



REPUBLIC OF KENYA



KENYA LAW
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**Mugo v Mwangi & another (Civil Suit E007 of 2023)
[2024] KEHC 4210 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E007 OF 2023
SN MUTUKU, J
MARCH 13, 2024**

BETWEEN

IAN MAINA MUGO PLAINTIFF

AND

JOSEPH KARIUKI MWANGI 1ST DEFENDANT

JANE WANJIRU KARIUKI 2ND DEFENDANT

RULING

The Application

1. Ian Maina Mugo, the Applicant, has brought this Notice of Motion (the Application) dated 11th May 2023 anchored under Order 40 Rules 1, 2, 3, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A of the *Civil Procedure Act* Cap. 21 Laws of Kenya and all enabling provisions of the law seeking the following orders:
 - i. Spent.
 - ii. That pending the hearing of this Application inter partes, a temporary injunction do issue restraining the first and second defendants/respondents herein by themselves, their agents and or servants, from interfering, alienating, disposing, removing, wasting, damaging, transferring or in any manner dealing/intermeddling with the property of the estate of Duncan Mugo Ndirangu (deceased).
 - iii. That a permanent injunction do issue restraining the first and second defendants/respondents herein by themselves, their agents and or servants, from interfering, alienating, disposing, removing, wasting, damaging, transferring or in any manner dealing/intermeddling with the property of the estate of Duncan Mugo Ndirangu (deceased).
 - iv. That costs of this application be provided for.



2. The Applicant has advanced grounds in support of this application on the face of the Application and in the Supporting Affidavit sworn by the Applicant on 11th May 2023. The grounds can be summarized that the Applicant is claiming to be son of the deceased Duncan Mugo Ndirangu who died on 25th January 2021. He claims that the deceased was married to Molly Wanjiru Maina with whom they sired two children, the Applicant and Addy Wangui.
3. The Applicant has stated that his mother, Molly Wanjiru Maina and One Joseph Maina Kariuki petitioned and obtained a grant of letters of administration in respect of the estate of the deceased in Nyeri, being Nyeri Chief Magistrates Succession Cause No. 618 of 2021 dated 19th April 2022. He has stated that unbeknown to them, another Succession Cause was filed in Kajiado being Kajiado High Court Succession Cause No. E038 of 2021 in which a grant of letters of administration intestate was issued to the defendants/respondents herein on 16th September 2021.
4. The Applicant stated that the Defendants/Respondents did not involve his mother in the Kajiado Succession Cause or seek her consent; that the Defendants/Respondents are brother and sister to the deceased and do not come first in priority. It is stated that the Defendants/Respondents have accessed bank accounts of the deceased without sharing the money with the Applicant or his mother and that the Applicant's mother has been left out of the list of beneficiaries of the estate.
5. The Applicant has expressed fears that the properties forming the estate of the deceased may be disposed off unless the orders sought in this application are granted.

Replying Affidavit

6. The Application is opposed by the Respondents through a Replying Affidavit sworn by both Respondents on 6th July 2023. The Respondents have admitted that they are the administrators of the estate of the deceased by virtue of being brother and sister of the deceased. They have stated that the deceased did not have surviving children or parents as at the time of his death and that they had to petition for the grant of letters of administration in order to safeguard the property of the deceased.
7. The Respondents have stated that the Applicant and Addy Wangui are not biological children of the deceased but dependants and that their mother Molly Wanjiru Maina was not married to the deceased. They have stated that they have followed the law in administering the estate and have provided for all the beneficiaries including the Applicant and his sister as the dependants of the deceased and that they have not made any provision for Molly because she was not married to the deceased.
8. They have stated that they have distributed the estate according to the law and have held the monies meant for the Applicant and his sister in trust for them; that they have no intention of disposing of the estate of the deceased because the property has already been shared out to each beneficiary and therefore the claim that they intend to dispose of the property of the deceased is untrue, misguided and unfounded.
9. They have stated that they disclosed all the material facts to the court in regard to the beneficiaries of the deceased and therefore it is false to state that they intend to leave out proper beneficiaries of the estate; that there is no irreparable loss demonstrated by the Applicant to warrant grant of injunctive orders as the Applicant is already a beneficiary of the estate and that the orders he seeks in this application are the same as those he has sought in his summons for revocation of grant hence the said orders can be considered by the Probate Court.



Submissions

10. The Application is being canvassed by way of written submissions as directed by this court on 3rd August 2023. The Applicant's submissions were filed on 30th October 2023. He relied on *Nguraman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR and submitted that he has demonstrated a prima facie case as defined in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* (2003) KLR 125; that he will suffer irreparable loss if injunction is not granted and that the balance of convenience tilts in his favour.
11. He has submitted that the deceased was married to his mother and that he and his sister are biological children of the deceased and that they will be disinherited if the orders he is seeking are not granted. He has submitted that the Respondents have excluded him and his mother and sister in the distribution of the estate and concealed from the court that the deceased had another family.
12. The Respondents' submissions are dated 30th October 2023. Three issues have been identified for determination as follows:

Whether this Honourable Court has jurisdiction to entertain the current suit.

13. While citing *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1 to support their arguments, the Respondents submitted that this court lacks jurisdiction to entertain the current application and suit as the same raises issues under the *Law of Succession Act* and can only be determined by a Family Court and further that this application and the suit are sub judice because in the *Kajiado High Court Succession Cause No. E038 of 2021* the Applicant has filed Summons for revocation of the grant dated 24th April 2023 in which prayer 5 of that Summons seeks injunctive orders against the Administrators who are the Respondents in this application, which prayer is similar to prayer 2 in this application.
14. The Respondents have urged this court to down its tools in this matter and allow the Succession Court to hear and determine the application before it.

