



**In re Estate of Kathuku Musau Dammas (Deceased) (Succession Cause 1392 of 2019) [2024] KEHC 3485 (KLR) (Family) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3485 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1392 OF 2019  
MA ODERO, J  
APRIL 12, 2024  
IN THE MATTER OF THE ESTATE OF KATHUKU MUSAU DAMMAS (DECEASED)**

**RULING**

1. Before this court for determination is the Chamber Summons dated 23<sup>rd</sup> June, 2022 by which the Applicant Prisca Nyiraneza Kathuku seeks the following orders:-
  - “(i) That the respondent, her agents, representatives or any other person acting on her behalf, be and is hereby restrained from collecting rent or in any way interfering with administration or management of the deceased’s property known as Plot No. A4-128 Kayole Estate or any property thereof consisting the estate of the deceased herein pending hearing and determination of this application and suit.
  - (ii) That the respondent herein do produce to the Court a full and accurate inventory and also render accounts of all rent collected from the property known as Plot No. A4-128 Kayole Estate since May, 2019 to date.
  - (iii) That henceforth, all the rent proceeds from Plot No. A4-128 Kayole Estate be collected and deposited in the deceased family’s company account, same being, Zizini Company Limited, Account Number 1103202979 domiciled at Kenya Commercial Bank, Milimani Branch, Nairobi, for management and administration of the estate.
  - (iv) That the respondent herein do remit a sum of Kshs. 2,808,000/= to the family account, Zizini Company Limited, Account Number 1103202979 domiciled at Kenya Commercial Bank, Milimani Branch, Nairobi, same being the rent collected from the Plot No. A4-128 Kayole Estate since May, 2019 to June 2022, forthwith.



- (v) That the Honourable Court be pleased to hold and declare that the respondent herein has intermeddled with the estate of the deceased person herein contrary to Section 45 of the Laws of Succession Act, Cap 160 Laws of Kenya hence liable to be sentenced and convicted accordingly.
  - (vi) Any other order the Honourable Court may issue for preservation of the estate.
  - (vii) Cost of this application be provided for.”
2. The summons which was premised upon Sections 45 and 74 of the *Law of Succession Act*, Rule 73 of the Probate and Administration Rules and all enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.
  3. The Respondent Anna Kanyiva Kathuku opposed the application through her Replying Affidavit dated 5<sup>th</sup> December, 2022.
  4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 17<sup>th</sup> May, 2023 whilst the Respondent relied upon her submissions, also dated 17<sup>th</sup> May, 2023.

### **Background**

5. This succession cause relates to the estate of the late Kathuku Musau Dammas (hereinafter referred to as “the Deceased”) who died intestate on 22<sup>nd</sup> April, 2019 at the Agakhan Hospital in Nairobi. A copy of the Death Certificate Serial No. 036xxxx appears as Annexure PNK ‘1’ to the Petition for Grant of letters of Administration Intestate dated 7<sup>th</sup> October, 2019.
6. Following the demise of the Deceased the Petitioner/Applicant Prisca Nyiraneza Kathuku describing herself as a wife to the Deceased sought and obtained from the High Court letters of Administration Intestate which Grant was issued to her on 3<sup>rd</sup> March, 2020.
7. Thereafter the Respondent Anna Kanyiva Musyoka and one Esther Kavee filed a summons for Revocation of Grant dated 19<sup>th</sup> October, 2020 claiming that the Grant was obtained fraudulently through concealment of material facts. Before that Summon for revocation of Grant could be heard the Applicant filed this present application.
8. The bone of contention between the parties is the property known as Plot No. A4-128 Kayole (hereinafter referred to as the ‘Kayole Plot’).
9. The Applicant maintains that this Kayole Plot forms part of the estate of the Deceased. She accused the Respondent of intermeddling with the said property by taking it over, collecting rents from the tenants and failing to account for the rents so collected.
10. The Applicant prays for orders that all rental income be deposited in the Family Account held at Kenya Commercial Bank, Milimani Branch. She further prays that the Respondent account for an amount of Kshs. 2, 808,000, which she has so far received as rental income.
11. In her reply the Respondent also claims to be the wife of the Deceased.

She insists that the Kayole Plot does not form part of the estate of the Deceased as the same was transferred to her during the lifetime of the Deceased and that she has been in charge of managing the property and collecting the rental income from the tenants. The Respondent urges the court to dismiss the present Application.



