



**In re Estate of Dorothy Justus Kivondo (Deceased) (Succession Cause E042 of 2023) [2024] KEHC 8607 (KLR) (17 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8607 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE E042 OF 2023  
FROO OLEL, J  
JULY 17, 2024**

**IN THE MATTER OF THE ESTATE OF DOROTHY JUSTUS KIVONDO (DECEASED)**

**BETWEEN**

**LILIAN NDINDA MUA ..... 1<sup>ST</sup> PETITIONER  
LUCY MUTHEU MUA ..... 2<sup>ND</sup> PETITIONER  
STEPHEN KIVONDO MUA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**JOSEPHAT MUSYOKA MUA ..... OBJECTOR**

**RULING**

**A. Introduction**

1. The parties herein are all siblings and children of the late Dorothy Justus Kivondo (Deceased). The 1<sup>st</sup> to 3<sup>rd</sup> petitioners did petition for letter of Administration intestate and filed their petition on 11<sup>th</sup> June 2023, seeking that the four of them (the objector included), be made joint administrators to their mothers' estate. It is instructive to note that the 1<sup>st</sup> to 3<sup>rd</sup> petitioners did sign the said petition, but the respondent herein Josephat Musyoki Mua, though named as a co administrator failed to sign the petition for letter of Administration intestate.
2. Simultaneously filed with the petition for letter of Administration, the 1<sup>st</sup> to 3<sup>rd</sup> petitioners/Applicants did file the summons dated 11<sup>th</sup> June 2023 seeking to restrain the respondent/objector herein from carrying on further construction and cultivation on the various estate properties being Konza south/Konza south Block 4/(Aimi)1581, Konza south/Konza south Block 5/(Konza) 219, Konza south/Konza south Block 5/(konza)13, Konza south/Konza south Block 2/(malili)1225 & Kalama/Muumandu/1288 or any other property forming part of the Estate. The court did consider this



application exparte in chambers and granted prayer (2) thereof, as captured above, pending inter parties hearing of the said Application.

3. The respondent did file his response to this Application, vide his replying affidavit dated 15<sup>th</sup> August 2023, and further filed an objection to making of the Grant on 30<sup>th</sup> August 2023. It was his contention was that vide a family agreement dated 19<sup>th</sup> May 2019, it was agreed that he would be the sole administrator to their mother's estate and that position should prevail. On 26<sup>th</sup> September 2023, the petitioner's/Applicants further filed summons, seeking orders to have the respondent's workers Antony Mwendwa Wambua and Muuo Muoki to vacate the home of the deceased standing on land parcel No Kalama/Muumandu/1288. In response, the respondent/objector too filed the summons dated 5<sup>th</sup> October 2023 seeking to restrain the petitioners/Respondent from cutting down trees, burning charcoal or taking away movables within all parcels of land forming the estate of the deceased herein or carrying out any activities which are wasteful in nature or farming on the estate parcels of land. The petitioner's/respondents filed their replying affidavit and further replying Affidavit dated 24<sup>th</sup> October 2024 in opposition thereto
4. In November 2023, the respondent opted to act in person and filed a fresh objection to making of a grant dated 14<sup>th</sup> November 2023, made on similar grounds as the initial objection earlier filed by his advocate and the petitioner's/Respondents did file their response to the objection through the replying Affidavit of the 1<sup>st</sup> petitioner Lillian Ndinda Mua dated 29<sup>th</sup> January 2024. The respondent subsequently Appointed the firm of Kwamboka Mongare Advocate and that of Manthi Masika to act for him and prosecute this matter on his behalf and they did file the summons dated 13<sup>th</sup> June 2024 seeking to set aside the exparte orders earlier issued on 11.07 2023 and also sought to have the court define an appropriate "status quo" to the extent that the Respondent/Applicant herein by himself and/or duly Authorized agents be allowed to fence & complete the unfinished construction and/or projects. This application has been opposed by the respondents, who filed their replying affidavit dated 10<sup>th</sup> June 2024 and sworn by the 1<sup>st</sup> petitioner/Respondent, Lillian Ndinda Mua.
5. What is clear, is that within one year of litigation and before even gazettelement of this petition, the parties herein, who are sibling of one mother and father are engaged in vicious shadow boxing, and side shows that would leave their parents ( May their soul rest in peace) squirming in disgust by the unnecessary "catfights" that they are engaged in, and which fights have led to criminal complaints being filed and other nasty engagement/exchanges as set out in the various affidavits filed by the parties. These shenanigans must stop and the parties herein should focus on the sole purpose of the succession process, which is to consolidate the estate of the deceased and have it distributed equitably as provided for under the *law of succession Act*, Cap 160 laws of Kenya.
6. In order to bring back sanity to these proceedings, I purpose under this ruling to consolidate all the pending applications and make a detrminatiOn to enable parties move this petition forward. This is based on section 47 of the succession Act, Cap 160, which 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."



