



REPUBLIC OF KENYA



KENYA LAW
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**Masuu v Mulandi & 5 others (Succession Cause 01 of 2019)
[2023] KEHC 19929 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
SUCCESSION CAUSE 01 OF 2019**

TM MATHEKA, J

JULY 13, 2023

BETWEEN

FAUSTINA NGINA MASUU PETITIONER

AND

ELIZABETH MUKULU MULANDI 1ST OBJECTOR

MARY MANZE MULANDI 2ND OBJECTOR

ANASTACIA NDETO MULANDI 3RD OBJECTOR

ANNE MWELU MULANDI 4TH OBJECTOR

EDWARD MULANDI 5TH OBJECTOR

MILLICENT MUTILE MULANDI 6TH OBJECTOR

RULING

1. On May 24, 2022 this court (Dulu J) gave the following orders:

1. That pending the hearing and determination of this succession cause No 1 of 2019, a temporary injunction be and is hereby issued restraining the objectors, either by themselves or their agents, servants, employees or any other person acting for or through them in any way whatsoever from harassing the petitioner (Faustine Ngina Masuu) and her family or encroaching or intermeddling with any part of the property known as Plot No 1520 situated at Ngandani Settlement Scheme in Kikumbulyu Division of Kibwezi Sub-County Makueni.



2. This court hereby directs the officer commanding Police Division (OCPD), Kibwezi Police Station to enforce the above restraining orders to preserve the safety of the petitioner and her children as well as her assets and property.
 3. The costs of the application will be in the cause.
 4. This matter will be mentioned on a date to be fixed hereafter together with P&A 135 of 2017 for further directions.
2. On March 9, 2023 the Petitioner filed Notice of Motion dated March 7, 2023 brought under Order 40 Rule 7, Order 51 of the Civil Procedure Rule 73 of the P&A Rules section 3, 3A of the *Civil Procedure Act*, Article 159 of the *Constitution of Kenya* seeking 2 prayers: that this court be pleased to discharge, set aside, and or vary the orders made on May 24, 2022 and provide for costs.
 3. The grounds for the application are set on the face of the application and the supporting affidavit of Elizabeth Mukulu Mulandi and the annexures therein.
 4. The main ground is that the orders do not serve the cause of justice in that the representative is using the same to oppress the applicants who are beneficiaries of the estate herein and whose home is situated in plot no. 1520, the subject of the said orders.
 5. Further that the property was developed by the deceased whose estate is subject of this estate – and one Patricia Ndunge Mulandi – (deceased) wife of the deceased, and mother of the 2nd and 4th objectors.
 6. The petitioner opposed the application vide her replying affidavit filed on April 12, 2023. She contends that this court is functus having rendered itself with respect to the order in its ruling of May 24, 2022. That no new evidence has been tendered by the objectors. She further contends that the objectors did not develop the land – that she took in her co-wife’s children when she died – and that has been for matrimonial home long before her co-wife Patricia Ndunge died.
 7. Parties proceeded by way of written submissions.
 8. The objectors/applicants through their counsel Naikuni, Ngaah and Miencha co Advocates framed one issue for determination: whether the application should be allowed.
 9. The applicants/objectors cited Order 40 Rule 7 of the *Civil Procedure Rules* which empowers the court to discharge, vary or set aside an order for injunction on the application of any party dissatisfied with the order. The applicants relied on *St Patrick Hill School Ltd v Bank of Africa Ltd* (2018) eKLR

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”

It is submitted that the petitioner/respondent has forced the objectors who are beneficiaries of the estate to pay rent, for their home while she houses her lover boy; denied the objectors access to their mother’s place of burial; destroyed trees by cutting them and burning charcoal. Further that the ruling has been waved at constitutional and prosecutorial agencies in Makeni Hc Misc 99 of 2022 *Faustina Ngina Masuu v of Police and Others* – claiming that her prosecution in Makindu Magistrate Cr Case No E419/2021 R v Faustina Ngina Masuu undermines the ruling of this court.



10. Relying on *Ochola Kamili Holding Ltd v Guardian Bank Ltd* (2018) eKLR where the Judge stated: -

“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are not meant to preserve the subject matter ... Not to oppress another party nor should an injunction be used to economically oppress the

other party or to deny justified repayment of outstanding loan. That once such a post injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice.”

The objectors argue that the petitioner’s conduct is undeserving of the court’s injunction order.

