



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of David Kiprugut Bor (Succession Cause 123 of 2021)
[2022] KEHC 16868 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 123 OF 2021
RN NYAKUNDI, J
DECEMBER 23, 2022
IN THE MATTER OF THE ESTATE OF DAVID KIPRUGUT BOR**

BETWEEN

BERNEDINE JEBET CHERUTICH APPLICANT

AND

STEPHEN KAPKITONY SITIENEI 1ST RESPONDENT

SARAH CHELAGAT SITIENEI 2ND RESPONDENT

EZEKIEL BOR 3RD RESPONDENT

RULING

1. The applicant approached this court vide a Notice of Motion dated November 18, 2022 seeking the following orders;
 1. Spent
 2. That pending the hearing and determination of this application, this Honourable court do issue a temporary/preservatory order restraining the respondents, their agents, servants, principals, donors of any power of attorney and/or their employees from alienating, allocating, selling, transferring, constructing, renovating demolishing, encroaching and or dealing/intermeddling with the following properties without the proper consent of this court;
 - a. Motor vehicle registration No KCA 200R
 - b. Motor vehicle registration No KDC 731H
 - c. Motor vehicle registration No KCW 930W
 - d. Parcel No Songhor/Songhor/Block 2/5



- e. Parcel No Nakuru/Tinet Kabongoi settlement scheme/730
 - f. Parcel No Mosoriot Centre Plot No 1287
3. That pending the hearing and determination of the objection and succession proceedings the money/shares in bank accounts namely;
 - a. 100 shares at Nandi Gold gardens
 - b. Money in family Bank A/C No 09xxxx
 - c. Money in National bank A/C No 01xxxx
 - d. Money in National bank A/C No 01xxxx
 - e. Money in Diamond Trust bank A/C No 06xxxx
 - f. Money in Equity bank Nandi Gold Investment A/C No 09xxxx
 - g. Money in NCBA bank PLC Nandi Gold Investment A/C No 83xxxx

All belonging to the deceased David Kiprugut Bor be frozen forthwith.
 4. That the Honourable court do issue summons to the respondents namely Stephen Kapkitony Sitienei, Sarah Chelagat Sitienei, Ezekiel Bor to attend and appear before this court on a date determined to show cause why they should not be committed to civil jail or penalized or intermeddling.
 5. That the respondents be penalized on the terms that the court shall deem just for blatantly intermeddling with the deceased's estate.
 6. That the following motor vehicles KCA 200R, KCW 930R and KDC 731H that have been alienated by the respondents, namely Stephen Kapkitony Sitienei, Sarah Chelagat Sitienei, Ezekiel Bor be brought and delivered physically to the jurisdiction of this court on a date determined by the court for the court to view the same and make directions on the same.
 7. That the costs of the application be in the cause.
2. The application is premised on the grounds set out therein and the contents of the supporting affidavit.
 3. The applicant contended that she is awaiting confirmation of the grant but the respondents have been intermeddling with the deceased's property. The alleged intermeddling includes the respondents invading her matrimonial home and taking the keys for motor vehicle registration KCA 200R, transfer if the motor vehicles KCA 200R, KCW 930N and KDC 731H to themselves and third parties. Further, that they have used said vehicles to get financial credit.
 4. The 1st respondent opposed the application vide a replying affidavit filed on November 23, 2022. He contends that the applicant obtained the grant for the estate without involving him yet he is the duly appointed guardian of Denver Jelimo, an immediate heir of the deceased. He has since filed an application for revocation of the grant and seeks to be an administrator in the estate.
 5. Further, the 1st respondent deposed that the properties listed, to wit Motor vehicle registration no KCA 200R, KDC 731H and KCW 930H do not form part of the estate and there is nothing to suggest that he transferred the same into their names upon the demise of the deceased.
 6. The applicant has not provided any documentary proof to established that the respondents have intermeddled with the immovable properties listed to wit; to warrant the issuance of summons to



show cause. The applicant was not a wife to the deceased and further, motor vehicle registration no KCA 200R was sold to Sarah Sitienei, KDC 731H belongs to Ezekiel Bor and has never belonged to the deceased at any time. KCW 930R has only belonged to NCBA bank Kenya Ltd, Ann Jepkosgei Kipsaina(DCD) and the deceased was never alienated by any one of the respondents. The applicant filed a suit on Kapsabet Chief Magistrate’s Succession Cause No E322 of 2021 attempting to collect the goods of the deceased and the same was dismissed.

He prayed that the application be dismissed with costs.

Decision

The law

7. The governing provisions on intermeddling with intestate or testate estate are crystal clear in section 45 of the *law of succession Act* which is worded 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”

8. The court construed these provisions in the case of *Benson Mutuma Muriungi v CEO, Kenya Police SACCO & another* [2016] eKLR where the court defined ‘intermeddling’ as follows:

“There is no specific definition of the term intermeddling provided in the Law of Succession Act. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as; “for any purpose” and “or otherwise intermeddle with” in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as; taking possession, or occupation of, or disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act or any other written law. I do not pretend to close the list either or to make it exhaustive. The list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law.”



9. The remedy of provisions is designed to ameliorate the serious problem that may arise in interfering with the deceased estate before distribution. The purpose of it is to protect the assets survived of the deceased to await final determination and distribution to the beneficiaries as provided for under section 29(a) and (b) of the *succession Act*.
10. I have perused the pleadings and annexures filed by the parties. The court has a duty to ensure the estate of the deceased is protected pending the distribution of the estate. However, for the court to do the same, the property that is to be protected by conservatory orders must form part of the free property of the deceased as at the time of his death. I have considered the annexures marked as BJC2,A,B and C. These are ownership records for the motor vehicles subject of this application.
11. I have also considered the parcels of land listed as properties of the deceased and the accounts claimed to be in the name of the deceased. The applicant claims there is intermeddling of the estate which the respondents have vehemently denied.
12. Given the conflicting nature of the contestation on the properties subject of this application, it is in the interests of justice that the status quo of the properties listed be maintained as at the time of the present application. The contrasts between the affidavit evidence and the prescribed provisions are striking to say the least.
13. However, it is trite that parties are bound by their pleadings. It is not the place of the court to decide what prayers a party sought to be granted. I say this with reference to the prayers in the present application. Prayer 2 seeks preservative orders pending the hearing and determination of the present application. Said orders are with regard to
 - a. Motor vehicle registration No KCA 200R
 - b. Motor vehicle registration No KDC 731H
 - c. Motor vehicle registration No KCW 930W
 - d. Parcel No Songhor/Songhor/Block 2/5
 - e. Parcel No Nakuru/Tinet Kabongoi settlement scheme/730
 - f. Parcel No Mosoriot Centre Plot No 1287
14. The upshot of the foregoing is that the prayer has been overtaken by events and cannot be granted in the circumstances.
15. With regard to prayer 3, the applicant has not produced evidence before the court to show the nexus between the deceased and the listed accounts holding the money and the shares alleged. Therefore, the same cannot be granted as it would freeze accounts whose ownership is not known to the court.
16. The application is hereby dismissed in its entirety for reasons that the applicant has failed to discharge the burden of proof within the ambit of section 45 of the *law of succession Act*. Further to this some of the assets deposited in the affidavits are not particularly able to fit into the definition of free property of the deceased in section 3 of the *law of succession Act*. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET VIA EMAIL THIS 23RD DAY OF DECEMBER, 2022.

.....



R. NYAKUNDI

JUDGE

(cmellyadvocates@gmail.com, kcandkigenllp@gmail.com)

