



**In re Estate of the Late SNS (Deceased) (Succession Cause 1769 of 1999)
[2023] KEHC 2543 (KLR) (Family) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1769 OF 1999
PM NYAUNDI, J
MARCH 10, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE SNS (DECEASED)
AND IN THE MATTER OF PRESERVATION OF THE
DECEASED’S ESTATE**

BETWEEN

SSNS 1ST APPLICANT
MS 2ND APPLICANT
RS 3RD APPLICANT

AND

SKHS RESPONDENT

RULING

1. By way of Chamber Summon Application dated 30th June 2022, brought under Section 47 of the [Law of Succession Act](#) and Rule 73 of the [Probate and Administration Rules](#), the Applicants seek the following orders from the Court:
 1. Spent
 2. That preservatory orders do issue restraining the Executor/ Respondent either by himself, his servants and or agents from selling, disposing off, alienating, charging the property known as Land Reference Number 209/33XX- Wangapala Road (“The Rental Property”) pending the confirmation of grant herein.



3. That this honourable Court be pleased to appoint an external and independent real estate management agency to manage and collect rents from the Five (5) rental units on Land Reference Number 209/33XX- Wangapala Road (“The Rental Property”)
4. That this Honorable Court be pleased to order that a joint estate account be opened in the joint names of the Executor/ Respondent and the Applicants’ Advocates on record for purposes of collection and preserving the rental income from Land Reference Number 209/33XX- Wangapala Road by the appointed estate agent.
5. That this Honourable Court be pleased to compel the Executor/ Respondent to deposit into court all the original title documents in respect to Land Reference Number 209/33XX- Wangapala Road (“The Rental Property”).
6. That the executor be cited for contempt of court for disobeying the orders issued on 28th September 2020 and hold him liable for Civil jail imprisonment for six (6) months.
7. That this honourable court in exercise of its inherent discretion be pleased to issue such further directions as may be necessary in the interest of justice and protection of the deceased’s estate herein.
8. That the officer in charge of Parklands Police Station (OCS) to ensure peace and compliance of these orders.
9. That the executor/ Respondent herein be compelled to personally bear the costs of the present application.
2. The Application is supported by the Affidavit RS, the 3rd Applicant, sworn on the 17th of February 2022 with the consent and authority of the 1st and 2nd Applicant.
3. The Respondent swore and filed a replying affidavit dated 19th September 2022.
4. On 5th October 2022, the Court observing that there were 4 applications pending directed, with the consent of the parties, that the same be canvassed by way of written submissions. The 4 Applications are those dated 5th October 2020, 30th June 2022 (subject of this ruling), 4th July 2022 and 21st September 2022.
5. The parties opted to file consolidated submissions. For good order I will render separate rulings.
6. The Submissions of the Applicant are dated 28th October 2022 and those of the Respondent’s submissions are dated 2nd Day of December 2022.

Applicants’ Submissions

7. The Applicants and Respondent are siblings. They are the biological daughters (Applicants) and son (Respondent) of the late SNS who died on the 23rd day of June 1999 and left a will dated 5th April 1999 in which the Respondent was appointed as Executor.
8. The Applicants aver that they were compelled to make this application following the Respondent’s delay in prosecuting his application dated 5th October 2020 seeking for stay of execution pending the hearing and determination of intended appeal at the Court of Appeal in respect of Judgment of the Court delivered in this cause on 28th September 2020.
9. It is their contention that there has been a One-and-a-half-year delay in prosecuting the Application.
10. That the delay in conclusion of this cause is to their detriment as they are unable to access their due benefit from the estate.



11. The Applicants contend that the Estate is at risk of dissipation or wastage by the Respondent and single out the property described as Land Reference Number 209/33XX- Wangapala Road.
12. The Applicants contend that the Respondent collects rent and is exclusively utilising the income from the property to the exclusion of the Applicants contrary to the dictates of the will.
13. The Applicants argue that unless a preservative or injunctive order issues the estate may be rendered obsolete. The orders sought will also enhance the proper management and accountability pending the final resolution of all incidental applications and or appeals emanating from the succession cause.
14. The Applicants' ask for the appointment of an external and independent real estate agency to collect the rental incomes from the rental property, manage the property and therefore save it from dissipation and in doing so safeguard the interests of the Applicants.
15. The Applicants also seek that they be allowed access to the rental property to visit and inspect it.
16. The Applicant's argue that the Applicant having failed to comply with the orders of the Court on 28th September 2020 in total disregard of the rights of the other beneficiaries should be cited for contempt.
17. The Applicant argues that the grant of the orders sought will not prejudice the Respondent and the Estate.
18. The Applicants rely on the decision in the case of *Re Estate of Simon Kimendero (Deceased)* 2020 eKLR on the conditions for the grant of preservation orders. In seeking costs for the Application, the Applicants rely on the case of *Local Authorities Provident Fund vs Joseph Njogu Gathu* Civil Appeal No. 66 OF 2009.

