



In re Estate of Mutisya Mumo alias David Mutisya Mumo (Deceased) (Succession Cause E028 of 2022) [2022] KEHC 13309 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE E028 OF 2022
GV ODUNGA, J
SEPTEMBER 26, 2022
IN THE MATTER OF THE ESTATE OF MUTISYA
MUMO ALIAS DAVID MUTISYA MUMO- (DECEASED)**

BETWEEN

DAVID KAVITA MUTISYA APPLICANT

AND

ESTHER MBAIKA RESPONDENT

RULING

1. By Summons dated May 18, 2022, the Applicant herein, David Kavita Mutisya, seeks the following orders:
 - 1) Spent
 - 2) That pending the issuance of a grant and a formal appointment of an administrator to the estate of the deceased herein, protection orders to issue against Esther Mbaika prohibiting any interference, wastage and intermeddling with the assets of the estate of the deceased and in particular properties LR No Mavoko Township Block 2/112 and LR No Mavoko Township Block 2/8.
 - 3) That the said Esther Mbaika be called to account for all assets and proceeds collected from her unlawful partial disposal of the estate and the same be deposited with the court immediately
 - 4) That this Honourable Court be pleased to commit Esther Mbaika to prison for the maximum period of one year for intermeddling with the property of the late Mutisya Mumo aka David Mutisya Mumo (the deceased).
 - 5) Costs of this application be borne by the said Esther Mbaika.



2. According to the Applicant, he is a dependant of the estate of the deceased who died on January 26, 2000, being his only surviving biological son and resides in Machakos having retired from gainful employment for close to two decades.
3. According to the applicant, the deceased acquired properties LR No Mavoko Township Block 2/112 and LR No Mavoko Township Block 2/8 through his membership with Mitaboni-Katani Company Limited which began around 1970s. It was averred that some time after that, the Respondent herein, Esther Mbaika attempted to defraud the deceased of his property during the lifetime of the deceased but the same did not materialise due to the intervention of the Court by the deceased. However, some time in 2008 or thereabout, the Respondent unlawfully disposed of part of the said property for a sum of about Kshs 8,000,000/- without authority since a grant of letters of administration to the estate of the deceased was yet to be taken out.
4. As a result of the said actions, investigations were commenced by the Directorate of Criminal Investigations and recommended that she be charged with a criminal offence. Acting on the said recommendations, the Office of the Director of Public Prosecutions preferred charges against the said Respondent based on the attempts by the Respondent to defraud the deceased of his property and disposing of the same without authority.
5. The Applicant lamented that the estate of the deceased continues to be interfered with by the Respondent to the detriment of the beneficiaries of the estate of the deceased and that the Respondent has been using the proceeds from the estate on her own to the exclusion of and detriment of the beneficiaries of the estate. It was averred that the said Respondent has not been acting in the best interest of the dependants hence the need to preserve the same. Unless restrained, it was averred, the Respondent intends to proceed with her said actions which are likely to cause irreparable and irrecoverable damage. Based on legal advice, the Applicant deposed that no one is permitted to meddle with or dispose of a property of a deceased person without a court order.
6. It was therefore urged that the Respondent be restrained and detained for her unlawful actions for the maximum period of one year imprisonment.
7. In opposing the summons, the Respondent averred that the said Summons is misconceive, grossly incompetent, vexatious, frivolous, a complete waste of Court's time and a gross abuse of the process of the Court. It was her position that the issues the Summons purports to raise are res judicata in that the same were raised, litigated on and determined with finality in the following Court matters: -
 - (a) HCC No 6660 of 1992 (Nairobi) - Esther Mbaika -vs- Mitaboni Katani Company Limited.
 - (b) ELC No 47 of 2013 (Machakos) - David Mumo Mutisya -vs- Esther Mbaika.
 - (c) Civil Appeal No 61 of 2017 (Nairobi) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) -vs- Esther Mbaika.
8. According to the Respondent, parcels numbers Mavoko Town Block 2/112 and Mavoko Town Block 2/8 have always been her assets and that they have never, ever, been a property of David Mutisya Mumo, the deceased herein. It was averred that the litigation involving the said parcels of land ended in the Court of Appeal, Nairobi when the said Court stated with finality that no amount of litigation will avail the appellant in view of the fact that the Court in HCC No 6660 of 1992 (Nairobi) - Esther Mbaika -vs- Mitaboni Katani Company Limited had settled the question of ownership of the two parcels of land.
9. It was averred that after litigation ended, the restrictions, cautions and caveats that had been registered against the two titles were removed pursuant to a Court order. The Respondent averred that the



criminal matter at Mavoko was instigated against her with the sole intention of intimidating and threatening her to surrender the two titles to land brokers who are salivating at the two parcels of land. She insisted that she is a bonafide member of Mitaboni Katani Company Limited as evidenced by a copy of the List of Members forwarded by the said company to the Land Registrar, Machakos, to facilitate issuance of Title Deeds to members.

