



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Gitau Assumpta Wambui (Deceased) (Succession Cause E671 of 2022) [2022] KEHC 13363 (KLR) (Family) (30 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13363 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E671 OF 2022
MA ODERO, J
SEPTEMBER 30, 2022
IN THE MATTER OF THE ESTATE OF GITAU ASSUMPTA WAMBUI (DECEASED)
MARIA NDUITA GITAU.....CITOR/RESPONDENT
VERSUS
RAPHAEL GITAU.....CITEE/APPLICANT

RULING

1. Before this Court for determination is the summons dated 5th May 2022 by which the Applicant RAphael Gitau seeks the following orders:-

- “ 1. Spent.
2. Spent
3. Thatthe Honourable court be and is hereby pleased to direct that the instant application is properly suited to be heard and disposed together with the Citation cause herein and issue a hearing date on priority basis.
4. This Honourable court be and is hereby pleased issue a preservative order restraining the Citor/Respondent by herself, agents or assigns, from in any way intermeddling by constructing any such new structures temporary or permanent, leasing, altering in any form, selling, sub dividing, destroying, residing in or, dealing in any manner whatsoever with –Ruiru/Mugutha/Block 1/T.4293Ruiru/Mugutha/Block 1/T.4294Ruiru/Mugutha/Block 1/8253Ruiru/Mugutha/Block 1/8253KJD/Kitengela/66105Kajiado/Kitengela/49123Kajiado/Kitengela/66105Kajiado/Kaputeie North/Isinya/Block 2/625Gakunyo Real Estate Two Plots at Konza Phase 3Nyayo Highrise/Sectional Unit-NBI Block 105/1005Gakuyo Real Estate No. 11380Gakuyo Real Estate No.15857Gakuyo Real Estate No.16557Gakuyo



Real Estate No.11381Gakuyo Real Estate No. 48836Gakuyo Real Estate No. 48810Gakuyo Real Estate No. 54482Gakuyo Real Estate No. 25303

and all other such properties subject of this succession of the estate of Gitau Assumpta Wambui pending the hearing and determination of the succession cause and its final determination and distribution of properties thereof.

5. The Honorable court be and is hereby pleased to compel the Respondent herein to release to the Applicant all the title certificates, all the deceased's bank details and M-pesa phone and records of transactions therefrom, and a proper account of all the rent and such amounts that she accrued from the Ruiru and Highrise Properties.
6. The cost of this application be borne by the Respondent.”
2. The Application which was premised upon sections 34, 45, 47 of the *Law of Succession Act*, Cap 160 Laws of Kenya, and Rules 49 and 50 of the *Probate and Administrative Rules* was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Maria Nduta Gitau opposed the application through her Replying Affidavit dated 2nd June 2022. The Application was canvassed by way of written submissions. The Applicant filed the written submissions dated 22nd June 2022, whilst the Respondent relied upon her written submissions dated 21st June 2022.

Background

4. The matter relates to the estate of Gitau Assumpta Wambui (hereinafter ‘the Deceased’) who died Intestate on 30th December 2021. The Applicant Raphael Gitau is the Widower of the Deceased. The Deceased and the Applicant had five (5) children. Four (4) of the children were sired by the Applicant whilst the fifth child Maria Nduta Gitau (the Respondent herein) was the product of a former union between the Deceased and another man. In simple terms, the Respondent is the stepchild of the Applicant.
5. To date no party has taken out letters of Administration in respect of the estate of the Deceased. The Respondent did file a citation dated 5th April 2022 seeking to have her stepfather accept or refuse to take out letters of Administration. The Applicant filed a reply to that citation vide the Replying Affidavit dated 26th April 2022. The Respondent did not pursue the citation and did not set the same down for hearing.
6. Thereafter the Applicant filed this present application seeking orders to preserve the Estate of the Deceased. Interim orders were granted in terms of Prayer (2) of the summons.
7. The Applicant contends that as the surviving spouse of the Deceased under Section 35(1) of the *Law of Succession Act*, he ranks in priority in taking out letters of Administration in respect of the estate of the Deceased. The Applicant states that he has been engaged in consolidating all necessary evidence and documentation to enable him file the Succession Cause.
8. The Applicant avers that in the meantime the Respondent has moved into one of the estate properties in Ruiru which she has without the consent of the Applicant and/or the other family members turned in to her permanent abode in a manner to suggest that the Respondent is the sole beneficiary to the estate. That the Respondent has gone ahead to effect changes and renovations to said properties, which may devalue the same to the detriment of the other beneficiaries. He prays that the court intervene and issue preservative orders to protect the estate against any further intermeddling pending the issuance of a Grant.



