



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1405 OF 2019

IN THE MATTER OF THE ESTATE OF KALEB MWANGI

HEZEKIAH MUCHOKI (DECEASED)

ESTHER MUTHONI MWANGI OBJECTOR/APPLICANT

VERSUS

STEPHEN KALEB MAINA 1ST ADMINISTRATOR/RESPONDENT

DAVID CALEB KINUTHIA..... 2ND ADMINISTRATOR/RESPONDENT

RULING

Esther Muthoni Mwangi (Objector/Applicant) filed a Notice of Motion under Certificate of Urgency dated 13th October 2020 and brought under sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1 & 2 of the Civil Procedure Rules 2010, Sections 40, 45 & 67 of the Law of Succession Act and Rules 36, 49 and 73 of the Probate and Administration Rules. She is seeking the following orders:

1. Spent

2. That pending hearing inter-partes and determination of this application , the Administrators/Respondents by themselves, their servants, employees, agents and/or assigns be restrained from receiving, intermeddling with, transferring, alienating, misappropriating, misapplying and/or wasting any and all income from Title Number IR 6713, LR NO. 36/890/1 EASTLEIGH NAIROBI, L.R NAIROBI BLOCK 76/540 BURUBURU NAIROBI, PARCEL NO. LOC 15/GAKUYU/273, PARCEL NO. LOC 20/KAMBIRWA/376, PARCEL NO. LOC 20/KAMBIRWA/1542 SAMUEL GITUTO FARMERS SOCIETY- 8 SHARES, MONEY MARKET FIND AC NO. 10810, BARCLAYS FUND A/C NO. 10811, BANK OF BARODA A/C NO. 95900100000131, SAFARICOM SHARES/ KENGEN SHARES, KENYA RE SHARES & MUMIAS SUGAR SHARES.

3. That pending hearing inter-partes and determination of this application, the Administrators/Respondents by themselves, their servants, employees, agents and/or assigns to deposit and/or make good account of the funds and/or shares of the estate of Kaleb Mwangi Hezekiah Muchoki (deceased) to this court received by themselves after fraudulently obtaining grant of representation in this petition issued to them on 3rd June 2020.

4. That costs of this application be provided for.

This application is supported by the affidavit of the Applicant sworn on the 13th October, 2020 wherein she deposes that she is the wife of the deceased whose estate this proceedings relate. She states that the deceased owned several properties including IR 6713, LR NO. 36/890/1 EASTLEIGH NAIROBI, L.R NAIROBI BLOCK 76/540 BURUBURU NAIROBI, PARCEL NO. LOC 15/GAKUYU/273, PARCEL NO. LOC 20/KAMBIRWA/376, PARCEL NO. LOC 20/KAMBIRWA/1542 SAMUEL GITUTO FARMERS SOCIETY- 8 SHARES, MONEY MARKET FIND AC NO. 10810, BARCLAYS FUND A/C NO. 10811, BANK OF BARODA A/C NO. 95900100000131, SAFARICOM SHARES/ KENGEN SHARES, KENYA RE SHARES & MUMIAS SUGAR SHARES and that part of this estate is leased to several tenants and generates income which is received and managed by the administrators/Respondents to the exclusion of other beneficiaries.

She avers that the administrators/Respondents have been collecting and misappropriating rental income from title No. IR 6713, LR No. 36/890/1 Eastleigh Nairobi to her exclusion and other beneficiaries due to the grant dated 3rd June 2020 obtained without knowledge of other beneficiaries. She also states that the deceased had another family, a wife and five children, all of whom are alive and the grant issued to the Respondents disinherits the other beneficiaries.

She further relies on other documents including birth certificates of her children and a letter from the chief acknowledging them as beneficiaries.

Stephen Kaleb Maina filed a Replying Affidavit sworn on 6th November 2020 where he stated that he was not aware that the Applicant was the deceased's wife and that the deceased owned the suit properties except for 4 ½ shares of Samuel Gituto which are held in trust for the deceased's brothers. He avers that he is not aware of any Barclays Bank accounts and that rent collected from the Eastleigh property were collected by his sister during the deceased's lifetime and that there is no danger of the estate being wasted.

David Kaleb also filed a Replying Affidavit dated 6th November 2020 with similar averments to the 1st Respondent.