7. Further Rule 73 of the probate and Administration Rules provides further cushion to the court to expeditiously deal with its proceedings and the said rules provides that;

“Nothing in these rules shall limit or otherwise affect the inherent powers 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.”
8. The court also by virtue of Rule 63 of the probate and administration rules is allowed to fall back to provisions of the civil procedure, and in particular the “Oxygen Rules”. Section 1A (1) of the civil procedure rules provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Section 1B of the *civil procedure Act*, further provides that for purposes of furthering the overriding objective specified in section 1A the court shall handle matters presented before it for the purpose of attaining the following aims.
  - a. The just determination of the proceedings
  - b. The efficient disposal of the business of the court
  - c. The efficient use of the available judicial and administrative resources.
  - d. The timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the respective parties; and
  - e. The use of sustainable technology.

## **B. Determination.**

- i. The Objection dated 31.10.2023 and 14.11.2023
  1. The Respondent did file these two objections based on the grounds and supporting affidavit made in support of the same. He averred that on 19<sup>th</sup> May 2019, immediately after their mother’s funeral, they held a family meeting where he had been appointed the soul administrator of the mother’s estate by all family members and further the said family members did sign an agreement dated the said instant date confirming and attesting to the said fact. It was his contention that the respondents were irresponsible persons and could not be trusted to administer the vast estate. He also accused them of engaging in various activities, which were wasteful to the estate and sought to be made the sole estate administrator.
10. The Respondents denied all the averments made as against them and stated that the respondent/ Objector should not be allowed to get away with making remarks that disparaged and demeaned the characters of other beneficiaries, which allegations were made without any basis whatsoever. The Respondent/Objector had hoodwinked them a few days after the burial of their mother to sign a premeditated document, which he had prepared in advance and where he had identified himself as the sole administrator. Subsequently after signing the said document, the Respondent/Objector had turned against them and told them that married beneficiaries had no business and/or interest in the said estate.
11. They had retracted the consent given and the Respondent/Objector could not force himself to be appointed the soul administrator because by his conduct he had shown that he had a malicious/evil



- plan to lock out other beneficiaries as he had already shown in the past. They were not intermeddling in the estate and had informed the respondent/applicant of every plan made before this succession was filed, but he had opted not to participate and/or sign the petition for letters of Administration.
12. The position of law is that the estate of the deceased, who has died intestate, will first evolve to the surviving spouse and then to the children. Section 38 of the [law of succession Act](#) specifically provides that;
- “where an intestate has left a surviving child or children, but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42 devolve upon the surviving child, if there be only one, or shall be equally divided amongst the surviving children”
13. The Respondent/Objector cannot be appointed the sole administrator for the simple reason that his siblings have outrightly rejected the previously signed consent proposing him as the sole administrator. This based on his hostile behavior towards them. The court notes that the parties herein are all children of the deceased and none has a superior right to administer the estate over the other. Further the petitioner’s/respondents have their right under Article 27 of [the constitution](#) of Kenya 2010, to right to equal protection and equal benefit of the law, and this right extends to equal treatment of women and men including the right to equal opportunities in political, economic, cultural and social spheres. The 1<sup>st</sup> to 3<sup>rd</sup> petitioners therefore cannot be roughshod into a position detrimental to their interest.
14. The upshot is that both objections as filed have no merit and the same are both dismissed.
- (ii) The Summons dated 11.06.2024, Summons dated 26.09. 2023, summons dated 05.10.2023 and the summons dated 13.06.2024.
15. The 1<sup>st</sup> to 3<sup>rd</sup> Petitioner’s/Applicants did file the application dated 11.06.2024 seeking to restrain the respondent herein from carrying on further construction and cultivation on the various estate properties being Konza south/Konza south Block 4/(Aimi)1581, Konza south/Konza south Block 5/(Konza) 219, Konza south/Konza south Block 5/(konza)13, Konza south/Konza south Block 2/(malili)1225 & Kalama/Muumandu/1288 or any other property forming part of the Estate. This application was heard *ex parte* and interim orders issued, which orders still subsist.
16. The 1<sup>st</sup> to 3<sup>rd</sup> petitioner’s/Applicants further did file their second summons dated 26.09.2023 seeking for orders that pending the hearing and determination of this cause an order do issue directing all workers employed by the respondent to vacate from the estate and particularly Antony Muuo Muoki and Mwendwa Wambua do vacate from the home/house of the deceased standing in land parcel number Kalama/Muumandu/1288.
17. The respondent/objector, on his part too, did file his application dated 5<sup>th</sup> October 2023, seeking for orders that pending the hearing and determination the main petition, there be an order against Stephen Kivondo Mua, Lucy Mutheu Mua & Winfred Mwatha restraining them from cutting down trees and burning charcoal or taking away any moveable’s within all parcels of land forming the estate of Dorothy Justus Kivondo or carry out any activities that are wasteful in nature or farming on the land forming the estate.
18. The Respondent/Objector further filed the 2<sup>nd</sup> summons dated 13.06.2024 seeking to have the court review, vary, suspend and/or set aside the *ex parte* orders and all other consequential orders pending hearing and determination of the main suit. Further he sought for the court to determine and define an appropriate “status quo” to the extent the at Applicant herein by himself and/or his duly authorized agents be allowed to fence & complete the unfinished construction and/or projects.



