



In re Estate of Samuel Boro Ndenderu (Deceased) (Succession Cause E035 of 2022) [2024] KEHC 388 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E035 OF 2022
SM MOHOCHI, J
JANUARY 19, 2024**

IN THE MATTER OF THE ESTATE OF SAMUEL BORO NDENDERU (DECEASED)

BETWEEN

MARGARET NDUTA KARIMI 1ST ADMINISTRATOR

ALICE WAMBUI BORO 2ND ADMINISTRATOR

AND

EDWIN IGOGO NDENDERU 1ST RESPONDENT

BONIFACE NDENDERU 2ND RESPONDENT

PETER NDENDERU 3RD RESPONDENT

RULING

1. Before this Court is a Chamber Summons Supported by a sworn Affidavit of Alice Wambui Boro dated 28th October 2022 filed pursuant to Section 3A of the *Civil Procedure Act*, Section 45, 79 and 83 of the *Law of Succession Act* Order 40, rule 1, 2 and 4 of the *Civil Procedure Rules*, Rule 73 of the *Probate and Administration Rules* Seeking inter Alia
 - I. Spent.
 - II. Spent.
 - III. Spent.
 - IV. That pending the confirmation of the Grant of Letters of Administration issued on 1st August, 2022, this Honourable court be pleased to issue an order restraining the Respondents by themselves or their agents from collecting rent from all that property known as Bahati/ Kabatini Block 1/4063, interfering with, removing items from or otherwise dealing in any manner with the deceased's estate.



- V. That this Honorable court, be pleased to order the Respondents to account for all the rent collected from the tenants in Bahati/Kabatini Block 1/4063 and give an account of all transactions therewith by them jointly and severally or any other persons/person in respect of all the deceased person's estate since his demise to the date of such compliance with this order.
- VI. The Respondents be condemned to pay costs of this Application.
2. The Application was premised on the following grounds; -
- a. The Applicants herein are the Administrators of the deceased estate having procedurally petitioned Grant of Letters of Administration and the same was issued on the 1st of August 2022.
 - b. That the Respondents relinquished their priority to petition when they failed to adhere to the court order issued in Citation No. E124 of 2021 and therefore not administrators of the estate of the deceased.
 - c. That prior to the issuance of the grant, the Respondents have been and continue to intermeddle with the estate of the deceased by collecting rent from all that property known as Bahati kabatini Block 1/4063, interfering with, removing items from, damaging and/or breaking into the properties with the deceased.
 - d. That there is need for the Respondents to be restrained from collecting rent, damaging property, interfering with, removing items from and collecting monies arising out of the Estate of the deceased and allow the lawful administrators to administer the estate.
 - e. That there is need for the Respondents to aive an account of the rent collected from all that property known as Bahati/Kabatini Block 1/4063 and all income, expenses, debt profits, savings, dividends and all transactions therewith in respect of all the deceased's estate to enable the Administrators effectively account and give a full and accurate inventory of the Grant of Letters of Administration
 - f. That this Honourable Court has inherent powers to grant the orders Sought for the ends of justice.

Applicants Submission

3. The Applicants submitted on a solo issue, Whether the Applicants have met the conditions for grant of a temporary injunction?
4. The Applicants contend that, the Application has satisfied the conditions for grant of the equitable remedy of injunction set out in in the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358, where it was held that:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience..



5. The Applicants submit that they have established a prima facie case with a probability of success with reliance being placed on the case of *Mrao Limited v First American Bank of Kenya Limited & Others* [2003] KLR 125 wherein Bosire J. Stated

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

6. The Court of Appeal adopted the definition set out in *Mrao Limited* (Supra) in *Nguruman Limited v Jan Bonde Nielson & 2 Others* [2014] eKLR in the following terms:

“We adopt that definition save to add the following conditions by 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.”

7. It is not in dispute that the Applicants were validly appointed as the Administrators of the estate of the deceased vide Grant of Letters of Administration dated 1st August, 2022. In recognition of the priority under Section 66 of the *Law of Succession Act*, the Applicants had initially cited the Respondents to petition for grant but on the mention date to confirm compliance with the court order, the Respondents failed to attend court and the order lapsed. The Applicants would later find out that the Respondents had understated the value of the estate and petitioned for grant in the Chief Magistrates court.

8. That, it is that defective grant issued on 14th March, 2022 in the lower court which forms the basis of the Respondents current rent collection and the forceful removal of the Applicants items on 7th August, 2022.

9. That, however, even a cursory look at the petition in Succession Cause No. E76 of 2022 (See annexure AWB-3 in the Applicants Supplementary Affidavit dated 11th April, 2023), the 3 properties listed i.e. prime properties listed below does not amount to Kshs. 5,000,000/=.