The Applicant filed a further affidavit dated 12th May 2021 where she stated that the Respondents deliberately misled the court and failed to disclose material facts and further that it is contradictory that the Respondents deny knowing about her and her children existence but request for compromise on her application. She avers that the Respondents are fully aware she is a surviving spouse of the deceased and was residing in part of his estate. She also avers that the Respondents have transferred shares held by Samuel Gituto Farmers Society and have been receiving and misappropriating rental income generated from the deceased's estate.

Pursuant to court directions on 3rd May, 2021 that this matter be disposed of by way of written submissions, the parties filed their respective written submissions. The Objector/Applicant's submissions are dated 17th May 2021. She has identified 3 issues for determination as follows:

1. **Whether the Objector/Applicant has established a prima facie and arguable case to warrant the interim orders.**
2. **Whether the grant issued to the administrators/ Respondents on the 3rd June 2020 was fraudulently obtained.**
3. **Whether the Administrators/ Respondents can deposit and/or make good account of the funds and/or shares of the Estate of Kaleb Mwangi Hezekiah Muchoki (Deceased) in court.**

On the first issue she relied on the following cases;

- (i) *Giella Vs Cassman Brown & Co. Ltd (1973) E.A. 358 pg 30.*
- (ii) *Mrao Ltd Vs First American Bank of Kenya Ltd [2003] eKLR.*
- (iii) *In African Banking Corporation Limited Vs. Netsatar Limited & 6 others 299 of 2009 (UR).*

She submits that the Administrators/Respondents fraudulently omitted the Applicant and her children from the Petition and that they are using the Grant to receive part of the estate income excluding her and her children. She further submits that the Respondents' actions violate her rights and that of the other beneficiaries.

On the 2nd issue she submits that she and her children are beneficiaries of the deceased's estate and the Respondents knew that she lived in part of the deceased's estate but intentionally misled the court by concealing crucial material facts. She relies on section 29 of the Law of Succession Act which provides that:

For the purposes of this part, dependant means –

- a) **The wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.**

And section 35 of the Law of Succession Act which provides that:

- (1) **Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—**
 - (a) **the personal and household effects of the deceased absolutely; and**
 - (b) **a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow that interest shall determine upon her re-marriage to any person.**
- (2) **A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.**
- (3) **Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.**

On the third issue, the applicant submits that the Respondents should give accurate information and/or account of all dealings. To buttress her assertion she relies on Section 83 of the Law of Succession Act on this issue.

She also cited the case of **In Re Estate of David Kyuli Kainda (deceased) (2016) eKLR** where the court stated that:

“the personal representatives must give account of the assets and liabilities that he has ascertained and the assets that they have collected, gotten in, recovered or gathered and the titles he has preferred, and the steps taken to preserve the estate. He should also state the debts and liabilities that he has paid or settled before moving to court for confirmation of the grant, and if he has not yet settled. The account at this stage should also state the assets that generate income, stating how much has been collected and how it has been utilized.”

It is her submission that she is one of the beneficiaries of the deceased’s estate but was left out of the Petition and thus it is prudent for the orders sought to be awarded to preserve from wastage, alienation, transfer and improper use of the estates proceeds.

The Respondents’ submissions are dated 25th May 2021. They submitted that they took out a grant and listed beneficiaries as Anthony Chege, Kenneth Irungu, Karira Caleb and Ann Nyambura Mwangi and deny that the Applicant and her children are beneficiaries of the deceased’s estate. They also submitted that restrictive injunction would result to wasting of the estate thus would not be appropriate and that the Applicant has not shown a probability of success. They rely on the principles espoused in the case of ***Giella Vs. Cassman Brown & Co. Ltd 1973 (E.A) 358.***

They further submit that the Applicant has not shown that a right has been breached as per the rules set out in the case of ***E.A Industries Vs Trufoods.***

It is their contention that the most appropriate remedy would be for the administrators to preserve the estate as trust for the beneficiaries. They rely on ***Re Estate of David Kyuli Kaindi (2016) eKLR*** where the court highlighted the duties of executor and personal representatives as settling the debts and giving full account of what he has collected and assets before confirmation.

They contend that it would be premature to halt the process by restrictive or mandatory injunction. They also rely on the case of ***In Kenya Breweries ltd Vs. Credit Society ltd 352 of 2000*** where the Court of Appeal stated that:

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be decided at once, or if the act done is simple and summary one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on interlocutory application.”