11. The applicants further submit that the petitioner is guilty of material non-disclosure – she failed to disclose to court that there were criminal charges against her with respect to the said parcel of land, she failed to disclose that the mother of the 2nd and 4th objectors was buried on the said parcel of land; that the 2 objectors were residing on the parcel of land yet the petitioner made it appear to the court that she was in occupation of the parcel of land on her own.
12. The applicants relied on section 47 of the *Law of Succession Act*, and Rule 73 of the *PE&A Rules* with respect to the inherent powers of the court to do justice
13. On her part the respondent filed submissions through her counsel Mbalu Associates, Advocates.
14. The respondent attacks the application for not rendering any evidence to demonstrate that she has used the order to oppress/prevent the objectors from accessing their home. That the application is only intended to divert the court’s attention from delving into the matters of the petition for grant of Letters of Administration. That plot no. 1520 is her matrimonial and the claim of evicting the objectors is unfounded.
15. The respondent concedes that the court has discretion under Order 40 Rule 7 to discharge, vary, or set aside an injunctive order and adds that the court in doing so – must look into the unique circumstances of each case and satisfy itself as to the interest of justice. She cites *Baraka Apparel EPZ (K) Ltd v Rose Mbula Ojwang t/a Faida 2002 Caterers* (2007) eKLR;

“There are no limits on the Judge’s discretion except that if he does vary the judgment, he does so on such terms that as may be just. The main concern for the court is to do justice to the parties.
16. That in giving the injunctive orders the court satisfied itself of the justice of the case and that without those orders the respondent risked eviction from her matrimonial home
17. The respondent further argues that the application was not about Order 40 per se – but protection under section 45(1), (2) section 47 and 66 of the *Law of Succession Act* with respect to the preservation of the estate of the deceased. The respondent contends that the orders are necessary from the protection of the estate – pending the determination of the succession cause.
18. The only issue for determination is whether this court can vary, discharge or set aside the order of injunction made on May 24, 2022.



19. What the court issued was a temporary injunction whose life span in accordance with Order 40 Rule 6 of the *Civil Procedure Rules* PR is 12 months.
20. Order 40 Rule 6 states that where an interlocutory injunction is issued in a suit, and the suit is not determined within a period of 12 months from the date of the grant that the injunction shall lapse unless for any sufficient reason the court decides otherwise.
21. I have carefully considered the record – the deceased herein died on *March 18, 2012* and due to wrangles in the family as to whether the respondent is a wife of the deceased the purpose of this petition has been lost. The petitioner and the objector have focused their attention on one property no. 1520 where the petitioner/respondent is said to be residing and have forgotten that there is the entire estate of the deceased to be dealt with. There is also the focus as to whether the petitioner is a widow of the deceased – again that is not an issue that ought to delay this matter for now 11 years.
22. The only way to move forward in this matter is to have a level playing field and to do away with all the interlocutory issues to pave way for the succession cause. When the respondent obtained the interlocutory orders – she did nothing else – there is no evidence that she made any effort to move the matter so that it would be determined within the period required by court. Hence, as far as the law is concerned – the injunction lapsed on May 22, 2023. The objectors have attempted to demonstrate that the respondent is not deserving of the injunction. The respondent has attempted to demonstrate that the injunction is necessary to protect the estate of the deceased. However, she has not laid evidence to show that the objectors are in any way intermeddling with the estate.
23. Clearly there are issues that require to be determined with respect to the estate and the actual beneficiaries of the estate of the deceased. What I am certain about is that it cannot be done in the manner adopted by the parties. Hence, my view is that this application by the objectors is merited.
24. It is conceded that the 2nd and 4th objectors have had their home on plot 1520 since they were minors. What emerges is that they cannot access their home as the injunction has been used by the respondent to treat the property as her sole home yet it is still part and parcel of the estate of Michael John Kathuku Mulandi. That is not permissible. It will also not be permissible for anyone to remove her from the home because it is conceded that she has been living there in whatever capacity – that is for the determination of this court.
25. Having found that the application is merited. The following orders issue: -
 1. The temporary injunction issued on May 24, 2022 has lapsed. There are no sufficient reasons to extend the same hence it is hereby discharged.
26. The parties are to maintain the status quo that prevailed before the temporary injunction – whereby the members of the family of the deceased who had access to the home in particular 2nd and 4th objectors.
27. The objection proceedings to be set down for directions on priority as per the court diary.
8. Each party to bear its own costs.

Dated, signed and delivered in open court on 13th day of July 2023

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MUMBUA T. MATHEKA

JUDGE

Kipkurui for the Objector



Mutava for Petitioner

CA: Munyao

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