1. Land parcel No. LR Bahatu Wendo Block5/195
2. Land parcel No. Bahatikabatini Block 1/4731
3. Land parcel No. Bahatikabatini Block 1/4063

10. That, however, should the court be inclined to restrain itself from determining the validity of both grants which is subject to a pending Summons for revocation of grant in Succession Cause No. E76 of 2029 We submit that there is cause to disrupt the status quo to protect the estate for the following reasons:

- i. As per paragraph 9 of the Applicants Supplementary Affidavit dated 11th April, 2023, the 1st Administrator has always been the one collecting rent on Bahatwkabatiniyb10k 1/4063 since the mother died and no explanation has been provided as to why the Respondents terminated rent collection by Damka Agents except to fulfil the Respondents personal interests.



- ii. Conversely, the 2nd Applicant has demonstrated the amount she has collected so far and its availability. (See annexure AWB-5 in the Applicants Supplementary Affidavit dated 11th April, 2023).
 - iii. Justice Matheka issued an order on 5th November, 2022 requiring the Respondent to account for all the rent collected and all the transactions in respect of the deceased estate not been done. In fact, the Respondents admit that they have been using the money for personal effects in total disregard to the options available in law for dependants to get reasonable provision. To continue to allow them manage the estate means they will use the resources present for their personal benefit at the expense of other beneficiaries and the estate. (see paragraph 12 of the Respondents Supplementary Affidavit dated 5th May, 2023)
 - iv. Nothing would have prevented the repairs of the rentals in Bahatukabatini/block 1/4063 if the rent collection was being done by Damka Agents. The termination can on' intimate to intentions of avoiding transparency and accountability at the expense of the estate In fact, the directive on termination was done on 23rd October, 2021 even before the Respondents assumed the faux administrator-ship (see Annexure AWB-03 in the Applicants Supporting Affidavit dated 28th October, 2022 and AWB-04 in the Applicants Supporting Affidavit dated 11th April. 2023.)
 - v. While the Respondents contend that, the removal of the Applicants items from shops was for safe keeping, the statements the 1st Respondent recorded at the police station confirms otherwise. He states that the real reason was to open the space for renting which as we have established was not to benefit the greater estate but to provide up-keep money for Respondents.
11. That, the Respondents have therefore not shown good faith in their dealings with the deceased properties and the insistence that the matter should be solved out of court is a ploy to continue to isolate the 2nd Applicant and her sisters and deal with the deceased estate as they please simply because of one them is in the US and is the last born who should shut up and respect her elders (in this case male).
 12. That, conversely, the Applicants have shown good intentions since the beginning of this matter. If the 2nd Applicant was not respectful of her elders, why did she cite them first even though all children have equal priority to petition in intestacy? If she was squandering money on herself and was dishonest as alleged, she Would not have given detailed statements on all the rent she collected since her mother died.
 13. The Applicants submits that, there is a right infringed by the Respondents that would necessitate a rebuttal. The Applicants have established a clear and unmistakable right that ought to be protected and that the Applicants have established a prima facie case with a probability of success and that Irreparable injury which would not be adequately compensated by way of damages.
 14. The Applicants submits that, the Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR established what constitutes irreparable injury as follows: -

“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, of whatever amount, will never be adequate remedy.”



15. The court goes on further to hold thus:
- “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 nature and extent of the injury. Speculative injury will not do; there must be more than founded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction-actual, substantial and is issued solely to prevent grave and irreparable injury; that demonstrable.”
16. The Applicants submit that, the Respondents forceful and disruptive actions have been demonstrated. If left to their own devices, they will run the estate down. They will continue to collect rent and use the money for their own purposes and resist any form of transparency and accountability at the expense of all other beneficiaries of the estate.
17. The Applicants submit that, they will be prejudiced if the orders are not granted as they have a right to be involved in the managing of the estate and the protection of their rightful share of the inheritance which right can be protected by an order of injunction.
18. The Applicants submit that, this application satisfies determination on the Balance of convenience which is discretionary on the court’s assessment and is only put to test when the court is in doubt as to the satisfaction of the rest of the elements. From the aforementioned analysis, the Respondents have been able to meet the first two elements and the balance of convenience should not be put to test.
19. However, should the court be inclined to consider it, the meaning was canvassed in *Micah Terer & Another v Letshego Kenya Limited* [2017] eKLR wherein the court held:
- “...although it is called balance of convenience, it is really the balance of inconvenience and it is for the Plaintiff to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. In other words, the Plaintiffs have to Show that the comparative mischief which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it”.
20. The Applicants submit that, no inconvenience will be occasioned to the Respondents whose alleged right to a property has not even crystallized. The role of administrators of an estate is to collect and preserve the estate and not to appropriate for themselves the proceeds before confirmation of grant. It is in fact the Applicants who will be denied their right to an equal share in the proceeds of the estate. The Respondents confession and or interest in collecting the rent and managing the estate right now makes the scale tilt to the Applicants favour in holding that a greater inconvenience will be occasioned in comparison to the Respondents.
21. That, the Applicants retain the burden of proving that their case has satisfied the aforementioned Conditions for them to be granted the orders by the court and the same has been done in the present claim as was buttressed by the court in *Jampen Enterprises Limited v NIC Bank Kenya PLC & Another* [2019] ekKLR wherein the court stated that the onus is on the Applicant to satisfy to the court that it is befitting of the injunctive reliefs sought.



