



**Mongare (Suing as Administrator and Personal Representative of the Estate of Richard Mongare Ogamba) v Kerubo (Succession Cause E016 of 2023) [2024] KEHC 4980 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4980 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
SUCCESSION CAUSE E016 OF 2023  
TA ODERA, J  
MAY 14, 2024**

**BETWEEN**

**JOB BOGONGO MONGARE (SUING AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD MONGARE OGAMBA) ..... APPLICANT**

**AND**

**REGINA KERUBO ..... RESPONDENT**

**RULING**

1. The Applicant on the strength of letters of administration ad litem filed notice of motion Application dated 29<sup>th</sup> January, 2024 under Sections 45, 47 and 73 of the *Law of Succession Act* (the Law) seeking the following order for orders against the respondent:
  - a. Spent
  - b. spent
  - c. That pending the hearing of the succession cause filed herein, the Honourable Court be pleased to issue an order barring the Respondent herein from alienating, managing, collecting rent or otherwise howsoever interfering with the operations and management of the various properties of the deceased herein, constituting the free estate of the deceased, and in particular L.R Central Kitutu/Lkuruma/499, L.R Central Kitutu/Ikuruma/139, L.R Central Kitutu/Lkuruma/92, L.R Central Kitutu/Daraja Mbili/2214 and Plot Nos.130 and 136 Orombe Farm. (hereinafter referred to as the suit properties).
  - d. That the Respondent be ordered to account for all funds and or proceeds she has collected and or received from the Deceased's estate, particularly in accruing from the rental premises situate



on suit properties since his demise on 30th Day of April, 2023 and how they were utilized, spent and or preserved.

- e. That failure to account as ordered above, the Respondent be ordered to refund to the estate all and any of the proceeds she has withdrawn from the Deceased's accounts and or misappropriated from the entire estate.
  - f. That the Respondent be ordered to bear the costs of the summons herein.
  - g. That the Honourable Court be pleased to make any other appropriate order (s) it may deem proper and necessary to make.
2. The application is supported by the affidavit of the Applicant on the grounds that;
- a. The deceased's family is yet to sit down and agree to commence succession proceedings, as they are still collecting the estate of his Application the Applicant averred that;
  - b. The Applicant is a son and a personal representative to the late Richard Mongare Ogamba, who died on the 30<sup>th</sup> day of April, 2023. The deceased to allow them commence the said exercise. However, without any legal justification and or any legal basis, the Respondent has unlawfully and without any color of right forcefully taken possession of some of the assets comprising the free estate of the deceased herein, and unlawfully directed the tenants thereon to be paying rent directly to her.
  - c. The Respondent has illegally continued to apply the proceeds from the aforesaid property to benefit of herself, an action which is bound to enrich herself to the detriment of the Applicant and the other lawful beneficiaries of the deceased.
  - d. Unless restrained by an order of this Honourable Court, the estate and the rightful beneficiaries of the deceased are bound to suffer irreparable loss and damage.
  - e. The Respondent may continue to commit further acts of illegalities that will constitute further intermeddling with the estate of the deceased herein, even before a formal succession is carried out.
  - f. This Court has the requisite jurisdiction to issue and or grant the orders sought herein.
  - g. There is reasonable apprehension that unless restrained by orders of this Court, the Respondent herein will continue with her acts of wanton wastage of the estate thus disinheriting the Lawful beneficiaries of the estate.
3. The Respondent did not file replying affidavit or a statement of grounds of opposition or a notice of preliminary objection in response to the Application despite being served and a return of service filed in court.
4. When the matter came up for hearing, Mr. Ochoki, learned counsel for the Applicant reiterated the contents Applicant's affidavit and added that the applicant had commenced the process of succession and that he had petitioned this court for the grant of administration which Petition he had filed together with this Application.

### **Analysis And Determination**

5. The Applicant has sought conservatory orders to restrain the Respondent from alienating, managing, collecting rent or otherwise howsoever interfering with the operations and management of the suit properties pending the hearing of this succession cause. The Applicant has also asked this court to



compel the Respondent to account for the rent so far collected from premises in the suit property failure of which be compelled to refund the same to the estate. His case is that without any legal justification and or any legal basis, the Respondent has unlawfully and without any color of right forcefully taken possession of some of the assets comprising the free estate of the deceased who died on 30<sup>th</sup> April, 2023, and unlawfully directed the tenants thereon to be paying rent directly to her.

6. In as much as the Respondent did not file any response to this Application, this court is duty bound and in the interest of justice to carefully examine the Application, the documents thereto in support of the Application so to arrive at a just determination. This is because it was the duty of the Applicant and not of the Respondent to prove the court that he deserves to get the orders he seeks in his Application based on his evidence.
7. I have taken time to peruse all documents attached to the Application including the Petition, the Chief, letter and a copy of a consent, in Form 38, prescribed under rule 26 of the Probate and Administration Rules, purportedly signed by the beneficiaries to the deceased. It is shocking and quite unfortunate that the Respondent who is the second wife to the deceased, is not listed as a beneficiary to the estate the deceased in the Petition despite being listed in the Chief letter as a widow of the deceased. Further a perusal of the consent reveals that her consent was equally not sought by the Applicant despite ranking higher in the degree of consanguinity provided for under section 66 of the *Law of Succession Act*. To add salt to the wound none of her children is listed as beneficiaries from whom consent was sought as provided for under rule 26 of the Probate and Administration Rules. It is very dishonest on the part of the Applicant that he together with members of his family would want this court to preserve the estate of the deceased for themselves in total exclusion of the family members of the Respondent whom according to the chief's letter are beneficiaries to the estate of the deceased and who must participate in the succession process right from its commencement to the end and be entitled equal share of the same.
8. Under section 51(2) (g) of the *Law of Succession Act*, it is clear that the persons to be disclosed in the application for representation are the immediate survivors of the deceased, that is to say surviving spouses, children, parents, siblings and children of any siblings who are dead. The provision is in mandatory terms; these individuals must be disclosed. Intestate succession is about the passing of property from the deceased to his immediate blood relatives that is persons who are connected to the deceased by bloodline.
9. Further Rule 26 of the Probate and Administration notice must be given to every other person entitled in the same degree as or in priority to the applicant prior to applying for grant of letter of administration. The Rule equally demands that an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require. In his case, there is no renunciation, written consent under form 38 and 39 by the Respondent and her children or even affidavit from the Applicant justifying their exclusion.
10. The Applicant ought to know that an application for injunction being an application seeking equitable relief must fail the moment the Court finds the applicant's hands are tainted given that he who seeks equity must come with clean hands and must also do equity. This is what was stated in the case; *Caliph Properties Limited v Barbel Sharma & Another* [2015] eKLR, where the Court stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill



all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”

11. From the forgoing therefore it is my finding that with unjustified exclusion of the Respondent and her children Applicant hands tainted and thus he is not entitled to the orders he is seeking in this Application. I read bad faith on the part of the applicant. The application dated 20.1.22 must therefore fail.
12. The above notwithstanding, this court under Rule 73 of the Probate & Administration Rules is given inherent power to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the court. In view of the fact that the orders sought herein cannot issue due to the anomaly in the application noted hereinabove, it is just and fair that the court makes orders for status quo. I order that the status quo obtaining before filling of the instant application be maintained.
13. I order that the respondent be included in the cause to avoid protracted litigation herein. Mention on 21.6.24 before the Deputy Registrar to confirm gazettelement.

**T.A ODERA**

**JUDGE**

**14.5.24**

**Delivered Virtually in the presence of: -**

**Oigo Court assistant**

**N/A for the applicant**