10. The Respondent averred that the Applicant herein is a busy – body who lacks the requisite locus standi to agitate a claim on behalf of the estate of the late David Mumo Mutisya since he is not the personal representative of the deceased’s estate and therefore he lacks capacity to execute any task for the said estate. In her view, the personal representative of the estate of David Mutisya Mumo is Zakayo Matheka Mutisya whom she litigated with all the way to the Court of Appeal. It was therefore her view that the present Summons is a non starter, illegal and intended to embarrass not only the Court of Appeal but also the High Court all of which concurred in their decisions that she did not commit any fraud vis-à-vis the acquisition of the subject titles.
11. In support of her case, she annexed copies of the following documentary exhibits:-
 - 1) Annexure EM 1: Judgment in Civil Appeal No 61 of 2017 (Nairobi) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) –vs- Esther Mbaika.
 - 2) Annexure EM 2: Judgment in ELC No 47 of 2013 (Machakos) - David Mumo Mutisya –vs- Esther Mbaika.
 - 3) Annexure EM 3: Preliminary Decree in HCC No 6660 of 1992 (Nairobi) - Esther Mbaika – vs- Mitaboni Katani Company Limited.
 - 4) Annexure EM 4: Final Decree in HCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited.
 - 5) Annexure EM 5: Title Deed for Mavoko Town Block 2/112.
 6. Annexure EM 6: Title Deed for Mavoko Town Block 2/8.
 - 7) Annexure EM 7: Decree in Civil Appeal No 61 of 2017 (Nairobi) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) –vs- Esther Mbaika.
 - 8) Annexure EM 8: Certificate of official search dated 4/06 /2021 for Title Number Mavoko Town Block 2/112.
 - 9) Annexure EM 9: Order issued on 13/10/2020 in ELC No 47 of 2013 (Machakos) - David Mumo Mutisya –vs- Esther Mbaika.
 10. Annexure EM 10: List of Members of Mitaboni Katani Company Limited.
 - 11) Annexure EM 11: Decree in ELC No 47 of 2013 (Machakos) - David Mumo Mutisya –vs- Esther Mbaika.
 - 12) A copy of the Plaintiff in HCCC No 70 of 1995 (Now ELC No 47 of 2013 (Machakos) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) vs Esther Mbaika.
 - 13) A copy of the Defence in HCCC No 70 of 1995 (Now ELC No 47 of 2013 (Machakos) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) vs Esther Mbaika.
12. In a rejoinder, the Respondent averred that he is the Legal Representative of the state of the deceased herein by virtue of letters of administration ad litem issued by this Court on May 20, 2022.



