



Jebungei & 4 others v Serem & 2 others (Probate & Administration 9 of 2012) [2024] KEHC 1303 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1303 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 9 OF 2012
RN NYAKUNDI, J
FEBRUARY 16, 2024**

BETWEEN

**GLADYS JEBUNGEI 1ST OBJECTOR
LENA JEROTICH SEREM 2ND OBJECTOR
EMMA JEPCHUMBA SEREM 3RD OBJECTOR
ROSE JEPLETING 4TH OBJECTOR
JANE JELAGAT SEREM 5TH OBJECTOR**

AND

**ELKANA KIPKORIR SEREM 1ST PETITIONER
JOHN KIBET SEREM 2ND PETITIONER
HOSEA KIPKEMBOI SEREM 3RD PETITIONER**

RULING

Representation:

M/S Chepseba Lagat & Associates

M/S Ngigi Mbugua & Co. Advocates

1. The Applicant approached this court vide a Notice of Motion Application dated 8th September 2023 seeking the following orders;
 1. Spent.
 2. That Elkana Kipkorir Serem and John E, Kibet Serem be removed as the Administrators of the Estate of the deceased herein.



3. That The Deputy Registrar of the High Court be directed to sign the requisite transfer forms and any other forms transferring the estate of the property forming the estate of the deceased to the land beneficiaries to give effect to the Rectified Certificate of Confirmation of Grant issued on 12/7/2023.
4. That Costs of the Application be provided for.
2. The Application is premised on the grounds set out therein and the contents of the affidavit in support of the Application.
3. Before proceeding with the Application. I note that there is an Application filed by the Applicant on 30th October seeking an injunction against the petitioners. The Application was filed after the court had given a ruling date on the Application by the same Applicant, dated 8th September 2023. It is not clear whether the Application was served on the Respondents and further, why the Applicant chose to file the Application knowing she has another Application pending determination. That notwithstanding, I shall address the Application which the court had granted a ruling date.
4. The Applicant's case is that 1st and 2nd Respondents have failed, refused, neglected and/or ignored to effectively play their role as the Administrators of the Estate herein. This is due to the following reasons;
 - a. They have failed to execute and sign the various ERA 39 and ERA 42 for registration of interests in the deceased property by transmission.
 - b. They have refused to provide their passport size photographs to be affixed on the said forms for registration.
 - c. They have failed to provide copies of their National Identity Cards and their PIN certificates to be attached on the said forms.
 - d. They have failed to surrender the original title deeds to the deceased's properties, which are in their custody.
 - e. They have not shown any commitment in their Replying Affidavit or otherwise to execute the said forms and to provide the documents as aforementioned to effect the said registration.
5. The Applicant urged that the Respondents have failed on their responsibility of administering the estate of the deceased herein in accordance with the legal provisions, to give effect to the court's Ruling delivered on 19/5/2023. Further, that the Respondents are bent towards. taking the court through rounds, with an unlawful intent of delaying the administration of the estate of the deceased herein. The actions of the Respondents are detrimental to the other beneficiaries of the estate of the deceased, and to the estate itself.
6. The Applicant submitted that the Respondents' wilful refusal to produce their copies of identity cards, KRA PIN certificates, coloured passport size photographs, original title deeds with respect to the deceased's properties and their refusal to sign the necessary forms for transmission is in itself conclusive proof that they are not fit to administered the estate of the deceased, hence should be removed from that capacity, in the best interest of the estate and the beneficiaries thereof.
7. Counsel cited section 73 of the *Probate and Administration Rules* and urged that this provision, read together with the provisions of section 47 of the *Law of Succession Act* as well" as those encapsulated under rule 49 of the *Probate and Administration Rules* empower the court to make such orders as may be fit in the interests of justice and to ensure effective administration of the deceased's estate. In the circumstances, the Orders as sought in the Application dated 8th September, 2023 are fit to grant in



order to prevent the ends of justice from being defeated and to ensure that the estate of the deceased herein is administered in accordance with the law and the Ruling of the Honourable Court delivered on 19/5/2023.

