



**In re Estate of Martin Luther Awuor (Deceased) (Succession Cause
1577 of 2006) [2025] KEHC 8536 (KLR) (Family) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1577 OF 2006
HK CHEMITEI, J
JUNE 19, 2025
IN THE MATTER OF THE ESTATE OF MARTIN LUTHER AWUOR (DECEASED)**

BETWEEN

**ISAAC ODHIAMBO 1ST APPLICANT
SARAH OTIENO 2ND APPLICANT
JENNIFER AWUOR 3RD APPLICANT
DONALD AWUOR 4TH APPLICANT**

AND

**OMNICARE MEDICAL LIMITED 1ST RESPONDENT
TYSONS LIMITED 2ND RESPONDENT**

RULING

1. This ruling relates to the application dated 4th March, 2024 filed by Isaac Odhiambo, Sarah Otieno, Jennifer Awuor and Donald Awuor seeking for orders that:-
 1. Spent.
 2. Spent.
 3. This honourable court be pleased to revoke and/or nullify the license agreement dated 8th April, 2022 entered into and executed between Tysons Limited and Omnicare Medical Limited in respect of the property known as Land Reference Number 209/7340/6 situated in Lavington/ Muthangari in Nairobi County which is part of the assets of the estate of the deceased herein to enable the Applicants to sell the subject property and share the proceeds of



sale among the beneficiaries in compliance with the terms of the certificate of confirmation of grant issued by this honourable court on 20th June, 2022.

4. This honourable court do order Tysons Limited and Omnicare Medical Limited to grant to the Applicant's immediate vacant possession of the property known as Land Reference Number 209/7340/6 situated in Lavington/Muthangari in Nairobi City County which is part of the assets of the estate of the deceased herein to facilitate sale of the subject property in compliance with the terms of the certificate of confirmation of grant issued by this honourable court on 20th July, 2022.
 5. This honourable court do order Tysons Limited and Omnicare Medical Limited to remove all the illegal permanent buildings and all other structures which have been constructed by Omnicare Medical Limited in the property known as Land Reference Number 209/7340/6 situated in Lavington. Muthangari in Nairobi County.
 6. This honourable court be pleased to grant any other orders as it may deem fit, just and expedient to meet the ends of justice in the circumstances of this application.
 7. Costs of this application be awarded to the Applicants.
2. The application is based on the grounds on the face thereof and supported by affidavit sworn by Isaac Odhiambo on 4th March, 2024 where he avers inter alia that this court confirmed the grant of letters of administration on 20th July, 2022, endorsing a detailed and consensual estate distribution plan that the beneficiaries had negotiated after years of conflict over entitlements and estate management.
 3. Prior to the grant, the estate's assets were managed by Tysons Limited under a consent order made in a previous High Court case (Misc. App. No. 35 of 2004: In the Matter of Martin Luther Awuor). In that matter, parties agreed, on 15th December, 2004 to appoint Tysons Limited as the estate manager to collect rent and pay the hospital bills of the deceased, who was then seriously ill and mentally incapacitated.
 4. That when this succession cause was filed in 2006, disagreements among the beneficiaries continued, delaying the appointment of Administrators for 17 years, until 9th May, 2022, when the Applicants were appointed as Administrators. Because of ongoing disputes, Tysons Limited remained in charge of managing all estate assets from 2005 to date, as they have not yet fully handed over the assets to the Administrators.
 5. He deponed that after assuming their duties - including distributing the estate as per the confirmed grant - the Administrators discovered that one property of the estate, L.R. No. 209/7340/6 in Lavington/Muthangari, Nairobi, had been unlawfully encumbered. On 8th April, 2022, Tysons Limited had entered into a 6-year license agreement with Omnicare Medical Limited without consulting or obtaining consent from the Administrators or other beneficiaries.
 6. Upon reviewing the license, the Administrators found that Omnicare was permitted to operate an aesthetic medical clinic on the property, which is designated for residential use only. No change-of-user application was ever made, rendering the license illegal.
 7. Furthermore, Omnicare has illegally constructed permanent structures - including a ward and a theater - on the property without approval from Nairobi City County, National Construction Authority, NEMA, or other relevant authorities. As a result, the illegal structures have been marked for demolition by the county government, placing the property at risk of damage or loss. The Administrators also found that the license had not been registered, making it null and void.



