



**Kathuku (Suing as the legal administrator of the Estate of Kathuku Musau Dammas (Deceased) v Musyoka (Environment & Land Case E171 of 2023) [2024] KEELC 4122 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4122 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E171 OF 2023**

**MD MWANGI, J**

**MAY 7, 2024**

**BETWEEN**

**PRISCA NYIRANEZA KATHUKU (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF KATHUKU MUSAU DAMMAS (DECEASED)) .. PLAINTIFF**

**AND**

**ANNA KANYIVA MUSYOKA ..... DEFENDANT**

**RULING**

(In respect of the Notice of Motion dated 15<sup>th</sup> November, 2023, brought under O.40 Rules (a), (b), 2(i) & (3) of the Civil Procedure Rules and Section 3A and 63(e) of the *Civil Procedure Act*)

**Background**

1. The Notice of Motion dated 15<sup>th</sup> November, 2023, seeks an order of temporary injunction restraining the Defendant by herself, agents, servants and or any other person whomsoever from encroaching upon, trespassing into, managing, demolishing, developing, remaining on, collecting rent or in any way interfering with the administration or management of the property known as plot No. A4-128 Kayole Estate or any property thereof consisting the Estate of the deceased herein pending hearing and determination of the suit.
2. The Plaintiff/Applicant further prays for costs of the application and any other order the Honourable Court may issue for the purpose of preservation of the Estate. It is based on the grounds on the face of it and the supporting affidavit of the Plaintiff sworn on 15<sup>th</sup> November, 2023.
3. The Defendant/Respondent upon service responded to the Plaintiff's application by way of a replying affidavit sworn by her own self on 8<sup>th</sup> December, 2023. In the reply, the Defendant/Respondent deposes that she is the widow of the deceased, the late Kathuku Musau Dammas (deceased), who, when he was alive caused the suit property to be transferred to her name.



4. The Defendant/Respondent asserts that the suit property, Plot No. A4-128 is her matrimonial property. She alleges that she has lived in the suit property over the years and she is the one who has been taking care of it.
5. The Respondent denies the Plaintiff/Applicant's claim in its entirety. Further, the Defendant/Respondent asserts that there is an ongoing succession cause at Milimani High Court being Succession Cause No. 1392/2019 in the Family Division. She alleges that the Plaintiff/Applicant is forum shopping since she had made a similar application as the one before this Court in the said Succession Cause and that there was a pending ruling. She has attached evidence in support of her averments in the replying affidavit.
6. In her further affidavit, the Plaintiff/Applicant denied that the Defendant/Respondent was a wife of the deceased, Kathuku Musau Dammas. She asserts that she was the only legally married wife of the deceased. She however, confirms the Succession Cause, Milimani P & A Cause No. 1392 of 2019 where her grant was issued. She further confirms that the suit property is one of the properties of the Estate of the deceased listed in the Petition before the Succession Court. The Plaintiff/Applicant too acknowledges filing a Chamber Summons Application dated 23<sup>rd</sup> June, 2022 seeking orders for the Defendant/Respondent to account for rent collected from the suit property and to have the Defendant held liable for intermeddling with the Estate of the deceased. She denies that the orders sought therein are similar to the orders sought under the application herein.
7. In the Supplementary/further affidavit, the Defendant/Respondent deposes that she has been advised by her Advocate that the jurisdiction of the Family Court is limited to issues of Succession, hence the need to file this application before this Court.

#### **Court's directions**

8. The Court directed that the application by the Plaintiff be canvassed by way of written submissions. Only the Plaintiff complied by filing submissions dated 25<sup>th</sup> January, 2024.

#### **Issues for Determination**

9. Having considered the Plaintiff's application, the response by the Defendants, the further affidavit filed by the Plaintiff and the submissions by the Plaintiff, the key issue, first and foremost, as far as I am concerned is the issue of jurisdiction in view of the disclosure by the Defendant and the admission by the Plaintiff, of the existence of the High Court Succession Cause No. 1392 of 2019 at Milimani, where the suit property is listed as one of the property(s) of the estate of the late Kathuku Musau Dammas-deceased.

#### **Analysis and Determination:**

10. In the well-known case of, "The owners of Motor Vessel 'Lilian S' v Caltex Kenya Ltd [1989] KLR, the Court rightly pronounced that:

"It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it a Court has not power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings



pending other evidence. A Court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

11. Githinji J, in *Re Estate of Kitur Chepsungulgei (Deceased)* [2021] eKLR, quoted, William Musyoka, in his book, *Law of Succession*, Law Africa 2006 at page 115 where he notes that the provisions of Section 47 of the [Law of Succession Act](#) gives the court wide discretion in dealing with testamentary and administrative issues. The import being that Section 47 gives the court the power to issue protective orders in order to safeguard the estate of a deceased person.
12. The Judge further cited the Court of Appeal decision in *Floris Piezzo & Another v Giancarlo Falasconi* [2014] eKLR, where the court while considering whether an injunction can issue in a Succession Cause expressed itself as follows:

“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the [Law of Succession Act](#) gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. 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.”

13. I entirely agree with Githinji J. I cannot say it in a better way as he did when he categorically stated that:

“Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the [Law of Succession Act](#), sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the [Law of Succession Act](#), the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the [Law of Succession Act](#). Therefore, before confirmation, the interest of the beneficiary remains



amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated."

14. From the foregoing, there was really no need for the Plaintiff/Applicant to file the current suit in order to seek a temporary injunction order. The High Court is competent to issue the orders that the Plaintiff is seeking under the application dated 15<sup>th</sup> November, 2023, in order to preserve and safeguard the estate of the deceased awaiting the outcome of the Succession Cause.
15. I must point out that the Plaintiff in the Chamber Summons Application before the Succession dated 23<sup>rd</sup> June, 2022, exhibited by both parties, was seeking similar orders as the ones sought in this application. Her prayer No. 1 in the said application was that:

“The Respondent, her agents, representatives or any other person acting on her behalf be and is hereby restrained from collecting rent or in any way interfering with administration or management of the deceased’s property known as plot No. A4-128 Kayole Estate or any property thereof consisting the estate of the deceased herein pending hearing and determination of this application and suit.”
16. This is the very same order sought in this matter. I agree with the Defendant/Respondent that the Plaintiff’s application is an abuse of the process of Court.
17. Consequently, I strike out the Plaintiff’s application dated 15<sup>th</sup> November, 2023 for want of jurisdiction, as well as being an abuse of the process of Court with costs to the Defendant/Respondent.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF MAY, 2024.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

**Mr. Bundi for the Plaintiff/Applicant**

**N/A for the Defendant/Respondent**

**Yvette: Court Assistant**

**M.D. MWANGI**

**JUDGE**