Respondent's Submissions

19. The Respondent opposes the Application and avers that it is an abuse of court process of court.
20. It is the contention of the respondent that the matter is Res Judicata as the Applicant had sought the same orders in their application dated 25th September 2019 which the Court determined on 28th September 2020.
21. The Respondent depones that the Application is filed to counter his application for Stay Pending Appeal at the Court of Appeal.
22. The Respondent further depones that the Application is speculative in nature as there is no evidence of mismanagement of the Estate.
23. Further he avers in paragraph 15-19 of his Affidavit that there has not been presented to him a request for payment that would enable him to make any payments to the Applicants. He further contends that in any event the Applicants have not demonstrated that they were reliant on the deceased person.
24. He denies being responsible for the delay in finalising the matter and blames the Applicants for filing spurious applications.
25. It is his submission that he has managed the estate in accordance with the wishes of the will of the deceased and for this reason there is no need to appoint a real estate agent or the creation of an escrow account.
26. It is his position that the Caveat registered on the property by the Applicants serves the same purpose as the intended preservative orders.



27. Finally, he avers that he cannot be cited for contempt regarding compliance with a judgment which he is appealing against.
28. The Respondent relies on the decision in [Jackline Kabibi Njeri vs Eunice Njeri Gitau](#) Succession Cause No. 444 of 2011
29. The Court observes that this citation was inaccurate as it was not possible to access the decision.

Analysis and Determination

30. Having considered the parties pleadings, submissions and authorities cited I derive the following issues for determination.
 - a. Have the Applicants met the threshold for grant of the orders sought?
 - i. Should the Court grant preservative orders with respect to the property referred to as Land Reference Number 209/33XX- Wangapala Road
 - ii. Whether an external and independent real estate and management agency should be appointed to manage and collect rents from the 5 rental units on the property referred to as Land Reference Number 209/33XX- Wangapala Road
 - iii. Whether an escrow account should be opened in the joint names of the Executor and counsel for the Applicants
 - iv. Whether the executor should deposit title documents in respect of Land Reference Number 209/33XX- Wangapala Road (“The Rental Property”) in Court
 - v. Whether the Executor should be cited for Contempt of Court
 - vi. Who should pay costs?
31. Should the Court grant preservative orders with respect to the property referred to as Land Reference Number 209/33XX- Wangapala Road?
32. The Applicants are concerned that the Respondent having proceeded to lodge an appeal at the Court of Appeal the estate is at risk of being wasted.
33. The Respondent counters this allegation by stating it is unfounded. He also argues that the Application is *Res Judicata* having been raised in their application dated 27th February 2019.
34. I have perused the judgment of the Court delivered on 28th September 2020 and observe that whereas in paragraph 4 of that judgment the Court noted that the Applicant was seeking preservation orders in the final orders of the Court at paragraph 74, the court did not pronounce itself on this prayer. The matter is therefore not *Res Judicata*
35. The Applicants seek the preservative orders to protect their interest in the estate, observing that since the death of their father in 1999, the Respondent has not provided any support to them.
36. Section 47 of the [Law of Succession Act](#) and Rule 73 of the [Probate and administration rules](#) vest the court with wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person.
37. In [re Estate of Jeremiah Ngiri Kibati \(Deceased\)](#) [2019] eKLR and [Re Estate of Elijah Ngari \(Deceased\)](#) [2019] eKLR, the court in dealing with the issue of issuance of preservative orders in succession matters cited with approval the decision of the Court in [Japhet Kaimenyi M’ndatbo v M’ndatbo](#)



M'mbwiria [2012] eKLR noting that an applicant in an application for preservatory orders has to satisfy the following conditions: -

- a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservatory orders of inhibition are issued.
- b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
- c. That the applicant has arguable case."

38. In the instant case the Applicants have not placed before the court material to substantiate their claim that the estate is at risk of being disposed of or wasted.
39. I also note that the Applicants filed a caveat in respect of the parcel of land at Wangapala Road. That caveat serves the same purpose as the preservation orders that are sought.
40. Accordingly, this limb of the Application is disallowed.
41. Whether an external and independent real estate and management agency should be appointed to manage and collect rents from the 5 rental units on the property referred to as Land Reference Number 209/33XX- Wangapala Road
42. Considering my findings above I find that sufficient material has not been placed before the court for making this order. What has been demonstrated is that there is a delay in finalising the administration of the estate. This has partly been explained by the interlocutory applications that have been made by the respondents and applicant instead of proceeding to finalise the pending application for confirmation.
43. Accordingly, this limb also fails.
44. Whether an escrow account should be opened in the joint names of the Executor and counsel for the Applicants
45. I reiterate observations made about the first prayer and observe that material has not been placed before the court to justify the making of this order. Accordingly, this limb fails.
46. Whether the Executor should be cited for Contempt of Court
47. The Applicants aver that the Applicant is in contempt of the orders of the Court granted on 28th September 2020. The record indicates however that there is a pending appeal. In the circumstances this court has no grounds upon which to hold him in contempt.
48. The upshot of the foregoing is that the Application is dismissed in its entirety. Each party will bear its own costs.
49. It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF MARCH, 2023.

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P M NYAUNDI

HIGH COURT JUDGE

In the presence of:



..... Advocate for Applicant

.....Respondent

Karani Court Assistant