9. The Applicants further claims that the Respondent has ‘stolen’ from his house the documentation required to enable him file a Petition for letters of Administration. He urges the court to order the Respondent to surrender said documentation to him to enable him file the Petition.
10. The Respondent denies that she had intermeddled in the estate and denies that she had taken over the property in Ruiru. The Respondent states that she ordinarily resides in the USA and is only in Kenya temporarily, thus her occupation/stay in one of the estate properties cannot be construed as intermeddling.
11. The Respondent avers that on 16th January 2022 the Applicant called for a family meeting at which it was agreed that they refurbish the estate properties to increase their value for the benefit of the estate. That based on this agreement the Respondent embarked on refurbishing said properties using her own funds. To her surprise, her stepfather later changed his mind and accused her of intermeddling with the estate. The Respondent demands a total refund of all the expenses she has incurred in refurbishing the estate as initially agreed.

Analysis and Determination

12. I have carefully considered the application before this court, the Reply filed by the Respondent as well as the written submissions filed by both parties. It is common ground that the Deceased herein died interstate on 30th December 2021. To date no person(s) has filed a petition seeking Grant of Letters of Administration in respect of the estate of the Deceased. Therefore, no party has the legal authority to administer and/or manage the estate of the Deceased.
13. The Applicant submits that the Respondent has without consent from any of the beneficiaries, moved into one of the properties in Ruiru chased away the workers and leased said property to new tenants. That the Respondent is now collecting rent from the said property without rendering accounts to the other beneficiaries. The Applicant therefore accuses the Respondent of intermeddling with the estate of the Deceased.
14. The Respondent denies intermeddling with the estate. She states that the whole family agreed on developing the properties to improve their value pending issuance of a Grant. The Respondent states that she resides in the USA and only came to Kenya temporarily in order to nurse her ailing mother who was bedridden until her demise. She states that she is only occupying one property as accommodation whilst she is in Kenya. The Respondent urges that the Applicant be ordered to hasten the process of Petitioning for Grant as the estate is in a mess.
15. The offence of intermeddling into the estate of a Deceased person is provided for by section 45 [Law of Succession Act](#), which provides as follows: -

“(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.”

16. In the case of *Veronica Njoki Wakagoto(Deceased)* [2013] eKLR the Court held that:-

“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 a it criminal offence.” (Own emphasis).

17. The Applicant has prayed for preservatory orders to prevent the Respondent from in any way intermeddling with the estate.

18. The principles upon which an interlocutory injunction may be granted are set out in the oft cited case of *Giella vs Cassman Brown*[1973] E.A. 358 as follows:-

1. The Applicant must establish a prima facie case with a probability of success.
2. The Applicant must demonstrate that he stands to suffer irreparable harm if the orders sought are not granted.
3. If there is any doubt then the court will decide the case on a balance of probability.

19. The definition of what constitutes a ‘prima facie’ case was given in the case of *Mrao LtdvsFirst American Bank Of Kenya Ltd& 2 others*[2003] KLR 125 where the court held as follows:-

“In civil case a prima facie case is a case in which as 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. This is clearly a standard which is higher than an arguable case.”

20. Given that neither the Applicant nor the Respondent hold letters of Administration in respect of the estate of the Deceased, neither has the right to in any way manage, administer and/or distribute the properties comprising the estate of the Deceased.

21. The Respondent has admitted that she is currently occupying one of the properties of the estate. She has not denied that she has been developing the property in question. The Respondent has not denied the allegation that she has rented out estate property and is collecting said rental income. By her own admission, the Respondent does not hold any form of Grant in respect of the estate of the Deceased. Her actions, therefore are tantamount to intermeddling in the estate. I am therefore satisfied that a prima facie case has been established.

22. The High Court is vested with wide powers to make such orders as may be necessary to preserve the estate of a deceased person pending distribution of the same.

23. Section 47 of the *Law of Succession Act* provides as follows: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”



24. Likewise, Rule 73 of the *Probate and Administration Rules* proves 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.”

25. The powers donated to the High Court under the above provisions of law do include the jurisdiction to grant injunctions in Succession Causes.

26. In the case of *Floris Piezzo & another – vs Gian Carlos Falasconi* [2014] eKLR the Court of the Appeal as follows:-

“..... We have no doubt at all that the *Law of Succession Act* gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same 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 and Administration Rule which further emboldens courts jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. We would imagine such orders would also include injunctive orders” (own emphasis)

27. I find that it is necessary to preserve the estate of the Deceased pending issuance of the Grant. Accordingly, I do hereby make orders in terms of prayer (4) of the Summons dated 5th May 2022.

28. Regarding Prayer (5) the Respondent has not denied being in possession of the documents relating to the estate. These documents would need to be surrendered to the person who will Petition for the Grant. At the present time I will not grant prayer (5), instead I direct that the family together with their respective Advocates hold a meeting to decide who is to apply for the letters of Administration. Once they have agreed on Administrators the documents to be availed to enable the agreed person(s) file the Petition. The said Petition to be filed within forty (40) days of this Ruling.

29. This being a family matter each party will meet its own costs.

DATED IN NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

.....

MAUREEN A. ODERO

JUDGE

