



REPUBLIC OF KENYA



**In re Estate of Paul Gatete Kiratu (Deceased) (Succession Cause
E3 of 2020) [2022] KEHC 15618 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E3 OF 2020**

TM MATHEKA, J

NOVEMBER 24, 2022

IN THE MATTER OF THE ESTATE OF PAUL GATETE KIRATU (DECEASED)

BETWEEN

ESTHER NYAMBURA WANYOIKE 1ST APPLICANT

DORCAS NJERI MAINA 2ND APPLICANT

MARGARET NJERI NJOROGE 3RD APPLICANT

AND

DAVID MACHARIA RESPONDENT

RULING

1. Paul Gatete Kiragu died on November 16, 2018 at the age of 95 years old. On the September 30, 2020 his daughters and daughters in law filed a petition for grant of letters of administration.
2. On November 30, 2020 an objection was filed by the children of the deceased children i.e deceased's grand children through one Paul Gatete Munah. He also objected to the inclusion of a property he stated was registered in the name of his deceased father
3. Another objection was filed by Faith Nyambura Gatete and her two sisters on the ground that they had not been involved yet the deceased was their father, In addition she was the administrator of the estate of their mother Ruth Gatete, that some of the properties listed by the petitioners were subject to the estate of Ruth Gatete. That worse still their sister in law could not have priority in the order of administrators as proposed by the petitioners.



4. While all these were pending the applicants *vide* summons dated May 17, 2021 brought under section 45 and 47 of the Law of Succession Act, rules 49 and 73 of the Probate and Administration Rules seek for the following orders:-
 1. spent
 2. That pending the hearing and determination of this application *inter partes* the respondent by himself, his agent, assigns, servant and/or persons claiming under him be restrained by way of temporary injunction from collecting rent, intermeddling, leasing or in any way interfering with the assets of the estate of the deceased herein more particularly rental premises in property known as Nakuru Municipality Block xxxx and any development thereon.
 3. That pending the hearing and determination of this succession cause the respondent by himself, his agent, assigns, servant and or person claiming under him be restrained by way of temporary injunction from collecting rent, intermeddling, leasing or any way interfering with the assets of the estate of the deceased herein more particularly rental premises in property known as Nakuru Municipality Block xxxx and any developments thereon.
 4. That this honourable court be pleased to issue an order compelling the respondent to refund rental income collected from the rental premises in property known as Nakuru Municipality Block xxxx from the month of April 2019 to date to be deposited into the estate bank account with SMEP bank account No xxxx.
 5. That this honourable court be pleased to issue an order directing the tenants occupying premises developed on the said property to deposit rent into the estate bank account SMEP bank account Noxxxx.
5. The grounds for the application are on its face and in the supporting affidavit of Dorcas Njeri Maina sworn on her own behalf and on behalf of her co applicants on the even date. She deponed that Nakuru Municipality Block xxxx forms part of the estate of the deceased and that it has rental premises that the respondent has been illegally collecting rent.
6. She averred that on or around November 28, 2018 after the death of the deceased they held a family meeting which was attended by all family members and they resolved among other things that rent collected from the deceased estate should be deposited in the estate's bank account with SMEP bank account number xxxx that is registered in the names of family members from both families of the deceased.
7. She deposed that around April 2019 the respondent who is a grandson of the deceased without the consent and/or authority of other family members intermeddled and/or trespassed upon deceased rental premises situated in the aforesaid parcel, illegally brought in tenants and started collecting rent from them.
8. She contended that the respondent has ignored, neglected and or refused to stop intermeddling with the said parcel of land despite several demands as well as a letter from their advocate warning him to desist from the same.