8. It is the Applicants' case that the Respondents have not disputed the fact that they were aware of the letters served on their then advocate on record M/s J.K. Birir & Company advocates on 18th July, 2023 and 21st August, 2023 requesting for their cooperation in the administration of the deceased's property. It therefore follows that they ignored the contents of the said letter with the intention of delaying the administration process. *In re Estate of George Gikundi (Deceased)* (2021) eKLR, the court was guided by the findings in Kerugoya Succession Cause No. 36 of 2013, *Re Estate of Wilfred Munene Ngumi (Deceased)* (2020) eKLR where the consequences of failure to sign completion documents were well elaborated. In so doing, the court allowed the Applicant's Application and Ordered the Respondent to sign the necessary documents for transmission of the deceased's property within 21 days failure of which the Deputy Registrar of the High Court sign the documents in that capacity. The legal provisions and the judicial pronouncements above are authoritative on the issue of failure by the Administrators to cooperate in the Administration of the deceased's estate, particularly by not signing the necessary forms for transmission of the estate of the deceased. It is apparent that in such scenarios, the court has powers to order the execution of the said forms by the uncooperative administrators, failure of which the Deputy Registrar of the High Court signs on their behalf in the alternative to the removal of such uncooperative persons from administering the estate of the deceased.
9. Counsel urged that the Application be allowed as prayed.

Respondent's case

10. The Respondent opposed the Application vide a replying affidavit dated 19th September 2023. The 2nd administrator deposed that there are two Applications which were served on his advocate on 18th September 2023 and it is unclear whether they were placed before the judge during vacation and what directions were issued.
11. The Respondent opposed the Application on the grounds that the same was alien to the *succession* *cat* and *probate and administration rules*. Further, that the same is exclusionary as it is meant to cover the Applicant's exploits of subdividing the estate without participation of the Respondents. He stated that the same camouflages the legal requirements that where the sub division of agricultural property is required in a succession transmission, the consent of the land Control Board must be sought. The Respondent contended that the Applicants never sought their input in sourcing the surveyor and further, that when the Applicants are being insincere when they say that they called for completion documents on 21st August 2023 when their counsel addressed the firm of J.K Birir & Co advocates, when there was a different firm on record being B. Murgor & CO Advocates. Additionally, it is not clear why they did not reach out to the Respondents personally. He urged the court to dismiss the Application as it is devoid of merit.

Analysis & Determination

12. The only issue that arises for determination is;
 1. Whether the Application is defective for want of form
 2. Whether the 1st and 2nd Respondents should be removed as administrators



Whether the application is defective for want of form

13. The Respondents opposed the Application on the grounds that it was defective for want of form. The Application on record is a notice of Motion that is expressed to have been brought under the provisions of Order 51, rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3 & 3A of the Civil Procedure Act. Rule 63(1) of the Probate and Administration rules provides as follows;

Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.
 - (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.
14. The orders sought by the Applicants would have the effect of revoking the grant as it would remove the administrators. Applications seeking such an order are governed by rule 44 of the probate and administration rules which is couched in mandatory terms, in requiring that the same be instituted vide a summons. Further rule 49 of the Probate and Administration rules provides:
- “A person desiring to make an Application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”
15. The court is alive to the provisions of article 159(d) of the Constitution which provides that (d) justice shall be administered without undue regard to procedural technicalities. However, procedure is the handmaiden of justice and therefore it is imperative that parties seeking reliefs from the court use the right avenues as provided in law.
16. Therefore, the Application is defective for want of form. Counsel for the Applicant approached this court under the wrong provisions and using the wrong Application. That notwithstanding, I shall proceed to consider the merits of the prayers sought by the Applicants.

Whether the 1st and 2nd Respondents should be removed as administrators

17. The 1st and 2nd Respondents were appointed as administrators of the estate of the deceased and the grant of letters of administration was confirmed vide a ruling of this court dated 19th May 2023. The law requires administrators distribute the estate within 6 months after confirmation of grant. The primary mandate of administrators is to distribute the estate of the deceased as per the provisions of section 83(g) of the Law of Succession Act which provides as follows;

Personal representatives shall have the following duties;

- f. within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in



respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.

