



REPUBLIC OF KENYA



KENYA LAW
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**Kibe & another v Karanja (Civil Appeal E106 of 2022)
[2023] KEHC 22317 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E106 OF 2022
PM MULWA, J
SEPTEMBER 21, 2023**

BETWEEN

ANDREW MOSE KIBE 1ST APPLICANT

SIMON CHEGE KARANJA 2ND APPLICANT

AND

BENSON HARRISON KURIA KARANJA RESPONDENT

RULING

1. By a Summons (General Form) application dated December 19, 2022, the applicants seek the following orders:
 - i. Spent
 - ii. The status quo of the estate of James Robert Karanja alias James R Karanja Muigai-Deceased be maintained pending the hearing of the application and the appeal.
 - iii. That pending the hearing and determination of this application and the appeal the court be pleased to grant preservation orders restraining the executor/respondent either by himself, his agents, servants, employees or any other person acting on their behalf from intermeddling with the estate of James Robert Karanja Muigai alias James R. Karanja Muigai- deceased by constructing permanent structures, selling. Leasing out the properties comprised in the estate to third parties or in any way acting in a manner likely to waste the free estate of the deceased.
2. The application is premised on the grounds that proceedings in Thika Chief Magistrate's Court Succession Cause No E220 of 2021 have been stayed and thus there is no reprieve in this case. That



the Respondent has intermeddled and destroyed the property of the deceased and is in the process of felling down trees and cutting timber among other illegal actions.

3. The application is supported by the annexed affidavit of Simon Chege Karanja sworn on December 19, 2022, wherein he depones that the free estate of the deceased is comprised of: - Loc16/Mbugiti/344, Loc16/Mbugiti/1456, Loc16/Mbugiti/1460, Loc16/Mbugiti/1461, Loc16/Mbugiti/1462 and Loc16/Mbugiti1464 and which are the subject of the appeal. It was averred that if the conduct of the Respondent is not condemned the estate will be wasted.
4. In opposing the application, the Respondent Benson Harrison Kuria filed the Replying Affidavit sworn on May 19, 2023, and stated that the Summons application is vexatious, scandalous, premature, misconceived and an abuse of the court process. That the trial court gave similar preservatory orders and there is no intermeddling with the estate. He deponed that the photos annexed exhibit his property which does not form part of the deceased estate. He attached a copy of the title deed and contended that the application was brought in bad faith and aimed at tainting his image as a lawless person.
5. The Respondent urged the court to dismiss the application as the applicants are dishonest and undeserving of the orders. And there is no prejudice to be suffered if the orders are not issued.
6. The application was heard by way of written submissions. Both parties filed submissions, the Applicants on June 29, 2023, and the Respondent on July 13, 2023.

Applicant's Submissions

7. Counsel submitted that the injunction should be granted as the Respondent in disregard of the trial court's status quo orders has continued to intermeddle with the estate of the deceased which makes it an offence as per Section 45 of the [Law of Succession Act](#).
8. In proving the intermeddling with the estate of the deceased counsel attached photographs and further submitted that the Applicants had proved they will suffer irreparable damages which would not be compensated by way of damages and this court has jurisdiction to determine the issue in dispute under section 47 of the [Law of Succession Act](#).

Respondent's Submissions

9. Counsel submitted that the parcel known as Loc. 16 Mbugiti/1466 does not form part of the free property of the deceased. The cited case was In the Matter of the Estate of Job Ndunda Muthike - Succession Cause No 112 of 2014 (2018) eKLR where the court held that: "coming back to the definition of free property, in view of what we have stated above it is quite clear that the phrase connotes not only personal property of a deceased person but also property which was in his possession or control or under his power and the disposal of which would legally have required his authority but for his death."
10. Counsel submitted that the right of the deceased to the property known as Loc 16/Mbugiti/1466 terminated upon his death. That the applicants have failed to demonstrate that the Respondent has intermeddled with the deceased estate and urged the court to dismiss the application.

Analysis and Determination

11. The issue for determination is whether the applicants have made out a case to grant preservatory orders.
12. The court has the discretion to issue preservatory orders for the purposes of protecting the estate of the deceased as per Section 47 of the [Law of Succession Act](#) which 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.”

13. Similarly, Rule 73 of the *Probate and Administration Rules* give the court inherent powers to make orders in the interest of justice. The provision provides: -
 - “73. 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.”
14. In issuing the preservatory orders the court must be satisfied that the applicant has satisfied the conditions set out in the case of *Giella vs Cassman Brown* (1973) EA 358, thus:
 - i. a *prima facie* case,
 - ii. irreparable loss in which loss cannot be compensated by damages, and
 - iii. The balance of convenience to tilt in the favour of the applicant.
15. In the instant case, the issue in dispute is what forms part of the deceased estate. According to the Applicants, the Respondent is intermeddling with the property of the deceased by cutting down trees contrary to the trial court orders of *status quo* to be maintained.
16. On the other hand, the Respondent contends the property known as Loc 16/Mbugiti/1466 is registered in his name and does not form part of the free estate of the deceased. He attached, to his replying affidavit, a copy of the title deed as proof that the purported intermeddled property does not form part of the deceased estate.
17. This court has considered the annexed list of the property forming part of the deceased estate and noted that property No Loc 16/Mbugiti/1466 does not form part of the deceased estate. The property is registered in the name of the Respondent, a title deed having been issued in 2012.
18. Though the Applicant contends that the estate of the deceased risks being wasted away if the Respondent is not estopped from its actions, this court finds that the annexed photographs by the Applicants do not specifically illustrate which parcel belonging to the deceased has been interfered with by the Respondent.
19. The Respondent having disputed the allegations of intermeddling the Applicants are to prove to the required standard that the deceased estate is in the process of being wasted. They have failed to prove the existence of a *prima facie* case as well as the irreparable loss to be suffered by the themselves.
20. *In Veronica Njoki Wakagoto (deceased)* (2013) eKLR the court held; “The effect of [section 45] ...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”
21. In the upshot, due to lack of evidence to demonstrate the estate is wasting as a result of the actions of the Respondent this court is minded of its duty as enshrined under Rule 73 of the Probate and Administration Rules where it is to protect the estate of the deceased, will proceed to make an order that commends itself, which is the status quo be maintained pending the hearing and determination of the appeal.
22. The result is that the application dated December 19, 2022, lacks merit and the same is dismissed.



23. It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE

In the Presence of:

Kinyua & Duale – Court assistants

N/A - for the Applicants

Mr. Ngeresa - for the Respondent