8. Further and after discovering the illegal agreement, the Administrators requested Tysons Limited to terminate the license and hand over the property for sale, in line with the confirmed grant. However, both Tysons and Omnicare refused. Omnicare has actively obstructed the Administrators by denying them and potential buyers' access to the property.
9. Accordingly, the Applicants request that the license agreement dated 8th April, 2022, between Tysons Limited and Omnicare Medical Limited, be revoked or declared null and void by this court.
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10. The application is opposed vide replying affidavits sworn by George Wakaria on 8th September, 2024 and Wycliff Ongwae on 21st September, 2024.
11. George Wakaria avers inter alia that he is a director at Omnicare Medical Limited, a company that is not a party to the succession proceedings but was served with summons dated 4th March, 2024. The application is legally flawed, procedurally defective and lacks merit. It appears to be a scheme aimed at unlawfully evicting Omnicare from the premises before the expiration of a valid license agreement that remains in force.
12. This Court derives its jurisdiction from the Law of Succession Act and is limited to matters strictly relating to the administration of a deceased person's estate. As such, it lacks jurisdiction to entertain the application, whose broad prayers fall within the purview of the Commercial Court.
13. Wycliff Ongwae avers inter alia that he is a director at Tysons Limited, an interested party in these proceedings. With the consent of the beneficiaries of the deceased's estate, Tysons Limited was appointed, on 15th December, 2004, as the manager and estate agent for all the deceased's assets. This included managing the property identified as L.R. No. 209/7340/6, located in Lavington/ Muthangari, Nairobi City County. The appointment took place while the deceased was still alive and mentally competent.
14. Following the deceased's death, disputes among the beneficiaries delayed the appointment of estate Administrators. As a result, the beneficiaries agreed that Tysons Limited should continue managing the property until Administrators were formally appointed and granted letters of administration, in accordance with the law.
15. On 8th April, 2022, Tysons entered into a 6 -year license agreement with Omnicare Medical Limited, permitting them to operate an aesthetic medical clinic on the premises. That license is still valid and has approximately 4 years remaining
16. He said that Tysons has made good-faith efforts to facilitate the estate's distribution process, evidenced by its role in the appointment of Administrators and the issuance of confirmed grants. Contrary to the Applicants' claims, Tysons has not obstructed the administration of the property or unlawfully interfered with the estate. Its mandate over the property ended on 9th May, 2022 when new Administrators were appointed.
17. Therefore, Tysons had no authority to initiate any application for a change of user after that date. Nevertheless, the license agreement it executed with Omnicare remains valid and lawful, as it was signed while Tysons still had the authority to manage the property and is thus capable of conferring enforceable rights.