19. Both parties have accused each other of various misdeed relating to management of the estate. The 1<sup>st</sup> to 3<sup>rd</sup> petitioner's/applicants want the respondent/objector stopped from carrying out further constructions and cultivations within various estate land parcels, while on the other hand the respondent too wants the petitioners stopped from cutting down trees, burning charcoal and/or taking away any movables from the estate. Further he wants the petitioners also stopped from carrying out any wasteful activities or farming on the parcels of land forming the estate.
20. As held in *Floris Piezzo & Another vrs Giancarlo Falasconi* (2014) eklr , the court while considering an Injunction Application in a probate matter did express itself thus;

“we have carefully considered the grounds of Appeal, rival written and oral submissions and the law. The application before the high court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased's question which arose and had to be determined first was whether the court had jurisdiction to grant an injunction in a succession cause. The appellants took the position that the court had no such jurisdiction, whereas the respondent took the contrary position. However, the high court was persuaded that rule 73 of the probate and administration rules reserved the courts inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion, we have no doubt at all that the *law of succession Act* gives the court wide jurisdiction in dealing with testamentary and administrative issues of an estate. Indeed section 47 of the said Act gives the court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as maybe expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that section 47 of the Act gives the court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased Estate. This section must be read together with rule 73 of the Probate and Administration rules, which further emboldens court's jurisdiction to make such orders as maybe necessary for ends of justice or to prevent abuse of the process of court. We would imagine such orders would include injunctive orders.”

21. Similarly in the matter of the Estate of Paulo Kiplagat Boiwo (2012) eklr, the court while affirming that preservatory orders were similar to injunctive orders noted that the applicants had to abide by the conditions set out in the celebrated case of *Giella Vs cassman Brown* (1973) E.A 358 namely that the applicant must make out a prima facie case and show that they will suffer irreparable loss which loss cannot be compensated by damages and lastly that the balance of convince should tilt in their favour where doubt exists.
22. Also, in the matter of the Estate of Jeremiah Ngiri Kibati (2019) eklr and *Re Estate of Elijah Ngari (Deceased)* (2019) eklr, the court while dealing with the issuance of conservatory orders in succession matters cited with approval the decision of *Joseph Kaimenyi M'ndatho M'mbwiria* (2012) eklr, that in an Application for presevatory orders, the following conditions had to be satisfied;
- i. That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the Applicant unless presevatory orders of inhibition are issued.
  - ii. That refusal to grant orders of Inhibition would render the applicants suit to be nugatory.
  - iii. That the applicant has an arguable case.



23. The genesis of the problems regarding this estate is based on the fact that there are no appointed administrator's, whose primary responsibility would have been to collect and collate the estate and manage it in a manner that preserves its assets pending distribution as shall be agreed upon and/or as determined by court after taking into account the interest of all parties. Be that as it may on the issue of whether the parties have established a prima facie case, This court adopting the same position of the Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR where the learned Judges stated that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

24. Both parties have shown that indeed they have a prima facie case, as the respondent is building on multiple estate parcels and might steal a match on his siblings when distribution is finally effected by claiming the said parcels of land to the others exclusion. The respondent has also shown that indeed there is some logging and burning of charcoal activity ongoing with the estate, though not extensive as alleged. The succession Act provides that the estate of the deceased must be preserved and eventually distributed to all beneficiaries, after taking into account the liabilities outstanding.

