



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Grace Wangui Kamau (Deceased) (Succession Cause E3641 of 2022) [2023] KEHC 19459 (KLR) (Family) (20 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19459 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE E3641 OF 2022

EKO OGOLA, J

JUNE 20, 2023

IN THE MATTER OF THE ESTATE OF GRACE WANGUI KAMAU (DECEASED)

BETWEEN

JOSEPH MBUGUA KAMAU PETITIONER

AND

JOSEPH NDAVA RESPONDENT

RULING

1. Before the court for determination is the Summons Application brought vide a Certificate of Urgency dated 9th January, 2023 in which Joseph Mbugua Kamau (hereinafter “the Petitioner/Applicant) seeks the following Orders
 - a. Spent
 - b. That pending the hearing and determination of this Application, this Honorable Court be pleased to issue an injunction preventing the respondent from collecting and utilizing rents collected from tenants of the residential properties located on Title No. Mombasa/MN South Block 3 (Kindungini Scheme) 1008 and Plot No. 9/2/Msa/S (Mtongwe) registered to the deceased;
 - c. That pending the hearing and determination of this Application, the Honorable court be pleased to issue an order the tenants of the residential properties located on Title No. Mombasa/MN South Block 3 (Kindungini Scheme) 1008 and Plot No. 9/2/Msa/S (Mtongwe) registered to the deceased to pay rent through the deceased’s bank account in Equity Bank No. 0950180363809 registered to the deceased;



- d. That pending the hearing and determination of this Application, the Honorable Court be pleased to issue an order directing the respondent to vacate the premises of the deceased Plot No. 9/2/MSA/S (Mtongwe)
 - e. That pending the hearing and determination of this Application, the Honorable court be pleased to issue an order preventing the Respondent from interfering with and or disposing the following items in the deceased's house on Plot No. 9/2/MSA/S (Mtongwe) prior to his moving in; one lathe machine for shaping metal and wood, four (4) sewing machines brand Singer; one wall unit containing utensils, one standing gas cooker, fridge, furniture, one analog television and Two water drums (200 litres)
 - f. That pending the succession of the deceased's estate, this honorable court be pleased to issue an injunction preventing the respondent from collecting and utilizing rents payable to the deceased and items belonging to the deceased
 - g. That an order be issued to the Officer Commanding Station (OCS) Mtongwe Police Station directing them to assist the applicant in execution of this court's Orders when granted.
2. The application is premised upon Section 45 of the *Law of Succession Act*. It is based on the grounds on the face of the application and is supported by an Affidavit of even date sworn by the Applicant.
 3. The Applicant's case is that he has petitioned this court for letters of Administration of the estate of the deceased with consent from all other beneficiaries. The Applicant states that the Respondent was an employee of the deceased, the caretaker of the deceased's residential properties on Title No. Mombasa South Block 3 (Kindungini scheme)1008 in Likoni and Plot No. 9/2/MSA/S in Mtongwe. According to the Applicant, the tenants in those properties used to pay rent through M-Pesa to the deceased.
 4. The Applicant avers that since the deceased died, the respondent has been collecting rent from the tenants and using it for his own gain; that the respondent has even moved into one of the houses that the deceased used to stay in whenever she visited Mtongwe and the Respondent has denied the beneficiaries of the deceased any access to the property.
 5. According to the Applicant, the Respondent may have sold the deceased's property that were in the Mtongwe house and on top of that the respondent threatened the applicant's life. The Applicant states that the actions of the respondent amount to intermeddling and it would be in the interest of Justice if the Orders sought are granted.
 6. In response to the Summons, Joseph Ndava (herein after 'the Respondent') filed a Replying Affidavit dated 24th January 2023.
 7. The Respondent's case is that he met the deceased in 1986 and the deceased was the Respondent's second wife who he cohabited with for over 35 years, a fact known by the Applicant. According to the respondent, the deceased lived in Mtongwe and not in Ndeiya, Limuru as alleged by the Applicant.
 8. With regard to property Title No. Mombasa South Block 3 (Kindungini scheme)1008, the Respondent states that he bought the land together with the deceased and agreed that the land be registered in the name of the deceased so that the property would not form part of the estate of the respondent's estate in the event of his death.
 9. According to the Respondent, he has always been responsible for the management of the house built on the property and has been undertaking repairs of the house, thus the respondent feels that if the Orders sought are granted, it will cause jeopardy to himself and the tenants in the property.



10. The Respondent states that Plot 9/2/MSA/S (Mtongwe) does not have a title. According to the Respondent in 1996 he bought an adjoining plot where he and the deceased extended their house and a shop. Thus the prayer for injunction is tantamount to an order for eviction which will violate his matrimonial property rights. The respondent contends that he has the right to collect rent as the spouse of the deceased.
11. According to the Respondent, the Applicant consulted the Respondent about funeral preparation and the deceased's bill at Pandya Hospital, that the Respondent and Applicant both executed a guarantee of payment at the hospital something which the Respondent believes is not a caretaker's duty.
12. The Respondent deposes that the Applicant deceived the Respondent and took the deceased's body in the pretext of moving the body closer to the burial place only for the Applicant to bury the deceased without informing the Respondent thus he did not attend the burial.
13. The Respondent states that he never threatened the Applicant but due to the anger he had for the Applicant burying the deceased without his knowledge, the Respondent denied the Applicant entry into the house. The Respondent contends that a prima facie case has not been established to warrant grant of the injunctive orders sought. The Respondent prays that the Application be dismissed.
14. The Applicant filed submissions dated 10th March, 2023 whilst the Respondent filed submissions dated 20th March, 2023.