18. He deponed that this Court does not have jurisdiction to determine the current application, as the primary issue concerns the validity of the commercial license agreement between Tysons Limited and Omnicare Medical Limited - an issue outside the scope of a succession cause. The matter is commercial in nature and should be resolved through a properly instituted civil suit, not by way of the current application.
19. The Applicants have filed written submissions dated 16th April, 2025 placing reliance on the following:-
- a. Benson Mutuma Muriungi -v- C. E. O. Kenya Police Sacco & Another (2016) eKLR where intermeddling was defined as follows: “[5] There is no specific definition of the term intermeddling provided in the Law of Succession Act. The Act simply prohibits taking possession of and or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, any written law or grant of representation under the Act. But in my understanding, the use of the wide and general terms, such as: “for any purpose” and “or otherwise intermeddling 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, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing 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 make it exhaustive. The list could be longer. However, any act or acts which will dissipate or put at risk the free property of the deceased are acts of intermeddling in law. [6] I treat this subject as important because intermeddling with free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to a jail term or fine or both as prescribed under section 45 of the Law of Succession Act. Parties should also note that the law has emphasized the need to protect free property of the deceased by providing for a very firm stance on intermeddling: has clothed the court with wide powers to punish for intermeddling and to issue any appropriate order (s) of protection of the estate of any person...”
 - b. Michael Waweru Ngene -v- Dorothy Ikamba Muturi (2012) eKLR where it was held as follows: “... I have however perused the said copy of the power of attorney attached and it has no evidence that it was registered and no evidence of stamp duty as required by section 18 of the Registration of Documents Act which states that: A document the registration of which is compulsory under this Act shall not, unless duly registered, be received as evidence in any transaction affecting the property to which the document relates, except with the consent of the court and upon such terms and conditions as the court may impose. The provisions of section 18 are mandatory. The plaintiff did not seek the court’s consent provided under the said section. A power of attorney is one such document that must be registered as provided under section 4 of the said Act Cap 285 and Stamp Duty Act Cap 480 section 19. Counsel for the defendant has clearly dealt with the issue of the plaint being defective in page 2 of his submissions. I agree with him that the purported power of attorney is a nullity ab initio and invalid for failure to comply with sections 4, 9 and 18 of the Registration of Documents Act and the Stamp Duty Act Cap, 480 and as a consequence thereof the plaint filed herein is incompetent.”
20. Omnicare Medical Limited has filed written submissions dated 24th April, 2025 placing reliance on the following among others:-



- a. Nairobi P & A Cause No, 1016 of 1993: Josephine Wambui Wachuka & Others vs Margaret Njoki Njoroge where it was found as follows: “The inherent powers of the court are resorted to where there are no clear provisions. This point was made by Khamoni J in the Matter of the Estate of Erastus Njoroge Gitau (Deceased) Nairobi High Court Succession Cause Number 1930 of 1997, to the effect that Rule 73 is to be used only in deserving cases where no specific provisions exists to deal with the situation in question. It is not an omnibus provision which allows the court to entertain all manner of applications. Rule 73 only relates to gaps in the [Law of Succession Act](#) and the Probate and Administration Rules. In Re Estate of Kilungu (Deceased) (2002) 2KLR 136, Khamoni J observed that Rule 73 cannot be used to do what the Law of Succession does not allow the court to do. The [Law of Succession Act](#) does not grant any powers to the court to grant injunctions, and therefore the court cannot resort to Rule 73 of the Probate and Administration Rules to grant injunctions. An injunction is a drastic order that should not be granted under the inherent powers. It should only be sought in a proper suit. Rule 63 of the Probate and Administration Rules imports several provisions of the Civil Procedure Rules. The provisions imported do not include those that provide for injunctions. It was intended that the probate court be given jurisdiction to grant injunctions nothing would have been easier than importing Order XXXIX (now Order 40) of the Civil Procedure Rules. The fact that Order 40 was not imported into probate practice means that there was no intent at all to empower the court to entertain injunctions in probate and succession matters. In Re Estate of Kilungu (Deceased) (2002) eKLR 136 it held that an injunction could not be granted in a probate matter, as Order XXXIX (Order 40) of the Civil Procedure Rules had not been imported into probate practice by Rule 63 of the Probate and Administration Rules. Let it be assumed for a moment that this court had jurisdiction to entertain in the application, does the current application merit the exercising of jurisdiction in favour of the application? The order sought is that of an injunction; restraining dealings in L.R. No. Kiambu/Ngoliba A/71 until the cause is determined. It is a prayer for an interlocutory order. The order sought is a temporary injunction of the sort envisaged under Order 40 of the Civil Procedure Rules although it is not stated as being premised on that provision. Order 40 provides for temporary injunctions to restrain acts that are likely to expose the suit property to injury, wastage, damage, alienation, sale, removal or disposition pending the hearing and disposal of the suit. In determining whether or not to grant the said order the court has to consider whether the application satisfies the conditions set out in the notorious case of Giella vs Cassman Brown & Co. Ltd (1973) EA 358 for grant of injunctions. The criteria for grant of the temporary relief of injunction set out in that case is that the applicant must show that they have a prima facie case with a probability of success, that they are likely to suffer irreparable loss or damage should the relief sought be not granted and that in the event of doubt balance of convenience should tilt in favour of the applicant. Order 40 of the Civil procedure Rules requires that the application for the temporary relief by way of injunction be filed in a ‘suit’. This means that the application for injunction must be interlocutory; it must be filed in a pending suit. The application in this matter is brought in a succession cause. It rides effectively on an application for confirmation of grant. The proceedings envisaged under the [Law of Succession Act](#) and the Probate and Administrations Rules are not suits. Succession causes are not about one party suing another, they are about administration of estate of deceased persons. The rationale is that they are not intended to be contentious, and even where they become contentious, they are not as highly contentious as the proceedings envisaged under the [Civil Procedure Act](#) and the Civil Procedure Rules. The ‘suit’ in Order 40 of the [Civil Procedure Act](#) and Civil Procedure Rules, Probate or succession proceedings are not commenced under the [Civil Procedure Act](#) and the Civil procedure Rules and therefore they are not suits, and



