



REPUBLIC OF KENYA



**In re Estate of James Mitio Muruatutu (Deceased) (Succession Cause
1339 of 2017) [2023] KEHC 19015 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 1339 OF 2017**

MA ODERO, J

JUNE 2, 2023

IN THE MATTER OF THE ESTATE OF JAMES MITIO MURUATUTU (DECEASED)

BETWEEN

JANE MURUATUTU APPLICANT

AND

JOYCE WANJA GAKUNO RESPONDENT

RULING

1. Before this Court is the summons dated 24th June 2022 filed by the Applicant Jane Muruatutu seeks the following seeks the following orders:-
 - “ 1. That pending the hearing and determination of this application inter-parties and confirmation of grant, the Honourable court be pleased to grant a temporary injunction restraining Joyce Wanja Gakuno from leasing out, transferring, distributing, interfering in any manner, alienating, charging, offering for the property known as Title Number Nairobi Block XXX/XX (Marururi) and other immovable property comprised in the estate without leave of court;
 2. That Joyce Wanja Gakuno be directed to render a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.
 3. That Joyce Wanja Gakuno be directed to render a true account of the proceeds generated from sale of the property known as Mavoko Town Block XX/X;
 4. That this Honourable Court be pleased to make such further orders as the interest of justice may require.



5. That the costs of this application be provided for.”
 6. The application was premised upon Section 45, 47, 82 (b) (ii) and 83 (4) of the *Law Of Succession Act* Cap 160, Laws of Kenya, Rules 25 (5), 49, 59 (1) and (5) and 73 of the *Probate and Administration Rules 1980*, and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Joyce Wanja Gakuno filed a Replying Affidavit dated 18th July 2022 opposing the application. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 8th November 2022 and Further submissions dated 24th January 2023. The Respondent filed the written submissions dated 5th January 2023.

Background

4. This Succession Cause relates to the estate of the late James Mitio Muruatutu (hereinafter ‘the Deceased’) who died intestate on 10th January 2015.
5. The Deceased was survived by the following persons:-
 - (i) Joyce Wanja Gakuno - Widow
 - (ii) Patrick Muchiri - Son
 - (iii) Peter Karwega - Son
 - (iv) Melvin Maina Mitio - Son
 - (v) Shirleen Wangari Mitio - Daughter (Minor)
6. The estate of the Deceased was comprised of the following assets:-
 - “ a) Nairobi Block XXX/XXX (Marurui);
 - b) Kenyatta Road Plot No. XX – Dinara Vesture Limited;
 - c) Naromoru Block/Ragati/XXXX;
 - d) Nairobi Block 126/XXX;
 - e) M/N Reg. No. XXX XXXX.
 - f) 50,000 Shares Makuyu
 - g) Kamiti Corner
 - h) Account No. XXXXXXXXXXXXXXXXXXXX – Equity Bank;
 - i) Account No. XXXXXXXXXXXXXXXXXXXX – Equity Bank, Mama Ngina Street;
 - j) Plot in Isinya;
 - k) Shares in Safaricom;
 - l} Shares in Zimanao Welfare Association Makuyu;
 - m) Account at Barclays Bank; and



- n) Account at Consolidated Bank.”
7. Following the demise the Deceased his widow Jane Muruatutu and sisters Ann Wanjiku Mitio and Joyce Wanja Gakuno were appointed as Co-Administrators of the estate. A Grant of Letters of Administration was issued to the three on 7th June 2018. The Grant is yet to be confirmed.
 8. The Applicant in her supporting Affidavit confirmed that she together with the Respondent and Ann Wanjiku Mitio were appointed as Administrators of the estate of the Deceased.
 9. The Applicant accuses the Respondent of deliberately intermeddling with the estate and wasting the same to the detriment of the other beneficiaries she alleges that the Respondent had disposed of some of the estate assets and leased out others without the consent and/or authority of her Co-Administrators and without the leave of the court. That the Respondent has failed to account for the proceeds of sale from the estate assets.
 10. Lastly the Applicant claims that there is a likelihood that the Respondent will proceed to dispose of the property known as Nairobi /Block 139/200 (Marurui) which is the family home where the Respondent resides with her two (2) children. She prays that the court issue orders to preserve the estate pending the confirmation of the Grant.
 11. The Applicant also complains that the Respondent has failed to produce in court a full and accurate inventory of the assets and liabilities of the Deceased as well as the full and accurate account of all dealings with the estate.
 12. The Respondent in her Replying Affidavit categorically denies the allegation that she has been intermeddling with the estate. She denies having disposed of or leased out any property belonging to the estate. The Respondent states that the properties mentioned by the Applicant belong to the herself and do not form part of the estate of the Deceased.
 13. The Respondent states that she has no intention whatsoever of selling or disposing of the family home.
 14. The Respondent states that she is anxious to finalize the distribution of the estate and accuses the Applicant of delaying the confirmation of the Grant. She urges the court to dismiss this application entirely.

