



REPUBLIC OF KENYA



**In re Estate of Robert Syuma Kalui (Deceased) (Succession Cause E006 of 2021) [2024] KEHC 2147 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2147 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
SUCCESSION CAUSE E006 OF 2021**

**RK LIMO, J**

**FEBRUARY 6, 2024**

**BETWEEN**

**HENRY NGUMBAU SYUMA ..... APPLICANT**

**AND**

**BENJAMIN SYUMA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN SYUMA ..... 2<sup>ND</sup> RESPONDENT**

**PERSONAL REPRESENTATIVES OF THE ESTATE OF DAMARIS KAVETE SYUMA**

**RULING**

1. Before this court is an application dated 19/10/2023 brought under Certificate of Urgency and Order 40 rule (1) of the Civil Procedure Rules and Section 45 (1) of the *Law of Succession Act*. The Applicant has also cited the provisions of Articles 23, 48 & 159 of *the Constitution* of Kenya 2010 and seeks the following orders;
  - i. Spent
  - ii. That the Honourable Court be pleased to issue orders restraining the respondents, their agents, assignees and employees, be restrained from interfering, demolishing renovating, altering or in any way manner take possession of the premises known as Kitui Township Plot No. 4096/66 pending and determination of the application herein.
  - iii. That the Honourable Court be pleased to grant conservatory orders on the premises known as Kitui Township Plot No. 4096/66 pending the completion of the suit herein.
  - iv. That the O.C.S Kitui Police Station to ensure compliance of the orders above
  - v. That costs for the application be provided for.



2. The application is premised on 18 grounds reproduced hereunder as follows;
- i. That the matter herein has been before this Honourable Court several times and is still pending for hearing before the Honourable Court.
  - ii. That the respondents had already closed their case and the appellant had testified. Two more witnesses in support of the applicant's case are yet to testify.
  - iii. That the applicant is already holding a confirmed Certificate of Grant issue by the Honourable Court
  - iv. That the applicant being an administrator is also holding the Certificate of Title in the name of the deceased with regards to the suit property herein.
  - v. That despite the good progress in the case here, the respondents together with their agents have become so violent against the applicant. They have several times threatened his life together with that of his family. The matter was reported at Kitui Police Station.
  - vi. That the respondents herein have gone ahead and demolished the suit premises herein that had tenants forcing the tenants to leave.
  - vii. That on 12<sup>th</sup> October 2023, a day after the court hearing of the summons to remove the grant thereof, the respondents together with their agents or assignee demolished part of the premises known as Kitui Township Plot No 4096/66 registered in the name of the deceased.
  - viii. That it is unfair, unlawful and unreasonable for the respondents to opt to destroy the subject matter when there is a dispute pending before the court which they are aware of.
  - ix. That the dispute on who is to inherit the parcel of land is pending before the honourable judge and it is half done. There are only two witnesses left to testify before the court issues its judgement.
  - x. That it is in the interest of justice and fairness that we pray for preservatory orders. The applicant prays that the same be granted to preserve the subject matter before the court delivers its verdict.
  - xi. That the applicant had attached copies of the photograph showing the destruction of the premises thereof that is being occasioned by the Respondents and their agents.
  - xii. That the respondents have no idea how much it cost- the applicant and his siblings to construct the suit premises thereof. The respondents never in any way contributed to the construction and maintenance of the premises herein.
  - xiii. That the premises has been in existence since 1968 and has been maintained through the sweat and hard work of the applicant and his siblings. The respondents have no respect of court proceedings.
  - xiv. That the respondents have no right to occupy or take the premises by force when the summons dated 30<sup>th</sup> August 2021 are pending the full determination of this Honourable Court
  - xv. That the applicant prays that this Honourable Court be pleased to issue orders restraining the respondents, their agents, assignees and employees from interfering, demolishing, renovating, altering or in any manner take possession of the premises known as Kitui Township Plot No.4096/66 pending the hearing and determination of the application herein and the entire suit.



- xvi. That the court has not yet made the determination on the issues regarding the estate of the deceased herein. The Respondent should not be intermeddling with the said estate. The same should be preserved.
- xvii. That the applicant together with other beneficiaries of the deceased estate stand to suffer irreparable loss that cannot be compensated by way of damages if the Respondent continue with the activities herein.
- xviii. That it is in the interest of justice and fairness that the application herein be allowed by this Honourable Court.

Henry Ngumbau in the supporting Affidavit has reiterated the above grounds and exhibited annexures depicting interferences.

- 3. In opposition, the Respondents filed a Replying Affidavit sworn by Benjamin Syuma on 25/10/2023. The deponent denies the allegation that his siblings and himself have engaged in destroying part of the property known as Plot No. 4096/66-Kitui Township. On the contrary, he avers that they renovated a pit latrine positioned at the rear end of the plot which was being used by tenants occupying the building. He avers that the old pit latrine filled up which forced their tenants to seek assistance from neighboring buildings prompting them to dig up a new pit latrine for their use. He avers that soil shown in photographs annexed to the application was scooped from the pit and bricks exhibited in the photographs are only for purposes of constructing the toilet and that the said construction cannot be described as intermeddling.