9. She averred that the actions by the respondent are detrimental to the beneficiaries of the estate and if not stemmed by this honourable court, it is likely to lead to wasting away of the estate of the deceased and that it is mete and just that the respondent be restrained from intermeddling with the estate.
10. The 3rd applicant swore a further affidavit on October 21, 2021. She deponed that being the beneficiaries of the deceased they have locus standi to institute this suit.
11. She contended that the respondent is not a direct beneficiary of the estate of the deceased and they rank higher in priority in the order of consanguinity.
12. She stated that parcel of land known as Nakuru Municipality Block 2/438 forms part of the estate as it was purchased by the deceased. That the deceased herein owned (9) nine rental units and/or houses in the said property and that the monthly income of the six (6) units is Kshs 8, 000/- while for the three units is Kshs 3,500/-.
13. She averred that all the nine (9) units were solely constructed by the deceased and completed shortly before his demise and disputed that the respondent was involved in the construction of the premises.
14. She deposed that the deceased was survived by two houses and after his death both families held a meeting and agreed to deposit rent from the suit premises in a joint account in the names of family members from both families being SMEP bank account number xxxx and accused the respondent for collecting rent without depositing the funds in the said joint account.
15. She stated that the minutes arising from a family meeting held on November 28, 2018 were inadvertently/mistakenly not signed.
16. It was her deposition that Nakuru Municipality Block xxxx as stated by the respondent is one of the properties owned by the deceased but not registered under his name hence it forms part of his estate.
17. She contended that if indeed the respondent is not wasting away the property then he should provide a full and accurate account of rent collected from the premises.
18. The respondent David Macharia Kiratu swore a replying affidavit in opposition to this application on July 12, 2021. He deponed that the application is bad in law, incompetent, non-starter, frivolous, vexatious, malicious and gross abuse of the court process.
19. He stated that the applicants were his relatives, being his aunts, and his mother respectively, while the deceased was his paternal grandfather. That the three lack capacity to institute any cause relating to the estate of Paul Gatete Kiratu as they are not administrators of his estate since there is a pending objection proceedings before this court against the grant issued to them and as such the orders sought herein are premature and made with ill will.
20. It was his deposition that the applicants lack *locus standi* to institute any proceedings regarding the subject property as the property is not registered in their name and applicants are misleading the court in regards to the subject property.
21. He averred that he was the deceased's right hand man and close confidant and that he was a man of means with properties within Nakuru county that is subject to a heated succession battle.
22. He deponed that indeed the subject property Nakuru Municipality Block xxxx is one of the properties owned by the deceased but registered in the name of his grandmother the wife to the deceased Ruth Wanjiku Gatete and uncle Francis Macharia the brother to the deceased; That the applicants did not have letters of administration to the estates of Ruth Gatete or Francis Macharia and therefore could not be heard on the same.



23. That the deceased opted to register most of his properties in the name of his kin/relatives to avoid temptations of continued borrowing against his assets and unauthorized disposal of his property.
24. He deposed that the deceased had cleared all his loans and had the intention to have the registration of all his assets revert to him a position which is known by all his family members.
25. He stated that he is involved in construction and transport business and he worked closely with deceased on different construction projects and that in the presence of Faith Nyambura Gatete and his aunt who was living with the deceased he was instructed by the deceased to build his home and other rental units on the subject property and use the proceeds to take care of himself and his family. That sometime in 2018 he began construction with the deceased and he finished the project in 2020 after the unfortunate demise of his grandfather and he moved into one of the units and rented the remaining six (6) as per the discussions of the deceased.
26. He disputed intermeddling with the deceased's property and stated that he was only carrying out his wishes by taking care of his property and duly paying land rates.
27. It was his further deposition that he is not wasting away the estate property as alleged and that the two rental property and town lodging remain unutilized due to succession battles.
28. He stated that the deceased's daughter is aware that the subject property was left under his care and control by the deceased and urged this court to disregard the filed family meetings as they are unsigned.
29. He stated that the subject property herein was not part of the agenda discussed in the family meeting as purported by the applicants.
30. It was his deposition that the application has been brought in bad faith with intent to deny him peaceful enjoyment and occupation of the property in accordance to the wishes of the deceased.
31. On December 2, 2021, this court referred this matter to mediation. On March 16, 2022 parties recorded a partial settlement agreement as follows:-

- “ 1. The parties agreed that the records in the land office reads name of Ruth Wanjiku Gatete and Francis Macharia Gatete who are both deceased. They were holding in trust of the family Nkr/Mun/Block 2/438.
2. The respondent who is collecting rent on this property is not ready to surrender to court to give directions.
3. Court to give ruling on the issue of ownership of the said property- Nkr/Mun/Block 2/438.”

