



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Mwangi Maingi (Deceased) (Succession Cause  
551 of 2015) [2024] KEHC 3695 (KLR) (2 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3695 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 551 OF 2015  
SM MOHOCHI, J  
APRIL 2, 2024  
IN THE MATTER OF ESTATE OF MWANGI MAINGI (DECEASED)**

**BETWEEN**

**SIMON THAIRU MWANGI ..... PETITIONER**

**AND**

**MARY WANGUI CHEGE ..... PROTESTOR**

**RULING**

1. The Applicant filed a Notice of Motion Application dated 9<sup>th</sup> August, 2023. The Applicant is seeking:
  - i. Spent
  - ii. That pending the hearing and determination of this Application inter-partes, the Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent herein either by herself, her agents and/or servants from interfering with the Petitioner by maliciously reporting to the police to have the Petitioner arrested on allegation that the Petitioner had interfered with the boundary while there are no established beacons on the ground as the land sold to her has not been surveyed.
  - iii. That pending the hearing and determination of this Succession Cause, the Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent herein either by herself, her agents and/or servants from interfering with the Petitioner by maliciously reporting to the police to have the Petitioner arrested on allegation that the Petitioner had interfered with the boundary while there are no beacons on the ground as the land sold to her has not been surveyed and beacons placed as required
  - iv. That costs of the Application be in the cause.



2. The Application is supported by the Affidavit sworn by the Applicant who states that he is the co-administrator of the estate of the deceased and that the Respondent being one of the persons who bought land from the estate has kept harassing him and his family by interfering with the old fence and thereafter runs to the police to report in Menengai and Sobe. That the Respondent has refused to agree with what was agreed on with the other 20 buyers and resorted to harassment causing the Applicant anxiety and physiological and financial suffering.
3. The Respondent in her Replying Affidavit sworn on 11<sup>th</sup> December, 2023 stated that the Application is not anchored in Succession Rules and therefore it is frivolous and an abuse of the Court Process. That she bought land from the deceased measuring 87ft x 70ft x 171ft alongside other purchasers. That the Applicant purchased a portion of land next to hers. That the Applicant started re-adjusting the portion to 50ft x 100ft in the course of re-adjusting the Applicant destroyed the Respondent's potatoes prompting her to report to Menengai police station. That the Applicant again went and uprooted the Respondent's fence prompting her to report to the police station again.
4. That the Respondent is justified by reporting the Applicant to the police since the Applicant is fond of interfering with her occupation. That she has no control of how the investigations are undertaken by the police. As to not agreeing with the other purchasers, the Respondent insisted she only want what is hers as per the agreement with the deceased.

#### **Applicant's Submissions**

5. The Applicant in his submissions filed on 13<sup>th</sup> March, 2024 he contended that citation of a wrong provision is not fatal to the Application, he cited the case of *Republic v Anti-Counterfeit Agency & 2 Others Ex -Parte Surgippharm Limited* (2014) eKLR and *Hermanus Phillipus Stern v Giovanni Gnechi-Ruscone* (2013) eKLR.
6. According to the Applicant the Application is properly before Court and is apprehensive that the Applicant will proceed to alienate the land to his detriment. He submitted that Rule 63 of the Probate & Administration Rules imports several provisions of the Civil Procedure Rules. And relied in the decision in *Joel Oichoe Oisebe v Bilia Bosibori Oisebe* (2014) eKLR.
7. Finally, that the Court has power to entertain any Application including the current application and relied on the decision in *Floris Piezzo & Ano v Giancardo Falasconi* (2014) eKLR. That he has satisfied the conditions for the grant of order of injunction as set out in *Giella vs Cassman Brown & Company Limited* (1973) EA 358. According to the Applicant, the actions of the Respondent amount to intermeddling with the estate and he stands to suffer irreparable loss and the Application is intended to preserve the estate of the deceased.

#### **Respondents Submissions**

8. The Respondent filed her submissions on 14<sup>th</sup> December, 2019 insisting the Application is not properly before Court. She added that Rule 63 of the Probate and Administration Rules lists the *Civil Procedure Rules* Applicable in succession proceedings and Order 40 is not among them. That Order 40 must be anchored in a suit that a succession cause is not a suit since no one had been sued. He added that Applications in succession matters are entertained by way of summons. He further added that Article 159(2) (d) of *the Constitution* should not be relied on.
9. According to the Respondent, the Application seems to be a boundary dispute and as such should not be entertained by Court. Court should limit itself to the succession matters. That the Respondent should not be stopped from making a report to the police which is a public place open to the public.



That the Applicant feels the police reports are malicious there exists forums for addressing such complaints.

