



REPUBLIC OF KENYA



In re Estate of Peter Mwarangu Muiruri (Deceased) (Succession Cause 635 of 2010) [2024] KEHC 1142 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 635 OF 2010
SM MOHOCHI, J
FEBRUARY 9, 2024
IN THE MATTER OF ESTATE OF PETER MWARANGU MUIRURI
(DECEASED)**

BETWEEN

**JAMES MUIRURI MWARANGU 1ST APPLICANT
VERONICAH WANJUGU MWARANGU 2ND APPLICANT
JOSEPH WAMBURI MWARANGU 3RD APPLICANT**

AND

**LUCY MUTHONI MWARANGU 1ST RESPONDENT
ROSE WANJIKU MWARANGU 2ND RESPONDENT
DAVID NGUGI MWARANGU 3RD RESPONDENT
GODFREY NGUGI MWARANGU 4TH RESPONDENT**

RULING

1. The Deceased Peter Mwarangu Muiruri died on the 29th June 2002 at Kenyatta National Hospital leaving behind a huge polygamous family of Forty (40) beneficiaries from Six (6) Houses with two (2) surviving widows. He left behind an un-valued substantial estate and it is now twenty-two (22) years and his succession remains concluded for myriads of reason.
2. The Grant of Letters of Administration intestate is yet to be confirmed A summons for confirmation of grant and proposed modes of distribution of the estate are on the file while some parties are yet to file their proposals.



3. At the moment this Court is once more, being invited to adjudicate upon two interlocutory applications both filed within five (5) months of each other thereby necessitating their concurrent consideration.
4. Before me are two Applications, the 1st Application is dated 20th January 2022, Summons for Revocation of Grant by James Muirur Mwarangu and Joseph Wamburi Mwarangu seeking the following reliefs:
 - i. That, the consent orders issued by this Court On 17th October, 2022 be set- aside and or vacated.
 - ii. That, the grant issued by this Court on 17th October, 2022 be revoked.
 - iii. That, the costs of this application be in the cause.
 - iv. That, the Applicants be granted leave to respond to the application dated 20th January, 2022.
5. The Applicants who are Co-Administrators contend that the application dated 20th of January, 2022 was never served upon them.
6. That they were also not aware of the hearing date of 17th October 2022 when the application dated 20th January was allowed by Consent.
7. That they feel aggrieved and prejudiced by the said consent that was recorded in their absence wish to oppose the said application.
8. The 2nd Application is a Summons dated 22nd May 2023 by James Muiruri Mwarangu, Veronicah Wanjugu Mwarangu and Joseph Wamburi Mwarangu against one of the surviving widows Lucy Muthoni Mwarangu seeking a blanket injunction that pending the hearing and determination of this suit this Court be pleased to issue an order for temporary injunction against the Respondent by herself, her agents and or servants from intermeddling trespassing, cultivating, grazing, digging, building any structures and/or interfering in any manner whatsoever with the property known as against any transaction relating to LR No. Nyandarua Sabugo/150.
9. The Applicants are the 1st, 2nd and 4th Administrators and that, the beneficiaries of the 1st, 2nd, 3rd and 4th houses have been in peaceful occupation of the said property having been settled by the deceased since 2002 and have been in continuous and quite occupation of the suit land for more than twenty-one (21) years.
10. That, the Respondent is a member of the so called 6th Family and has illegally been interfering with the peaceful occupation by trespassing on the land, cultivating, digging a pit latrine, and building temporary structures in an attempt to cement her ownership over the land.
11. That the Respondent has been living elsewhere since 1991 and has started interfering with the peaceful occupation sometime in the year 2021.
12. That despite numerous requests and intentions having been issued to the Respondent, she has adamantly refused, neglected and/or ignored to vacate the said land.
13. That her continued interference and intermeddling with the land is causing disturbance and is likely to degenerate to a breach of peace.
14. That, the Respondent intends to continue the interference on the suit land, unless restrained by this Court and it is only fair, just and equitable that the said application be heard on priority basis.



15. This Court had directed parties to file written submissions of which only the Applicants appear to have complied with and filed their written submissions on the 7th September 2023.

