



In re Estate of the Late Wesley Kipsang Koech (Deceased) (Succession Cause E007 of 2022) [2022] KEHC 16473 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE E007 OF 2022
AN ONGERI, J
DECEMBER 16, 2022**

IN THE MATTER OF THE ESTATE OF THE LATE WESLEY KIPSANG KOECH (DECEASED)

BETWEEN

**RACHEL CHEBORE KOECH 1ST PETITIONER
PATRICT KIPROTICH SANG 2ND PETITIONER
DENNIS KIPKIRUI SANG 3RD PETITIONER
CHERONO WINNY 4TH PETITIONER**

AND

BENJAMIN MALAKWEN KOECH PROTESTOR

RULING

1. The application coming for consideration in this ruling is the one dated June 22, 2022 seeking the following prayers;
 - i. That this matter be certified as urgent and that the same be heard and orders given *ex-parte* in the first instance.
 - ii. That the respondent/intermeddler herein, be restrained from further intermeddling, wasting, disposing off and/or in any other manner interfering with assets that form part of the deceased's estate hereof.
 - iii. That the respondent be ordered to file in court within seven (7) days bank statements for a period covering the last one year and an inventory of assets (moveable and immovable) held in the name of Kericho Guest Enterprises Limited, assets that are in joint names of the respondent and the late Wesley Kipsang Koech, business till/paybill and all the m-pesa transactions for the last one year.



- iv. That in the alternative and without prejudice to prayer (3) herein above, the court does appoint a duly qualified auditor and as the case may be an accountant who will carry out a forensic audit/account of the businesses, bank statements, till, paybill and m-pesa transaction therein with a view to establish the extent of the wastage that the respondent has visited upon the estate of the late Wesley Kipsang Koech.
 - v. That the costs of this application be borne by the respondent/intermeddler.
2. It is supported by a supporting affidavit sworn by Dennis Kipkirui Sang.
 3. The 3rd petitioner/applicant avers that his co-petitioners have given him consent to make and swear the affidavit herein.
 4. The 3rd petitioner/applicant avers that the respondent herein and his father now deceased were jointly engaged in various business ventures.
 5. The 3rd petitioner/applicant avers that the respondent herein has refused to cooperate with the administrators of the subject estate by neglecting and/or renegeing in releasing vital documents that are necessary to collect, prevent wastage, secure and manage the subject estate as required by law.
 6. The 3rd petitioner/applicant avers that the respondent herein has intermeddled with the free property of the subject estate.
 7. The 3rd petitioner/applicant avers that it was in the interest of justice and fairness that the court should order that the respondent herein to produce documents, accounts and an inventory of all assets that form the subject estate.
 8. The 3rd petitioner/applicant avers that the respondent herein has entirely frustrated the succession process in respect of the estate of the late Wesley Kipsang Koech.
 9. The respondent opposed the application and filed a replying affidavit sworn on September 28, 2022.
 10. The respondent avers that the deceased was his brother and business partner with respect to businesses conducted under the company known as Kericho Guest Enterprises, Soda Connect Distributors and Kongonyot Millers.
 11. The respondent avers that the sole business he undertook with the deceased under Kericho Guest Enterprises Limited was distribution of products of Kenya Breweries Limited (KBL), however, the business terminated after KBL terminated the distributorship agreement, which matter was still pending determination in court.
 12. The respondent avers that Kongonyot Millers collapsed sometime before the death of the deceased in September, 2021 with a working capital of Kshs 920,482/= out of which Kshs 582, 595/= was applied to settle the deceased's hospital bill incurred at Siloam Hospital.
 13. The respondent avers that Soda Connect was essentially a distributorship business that ceased on carrying business after the demise of the deceased after accruing losses.
 14. The respondent avers that there are several properties acquired jointly between himself and the deceased and registered in their common names which he sought to have subdivided equally between them.
 15. The respondent avers that the proceeds from the said properties held in common between September 2021 and September 2022 ought to be divided equally between them taking into account the amount



