been given dividends.
44. Further, the applicants asserted that the estate is in ruins due to years of neglect, mismanagement and misappropriation and that it is in the interest of the estate that the orders sought be allowed.
45. In [Re Estate of John Gakunga Njoroge](#) [2015] eKLR Murithi J held: -
- “A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the



jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act”

46. Section 45 of the *Law of Succession Act*, Cap 160 Laws of Kenya provides: -

“ 45.

- (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.
- (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.”

47. In *Jane Kagige Geoffrey & Another v Wallace Ileri Njeru & 2 others* [2016] eKLR it was held that:-

“The net effect of the foregoing is clear; before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling. This includes those not entitled therewith taking possession of, disposition, or alienation, as well as trespassing onto the property. Such acts are subject to reversal by the court summarily. The spirit behind sections 45 and 82 of the *Act*, in my view, is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed. If intermeddling is allowed, the likelihood of the innocent beneficiaries being prejudiced by having their shares affected by reduction is real whereby, there may be no settlement and or peaceful co-existence or end to disputes between of the family members. In this regard, it is for the purposes of preserving the social fabric, cohesion and peaceful co-existence of or end to disputes between family members who are beneficiaries to estates that the law restricts, indeed prohibits any dealings with an estate until the grant is confirmed. The net effect of the aforesaid provisions of the law and decided cases is that, the estate of the deceased cannot be dealt with without the sanction of the court. Before the grant of letters of administration are confirmed, no one including the administrators of the estate of the deceased can deal with the property of a deceased by way of intermeddling therewith or effect a sale of immovable property belonging to the estate. Anyone who purports to purchase property from the estate before confirmation therefore does so at his own peril.”

48. It is clear from the material placed before the court that the Petitioner/Applicants are beneficiaries of the estate of the deceased and in their submissions and annexures thereto laid out the ways in which the Respondent have been in exclusive possession and use of the deceased’s estate and even intermeddled with the estate, sentiments which have been rebutted by the Respondents. These actions in one way or another may result in the dissipation of the deceased’s estate. It is my view that they have established that they have a prima facie case. However, at this interlocutory stage, the court is not required to and



should not make any conclusive findings on the merits or lack thereof of the Applicants' claims. That shall be the function of the court at trial to establish entitlement to the deceased's estate and to what extent.

49. The deceased herein died in 2006 and some of the beneficiaries have admitted that they have been in occupation and/or use of parts of the estate. From my analysis, I believe that the same can be adequately compensated by an award of damages at a later stage particularly in relation to the proceeds from the Horizon Hotel, the commercial plot at Mairo Inya, the commercial plot known as Chestnut House and any such other property that may be determined to be part of the deceased's estate. It is my view that at this stage, Prayer no. 1 by the Applicants in the application herein therefore fails on this limb. However the Respondents will render accounts south for the properties in issues for a period running from 1/1/2022 to 30/6/2022 and subsequently every 6 months until further orders of the court. The report be filed by 6.10 .2022.
50. However, I agree with the Applicants that further wastage and alienation by any of the beneficiaries should be curtailed until such a time as the determination and final distribution of the estate of the deceased is complete. I agree that some beneficiaries are likely to be prejudiced if the activities of the deceased's estate are not checked. It is important that thus court makes orders to preserve the estate pending the final determination of the succession proceedings and taking into consideration the guidance provided under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to meet the ends of justice.
51. Though the Respondents have raised objection with the appointment and/or confirmation of the Petitioner/Applicants as administrators, the same has not been annulled and under law, remains valid and in any case I am not called to determine the same in the application herein however for accordancy of doubt and to fast track hearing and determination of matter; the Court is to appoint administrators at the orders below.
52. As regards to the parent's home at Mairo Inya, the 1<sup>st</sup> Respondent shall not be evicted from the said property but any of the beneficiaries are allowed to visit their parents' home. However, going forward the 1<sup>st</sup> Respondent or any other party herein is henceforth restrained either by themselves, their servants or any other person acting from their authorization or control be restrained from intermeddling with the estate by demolishing the buildings, constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties or undertaking or continuing to carry out any further development in all the properties of the deceased, pending the hearing and determination of this application and/or succession cause or until further orders of the court.
53. As regards the utilization of the Estate for commercial farming activities, it would be unfair to restrain the Respondents at this stage in absence of proper information or evidence on record on the stage of crops planted considering that costs may have been incurred by parties in planting and or cultivating the land. In this regard, it is my view that the status quo be maintained in so far as farming of the suit property is concerned pending the hearing and determination of the succession cause or objection or until further orders of the court.
54. Finally this court orders that, preservative orders do issue restraining the parties either by themselves, their servants, or any other person acting from their authorization or control restraining them from intermeddling with the estate by constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties, discussing the facts of this case outside the jurisdiction of this court, or undertaking or continuing to carry out of any further development in the rest of the deceased's property, pending the hearing and determination of this succession proceedings.



- i. To fast track the hearing and disposal of the matter, Elizabeth Wangui Ndungu, Jooseph Nderitu Ndungu and Dr Esther Wanjiku Ndungu are appointed the administrators of instant estate.
- ii. Prayer no. 1 by the Applicants in the application herein therefore fails on this limb. However, the Respondents will render accounts south for the properties in issues for a period running from 1/1/2022 to 30/6/2022 and subsequently every 6 months until further orders of the court. The report be filed by 6.10 .2022.
- iii. The *status quo* be maintained in so far as farming of the suit property is concerned pending the hearing and determination of the succession cause or objection or until further orders of the court.
- iv. preservatory orders do issue restraining the parties either by themselves, their servants, or any other person acting from their authorization or control restraining them from intermeddling with the estate by constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties, discussing the facts of this case outside the jurisdiction of this court, or undertaking or continuing to carry out of any further development in the rest of the deceased's property, pending the hearing and determination of this succession proceedings.
- v. There be liberty to apply.
- vi. Costs in the main cause.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 29TH DAY OF JULY 2022.**

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**CHARLES KARIUKI**

**JUDGE**