Applicant's Submissions

16. The Applicant submits that, the consent Order dated 17th October 2022 can be set aside on the basis that they were unaware of the hearing, they were never served and only became aware when their advocates perused the file.
17. The Applicant cites Order 31 Rule 2 of the *Civil Procedure Code* to buttress their argument that as admittatures were not involved in the consent.
18. That such consent was obtained without sufficient material facts which is a ground for invalidation.
19. The Applicant equally submit that the grant should be revoked for being obtained where the process of obtaining it was defective for failure to serve it on them as administrators.
20. The Applicant further argues that the consent dated 17th October 2022 and its resultant adoption resulted in contravention of Section 56(b) of the *Law of Succession Act* on the statutory limit of the number of administrators that can be appointed.

Analysis & Disposition

21. The main issues for determination is: Whether the Applicants has made out a case for grant of the injunctive orders sought. Whether the Grant of Letters of Administration should be revoked?
22. With regard the application for injunction, and considering that the application has been brought pursuant to Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* and Section 47 of the *Law of Succession Act* which provides: -
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.
- Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”
23. On the same limb, Rule 73 of the *Probate and Administration Rules* provides that: -
- “73. Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
24. The two provisions cloth the High Court with wide discretion to do what is necessary to ensure that the ends of justice are met. In *Millicent Mbatia Mulavu & another v Annah Ndunge Mulavu & 3 others* [2018] eKLR the Court affirmed that the two provisions grant the High Court powers to issue protective measures including injunctions for purposes of preserving the estate of a deceased person.
25. The Court of Appeal while considering whether an injunction can issue in a Succession Cause expressed itself *Floris Piezzo & Another -vs- Giancarlo Falasconi* (2014) eKLR, 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."

26. It is thus apparent that, the High Court has jurisdiction to issue all manner of orders including the issuance of conservatory and or injunctive orders where appropriate, to preserve and safeguard, the estate of a deceased person. Indeed, it is common ground that for an injunction to be issued, the Applicant must satisfy the three requirements settled in *Giella v Cassman Brown* [1973] EA 348 where the Court held that an Applicant must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the Court is in doubt show that the balance of convenience is in their favour.
27. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (Supra) and further clarified that the conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. Consequently, if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the Court will consider the other conditions.
28. As to what constitutes a "prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that 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 to call for an explanation or rebuttal from the latter."
29. It is apparent then that prima facie case is therefore one that is not frivolous but one which is easily discernible from the pleadings even before the party is heard as it will show a right exists which may be infringed if an injunction is not issued and the onus of establishing the existence of a prima facie case lies with the applicant.



30. In the instant application, the Applicant claims that the Respondent has illegally been interfering with the peaceful occupation by trespassing on the land, cultivating, digging a pit latrine, building temporary structures in an attempt to cement her ownership over the land.
31. *In Re Estate of Simon Kimendero (Deceased)* [2020] eKLR, the Court noted that of specific significance to preservatory order in respect of estate property is that: -
- i. The applicant has an arguable case;
 - ii. The property is estate property; and
 - iii. The property is likely to be dissipated or wasted away.
32. In the instant application and as noted above, prima facie, the Applicants have an arguable case considering that they are the Administrators in the estate of the deceased and the Respondent is a surviving widow therefore having similar interest in the property of the deceased.
33. There is no doubt that the land in question belongs to the deceased person and or forming part of the parcel of the deceased and therefore forming part of the estate of the deceased.
34. I hold the view that the ploughing of the parcel of land by the Respondent raises questions as regards intermeddling under Section 45 of the *Law of Succession Act*. In particular, Section 45 is to the effect that no person should handle, take possession, dispose off, or otherwise intermeddle with the free property of a deceased person unless authorized to do so or by a grant of representation. Section 45(2)(a) makes it a criminal offence to intermeddle with an estate without legal authorization and the same is punishable with a fine, imprisonment or both.
35. I refer to two decisions which I found to be very instructive and supports the position taken by the Applicant in this matter - *In the Estate of Veronica Njoki Wakagoto (Deceased)* (2013) eKLR the Court stated: -
- “that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law...the law takes a very serious view of intermeddling and makes it a criminal offence”.
36. I associate myself with the holding in *Re Estate of John Gakunga Njoroge* [2015] eKLR Murithi J held: -
- “A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the *Law of Succession Act*. In this regard, the jurisdiction of the Court to protect the estate of a deceased person is set out in Section 45 of the *Law of Succession Act*”
37. In the instant case, there is an indication that the Respondent has authorization by way of mediation consent to move into, reside and plough or otherwise deal with the property LR No. Nyandarua Sabugo/150 or portion thereof and her action do not amount to intermeddling under Section 45 of the *Law of Succession Act*. I am satisfied that if the restraining order so sought is granted, there will be irreparable loss and a miscarriage of justice.
38. In *Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others* (2016) eKLR, the Court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages and in this instance the Applicant has not demonstrated the loss to be occasioned and that it cannot be compensated by damages.