Analysis & Determination

32. The issues that arise for determination are:-
 1. Whether the application is incompetent for having been filed before the applicants obtained a grant of letters of administration in respect to the estate of the deceased
 2. Whether the land parcel Nakuru/Municipality/Block xxxx and the rental units erected thereon form part of the estate.
 3. Whether there was intermeddling.



4. Whether the respondent should render account of rental proceeds from the property known as Nakuru/Municipality/Block xxxx.
5. Whether the tenants occupying premises developed on Nakuru/Municipality/Block 2/438 should deposit rent into the estate bank account with SMEP bank account No xxxx.
6. Whether the orders for injunction should issue.

Issue No 1- Whether the application is incompetent for having been filed before the applicants obtained a grant of letters of administration in respect to the estate of the deceased

33. The respondent contends that the applicants lack *locus standi* as they are not administrators of the deceased estate and have also not obtained grant *ad litem* in order to institute this suit on behalf of the deceased estate.
34. It is factual that none of the applicants herein have obtained grant *ad litem* to institute this suit on behalf of the deceased estate. It is also true that the applicants are not the administrators of the deceased's estate. The applicants have however petitioned for letters of administration intestate in their capacity as daughters and daughter in law respectively of the deceased.
35. The Court of Appeal in [Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama](#) [2014] eKLR, addressed itself on the issue of *locus standi* in succession matters as follows: -

“... But in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with *locus standi* upon obtaining a limited grant or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* (supra) this court differently constituted rendered itself thus;

'.....an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”
36. Re [Estate of Benson Maingi Mulwa \(deceased\)](#) [2021]eKLR Odunga J held that:

“In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is properly entitled to protect his or her interest in the estate.
37. [John Marete Kirema & Another v Gladys Karimi Muthamia & 3 others](#) [2013]eKLR Makau J held that:

“My understanding of section 45 of the [Law of Succession Act](#) is that when the court finds the deceased property is in danger of being intermeddled with it can on its own motion issue appropriate orders to preserve the deceased estate pending regularization of any process that needs to be regularized...”
38. The 1st and 2nd applicants are direct beneficiaries of the deceased's estate and have accused the respondent of intermeddling with the estate of the deceased. They need not be administrators to seek



the preservation of the estate pending the regularization of the process. The respondent concedes that two of them are daughters of the deceased while the third one is his own mother who is a daughter in law of the deceased. Given that the wives of the deceased are both deceased, the daughters have priority as compared to the grandson.

39. Secondly, it is conceded by both sides that the said property though registered in the names of the deceased's wife and brother belonged to the deceased. By that concession the property falls among the properties of the deceased that must be protected pending the distribution of the estate. That concession makes it unnecessary to await the probate proceedings with respect to the said property. Thirdly section 45(1) of the [Law of Succession Act](#) states:

“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.”

The respondent depones that the property belonged to the deceased and that he took possession of the same after the demise of the deceased in 2020. The law clearly prohibits that. He has not given the court any evidence to support his assertion that he did so to fulfil the wishes of the deceased. In any event the deceased could have as well registered the property in the respondents name as the deceased's right hand man.

40. In the foregoing circumstances it is my view that the applicants need not be administrators of the deceased's estate to seek the exercise of the probate court's powers to protect the estate of the deceased under section 45 of the [law of succession Act](#) and as such in their capacity as beneficiaries they have *locus standi* to bring this suit.

Issue No 2-Whether the land parcel Nakuru/Municipality/Block 2/438 and the rental units erected thereon form part of the estate.

41. It follows hence that from the respondent's own deposition at paragraph 12 of his replying affidavit the aforesaid property belonged to his grandfather, the deceased herein.
42. Both parties in their consent have expressly stated that Ruth Wanjiku Gatete and Francis Macharia in whose names the property is registered and both of whom are deceased were holding it on behalf of the deceased in trust for the family.
43. The respondent at paragraph 18 of his affidavit deponed that he began construction with the deceased in 2018 and upon his demise he moved into one of the units and rented the remaining six (6) as per his discussion with the deceased. It is trite law that he who alleges must prove. Section 107 of the [Evidence Act](#) provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

44. The respondent did not annex any evidence to show that he contributed towards the construction of the rental premises and in the absence of the same, the rental premises have to be treated as part of the estate of the deceased unless otherwise established.