They submitted that the Application does not specify the type of injunction sought hence it should fail. Further that the Applicant does not show how the estate is being wasted by the administrators and that the court should apply the test in ***Daniel Kipruto Lagat Vs Johana Kiptuo Lagat 181 of 2015***, where the judge quoted ***the Giella v. Cassman Brown case (supra)*** stating the threshold before granting injunctive relief.

Regarding the rental property and money in the bank, they submitted that the money cannot be withdrawn from the bank without confirmation of grant and that they are not intermeddling and that all acts done by them are pursuant to grant issued by court. They rely on section 45 and 82 of the Law of Succession Act that provides that:

(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 be guilty of an offence.

They submitted that they have been collecting rent and utilizing a substantial part of it to maintain the estate.

Analysis and Determination

I have considered the Notice of Motion the Supporting Affidavit, Replying Affidavits and rival submissions. I have also considered the authorities relied on by the respective parties. What the Applicant seeks from this court is an interlocutory injunction against the Respondents in respect of the estate of the deceased in this matter.

I have read the file. I have noted that the Respondents are the appointed Administrators in respect of this estate by virtue of a grant issued to them on 3rd June 2020. I have noted that the Petition names the two of them together with Anthony Chege, Kenneth Irungu Kaleb, Karira Kaleb and Anne Nyambura Mwangi as survivors of the deceased. Among the documents annexed to the Petition is a letter from the Chief of Gaturi Location, Murang’a identifying the six (6) of the survivors named above as the beneficiaries of the estate of the deceased. It is also clear to me that the grant is yet to be confirmed. There is also a pending Summons for Revocation of that grant brought by the Applicant herein.

The claim by the Applicant is simply that she and her children have been left out of this matter yet they are beneficiaries of the estate of the deceased. She claims that the grant issued herein was fraudulently obtained by the Administrators who concealed to the court material facts that the deceased had another wife and children. She has attached a copy of a letter from Chief of Gikindu Location, Gikindu Division in Murang’a to support her claim that she is a wife of the deceased and her children are children of the deceased.

I am alive to the fact that there is pending before this court Summons for revocation brought by the Applicant where she also raised the same

issues of her and her children's having been left out in this matter. Once that Summons is canvassed, I am sure that the issues regarding the beneficiaries of the deceased and the property forming the estate of the deceased will be sorted out. Before that time it is upon this court to determine whether the Applicant deserves the orders she is seeking in this Notice of Motion.

Has the Applicant satisfied this court that the orders she is seeking ought to issue?

The law on granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that:

"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

Order 40 is one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act by dint of Rule 63 of the Probate and Administration Rules.

This being an application for interlocutory injunction, the law is settled that an Applicant must demonstrate the following as laid down in **Giella v Cassman Brown** cited above:

(i) that he has a prima facie case with probability of success;

(ii) that he will suffer irreparable loss that cannot be adequately compensated by damages: or

(iii) that the balance of convenience is in his favour.

It is the Applicant's duty to demonstrate that she meets the test set in the case above among other decisions. The Applicant submitted that she is the 2nd wife of the deceased and that she and the deceased had five children. She supports that submission by attaching the children's birth certificates which indicate the deceased as their father as well as a letter from the Chief of Gikindu Location. She contends that the Administrators fraudulently omitted the Applicant and her children from the petition and that they are using the grant to receive part of the estate income excluding her and her children. The respondent however contend that they did not know about the Applicant and her children hence not including them in the petition for grant. If the Applicant proves that she and her children are dependants as defined under the Law of Succession Act, then law is on her side. But we are not there yet. Until such evidence is provided and the court finds in her favour, this matter remains unsettled. She has however come to this court and sought protection of the estate of the deceased. It is for this court to consider if she has met the threshold to enable her get the orders she is seeking.

The law requires the applicant to show that it has a prima facie case with a probability of success in order to persuade the court to grant an interlocutory injunction in its favour. In the *Mrao case* cited by the Applicant above, the Court of Appeal considered what prima facie case is and stated that **"in civil cases it 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 as to call for an explanation or rebuttal from the latter."**

In *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR, the Court of Appeal agreed with the definition of a prima facie case in the *Mrao case* and stated:

"We adopt that definition save to add the following conditions by way of explaining it. 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."