Determination

15. I have carefully considered the Application, the Replying Affidavit and the Submissions by parties. The issues arising for determination are: -
 - i. Whether the Acts of the Respondent amount to intermeddling
 - ii. Whether the Injunctive Orders sought should be granted

Whether the Acts of the Respondent amount to intermeddling

16. This application is brought under Section 45 of The Law of Succession Act. Section 45 of The Law of Succession Act provides: -

“ 45.

- (1) 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.
- (2) 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.”

17. According to the above Section anyone who has no authority under this Act, or by any other written law, or has grant of representation under this Act takes possession or dispose of or otherwise intermeddle with any free property of a deceased person for any purpose is guilty of an offence under the said Section.
18. For a person to be able to deal with the estate of a deceased person in any way, that person has to first get authority from court, that is, by acquiring a Grant of letters of administration of the estate of a deceased person.
19. In the instant case, the Applicant has petitioned this court for Grant of letters of Administration but they have not been issued to him yet. No one has the letters of Administration yet, therefore no one has the authority to deal with the estate of the deceased as yet. The Applicant has provided documents showing that land Registration Title No. Mombasa South Block 3 (Kindungini scheme)1008 is registered under the deceased’s name. There is also an agreement provided by the Applicant showing that Plot 9/2/MSA/S was sold to the deceased by one Hoswell Njugo Githua on 6th April, 1994. The Respondent has stated that he together with the deceased bought land Registration Title No. Mombasa South Block 3 (Kindungini scheme)1008 and agreed to register it in the name of the deceased but there is no proof of this. The respondent has also stated that he together with the deceased bought Plot 9/2/MSA/S. However, the respondent’s name does not appear in the agreement provided.
20. The Respondent has not denied that he has been collecting rent from the deceased’s residential houses on the deceased’s properties, he has indicated that he has been using the money to do major repairs on the houses. He has provided copies of writings showing several items he has bought for the repairs of the houses but this copies are not proving that the items written on them were actually used to repair those houses.
21. The Respondent has provided a letter from the Senior Chief in Likoni which letter shows that the respondent was living with the deceased. Even if this is true, the respondent does not have a letter of Administration to the estate of the deceased. In light of the foregoing, I find that the respondent has been intermeddling with the estate of the deceased.

Whether the Injunctive Orders sought should be granted

22. The High Court has jurisdiction to issue all manner of orders including the issuance of conservatory and or injunctive orders where appropriate, to preserve and safeguard, the estate of a deceased person. Indeed, it is common ground that for an injunction to be issued, the applicant must satisfy the three requirements settled in *Giella v Cassman Brown* [1973] EA 348 where the court held that an applicant must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favor.



23. The Court of Appeal in *Mrao Ltd V First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that a prima facie is,

“a case in 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 to call for an explanation or rebuttal from the latter.”

24. In the instant application, having established that the respondent has been intermeddling with the estate of the deceased, there is a prima facie case, for granting an injunctive order.

25. The second thing to consider before granting injunctive orders is whether the Applicant or the beneficiaries of the estate will suffer irreparable damage that cannot be compensated by an award for damages. The Respondent in this case has been collecting rent from the tenants in the properties of the deceased and has not demonstrated to this court how the collected rent has been utilized in. The Applicant has also stated that the Respondent has tampered with personal items of the deceased which are in the house of the deceased where the respondent is residing. Those items might be of sentimental value to the beneficiaries of the deceased and if disposed or destroyed, the beneficiaries cannot be compensated.

26. The duty of the succession court is to see that the deceased's estate is preserved and protected so that it does not go to waste. The Applicants have satisfied the requirements for injunction and therefore the prayers in the Application of 9th January 2023 are granted as follows:

- i. A temporary injunction is hereby issued to prevent the respondent from collecting and utilizing rents collected from tenants of the residential properties located on Title No. Mombasa/MN South Block 3 (Kindungini Scheme) 1008 and Plot No. 9/2/Msa/S (Mtongwe) registered to the deceased
- ii. The tenants of the residential properties located on Title No. Mombasa/MN South Block 3 (Kindungini Scheme) 1008 and Plot No. 9/2/Msa/S (Mtongwe) registered to the deceased shall pay rent through the deceased's bank account in Equity Bank No. 0950180363809 registered to the deceased pending the determination of this cause
- iii. A temporary injunction is hereby issued to prevent the respondent from collecting and utilizing rents payable to the deceased pending the hearing of this cause
- iv. The Respondent shall not vacate Plot No. 9/2/MSA/S (Mtongwe) since the issue of whether he was the deceased's husband has not been resolved. However, the Respondent shall not interfere with the house or the items in the house in any way pending the hearing and determination of this cause.
- v. The Respondent shall bear the costs of this Application

Orders Accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2023.

E.K. OGOLA

JUDGE

Ruling read and delivered in chambers online in the presence of:

M/s Mwavishi hold brief for Waithera for the Applicant



.....for the Respondent
Ms. Gisiele Court Assistant