22. That Similarly, in *Mrao Limited case* (*Supra*) Bosire J. stated that:

“The power of the court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of law and evidence.”

23. The Applicants thus pray that their Application be allowed as prayed.

Respondents Submission

24. That it is the Respondents submission that, the Administrators herein filed the instant cause and the respondents (objector) instantly objected to the making of the grant the Administrators. The reason for the objection was that Respondents and that there was another without the consent and knowledge of the cause filed earlier by the Respondents in the Chief Magistrate Court other Same Estate filed the instant cause.

25. That it is the Respondents submission that, the Administrators first cited the Respondents Vide Citation Number E124 of 2021 and the Respondents complied by filing Succession Case in the Chief Magistrates court vide Succession Cause Number E76 of 2022 notwithstanding the administrators, without the consent, authority and knowledge of all the other beneficiaries and family members went ahead and filed another succession cause vide the instant succession cause High Court Number E035 of 2022.

26. That it is the Respondents submission that, a look at the proceedings and pleading so far, the contentious issue is not yet to the point of distribution of the deceased properties but it is as to whom is supposed to file and administer the deceased estate; is it the Administrators or the Respondents? Were the Administrators procedurally appointed? Did the Respondents relinquish their right to priority to administration? Did the Respondents fail to comply with the orders of citation number E124 of 2021.

27. That it is the Respondents submission that, the answers to the above is NO: the administrators were never procedurally appointed, the respondents have never relinquished their right of priority to administration, the respondent duly complied with the Orders citation number E124 of 2021 by filing Chief Magistrate Cause Number E/o o2022.

28. The Respondents submit that, it is evident from the court record that the 2nd administrator is a lone ranger who is only out to disturb the peace of the other family members and father disturb the administration of the estate (it is the court record that the 1st administrator has denounced the 2nd administrator after learning that she is only using her to gain her on personal interests) the 2nd Administrator has never recognized us as her elder brothers and with priority right to administer the estate, She has hidden and concealed to us crucial documents and information in respect to the estate for her gainful purposes and has been insulting us whenever she's been asked to produce them.

29. The Respondents submit that, that this honourable court to refers back this whole issue to the family for sober deliberation on the proper appointments of administrators and final distribution of the estate. We wish to involve the extended family members, clan and village elders (Nyumba Kumi) for reconciliation. We therefore urge the court to revoke and/or cancel the administration rights sought by the administrators.

Analysis & Determination

30. This Court declines being drawn into the contestation of control of the estate of the deceased and shall in the alternate support the parties in expediting the conclusion of the probate and administration



process by Confirmation of grant and distribution and transmission of assets in the estate of the deceased.

31. The Grant issued herein specifies the Administrators and anyone wishing to be added as one, may as well move court in a proper manner.
 32. The Respondents indicates a desire to resolve their issues at home with family and wazees, this court supports this especially if it is for fair distribution of the estate of the deceased in strict compliance to the constitution and the law and without discrimination on the basis of gender. This court thus encourages all parties here to speak with and not speak to, each other and remember that they never chose before their own birth, their gender or the family to which they shall belong.
 33. The instant Application seek for the exercise of discretionary powers of the court and having heard both the Applicants and the Respondents this court shall thus judiciously exercise its inherent discretion with a view of determining and concluding the probate and administration of the late Samuel Boro Ndenderu and that any subsisting sibling rivalry may better determined by the conclusion herewith.
 34. The widow and children of the late Samuel Boro Ndenderu with support of their larger family should utilize the directions/orders in this ruling to discuss and agree a fair distribution of the estate of the deceased.
 35. Accordingly, this court in exercise of its discretion I hereby allow the Application on the following terms; -
 - a. That, the Respondents are hereby Restrained by themselves or their agents or servants from collecting rent from all that property known as Bahati/ Kabatini Block 1/4063, interfering with, removing items from or otherwise dealing in any manner with the deceased's estate, pending the confirmation of the Grant of Letters of Administration issued on 1st August, 2022.
 - b. The 1st and 2nd Co-Administrators, are hereby Directed and Ordered to file a Summons for confirmation of grant within the next sixty (60) days from today.
 - c. If any Beneficiaries is disagreeing with then Administrators, He/She may file an Affidavit to articulate the alternative proposal.
 - d. The Respondents are hereby directed to prepare accounts jointly and severally, relating to rent collected or incomes received on behalf of the deceased, from the tenants in Bahati/Kabatini Block1/4063 to be filed in court within the next sixty (60) days.
 - e. A mention date to confirm Compliance and further directions shall be on the 21st March 2024
- It is So Ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 19TH DAY OF JANUARY, 2024.

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S. MOHOCHI

JUDGE