39. This Court is unable to allow a prayer that seeks a blanket injunction against a widow of the deceased by herself, her agents and or servants from intermeddling trespassing, cultivating, grazing, digging, building any structures and/or interfering in any manner whatsoever with the property known as against any transaction relating to LR No. Nyandarua Sabugo/150.
40. The Applicants do not have title or any better title to LR No. Nyandarua Sabugo/150 and that the right(s) they now invoke shall only crystallise on confirmation of grant and distribution.
41. The Blanket Injunction sought against the Respondent over the entire LR No. Nyandarua Sabugo/150 a parcel approximately 98.8 acres is oppressive and insensitive is infused with malafide.
42. The Mediation process resulted in the consent dated 17th October 2022 and this outcome should be applauded and encouraged and that its import is that a faction of three (3) houses have generally agreed to conclude the probate while on the other hand, a faction of three (3) houses are reluctant to even comply with Court orders and file their alternative proposed mode of distribution and have at every turn filed a multitude of interlocutory applications which this Court finds disturbing.
43. This Court abhors “Weaponization of litigation” by any litigant, a conduct negating all tenets of administration of justice and shall remain vigilant to proactively deter such measure and that parties herein are thus notified.
44. In the case of *Fredrick Njiru Nyaga V Vinzenza Rwamba Njiru* [2008] eKLR Khaminwa J allowed an appeal on one of the basis of eight (8) administrators having been appointed contrary to the law such as in this instance.
45. This Court is of the view that an illegal mediation outcome, is to be disregarded at the point of adoption of the consent and that, it is the role of the Court, to scrutinise the consent by parties and adopt it with appropriate modifications and that all other aspect of the mediation agreement would thus remain unaffected as opposed to setting aside the entire consent.
46. The general rule is this: Courts will not enforce illegal bargains. The parties are left where the Court found them, and no relief is granted: it’s a hands-off policy. The illegal agreement is void, and that a wrongdoer has benefited to the other’s detriment does not matter. In this instance the adoption of a consent recommending express contravention of a statutory provision in the Succession Act could only benefit from the “excusable ignorance” exceptional parameter but in the apparent lack of consensus by all administrators, the consent cannot extend to the Applicant’s herein.
47. The fact that the deceased had six (6) houses and that only a maximum of four (4) Administrators is permissible in law, does not in any way imply that the interests of the 5th and 6th Houses are unrepresented.
48. This Court thus reviews and varies the order of adoption of the consent dated 17th October 2023, to eliminate the proposed inclusion of an additional administrator from the 5th and 6th house whose interests can be secured even in the absence of a nominee as administrator.
49. Accordingly, the Grant issued on the 17th October 2022 to James Muiruri Mwarangu, Veronicah Wanjugu Mwarangu, David Ngugi Mwarangu, Joseph Wamburi Mwarangu Rose Wanjiku Muthoni and Godfrey Ngugi Mwarangu is hereby set-aside and a fresh grant of letters of administration intestate is hereby made to James Muiruri Mwarangu, Veronicah Wanjugu Mwarangu, David Ngugi Mwarangu and Joseph Wamburi Mwarangu.
50. Leave to amend the Summons for Confirmation of Grant dated 10th November 2022 by David Ngugi Mwarangu is hereby granted.



51. James Muiruri Mwarangu, Veronicah Wanjugu Mwarangu, Joseph Wamburi Mwarangu are hereby directed to file affidavit(s) containing their proposed mode of distribution should they disagree to the one made by David Ngugi Mwarangu, Rose Wanjiku Muthoni and Godfrey Ngugi Mwarangu within the next thirty (30) days.
52. 2nd Application dated 22nd May 2023 is hereby found to be without merit and the same is hereby dismissed.
53. This matter shall as a matter of priority proceed to the confirmation of grant stage for conclusion of this probate.

It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 9TH DAY OF FEBRUARY, 2024.

S. MOHOCHI
JUDGE