25. On which party will suffer irreparable loss, I do hold that the estate must be preserved pending its distribution. To allow either party more access, use, development of the estate more than, other beneficiaries would lead to irreparable loss and damage (to the beneficiary who is/are blocked). The damage done can only be undone by more litigation, to the loss of all parties including the court when considered as against the “oxygen principles”. To this extent the respondent has a valid point, when he seeks a status quo order, which balances the equation and setting aside of the injunctive orders solely directed at his activities to the advantage of his other siblings.

26. Finally, on the balance of convenience, although it is called balance of convenience it is really the balance of inconvenience and it is for the Applicant(s) to show that the inconvenience caused to them would be greater than that which may be caused to the Respondents. Should the inconvenience be equal, it is the applicant who suffer? In other words, the applicants have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

27. Given the circumstances herein, the inconvenience is equal as the law places all the parties herein on an equal pedestal. As noted above it would be unfair and inequitable for the court to block one party and allow the other party to carry out similar activities to the determinant of the injuncted beneficiary. The balance of convenience under the circumstances would lie in granting “status quo orders” beneficial to all parties.



28. The respondent/objector in his supporting affidavit dated 5<sup>th</sup> October 2023 at paragraph 5 did propose that the orders earlier issued do apply across the board and all parties should be restrained from carrying out any further activities on the land or carrying out any farming activities in the estate. The petitioners/applicants to have indicate that this position is acceptable to them for the sake of moving forward the case.
29. Finally, there is the application dated 26<sup>th</sup> September 2023, where the 1<sup>st</sup> to 3<sup>rd</sup> petitioners/Applicants seek to have Antony Muuo Muoki and Mwendwa Wambua vacate from the estate especially from land parcel Kalama/Muumandu/1288. From the pleading filed the duo are the workers/employees of the respondent and work under his direct instructions. It is common ground that the respondent works and resides in USA and for all intent and purposes has many projects which he has undertaken within the estate some of which are complete and others are not complete. The duo aforementioned are therefore not intermeddlers to the estate but merely agents of the respondent.
30. The respondent has an inalienable right to access the estate, and since he is away, his workers must be allowed in, but subject to obeying all orders directed at their boss, the respondent herein and the other parties herein.

### **C. Disposition.**

31. Having considered all the above captured objections and the various summons applications as indicated above I do orders as follows
  - a. The respondent's objection Applications dated 30<sup>th</sup> August 2023 and 14<sup>th</sup> November 2023 both lack merit and the same are dismissed with no orders as to costs.
  - b. With regard to summons dated 11<sup>th</sup> June 2023, 5<sup>th</sup> October 2023 and 13<sup>th</sup> June 2024 the same are hereby marked as compromised on orders that;

“Pending hearing and determination of the main succession petition herein, an order of injunction be and is hereby issued restraining all the parties herein Lillian Ndinda Mua, Lucy Mutheu Mua, Stephen Kivondo Mua & Josephat Musyoka Mua by themselves their agents servants, employee or through any 3<sup>rd</sup> party claiming through them from engaging in any construction, further construction, felling trees burning charcoal and/or carrying out any activities that are wasteful in nature on any of the estate properties.”
  - c. The summons dated 26<sup>th</sup> September 2023, lacks merit and the same is dismissed with no orders as to costs.
  - d. The parties herein Josphat Musyoka Mua, Lilian Ndinda Mua, Lucy Mutheu Mua & Stephen Kivondo Mua are all appointed as joint administrators of the estate of Dorothy Justus Kivondo, and the registrar is directed to forward the relevant notices for Gazettement.
  - e. The parties herein are directed to attend court annexed mediation to agree on issues relating to preservation of the estate, it use & occupation of the estate properties. This is to be done within the next 60 days from the date the court mediator is appointed.
  - f. Pending completion of this mediation process no new farming activity will be carried.
  - g. Parties at liberty to Apply.
32. It is so ordered.



**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17<sup>TH</sup> DAY OF JULY, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 17<sup>th</sup> day of July, 2024.**

**In the presence of;**

Mr. Muumbi for 1<sup>st</sup> to 3<sup>rd</sup> Petitioners

Ms Kwamboka for Respondent/Objector

Susan/Sam Court Assistant

