



**In re Estate of Musa Ismail Ali (Deceased) (Succession Appeal
E002 of 2023) [2024] KEHC 14354 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
SUCCESSION APPEAL E002 OF 2023
F GIKONYO, J
NOVEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF MUSA ISMAIL ALI (DECEASED)**

BETWEEN

TUMATE ABDULLAH ALIAS HASSAN APPELLANT

AND

KHADIJA MUSA 1ST RESPONDENT

SARAH MUSA 2ND RESPONDENT

RULING

Background

1. The appellant/applicant vide memorandum of appeal dated 19/10/2023 has lodged an appeal against the ruling of the senior resident Kadhi delivered on 05/10/2023 in Kericho Kadhi's Court Succession No. 1 of 2021.
2. A third party has sought and obtained ex-parte orders in Narok Misc. Civil Application No. E001 of 2024; Serah Njoki Munge T/A Sanjomu Auctioneers Vs Ahmed Ainashe authorizing auctioneers to levy distress for rent against the occupying tenants.
3. The appellant/applicant is apprehensive that in the event the third party moves in and assumes possession and occupation of the subject premises, the purpose and object of the pending appeal would be rendered nugatory.
4. The appellant/applicant contends that it would be in the interest of justice that the subject matter of this appeal be preserved pending hearing and determination of this application and or pending hearing and determination of the appeal herein.



The application.

5. the appellant/applicant vide notice of motion dated 20/02/2024 sought the following orders;
 1. spent.
 2. That there be a stay of execution of the ex parte orders issued on the 18th day of February 2024 in Narok Misc. Civil Application No. E001 of 2024 Serah Njoki Munge T/A Sanjomu Auctioneers Vs Ahmed Ainashe authorizing auctioneers to levy distress for rent against the occupying tenants pending the hearing and determination of this application and or pending further orders of this honourable court.
 3. That this honourable court be pleased to issue such other and further orders it may deem fit in the interest of justice.
 4. That costs of this application be proved[sic] for.
6. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Tumate Abdullah alias Hassan on 20/02/2024.
7. The applicant in his appeal seeks to challenge what he termed as irregular and unilateral sale and transfer of Plot No. 48 Olpusmuru in collusion with the Kadhi.
8. The applicant contends that he does not know anyone by the name of Peris Njoki Kihara.

The response.

9. The respondents opposed the application vide a replying affidavit sworn jointly by Khadija Musa and Sarah Musa on 14/03/2024.
10. The 1st and 2nd respondents are daughters of the deceased. Together with other beneficiaries of the estate of Musa Ismail Ali(deceased), they appointed the 1st respondent as the administratrix of the estate of the deceased.
11. The deceased was the registered proprietor of the plot. No. 48 Olpsimoru trading center thus forming part of the estate of the deceased.
12. The appellant/applicant is their nephew and son of the late Abdullahi Musa Ismail who passed away and the family had never filed any succession petition. They therefore contend that the Kadhis Court at Kericho erred in law and fact by appointing the appellant as an administrator of the estate of the deceased whereas four daughters and one son of the deceased are alive and could manage the estate of the deceased.
13. They were advised by the honourable Kadhi in Kadhis court at Kericho to file a petition seeking orders of the Kadhis court to permit them to sell plot no. 48 Olpusmoru Trading Centre and share the proceeds of the sale in equal measure with the guidance of the Kadhi as the property could not be subdivided and there was a dispute as to whom was collecting rent from the property.
14. Before the Kadhi, the appellant indicated that the properties constituting the estate of the deceased (Musa Ismail Ali) be sold and the proceeds of the sale be shared amongst the beneficiaries of the estate and for those beneficiaries who had passed on and had children that the proceeds be forwarded to their children in accordance to the Islamic law of inheritance.
15. The Kadhis court set a reserved price which was a minimum of Kshs. 2,000,000 and a maximum of Kshs. 4,000,000.



16. They searched for a buyer who would buy the property at a maximum price of 4,000,000 in 2021 and were not able to get it for almost two years and the dispute on collection of rent continued.
17. They were able to secure a buyer at the minimum price of Kshs. 2,000,000/=.
18. The 1st respondent/administratrix called for a family meeting and stated that she had already got a purchaser and at that moment no one disapproved the sale including the appellant herein he even agreed that the property be sold at that point.
19. With the approval of all the beneficiaries of the estate of the estate of deceased together with other family members we sold the property to one Peris Njoki Kahara.
20. The sale was conducted before the Kadhi at the Kadhis court at Kericho who advised that the purchase price be deposited in the judiciary account in which the monies were to be distributed after deposit.
21. After the sale of the suit property the proceeds were distributed to all the beneficiaries of the estate including the family of Abdullahi Musa Ismail the father to the appellant who has totally refused to collect the same from the Kadhis court at Kericho.
22. The purchaser after purchasing Plot No. 48 Olpusumuru Trading Center. The respondents transferred the property to her name and issued notices to the tenants.
23. The respondents contend that even when the deceased was still the registered owner in 2019, the tenant known as Ainashe Ahmed refused to remit rent and they opted to issue a notice to vacate the premises and he refused.
24. The respondents therefore urged this court to grant Peris Njoki Kahara prayers sought to distress for rent as the property no longer forms part of the estate of the deceased.
25. The respondents contend that the distress for rent does not in any way affect the appeal process as the person being levied distress is not a beneficiary of the estate.
26. The appellant's application is overtaken by events as the property has been sold and the proceeds the all shared in accordance with the Muslim law of inheritance.