Analysis and Determination

15. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The two issues for determination are:
 - (a) Whether the prayer for a temporary injunction should be allowed.
 - (b) Whether the Respondent should file Accounts in respect of the estate.
 - (a) Injunction
16. The grounds upon which an injunction may be granted were set out in the case of *Giella vs Casman Brown* [1973] EA as follows:-

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of



damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

17. The definition of a prima facie case was given in *Mrao Ltd vs First American Bank Of Kenay Ltd & 2 others* [2003] eKLR as follows:-

“In civil cases a prima facie case 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. This is clearly a standard, which is higher than an arguable case.

18. At this stage the court is not required to made conclusive findings on the matters in issue. All that the court is required to do is to determine whether there exists a ‘prima facie’ case warranting issuance of the interlocutory orders. In *Silvester Momanyi Maribe – vs Guizar Ahmed Motari & another* [2012] eKLR Hon Justice Odunga (as he then was) stated as follows:-

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law. Most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded form expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavits has stated on oath which is not true.”

19. The Applicant has alleged that some of the estate property has been disposed of. the veracity of that allegation cannot be determined at this interlocutory state. Suffice to say disposal of estate assets before the Grant has been confirmed amounts to intermeddling which is against the law.

20. In the case of *Estate Of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR the court stated:

“the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law..... the law takes a very serious view of intermeddling and makes it a criminal offence.”

21. The duty of this court as a Probate Court is to oversee and supervise the distribution of the estate of the Deceased to the genuine beneficiaries.

22. The Applicant claims that there has been intermeddling with the suit property by way of sale and lease of the estate Assets. On her part the Respondent has also accused the Applicant of intermeddling with property belonging to the estate of the Deceased.

23. In the case of *Japhet Kaimenyi M’ndatbo v M’ndatbo M’mbwiria* [2012] eKLR the court noted that an Applicant seeking preservatory orders over the estate of a Deceased person had to satisfy the following conditions:-

- a) “That the suit is at 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 order of inhibition would render the Applicant’s suit nugatory.
- c) That the applicant has arguable case.”



24. From the Affidavit evidence and from the annexed photographs the court is not able to make a determination that it is the Respondent who has been intermeddling with the suit property. In order to reach such a conclusion the court would have to hear the parties substantively on the issue of intermeddling.
25. That being said it is pertinent to note that at the present time no person is authorized to deal in any manner whatsoever with the suit property as no Grant has been issued to any party in respect of the said property. The court has a duty to ensure that the estate of a Deceased person is protected from any form of intermeddling and/or interference from any quarter.
26. Section 47 of the *Law of Succession Act* vests court with wide discretion in granting protective powers of purposes of safeguarding the estate of a deceased person. It provides:

“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.”
27. Likewise, Rule 73 of the *Probate and Administration Rules* provides that:-

“Nothing in these Rules shall limit or otherwise affect the inherent power 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.”
28. I find that it is in the interest of the estate to ensure that all the estate assets are preserved pending the confirmation of the Grant. I therefore grant a temporary injunction as prayed.

(b) Filing of Accounts

29. The Applicant in her Affidavit complained that the Respondent had failed to produce in court accounts regarding the management of the estate. I wish to remind the Applicant that she is a Co-Administrator of the estate. Therefore she too has an obligation to produce accounts regarding the Administration of the estate. The duty to produce accounts does not fall on one administrator alone.
30. The Respondents herein were appointed as joint administrators of the estate of the Deceased way back in the year 2018. The relationship between the Administrators of an estate and the beneficiaries is one which is fiduciary in nature. The Administrators are legally obligated to give an account of their administration of the estate.
31. The duties of an Administrator are clearly set out in Section 83 of The *Law of Succession Act*, Cap 160 Laws of Kenya. Sections 83(e) and (9) of the said Act provide as follows:-

“ 83

 - (a)....
 - (b).....
 - (c)
 - (d)....
 - (e) to produce to the Court, if required by the Court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and



liabilities of the Deceased and a full and accurate account of all dealing therewith up to the date of the account.

- (f) Subject to Section 55 to distribute or retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this Section and the income therefrom, according to the respective beneficial interests therein under the Will or on intestacy, as the case may be.
- (g) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the Court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.” [own emphasis]
32. In the case of *Re: Estate Of Julius Mimano (Deceased)* [2019] eKLR, Hon Justice William Ouko stated as follows:-

“Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.” [own emphasis]

33. The duties cited above are statutory duties which bind all the Administrators of the estate jointly and/or not the Respondent alone as is being suggested by the Applicant. I therefore direct that the Administrators of the estate prepare and file in this court full and accurate accounts of their dealings with the estate from June 2018 to date.

Conclusion

34. Finally and in conclusion this court now makes the following orders:-
- (1) Preservatory orders be and are hereby issued restraining both Applicant and the Respondent or any other person whosoever from intermeddling with the estate of the Deceased by selling transferring changing leasing or in, any manner disposing off any of the assets belonging to the estate.
 - (2) The Administrators are directed to prepare and file within Sixty (60), days a full and accurate inventory of the assets and liabilities of the Deceased as well as a full and accurate account of all dealings with the estate from June 2018 to date.
 - (3) This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 2ND DAY OF JUNE, 2023.

.....

MAUREEN A. ODERO



JUDGE