- of Kshs 997,065/= incurred by the deceased's estate to cover his funeral expenses and other attendant expenses.
16. The respondent avers that all income accruing from the aforesaid businesses have been credited to Kongonyot Millers Bank account held at DTB Kericho Branch.
 17. The respondent avers that the petitioners' allegations in the circumstances were unjustified and ought to be dismissed.
 18. The parties filed written submissions which I have considered.
 19. The petitioners reiterated that the respondent had been in exclusive control and possession of all the properties and/or businesses owned by the deceased to the exclusion of the 1st petitioner/applicant and her children and continued to do so to their detriment, which actions were tantamount to intermeddling contrary to section 45 for the *Law of Succession*. The petitioner cited the cases of *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR & *In re Estate of M'Ngarithi M'Miriti* [2017] eKLR.
 20. The petitioners reiterated that they were apprehensive that if the respondent was not stopped, they would be disinherited.
 21. The petitioners contended that if the respondent was not stopped, he would commit further acts that will constitute further intermeddling with the estate of the late Wesley Kipsang Koech thus frustrating the succession cause.
 22. The petitioners maintained that they suffered and continued to suffer irreparable loss, wastage and damages in the hands of the respondents unless he be restrained by an order of the court from further siphoning the properties of the estate of the late Wesley Kipsang Koech.
 23. The respondent contended that the businesses in question had collapsed and save for allegations that he had committed acts of intermeddling over the deceased's property, the petitioners neither particularized such acts nor submitted evidence in support of their allegations.
 24. The respondent contended that the court ought to take cognizance of the fact that he had a *bona fide* stake in the properties admitted to have been acquired with the deceased, he therefore urged the court not to unduly dispose him of his right to use and occupy the said properties under the guise that he was intermeddling. He cited the findings of the court *In re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR in support of his assertions.
 25. The respondent contended that the court sitting as a probate and administration court lacked the jurisdiction to hear and determine issues pertaining properties held in common with third parties or proceeds of businesses operated by the deceased with third parties.
 26. The respondent reiterated that the court should restrict itself to the free/exclusive property of the deceased. The respondent cited the findings of the court *In re Estate of Robert Wachira Paul (Deceased)* [2021] eKLR.
 27. The respondent maintained that immovable property held in common with deceased, and questions arising from severance of tenancies and other issues arising is the sole preserve of the environment and land court. The respondent cited the case of *Joseph Kaberia Kumari v Tony Mwenda Muthuara* [2021] eKLR.
 28. The issues for determination are as follows;
 - i. Whether the respondent has intermeddled with the estate.



- ii. Whether the respondent should file an inventory of the assets of the deceased.
 - iii. Whether on the alternative an auditor should be appointed to carry out a forensic audit of the estate.
29. Grant of letters of administration were issued by this court on May 28, 2022.
30. Notably, the duties and responsibilities of personal representatives and administrators are fiduciary in nature and they have been laid out in section 83 of the *Law of Succession Act* as follows;

“Personal representatives shall have the following duties—

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
 - (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
 - (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
 - (d) to ascertain and pay, out of the estate of the deceased, all his debts;
 - (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
 - (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
 - (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
 - (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
 - (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.” (emphasis mine)
32. *In re Estate of Makokha Idris Khasabuli (Deceased)* [2019] eKLR Musyoka J highlighted the duties of administrators as follows; “The primary roles of administrators are several. The first is collection or gathering or getting in of the assets of the estate. The second role is the protection or preservation of the assets collected or gathered or gotten in. The third one is payment of debts and liabilities of the estate from the assets gathered and preserved. Finally, is the distribution of the estate after all the debts and



liabilities have been settled. Collection or gathering or getting in of assets may require filing of suits to recover estate property. Payment of debts would include clearing any loans the deceased had with any banks or other persons, and where assets are encumbered by charges and mortgages, by having such encumbrances removed through settlement of debts and liabilities, for such encumbered assets cannot possibly be distributed at confirmation before the encumbrances have been cleared.”

33. The duty to account for the assets, liabilities and dealings of any estate purely lies on the personal representatives. There is no short cut about it. It is a statutory obligation to which the administrator of an estate must adhere without any discretion.
34. The four administrators are hereby directed to compile a list of all the assets, liabilities and the beneficiaries of the estate and to file a summons for confirmation within 30 days of this date.
35. I defer this ruling until the administrators have filed a summons for confirmation. This matter will be mentioned on February 16, 2023 for all the parties to appear for directions.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 16TH DAY OF DECEMBER, 2022

A. N. ONGERI

JUDGE