consequently Order 40 of the Civil Procedure Rules does not apply to such proceedings... The court has no jurisdiction to determine any matters that are not purely succession matters. The determination of the validity of the license agreement is outside the scope of the court's jurisdiction. Section 47 of the Act and Rule 73 of the Rules do not donate to the Court the powers to issue the reliefs sought akin to injunctions as prayed in the application. There is no suit filed and pending before the court for determination and the Repondents are not parties to the succession cause. As deponed at paragraph 5 (d) of the Replying Affidavit, it has not been demonstrated how the cited provisions of the law confer jurisdiction to the court and/ or that the Repondent has violated the cited provisions. The Court of Appeal in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR held that, 'Jurisdiction is everything. Without it, a court has no 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.'

- b. In Re Estate of Atibu Oranje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) Ruling where it was stated as follows: "Section 47 merely states that the High Court has jurisdiction to deal with applications and determine disputes that arise over matters that are governed by the Law of Succession Act, and pronounce decrees and make orders as may be expedient, in the context of the provisions of the Law of Succession Act. It does not confer jurisdiction to handle disputes and applications that are not provided for under the Law of Succession Act. Inherent power is not saved under section 47 of the Law of Succession Act, but under Rule 73 of the Probate and Administration Rules. The High Court can only exercise jurisdiction, according to section 47, with respect to the matters covered by or provided for under the Act. It says no more than that. The Law of Succession Act is divided into 8 parts, and the High Court is limited to handling applications that arise with respect to the matters that are governed in those 8 parts... Inherent power is not saved under section 47 of the Law of Succession Act, but under Rule 73 of the Probate and Administration Rules... I believe I have said enough to show that this court has no jurisdiction, in these probate proceedings, to entertain a suit application relating to declaration of trust, for that is what the Applicants really seek in their application."
21. Tysons Limited has filed written submissions dated April, 2025 placing reliance on the following:
- a. Jeremiah Kamau Gitau & 2 others v Wandai & 5 others [1989] KEHC 75 (KLR) where intermeddling was defined as follows: "Intermeddling with the property of a dead man consists of "taking possession, disposing or otherwise intermeddling with any free property."
 - b. In re Estate of Kamau Mwanthi Kamatu (Deceased) [2020] KEHC 6602 (KLR) where it was stated as follows: "It is expected that a person to whom a grant of representation has been made would immediately get in and commence the process of administration of the estate by identifying the assets and liabilities of the estate and preserve the same for the purposes of distribution in order to ensure that the estate is not wasted. Failure to do so would lead to consequences provided for in section 94 of the Law of Succession Act which states as follows: When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss of damage so occasioned."
 - c. In re Estate of Eliud Njoroge Kuria (Deceased) [2015] eKLR where the court stated as follows: "On the income collected by the estate agents, it must be stated that such agents are trustees."