## Analysis and Determination

12. I have carefully considered this application, the reply filed thereto as well as the written submissions filed by both parties. The Applicant has accused the Respondent of intermeddling with the property of the Deceased, which property she avers forms part of the estate of the Deceased.
13. The law relating to intermeddling is codified in Section 45 of the [Law of Succession Act](#) Cap 160, laws of Kenya 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.
14. In the case of [Veronica Njoki Wakagoto \(Deceased\)](#) [2013] eKLR: Hon. Justice William Musyoka 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 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.” [Own emphasis]
15. Likewise in re Estate of M ‘Ngarithi M’ Miriti [2017] eKLR it was held that:  
“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.” [Own emphasis.]
16. In this case the only person who has been issued with letters of Administration and who therefore has the legal authority to deal with the property of the Deceased is the Applicant.



17. Moreover the Applicant is the legal wife of the Deceased. She has annexed to her Affidavit dated 7<sup>th</sup> October, 2019 a copy of the Marriage Certificate serial No. 42xxxx as proof of her status as a wife (Annexure 'PNK '3'). Additionally the Chief's letter dated 26<sup>th</sup> August, 2019 (Annexure PNK '2') names only the Applicant as the widow of the Deceased.
18. The Respondent in her reply also claims to have been a wife to the Deceased. There is no evidence that the Deceased ever legally dissolved his marital union with the Applicant. Therefore during the subsistence of his marriage to the Applicant the Deceased had no legal capacity to enter into a valid legal marriage with any other person.
19. In the case of Mary Wanjiru Githatu -vs- Esther Wanjiru Kiarie Appeal No. 2001, 2009 (Eldoret) Hon. Justice Bosire J/A (as he then was) observed as follows:-

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependant on any system of law except whereby reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute...”
20. Therefore the claim by the Respondent that she was a 'wife' to the Deceased stands on very shaky ground.
21. The Respondents claim that she is also a wife to the Deceased cannot be ventilated by way of affidavit evidence. This would require a full hearing at which evidence would be called to enable the Respondent prove her claim.
22. As stated earlier the bone of contention in this matter is the Kayole Property. The Applicants claims that the said property belonged to the Deceased and forms part of his estate.
23. I have carefully perused the documents annexed by the Applicant to her petition for Grant of letters of Administration Intestate dated 7<sup>th</sup> October, 2019. There is no copy of a Title Deed or a letter of Allotment in respect of the Kayole plot.
24. All that exists is a receipt dated 3<sup>rd</sup> June, 2019 indicating payment by the Deceased of transfer fee and Ground rates for 2019 amounting to Kshs. 12, 880 in respect of Plot No. A4-120 Kayole. This document cannot in my view amount to proof that the said plot belonged to the Deceased.
25. The Respondent does not fare any better. The Respondent claims that the Deceased transferred the Kayole plot to her during his lifetime. She has not annexed any sale Agreement nor any transfer signed by the Deceased.
26. All that the Respondent has annexed are lease agreements naming herself as the landlord (Annexure 'AK'). A tenancy agreement does not amount to proof of ownership.
27. Therefore as things stand this court is not able to declare with certainty whether or not the Kayole Plot forms part of the estate of the Deceased.
28. It must be remembered that this court is sitting as a Probate Court with the mandate to oversee the distribution of the estate to the genuine heirs of the Deceased.
29. A dispute has arisen over the question of ownership of the Kayole Plot. Questions of ownership, use and occupation of land are by virtue of Section 13 of the Environment and Land Court Act to be referred to the Environment and Land Court which has the exclusive mandate to determine such matters.



30. *In Re Estate of Stone Katbuko Muinde (Deceased)* [2016] eKLR Hon. Justice William Musyoka held as follows;-

“Such claims to ownership as alleged estate property as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing a suit at the magistrates’ courts or at the Civil or Commercial Divisions of the High Court or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that the court can give effect to it.”

31. That being said this court being a Probate court does have the mandate and indeed the obligation to protect the property of the Deceased from any form of intermeddling. From the evidence available there exist the very real possibility that this Kayole plot may be dissipated before the question of ownership is determined by the Environment and Land Court.

32. This court is sitting as a Probate Court whose mandate is to supervise the distribution of the estate to the genuine beneficiaries. The court has the mandate to make such orders as may be necessary to protect/preserve the estate pending final distribution.

33. Section 47 of the *Law of Section Act* vests court with wide discretion in granting protective powers of purposes of safeguarding the estate of a deceased person. It 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.”

34. Likewise, Rule 73 of the *Probate and Administration Rules* provides that:-

“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.”

35. In the premises I deem it prudent to direct the parties to nominate within fourteen (14) days an estate agent agreeable to both to collect all the rental income and to manage the property until such time as the question of ownership is determined.

36. The said rental income is to be deposited into a joint interest earning account opened in the name of both advocates. The fees due to the Estate Agent are to be paid out of the rental income, so collected. It is so ordered.

**DATED IN NYERI THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

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**MAUREEN A. ODERO**

**JUDGE**