I have considered this matter. This courts task at this stage is to determine on the material placed before it, whether the applicant has put forward a case requiring the court to intervene and restrain the Respondents from dealing in the deceased's estate; that the Applicant will suffer irreparable injury that cannot otherwise be compensated by way of damages or that the balance of convenience tilts in her favour.

It is not lost to this court that in the course of these proceedings, the Respondents had indicated the likelihood of parties discussing the matter with a view to reaching a compromise. This court took time to allow parties this chance to pursue a consent but it seems these discussions hit

a snag. It is also not lost to me that both the Applicant and the Respondents secured letters from different chiefs from different Locations in Murang'a. It is also not lost to me that the birth certificates attached to the Notice of Motion appear to bear the name of the deceased as the father of the Applicant's children. This, coupled with the evidence presented before me, has persuaded me that the Applicant has satisfied the test for granting a temporary injunction as far as an arguable case goes. The Applicant has demonstrated that she has a prima facie case with a probability of success. I note that the Respondents have not disputed the chief's letter identifying the Applicant and her children as beneficiaries and they have also recognized the property to which the Applicant resides as forming part of the estate of the deceased. They also have not disputed the birth certificates. All this goes to strengthen the case for the Applicant that she has an arguable case.

On whether the Applicant will suffer irreparable injury which cannot be compensated by damages unless the injunction is granted, consideration should be had of the implication of the respondent's acts. In *the Nguruman case (supra)*, the court stated as follows;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

Succession is the passing of property under the laws of inheritance by way of a will or intestate succession and to the exclusion of grants, gifts or by purchase. The deceased's estate should be vested in his rightful heirs and said heirs should be properly identified in order to protect their constitutional rights to property. If the grant is confirmed there is risk that the property will be distributed to the exclusion of other beneficiaries. The applicant contended that she lives in part of the deceased's estate, and failure to protect the estate until the issues she is raising are determined would mean that she may be evicted from said property rendering her homeless. The values of the property are estimated by the Respondents but the Applicant and her dependents would not be easily compensated if the suit eventually succeeds as the monies may be used up and property transferred to third parties.

Regarding balance of convenience, this court has to ask itself which party will suffer great harm from granting or refusing the remedy pending decision on the merits. In the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on balance of convenience expressed itself thus:-

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies."

The Respondents urge that restrictive injunction would result to wasting of the estate thus would not be appropriate. As this is the deceased property status quo is being sought for maintenance I find that an injunction in dealing in the property would in no way cause wastage in the same as the moneys and the titles therein will be maintained. The Respondents have not elaborated how the orders sought would negatively impact on them and the estate. The Applicant on the hand is apprehensive that if the orders sought are not granted there is a risk of irreparable injury. In my view the balance of convenience tilts in favor of the Applicant as she has more to lose if the orders sought are not granted.

As to whether the Respondents should file statements of accounts, the Law of Succession Act is clear in Section 83 (e) and (h) on the duties of a personal representatives

83 (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;

(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.

The applicant contend that the respondents have been misusing and misappropriating the deceased's estate using the fraudulently obtained grant. It is her contention that they collect rental income and have not accounted for the same and also that they have effected transfer of the deceased shares at Samuel Gituto farmers Society to the detriment and that of other beneficiaries. The Respondents on the other hand claim that they have been collecting income and the same been used to preserve the estate of the deceased and that they have not transferred any monies from the bank as they are awaiting confirmation.

The duty of an administrator is to account for the deceased estate and this account should be made available to all beneficiaries in the estate. See **Re Estate of David Kyuli Kaindi (deceased) (2016) eKLR** on this issue.

Rendering of accounts is a statutory duty that any personal representative owes to the beneficiaries and to the court. An account should be rendered even without any order from the court or demand by the beneficiaries. Therefore by virtue of this section such statement should be filed by the Administrators pending hearing and determination of the suit.

I think I have said enough to demonstrate that the Applicant has persuaded this court that her Notice of Motion dated 13th October 2020 has merit and ought to be allowed. Consequently, I hereby allow the Notice of Motion dated 13th October 2020 in terms of prayers 2 and 3. This being a family matter, I order that each party should bear their costs. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 27TH JULY 2021.

S. N. MUTUKU

JUDGE