### **Analysis and Determination**

10. The Applicant seeks to restrain the Respondent from reporting him to the police on allegation that the Applicant had interfered with the boundaries of the land she was sold by the deceased. The Applicant in his submissions insisted that he was entitled to preservative orders on the parcel of land which is or forms part of the assets of the deceased. The application is anchored on Order 40 Rules 1, 2 and 3 and Order 51 Rule 1 of the [Civil Procedure Rules](#) as well as Section 3A of the [Civil Procedure Act](#).
11. The Applicant invoked Order 40 of the [Civil Procedure Rules](#) which deals with injunctions. Counsel for the Respondent submitted that an order of injunction is not available to the Applicant because Order 40 of the [Civil Procedure Act](#) does not apply to Succession matters. Order 40 of the Civil Procedure Rules provides for interlocutory injunctions.
12. Succession matters are unique in their own nature and there are Rules of procedure coined in the Probate and Administration Rules that regulating conduct and procedure of succession matters. The Civil Procedure Rules only apply to Succession matters in exceptional circumstances. This is provided for under Rule 63(1) of the [Probate and Administration Rules](#) to wit:
  - “63. Application of Civil Procedure rules and High court (Practice Procedure Rules)
    - a. 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 provision of the Civil Procedure Rules, namely Order 5 Rule 2 to 34, Orders 11, 16, 19, 26, 40 45 and 50 (Cap 21 Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.) shall apply so far as relevant proceedings under these Rules.”
13. Section 47 of the [Law of Succession Act](#) empowers the High Court with jurisdiction to entertain any application and to determine any dispute under the Act and pronounce such decrees and make such orders as may be expedient. Rule 73 of Probate and Administration Rules Give the Court inherent power to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the Court processes.
14. [In re Estate of Kaleb Mwangi Hezekiah Muchoki \(Deceased\)](#) [2021] eKLR the court stated that:-
  - “Order 40 is one of the provisions of the Civil Procedure Rules imported into the [Law of Succession Act](#) by dint of Rule 63 of the Probate and Administration Rules. However, Order 40 addresses temporary injunctions.”
15. Therefore, the Court finds that the Applicant’s application for injunction is properly before the court.
16. The Court shall now determine whether the Applicant has met the criteria for the grant of an order of injunction. An injunction, is a discretionary remedy granted on sound legal principles and evidence. In the celebrated case of *Giella vs Cassman Brown and Co. Ltd.* [supra]. The Court set out the ground for granting injunction, which are:-
  - a. The Plaintiff must establish that he has a prima facie case with high chances of success.



- b. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
- c. If the court is in doubt, it will decide on a balance of convenience.
17. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR stated as follows as to what constitutes a prima facie case:
- “a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 as to call for an explanation or rebuttal from the latter.”
18. Looking at the two authorities and the principles that are required for the grant of order sought, the Court notes that the Respondent bought a parcel of land from the deceased and annexed sale agreement, “MWC-1”. The Applicant averred and submitted that the Respondent is one of the individuals who purchased land directly from the deceased prior to his death. The allegation of intermeddling is farfetched. Unless and until the Applicant is able to show that the Respondent is intermeddling in the estate of the deceased he cannot interfere with the quiet possession of the Respondent. She bought land from the deceased she has a right to enjoy the land and in any event take necessary steps toward protecting her right to property including reporting any unwelcomed activity. The Court agrees with the Respondent that she is not obliged to agree with the other 20 buyers. In any event if her disagreement goes to affect the estate then the Applicant should move the Court appropriately.
19. Whereas the Court can grant orders to preserve the estate of a deceased person, the Applicant has not demonstrated how he wants the estate to be preserved or how the Respondent has interfered with the estate necessitating issuance of orders. The balance does not shift in his favour.
20. The Applicant claims he has attachment to the land as it has “intrinsic and sentimental value” that cannot be compensated by an award of damages. He has also failed to demonstrated how the Applicant is interfering with the estate or the boundaries or wasting which will affect the final distribution. If the Respondent was wasting the land or interfering with the beacon or boundaries the Applicant should have presented proper evidence on the same.
21. The Application appears to be a personal conflict between the Applicant and the Respondent not in any way related to the estate or even preserving the estate from waste or alienation. The Court thus finds that the Applicant has not met the threshold to grant the orders sought.
22. Costs follow the event.
23. In the upshot the Court finds no merit in the Notice of Motion Application dated 9<sup>th</sup> August, 2023 and is dismissed with costs to the Respondent.

It is so ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 2<sup>ND</sup> DAY OF APRIL 2024.**

.....

**MOHOCHI S. M.**

**JUDGE**