Issue No3- Whether there was intermeddling

45. Section 45 of the [law of Succession Act](#) 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 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.”

46. In *Gitau and 2 others v Wandai & 5 others* [1989] KLR 23, Tanui J, as he then was stated as follows: -

“According to section 45 of The *Law of Succession Act*, cap 160 intermeddling with the property of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property.”

47. The respondent herein is neither a personal representative nor an administrator/executor of the deceased estate.
48. The only person who can handle the property of a dead person as if that property belonged to them is the person who holds a grant of representation, for that is a personal representative of the deceased, whether as an administrator or an executor. It is the grant that vests the property in the grant holder by virtue of section 79 of the *Law of Succession Act*. (See the case of In *re Estate of David Livingstone Loka Injene (deceased)* [2019] eKLR).
49. The respondent on his own admission has taken possession of the property and the income from therein. That is intermeddling. .

Issue No 4- Whether the respondent should render account of rental proceeds from the property known as Nakuru/Municipality/Block 2/438.

50. An intermeddler under section 45(2) of the *Law of Succession Act* is answerable to the rightful administrator to the extent of the properties he has intermeddled. The applicants herein have not yet been appointed as administrators of the deceased estate and therefore the respondent cannot account to them.
51. This court however should not ignore the fact that the respondent admitted to have been collecting rent. It is crucial to know how the money has been used as this will be critical in the final distribution. This prayer is merited and he ought to render accounts.

Issue No 5-Whether the tenants occupying premises developed on Nakuru/Municipality/Block xxxx should deposit rent into the estate bank account with SMEP Bank Account No xxxx.

52. It is the duty of the probate court to protect the estate of a deceased person where there is likelihood of it being wasted before letters of administration intestate is issued. This power emanates from the



provisions of rule 73 of the *Probate & Administration Rules* that gives the court inherent power to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the court. In order to preserve the estate of the deceased this prayer is justified.

Issue No 6- Whether the orders for injunction should issue

53. In order for the court to grant this prayer, the applicants must satisfy the conditions laid down in the case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358. They must show that there is a *prima facie* case with a probability of success and that they stand to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.
54. The applicants have demonstrated they have a *prima facie* case. They have shown and the respondent has admitted to the intermeddling with the estate of the deceased.
55. The balance of convenience lies heavily towards the need to preserve the estate pending proper issuance and confirmation of grant.
56. In the end the following orders issue;
 1. That pending the hearing and determination of this succession cause an injunction do hereby issue against the respondent by himself, his agent, assigns, servant and or person claiming under him be restrained by way of temporary injunction from collecting rent, intermeddling, leasing or any way interfering with the assets of the estate of the deceased herein more particularly rental premises in property known as Nakuru Municipality Block xxxx and any developments thereon.
 2. That the respondent to render account to this court for all the rental income collected from the rental premises in property known as Nakuru Municipality Block 2/438 from the month of April 2019 to date within 45 days hereof by a date to be assigned by the court assistant.
 3. That the tenants occupying premises developed on the said property to deposit rent into the estate bank account SMEP bank account Noxxxx (The applicants are to supply full particulars of this account to the court within three (3) days hereof to be included in the court order).
 4. That signatories to the account are prohibited from making any withdrawals from that account SMEP bank account No xxxx without the authority of the court. This order be served on the manager SMEP Bank (The applicants are to supply full particulars of this account to the court within three (3) days hereof to be included in the court order).
 5. Each party to bear its own costs.
 6. This is family matter. The family is large. Going by the number of applications and counter applications it may live in the corridors of this court for very long. This court is obligated by article 159(2) (c) of the *Constitution* to encourage them to pursue alternative dispute resolution mechanisms. In Nakuru we have alternative justice system (AJS) and mediation. Parties and their counsel can seek either through a mention before the requisite deputy registrar. For this purpose, parties to appear before the deputy registrar within thirty (30) days hereof on a date to be assigned by the court assistant.



7. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 24TH DAY OF NOVEMBER, 2022.

MUMBUA T MATHEKA

JUDGE.

CA Jennifer

Frank Mwangi & Company Advocates

Kamoing' & Company Advocates,