The income collected by them should be accounted for. It is not their property and they collect it on behalf of others. They must account for it. Of course, the relationship between them and the estate is founded on agency, but on all accounts it is one of trust. They are bound to account for what they have collected and for how they have applied the funds.”

Analysis And Determination

22. I have gone through the application, the responses thereto and the rival submissions and I think the first issue to determine is the question of jurisdiction.
23. There is no doubt that the issue between the parties has to do with a lease agreement between them. The Respondents entered into the same based on the consent granted to Tysons by this court. It appears that even after the grant was confirmed the said managing agent has continued with its mandate.
24. However, and in line with section 47 of Cap 160 I do not think it is the purview of this court to handle issues to do with leases and evictions. That is the preserve of the commercial courts or any other court with competent jurisdiction.
25. I therefore agree with the Respondents that this courts brief is limited to inheritance and issues surrounding beneficiaries and distribution of the estates. Now that the grant was confirmed it is only prudent that the Applicants approach the other courts to determine whether the 2nd Respondent is lawfully holding a valid lease or not and if the court is satisfied have the same terminated or not.
26. In Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011 the court stated, “A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred upon it by law.”
27. In re Estate of Atibu Oronje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling) the court stated as follows: “... 8.Does this probate court have jurisdiction to determine the dispute framed in the application dated October 2, 2018? The starting point should be with the mandate of the probate court. The probate court is constituted for one sole purpose, distribution of the property of a dead person. The law which governs this area of distribution of assets of a dead person is the *Law of Succession Act*, cap 160, Laws of Kenya. The preamble says it is “An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons, and for purpose connected therewith and incidental thereto.” 9. The central areas of concern, in probate and administration, are the dead person and his property. With regard to the dead person, what is of importance would be, whether there is proof of his death; and, once that is established, the next consideration will be determination of the individuals entitled to the property. If he died testate, having left a valid will, it will be the individuals named as beneficiaries in the will; if he died intestate, without a will, it will be the persons entitled under the applicable law of intestacy. With respect to property, there is only one critical consideration, whether he owned any property. Modern property is subject to registration, and whether a person owns a piece of property is evidenced by documents of registration or ownership. What is in dispute here is land, what would evidence ownership of the subject property would be evidence of registration of the same in the name of the deceased. The probate court only distributes assets that are undisputedly owned by the deceased. Assets that are unencumbered or the subject of ownership disputes are not undisputedly owned by the deceased, and are not available for distribution by the court until the encumbrances are removed or the ownership disputes resolved. Property available for distribution is defined in section 3 of *Law of Succession Act* as the free propriety of the deceased. 10.The design of the *Law of Succession Act* is that the mandate of the probate court is limited to distribution of the assets, and where a dispute arises on ownership of any asset, then the same should be placed in another



forum, and not the succession cause, for litigation and determination. That is the spirit of rule 41(3) of the Probate and Administration Rules, which states as follows; -“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

11. There is ample case law to the effect that succession proceedings are not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution. One such case is *In re estate of Kimani Kimithia* [2008] eKLR (Ibrahim J) where it was stated that succession proceedings were not the appropriate way to challenge the title of the deceased to assets said to comprise his estate, on claims that such assets were subject to a trust in favour of the claimant. It was stated that such claims ought to be subjected to separate proceedings, where the claimants have to prove the trust, and thereafter seek revocation of the title or partition, which requires declaratory orders on the existence of the trust. It was asserted that that was not the function of the succession cause, where the claimant was neither a beneficiary nor dependant of the deceased, and that succession proceedings were not appropriate for resolution of seriously contested claims against the estate by third parties. The court then held that It had no jurisdiction to determine the claim of trust or to grant relief related to it...”

28. In light of the foregoing, therefore I decline to allow the application for want of jurisdiction and the same is dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 19TH DAY OF JUNE 2025.

H K CHEMITEI

JUDGE