13. According to him, this application has never been brought before a Court of competent jurisdiction not determined on merits by such a court hence the doctrine of res judicata is inapplicable. It was averred that the Respondent pegs her ownership of the suit properties on an irregularly entered ex parte judgement issued in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited by a Court devoid of jurisdiction.
14. It was averred that the Respondent has never been a member of Mitaboni-Katani Company Limited, a fact duly confirmed by the Company’s Directors through sworn affidavits annexed. It was disclosed that the Respondent instituted HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited seeking title deeds for the said properties yet she had already fraudulently obtained the same.
15. It was disclosed that on January 18, 1994, S Amin, J set aside the irregular interlocutory judgement entered in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited and directed that service of summons be effected afresh upon the said Company. However, on March 1, 1994, AB Shah, J (as he then was) on his own motion reviewed/varied/set aside the said decision of Amin, J and proceeded with the formal proof against the rules of natural justice to the detriment of the Company and the deceased who was the rightful owner of the said properties.
16. It was averred that the deceased and his estate subsequently instituted HCCC No 70 of 1995 (Now ELC No 47 of 2013 (Machakos) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) vs Esther Mbaika and Civil Appeal No 61 of 2017 (Nairobi) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) –vs- Esther Mbaika respectively in an attempt to recover the suit properties from the unlawful grasp of the Respondent. However, judgement was entered against the Estate and the Deceased in both cases on account of undisturbed judgement in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited. The Applicant however averred that she had since filed an application seeking to reopen the said suit and to set aside the impugned interlocutory judgement in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited in order for the issue of ownership to be determined on merits.
17. According to the Applicant, the Respondent’s claim of the suit properties are based on falsehoods which cannot be sustained if subjected to full trial by a Court of competent jurisdiction. She further averred that the Respondent intermeddled with the free property of the deceased by unlawfully selling Mavoko Town Block 2/8 despite the pendency of the suits filed against her by the Estate and the Deceased. Based on legal advice, she stated that obtaining legal authority to deal with the free property of the deceased does not absolve Esther Mbaika from liability for acts of intermeddling carried out previously against the free property of the deceased.
18. On behalf of the Applicant, it was submitted that Deceased acquired all that parcel of land known as LR NO Mavoko Township/Block 2/112 and LR NO Mavoko Township/Block 2/8 (hereinafter referred to as the properties) through his membership in Mitaboni Katani Company Limited, a company that was formed in 1971 or thereabout for the purpose of purchasing land on behalf of its registered members/shareholders and distributing the land among its members/shareholders according to the shares they held. It was submitted that the said Company purchased land known as the LR No 7283/2 measuring approximately 9800 acres situate in Mavoko on behalf of its members and that the Deceased was a fully paid up member of the Company owning 300 shares. Consequently, the Deceased was allotted two plots namely; LR No Mavoko Township/Block 2/112 and LR No Mavoko Township/Block 2/8 measuring 50 and 20 acres respectively.
19. It was submitted that in late 1991 the Respondent herein engineered the fraudulent registration of the subject properties under her name. Thereafter, she proceeded to dispose-off one of the properties



- known as LR NO Mavoko Township/Block 2/8 without any colour of right and/or lawful authority after the demise of David Mutisya Mumo the Deceased herein. The Respondent, it was submitted, continues to illegally and/or unlawfully hold onto the free property of the Deceased and there is a real and imminent threat that she will continue to dispose-off more of the free property of the Deceased. By these summons, the Petitioner therefore seeks inter alia Protection Orders to preserve the properties rightfully forming part of the Deceased's estate and committal of the Respondent for a maximum period of one year on account of intermeddling with the free property of the Deceased.
20. It was submitted that section 45(1) of the *Law of Succession Act*, Cap 160 Laws of Kenya provides that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased except so far as expressly authorized by the Act, or by any other written law, or by a grant of representation. According to the Petitioner, the Deceased lawfully acquired the said properties and was allotted the suit properties a position well affirmed by the former Chairman/Director and Secretary/Director of the Company through their Affidavits sworn on June 10, 2022. However, the Respondent herein, in late 1991 or thereabout, contrived the fraudulent transfer of the subject properties in her name and in a bid to sanitize her fraudulent entries on the land register, she instituted a suit HCCC No 6660 of 1992 - Esther Mabaika vs Mitaboni Katani Company Ltd claiming the Title deeds of the properties and albeit instituting the suit in a Court lacking jurisdiction, the Respondent proceeded to irregularly obtain interlocutory judgment against Mitaboni Katani Company Ltd to the detriment of the latter and the Deceased who was the legal and rightful owner of the properties.
 21. It was submitted that the Respondent is yet to tender any evidence showing how she acquired the properties let alone her membership with Mitaboni Katani Company Limited as claimed in HCCC No 6660 of 1992. The Petitioner submitted that Mitaboni Katani Company Limited the Defendant in the abovementioned suit was denied their constitutional right to be heard as they were never served with the summons of the suit yet the Court went ahead to unprocedurally enter judgment against them. It was noted that the Respondent herein did not furnish this Court with any evidence illustrating how she acquired the properties but for the fraudulently acquired titles as established in the Directorate of Criminal Investigation Report. According to the Petitioner, it is therefore an incontrovertible fact that the properties belong to the Deceased and the Respondent herein hampered his quiet enjoyment of the properties before his demise in the year 2000.
 22. It was contended that in the year 2008, the Respondent purportedly sold the free property of the deceased to one Washington Kariuki Kiiru for a consideration of Kenya Shillings Eight Million (Kshs 8,000,000) without any lawful authority. In furtherance of the illegality the Respondent filed an Application dated September 21, 2020 seeking to remove the caution registered against the properties by the estate of the deceased.
 23. In support of his submissions, the Petitioner cited Section 45 (2) of the *Law of Succession Act* which provides that any person who intermeddles with the free property of the Deceased shall 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 submitted that the Respondent intermeddled with the Deceased's property by purporting to sell it to an alleged third party without any lawful authority or justification. The Court was therefore urged to find the Respondent herein liable for intermeddling and be pleased to commit her to prison for a maximum period of one year.
 24. It was submitted that Section 47 of the *Law of Succession Act* vests this court with wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person, a position reiterated by the Court of Appeal in *Floris Piezzo & Another -vs- Giancarlo Falasconi (2014) eKLR*.