18. The consequences of an administrator's failure to sign completion documents were well elaborated in Kerugoya Succession Cause No. 36 of 2013, *Re Estate of Wilfred Munene Ngumi (deceased)* [2020] eKLR where the court stated:

“Section 83(g) of the Act mandates administrators of an estate to, within six months of confirmation of grant or longer period as the court may allow, complete the administration of the estate, and to produce to the court a full and accurate account of the complete administration.

This undertaking cannot be done unless the necessary documents are executed by the parties...”

In Re Estate of the Late Kubuta Kamara Nguuro alias Pharis Njegegu (Deceased) [2021] eKLR, where the court faced with a similar situation as the present one, it expressed itself as follows:

- “24. This state of affairs is not healthy and should not be countenanced by the court. The Applicants prayed that the Executive Officer/Deputy Registrar do sign all the documents on behalf of the Respondent. In *Rose Wanjiku Kuria v Nganga Mugwe* [2003] eKLR and which decision I agree with, the court held that by virtue of section 79 of the *Law of Succession Act*, the administrator gets all the property of the deceased vested in him/her and the court further stated that the Court's Registrar or his deputy or any other officer of the court not having been granted Probate or letters of administration and therefore having had no property of the deceased vest in him and no powers and duties in accordance with provisions of the *Law of succession Act*, cannot become an executor or administrator and as such cannot administer the estate of the deceased person and the court to order him or authorize him to administer by signing any of those documents as requested in this summons, is to make an order which is not supportable under the *Law of Succession Act*.
25. However, this court being a succession court has ample powers donated to it by section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* to resort to, in order to meet the ends of justice. The task of administering the estate is still on the shoulders of the Respondent (administrator). As I have already noted, despite the grant having been confirmed in the year 2007 and even after the subsequent amendment by Muchemi J (which included the Wang'uru Plot in the certificate), the Respondent has nonetheless failed to administer the estate. I believe that court orders ought not to be issued in vain but must be complied with. Further, the office of administrator of estate of a deceased person is an office which is built on the foundation of trust and goodwill. Where such is seen to be lacking, then the court ought to invoke its powers to ensure that justice is done to the beneficiaries more so where the administrator puts the beneficiaries in an unenviable position.”



19. The administrators have several duties prescribed by law, the most relevant to this being the completion of the administration of the estate as per the provisions of Section 83(i) of the [Law of Succession Act](#) which provides as follows;

“To complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the Application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

20. The administrators’ duty to complete the administration is inclusive of execution of documents necessary to conclude the administration. Section 47 of the [Law of Succession Act](#) provides that:

“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.”

21. The Applicants have provided evidence that they requested the Respondents to provide the conveyance documents so that they could effect the transfers vide the letter annexed as LJS4. However, it is evident that the Applicants addressed the request for documents to the firm of J.K Birir & Co Advocates vide a letter dated 21st August 2023. Additionally, that the 1st and 2nd Respondents appointed the firm of B. Murgor & Company Advocates.

22. The record of the court indicates that the Respondents herein, being the petitioners and administrators, appointed the firm of Ngigi Mbugua & Co Advocates alongside the firm of B. Murgor & Co Advocates on 31st August 2023. The Application before this court was filed on 8th September 2023 by the firm of Chepseba Lagat & Associates. The Applicant also filed another Application on the same date seeking that the Application be certified urgent and heard during the court’s vacation. The Applicant served the Application upon the Respondents and this is evidenced by the affidavit of service dated 18th September 2023 which then prompted the replying affidavit by the 2nd Respondent.

23. A perusal of this file reveals a plethora of Applications filed by different firms to the extent that the file is convoluted, the most recent of which is an Application filed by the objector’s advocates as recently as 30th October 2023. Counsel of the parties involved have created a situation where they consistently file Applications at will making the work of the court in helping them conclude their matter difficult either by design or by mistake. This cannot be allowed to continue and must come to an end. Succession matters are emotive as they involve families and property and therefore, advocates should strive to guide the parties to an expeditious determination of their cases.