Directions of the court

27. The application was canvassed by way of written submissions. The applicant has filed. The respondents have not filed.

The applicant's submissions

28. The applicants submitted that the rent has been dutifully paid to the appellant who is a beneficiary to a portion of the deceased estate which is Plot No. 48 Olpusumuru Trading Centre. The rent distress which the respondents claim cannot be executed nor the eviction plans since the landlady does not own the premises hence she cannot subject any occupant to any contractual obligation in a landlord-tenant relationship. Therefore, there will be a substantial loss on the part of the appellant to pay the rent in distress before the appeal is heard and determined. The applicant relied on *Pauline Yebei & Another V Estate Of Kiprotich Letting Represented By Andrew Kipkoech Kiprono* [2017] eKLR, *High Court Of Nyamira Nyatera V Nyakundi* (Civil Appeal E033 Of 2022, High Court Of Eldoret, *Ngetich V Kimosop* (Civil Appeal E125 Of 2023, *Ena Investment Limited V Benard Ochau Mose & 2 Other* [2022] Eklr(Civil Appeal E13 Of 2022), *Nicholas Stephen Okaka & Another V Alfred Waga Wesonga* [2022] eKLR Civil Appeal E003 Of 2022) Paragraph 27 RWW V EKW [2019] eKLR, and



Analysis And Determination

29. Most of the prayers sought in the Notice of Motion filed by Tumate Abdullah Alias Hassan, the appellant/applicant herein were on interim basis; pending the hearing and determination of the motion.
30. Be that as it may, the applicant seeks for an order: -

That there be a stay of execution of the ex parte orders issued on the 18th day of February 2024 in Narok Misc. Civil Application No. E001 of 2024 Serah Njoki Munge T/A Sanjomu Auctioneers Vs Ahmed Ainashe authorizing auctioneers to levy distress for rent against the occupying tenants pending the hearing and determination of this application and or pending further orders of this honourable court.
31. The applicant argues that, a third party sought and obtained ex-parte orders in Narok Misc. Civil Application No. E001 of 2024; Serah Njoki Munge T/A Sanjomu Auctioneers Vs Ahmed Ainashe; authorizing auctioneers to levy distress for rent against the occupying tenants.
32. This is not an appeal against the order for levying of distress for rent arising from the said miscellaneous civil application. There is no such appeal or review of the said order of distress for rent.
33. These errors are fundamental errors.
34. Nevertheless, the applicants submitted that the rent has been dutifully paid to the appellant who is a beneficiary to a portion of the deceased estate which is Plot No. 48 Olpusumuru Trading Centre. He claims that, the distress for rent which the respondents claim cannot be executed nor the eviction ordered since the landlady does not own the premises; hence she cannot subject any occupant to any contractual obligation in a landlord-tenant relationship. According to the applicant, there will be a substantial loss on the part of the appellant to pay the rent in distress before the appeal is heard and determined.
35. The applicant claims that plot. No. 48 Olpsimoru trading center forms part of the estate of the deceased. And, he filed this appeal to buttress that point. However, he is seeking to justify payment of rent for the premises to the appellant- who is one of the beneficiaries- before the appeal is heard. What an oxymoron: the appellant's intermeddling with the estate of the deceased is a lawful breach of law!
36. Is this a lawful engagement by the appellant?
37. Selfishness is apparent. The application is not to vindicate the law or for the love of justice. The application is meant to secure a collateral advantage to the appellant in violation of the law of Succession; a flagrant abuse of the law and process. Therefore, the court will not aid such suitors who seeks a court order to continue receiving rent for his benefit and consumption from a property he claims is estate property.
38. In the circumstances of this case, Conventional wisdom requires that, the appellant prosecutes his appeal wherein issues on this property and rights of the parties shall be determined completely and effectually.
39. In the upshot, the application is found to be without merit and is dismissed. Costs to abide by the appeal.



40. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
19TH DAY OF NOVEMBER, 2024.**

.....

F. GIKONYO M

JUDGE

In the presence of: -

Kilele for the applicant

Ole Kamwaro for the respondent

Otolo C/A