#### **Report by Deputy Registrar dated 31/10/2023**

- 4. Following the applicant's stand that the respondents were intermeddling with the property of the deceased and the denial by the Respondent, this court directed the Deputy Registrar to conduct a site visit of the premises to make observations of the situation on the ground which was done on 26/10/2023. The Deputy Registrar described the premises as follows;

The front side being let out shops and behind side few residential units. We also noted the presence of young children and chicken within the premises.

The Deputy Registrar tabled a scene/site visit report where the following observations were recorded;

- i. Court sees an area along the wall covered by stone debris where the toilets are said to have been previously. However, the court could not confirm if they were filled as alleged by the 2nd Respondent as they were already demolished.

Both parties are in agreement where the former toilets were situated.

- ii. Court sees a dug hole which is 8-9 feet deep, 10 meters away from the wall and 7 meters away from the debris. The hole is covered by 3 iron sheets. Inside the hole there is a crossing water pipe as exposed by the digging of the hole.
- iii. The court sees construction stones/bricks at the scene
- iv. Court sees a heap of soil dug from the hole.

- 5. The application is based on alleged intermeddling with the estate of the deceased. The applicant avers that the respondents together with their agents demolished part of the premises known as Kitui Township Plot No. 4096/66. The applicant did not describe or explain the extent of the destruction or



what was destroyed, but it is averred under paragraph 7 of his Supporting Affidavit that the demolition caused tenants to vacate. On their part, the respondents have denied the allegations of intermeddling and aver that they were constructing new pit latrines for use by tenants as the old ones had filled up.

6. This Court has considered this application and the response made. The applicant is seeking preservative orders in terms of Section 45 of the [Law of Succession Act](#) and injunctive reliefs against the respondents.
7. To begin with the preservative orders, the applicant claims that the Respondents are intermeddling with the estate of the deceased in this case. Intermeddling with an estate of a deceased is a serious issue that can even attract penal sanction through criminal process. Section 45 of the [Law of Succession Act](#) provides as follows;
  - i. 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.
  - ii. Any person who contravenes the provisions of this section shall;
    - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
    - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

8. The Respondents herein have denied the accusations of intermeddling and claim that they are were putting up a pit latrine because the old one had filled up. So, what is intermeddling? In [re Estate of M'Ngarithi M'Miriti](#) [2017] eKLR the court held the following in view of intermeddling;

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the [Law of Succession Act](#). I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the [Law of Succession Act](#). That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

9. In [Veronica Njoki Wakagoto \(Deceased\)](#) [2013] eKLR, it was held;

“The effect of [section 45] ...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate



property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

The Respondents view that they are not intermeddling but only constructing a toilet is supported by the finding of the Deputy Registrar of this Court and while it is true that the question of distribution and dependency is disputed and is pending in this court, it is evident that the disputed premises is either in the possession of the Respondents or the property is in their control. This Court based on the evidence presented is not persuaded that they can be referred to as intermeddlers at this stage. There is no evidence indicating that they are involved in destruction or wanton waste of the property comprising the estate of the deceased. If anything, they are putting up a toilet to ease the burden of the tenants in respect to sanitation. They are probably preserving the property and its value.

10. On the question of the injunctive relief, the principles of injunction were well settled in the famous case of *Giella v Cassman Brown & Co. Ltd* (1973) E. The principles are;
  - a. The Applicant must first establish a prima facie case with a probability of success.
  - b. The Applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
  - c. Where there is doubt on the above, then the balance of convenience should tilt in favour of the Applicant.
11. Similarly, in the case of *Nguraman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal held that:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to; establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially.”

12. The Court of Appeal in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 gave a definition for “prima facie case” in civil cases as follows;

“In civil cases, a prima facie case 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

13. The rights of the applicant vis a viz the rights of the Respondents over the estate of the deceased are yet to be determined by this court because the question of dependency is disputed. The Certificate of Confirmation of Grant dated 9/7/2020 and the mode of distribution of the estate of the deceased including the suit property herein is contested and the Summons for Revocation of Grant is presently pending before this court. And although the applicant currently holds title of the suit property, distribution of the estate of the deceased can still go either way depending on the outcome of the



matter before the court. I do understand that the filing of an application for revocation of grant does not authorize the Respondents from taking possession or disposing the property of the deceased. However, the applicant did not provide this court with particulars of the alleged destruction of the estate. The details that came out regarding the current status of the estate is that the Respondents were constructing a toilet on the property which in itself is improving the condition of the estate of the deceased.

14. The second ground for consideration in granting orders of injunction is requirement of irreparable harm and the Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* (supra) stated as follows;

“Temporary injunction should never issue when an action for an award of damages would adequately compensate the injuries threatened or caused...

In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

15. The applicant has not demonstrated that the Respondents’ action in putting up a pit latrine will make him or other dependents suffer irreparable harm. If anything, if the decision of this court goes their way, they stand to benefit because the condition of the property will not have been negatively affected. To stop construction of a toilet will ultimately result in wastage but I agree with the applicants that there is every need to preserve the status quo of the estate and that applies to all the assets forming the estate. In the end, this Court finds no merit in the application dated 19/10/2023. The same is disallowed but I will not make any order as to costs. In the interest of preservation of the estate of the deceased, this court further directs parties to pave way for completion of construction of the toilet which had stalled following orders of stay, the same is to be done within one month following which, parties are directed to maintain peace and wait for this court to determine the Summons for Revocation of Grant dated 30/8/2021.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HON. JUSTICE R. LIMO-JUDGE**