25. Based on *Giella vs Cassman Brown* (1973) EA 358 and [*Mrao Ltd Vs First American Bank of Kenya and 2 others*](#) it was submitted that the Petitioner herein has tendered a mountain of evidence showing the Deceased's rightful proprietary interest in the subject properties. Equally the Petitioner has illustrated how the Respondent herein has infringed on their proprietary right for over 3 decades by illegally and or/unlawfully holding on to the properties and disposing off part of the properties. To the Petitioner, the Respondent's fraudulent actions have been unearthed by the Directorate of Criminal Investigations and the same has culminated in criminal proceedings MCCR E006 of 2021-Republic vs Esther Mbaika for defrauding the Estate of the Deceased off its rightful properties.
26. It was therefore submitted that the foregoing meets the threshold of a prima facie case with a probability of success and that the Estate of the Deceased has established a legal and/or equitable right warranting protection by this Court. Further, the Estate of the Deceased stands to suffer irreparable harm which can never be adequately remedied or atoned for by damages if the Protective Orders are not granted. Since the Respondent has purported to sell part of the properties measuring 20 acres to a third party to the detriment of the estate and/or its beneficiaries, there is real and imminent danger that the Respondent herein will continue to dispose-off the Deceased's property if this Honourable Court does not grant the Protective Orders sought thereby depriving the beneficiaries of the Estate of the Deceased their rightful inheritance. Equally, when in doubt the Court should render its determination on a balance of convenience. It follows that the nature/level of injury the Petitioner stands to suffer were the injunction not issued, should outweigh injury which would be suffered by the Respondent were the same not determined in their favour.
27. It was reiterated that the subject properties are part of the Deceased's estate and ought to be preserved for the eventual distribution amongst its lawful beneficiaries. If the Protection Orders are not issued, the beneficiaries of the Deceased's Estate stand to lose their rightful inheritance as the Respondent set on disposing off the properties. On the other hand, the Respondent will not suffer any prejudice if the Protection Orders do issue hence the scale tips towards the Petitioner herein on a balance of convenience.
28. It was submitted that the properties herein rightfully belong to the Deceased's estate and the Respondent lacks any proprietary interest in the same. The Respondent herein is guilty of intermeddling and ought to be imprisoned for a maximum of one-year for attempting to dispose-off the lawful property of the Deceased.

Determination

29. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.
30. The first issue for determination is whether the current application is caught up by the doctrine of res judicata. Section 7 of the [*Civil Procedure Act*](#), 2010 provides that:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.



31. The Court of Appeal dealt with the question of res judicata in *Civil Appeal No 105 of 2017 the Independent Electoral and Boundaries Commission vs Maina Kiai and 5 Others [2017] eKLR* by holding that:

' Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b). The former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in *Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR* they rendered the elements as;

- ' (a) The former judgment or order must be final;
- (b) The judgment or order must be on merits;
- (c) It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- (d) There must be between the first and the second action identity of parties, of subject matter and cause of action.'

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

32. The rationale for this doctrine was also discussed in *Res Judicata, Estoppel, and Foreign Judgments* by Peter R Barnett on page 9 as follows:-

' The doctrine finds expression and justification in two fundamental principles; one public-that it is in the interest of the state that there be an end to litigation, and the other private-that no person should be proceeded against twice for the same cause. Even so, the main object of the doctrine of res judicata is the avoidance of repetitious and wasteful litigation'.

33. In this case it is agreed by the parties that the Respondent herein instituted HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika -vs- Mitaboni Katani Company Limited seeking title deeds for the said



properties in which a default interlocutory judgement was entered. From the Petitioner's own affidavit, the said judgement was set aside but was reinstated subsequently and the matter proceeded with the formal proof. However, the deceased and his estate subsequently instituted HCCC No 70 of 1995 (Now ELC No 47 of 2013 (Machakos) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) vs Esther Mbaika in an attempt to recover the suit properties from the Respondent. That attempt was however unsuccessful and an appeal against the decision was preferred in the Court of Appeal vide Civil Appeal No 61 of 2017 (Nairobi) - Zakayo Matheka Mutisya (Substituted for David Mutisya Mumo) –vs- Esther Mbaika. The appeal suffered the same fate on account of undisturbed judgement in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited. The Applicant however averred that she had since filed an application seeking to reopen the said suit and to set aside the impugned interlocutory judgement in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited in order for the issue of ownership to be determined on merits.