24. Again it seems to me that there is imminent danger from some of the so called beneficiaries of particular mention is one John Kibet Serem. Set to exercise power and jurisdiction over the estate likely to threaten or infringe the rights of inheritance of other heirs with an equal interest to the heritage of the deceased. I am satisfied from the affidavit that there is a real likelihood of harm, dissipation, intermeddling and interference of the estate at some stage before final transmission to the heirs as indicated in the certificated of confirmation of grant. Section 45 of the [Law of Succession Act](#) provides as follows:

1. “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.



2. 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 both fine and imprisonment.”

In *Veronica Njoki Wakagoto (Deceased)* (2013) eKLR that;

“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 authorized 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.”

Caution is needed to preserve the sanctity of the estate before it is finally transmitted to the heirs who have a legitimate expectation that through the certificate of confirmation of grant their rights to inheritance should not be intermeddled by any other person, sibling, beneficiary or interested party without an order of the court. What is being alleged is in line with what the court stated *in Re Estate of M Ngarithi M Miriti* (2017) eKLR where the term “intermeddling” was elucidated to mean as follows;

“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 mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act 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 very serious criminal charge for which the person intermeddling or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate orders of protection of the estate against any person.”

25. The probate court has an undoubted jurisdiction to grant injunctive relief on a quia timet basis under rule 73 (1) of the *probate and administration rules* as read with section 45 of the *Law of Succession Act* when that is necessary in order to prevent a threatened or apprehended Act of intermeddling. This kind of relief ordinarily involves preserving and protecting the rights and property of the deceased pending final orders of the court on distribution. On the basis of this perspective any other person may it be a direct beneficiary to the intestate estate of the deceased is restrained from undertaking any activities likely to interfere with the administration and transmission of the estate. That is all for now on this issue. The more urgent issue in the present case is to have the property distributed by the administrators executing the necessary instruments to transfer the shares and rights so incorporated in the certificate of confirmation of grant.
26. The Applicants being relatives to the Respondents were in a position to reach out personally to establish why they had not forwarded the necessary transfer documents to ensure completion. This is compounded by the fact that the Respondents appointed another firm to come on record in place of the firm of J.K Birir & Company advocates, the firm that was the recipient of the letter dated 21st



August 2023. I have also noted the sentiments of the Respondents, that the said property is agricultural land whose division would require the consent of the land control board.

27. In the premises, I find that the Application is devoid of merit as the reasons as to why the administrators have not executed their duty has clearly been explained. I implore counsel on record to take control of the matter and bring some sanity into these proceedings. I hereby direct that;

1. The 2nd and 3rd Respondents shall sign the requisite transfer forms and any other forms transferring the estate of the property forming the estate of the deceased to the beneficiaries to give effect to the rectified certificate of confirmation of grant issued on 12th July 2023 within the next 21 days.
2. If the Respondents fail to comply with this order, the Deputy Registrar of this court is authorized to sign/execute all the necessary documents to effect the transfer of property forming the estate to the beneficiaries to give effect to the rectified certificate of confirmation of grant issued on 12th July 2023.
3. That an order is hereby made for the administrators to comply with section 83 of the Law of Succession Act to sign, execute, endorse and facilitate implementation of the certificate of confirmation of grant which in essence is a decree of this court.
4. That the so provided duties conferred upon the administrators by law be complied within 45 days of today's ruling.
5. That if the administrators commit an act of avoidance or breach as sworn in the certificate of grant that they would administer the estate of the deceased faithfully, the ministerial powers vested with the Deputy Registrar of the High Court be invoked forthwith upon expiry of the 45 days to execute the legal instruments as covenanted in the certificate of confirmation of grant.
6. Each party shall bear its own costs.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 16TH DAY OF FEBRUARY, 2024

.....

R. NYAKUNDI

JUDGE