Whether the Applicant is entitled to the orders sought

15. Under this issue, it is submitted that the Applicant is not entitled to the orders he is seeking because he is not a biological son of the deceased and secondly that he has been adequately provided for in the Succession Cause as a dependant. It is submitted that the Applicant has not satisfied the conditions for granting of injunctions as provided under Order 40 Rules 1 and 3 (see *Giella v Cassman Brown Co. Ltd* (1973) EA 358).
16. It was submitted that the Applicant has not established a prima facie case as defined in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* (2003) KLR 125; that the Applicant has not demonstrated that he will suffer irreparable loss which cannot be adequately compensated by an award of damages; that the Applicant has been adequately provided for as a dependant and that there will be no irreparable loss to him if the orders sought are not granted.

Who should bear the costs of this application?

17. It was submitted that costs are awarded to the successful party; that the Applicant has not proved that he is entitled to the orders he is seeking and therefore costs should be awarded to the Respondents.



Analysis and Determination

18. I will determine two issues, whether this court is clothed with requisite jurisdiction to determine this application and whether the Applicant has demonstrated that he deserves the orders he is seeking. The law is clear on the issue of jurisdiction.
19. The *Law of Succession Act*, Cap. 160 Laws of Kenya, (the Act) applies to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons. The deceased in this matter died on 25th January 2021 and therefore the administration of his estate is governed by this Act. Section 3 of the Act defines “court” to mean a court having jurisdiction under this Act in the matter in question. The High Court has jurisdiction by virtue of Section 47 of the Act to:

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.

20. There is a need for clarity in the above provision. The High Court being referred to above is the High Court sitting as Probate Court exercising jurisdiction under Cap. 160 Laws of Kenya and not exercising the normal civil jurisdiction where suits. This matter before me is a Civil suit. It is not a Probate and Administration case or Succession Cause. There is a Succession Matter filed at the Kajiado High Court, being Succession Cause No. E038 of 2021. The Applicant did not choose to challenge any action taken by the administrators of the estate of the deceased in that Cause, but instead, he chose to file this Civil Suit.
21. I agree with the Respondents that this court, sitting as a Civil Court, lacks jurisdiction to deal with this matter. It is a matter that squarely falls under the jurisdiction of the Probate Court. As law dictates, where a court lacks jurisdiction, it has no business in dealing with a matter and must down its tools. I find and hold that this court sitting as a civil court lacks jurisdiction to deal with this application and ought to down its tools.
22. Even if this court were to proceed with the determination of this matter, the issue for determination would be whether the Applicant has satisfied the conditions for granting injunctions, which conditions are well settled in case law, see Giella case.
23. Further, in *Nguraman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal emphasized the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent, that the Applicant has to satisfy the triple requirements by establishing his case only at a prima facie level, demonstrating irreparable injury if a temporary injunction is not granted, and by allaying any doubts by showing that the balance of convenience is in his favour. 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.
24. The main suit in this matter was filed as a Civil Suit. My reading of the court record shows that there are two Succession Causes in respect of the estate of the deceased filed in two different courts. There is Chief Magistrates Succession Cause No. 618 of 2021 filed at Nyeri Chief Magistrates Court, filed on 2nd December 2021 according to the Court Stamp. The Petitioners are Molly Wanjiru Maina and Joseph Maina Kariuki, who are described as wife and brother of the deceased. The two are named as



having survived the deceased. The letter of the Chief of Mwiyo Location Mweiga, Nyeri dated 15th October 2021 names two children of the deceased: Ian Maina Mugo and Addy Wangui Mugo.

25. Molly Wanjiru and Joseph Maina obtained the Grant on 19th April 2022. That Grant attracted Summons for Revocation brought by the two administrators, now defendants in this Civil Suit. The main reason for seeking revocation is that the distribution of the estate of the deceased had already been completed vide Kajiado High Court Succession Cause No. E038 of 2021. This High Court Succession Cause had been brought by the two defendants who obtained a Grant on 16th September 2021. It is clear to this court that by the time the Grant in the Nyeri Succession Cause was issued on 19th April 2022, the Grant in the Kajiado High Court Succession Cause No. E038 of 2021 had already been issued pending confirmation.
26. From the documents in the court file records, the Applicant and his sister Addy got shares in the estate of the deceased in Kajiado Succession Cause. The certificate of confirmation dated 7th February 2023 indicates that the Applicant and the sister are listed as having benefited from the shares from the estate of the deceased. The Applicant has failed to satisfy the conditions for granting injunctions.
27. He has failed to demonstrate a prima facie case with a probability of success; that he stands to suffer an irreparable loss which could not be compensated by an award of damages and has failed to demonstrate that the balance of convenience tilts in his favour. Consequently, the orders the Applicant is seeking cannot issue.
28. Given that what is under consideration is the Summons dated 11th May 2023 and not the main suit, I will and do hereby find that the Summons is unmerited and proceed to dismiss the same, which I hereby do. The Applicant is recognized as a dependant of the estate of the deceased. For this reason, I hesitate to order him to bear the costs of this application. Let each party bear its own costs.
29. In regard to the main suit, I will leave the matter to the parties to pursue settlement or the Plaintiff to take the appropriate action as he deems appropriate.
30. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF MARCH 2024.

S. N. MUTUKU

JUDGE