34. In its decision the Court of Appeal made it clear that the Petitioner cannot successfully challenge the Respondent's claim to ownership of the two parcels unless and until the judgement in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited is successfully challenged and set aside. That sound principle remains to date since according to the Petitioner, his application seeking to challenge the said judgement is still pending. In my view, just like the Court of Appeal stated, unless and until that application succeeds, the issue of ownership of the suit parcels cannot be entertained in these proceedings.

35. That this Court has the power to grant the orders sought which are injunctory in nature is not in doubt. As was held by Court of Appeal in *Floris Piezzo & Another –vs- Giancarlo Falasconi* (2014) eKLR;

' 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 Rules which further emboldens Court's 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.'

36. Sections 45 and 47 provide as follows:

45. 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.

37. In order for this Court to grant protective orders on the ground that the Respondent has intermeddled in the Estate of the deceased, the Petitioner has to satisfy this Court that the properties in question are free properties of the deceased. As things stand, at least for now, the properties in question are not the free properties of the deceased unless and until the judgement in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika –vs- Mitaboni Katani Company Limited is set aside. The issue as to how the Respondent acquired the said properties cannot be determined by this Court sitting as a Succession Court. It is only after that determination is made that this Court can entertain further proceedings.

38. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs Trufoods* [1972] EA 420 and *Giella vs Cassman Brown & Co Ltd* [1973] EA 358. In *Nguruman Limited vs 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) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd V Afraba Education Society* [2001] Vol 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.'

39. While reiterating the said principles, Ringera, J (as he then was) in *Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi (Milimani)* HCCC No 1234 of 2002 stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in Nairobi High Court *Civil Case No 517 of*



2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR) where it was stated:

' I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein.'

40. However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. It was therefore held by Ringera, J (as he then was) in *Dr Simon Waiharo Chege vs Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No 360 of 2001*:

' The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.'

41. According to the Court of Appeal in *Esso Kenya Limited vs Mark Makwata Okiya Civil Appeal No 69 of 1991*:

' The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course. The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing. The



principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory. As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.'

42. What then constitutes a prima facie case? In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal 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. While adopting the same position the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR added that:

' The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie



case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'

44. In this case, the Petitioner's case is that the properties in question were the property of the deceased and that the same were fraudulently transferred to the Respondent without the knowledge or consent of the Deceased or the Estate. However, the interest of the Estate depends on whether the properties the subject of this application forms part the estate of the deceased herein. According to section 3 of the Law of Succession Act, 'estate' means 'the free property of a deceased person' while 'free property', in relation to a deceased person, means 'the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.' It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, interests had not been terminated.
45. In Mpatinga Ole Kamuye vs Meliyo Tipango & 2 Others (2017) eKLR, the Learned Judge observed that:
- ' This Court's view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution.'
46. It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate. Section 109 of the Evidence Act, provides that: -
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.
47. The burden is therefore upon the Petitioner to prove that the said properties not only belonged to the deceased but that by the time of his death, the deceased's interests therein had not been terminated and that he was legally competent freely to dispose of it.
48. In my view in light of the decision in HCCC No 6660 of 1992 (Nairobi) - Esther Mbaika -vs- Mitaboni Katani Company Limited which decision remains in place as of now, there is no basis upon which this Court can find, on a prima facie standard that the properties in question are the free properties of the deceased. Accordingly, I find that the Petitioner has failed to establish a prima facie case and as is stated above, if prima facie case is not established, then irreparable injury and balance of convenience need no consideration since the existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in between.
49. As regards the issue of detention of the Respondent for intermeddling, firstly, there is no evidence to support that position. Secondly, even if the Court had found that she did intermeddle, this is not the right forum to make such a decision. Intermeddling is a criminal offence and must be dealt with under a criminal process. This Court, sitting as a Succession Court cannot venture into such an inquiry. While it may well recommend that such proceedings be considered, it cannot itself undertake the same. Further, to do so would violate the appellate rights granted to those facing criminal charges since it would deny the offender one tier of an appeal.



50. Having considered the issues raised herein, I find no merit in the summons dated May 18, 2022 which I hereby dismiss but with no order as to costs since the issues raised have not been determined on their merit.

51. It is so ordered.

G V ODUNGA

JUDGE

**RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH
DAY OF SEPTEMBER, 2022**

M W MUIGAI

JUDGE

Delivered the presence of:

