



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 91 OF 2014

IN THE MATTER OF THE ESTATE OF DANIEL MUTHAMI KIEMA (DECEASED)

AND

IN THE MATTER OF PRESERVATION OF THE ESTATE OF DANIEL MUTHAMI KIEMA (DECEASED)

BETWEEN

CORNELIUS MUSEMBI KIEMA.....PETITIONER/APPLICANT

AND

LILIAN MWANIA.....RESPONDENT

RULING

1. The matter herein relates to the estate of Daniel Muthami Kiema who died intestate on 6.10.2013.
2. The Petitioner herein petitioned for letters of administration and the same is yet to be granted.
3. The Petitioner herein then filed summons dated 16th June, 2015 under Sections 39, 45 and 47 of the Succession Act and Rules 49 and 73 of the Probate and Administration Rules seeking orders for preservation of the estate of the deceased for he was surprised to find out that money that is part of the estate of the deceased was withdrawn from a bank account that belonged to the deceased.
4. The Applicant/Petitioner seeks the following orders:-

1. Spent

2. THAT pending the hearing and determination of this application the court be pleased to restrain the respondent from presenting herself as a wife of the deceased, Daniel Muthami Kiema.

3. THAT the court be pleased to issue an order restraining the Deputy Inspector General of Kenya Police Service, the Secretary/ Director of Pensions, Ministry of Finance, the Public Trustee, Machakos from processing and/or paying the pensions funds and/ or other benefits that are due to the estate of the deceased in favour of Lilian Mwanja pending the hearing and determination of this application.

4. THAT the Honorable court be pleased to summon the area Chief, Ikanga Location, Onesmus N. Mataula to attend court and confirm under oath the actual dependents of the estate of the deceased and particularly shed light on the status of Lilian Mwanja for purposes of confirming the actual dependants to the estate of the deceased to enable the court give directions on the administration of the estate.

5. THAT the Respondent do bear the costs of this application

5. It is supported by an Supporting Affidavit sworn by **Cornelius Musembi Kiema** sworn on **16/06/2015** and filed on **17/06/2015**. In the said affidavit, the applicant avers that the deceased was never married and he attached a copy of the chief's letter indicating the same. The applicant avers that the area Chief has fronted the respondent as a widow to the deceased and this prompted him to seek for a letter seeking for a list of the beneficiaries from the District Commissioner, however the same was not issued. The applicant is apprehensive that the respondent shall waste the estate unless restrained and that the chief of the Ikanga Location, Mutomo Sub-County is colluding with her so as

to meet their mutual end of benefiting from the estate of the deceased and he now seeks that the court stop payments being processed in favour of the Respondent

6. The Respondent opposed the application via Replying Affidavit sworn on **10/11/2015**. The said respondent averred that she was married to the deceased and had 3 issues. She attached copies of birth certificates to that effect. She admits assistance from the Chief of Ikanga Location to process the dues of the deceased and has attached a copy of a letter issued by the said chief issued to the director of pensions to process payment of deceased's pension. She avers that as a wife of the deceased she is entitled to his estate and seeks that the application be dismissed with costs.

7. The application was allowed in the interim in terms of prayer 1, 2 and 3 and later prayer 4 by consent. The Chief of the Ikanga Location was summoned and on 19.7.2017 he testified that he is the author of the letter dated 24.1.14 that indicated that the deceased and the respondent were husband and wife and they lived together for almost 12 years and had three children. He testified that he knew the children and that he came to know the deceased in 1999. On cross-examination, he confirmed that he signed birth certificate forms for the children after the death of the deceased and he does not know where they were born. He also disputed the letter by the assistant chief claiming that the deceased was not married.

8. The applicant filed witness statements that are on the court record. The respondent has filed none.

9. The main prayers by the Petitioner are for preservation of the Estate of the deceased herein and for the Respondent to cease interfering with the said estate. He does not agree that she is a wife to the deceased. The two other witness statements of the applicant's witnesses also deny the fact that the deceased was ever married

10. The respondent has not filed any witness statements.

11. Whereas it appears that the issue in this application is whether or not the respondent is a wife of the deceased, after going through the evidence on record, I find the following issues necessary for determination:-

i. Whether the Application has merit

ii. What orders may the court grant?

12. The petition herein was filed on 29.1.2014 and the same has not proceeded to gazette. However the respondent is accused of what amounts to intermeddling with assets that form part of the deceased estate. The respondent's justification is that she is a wife to the deceased and therefore is entitled to the estate.

13. Section **82(a) of the Law of Succession Act** provides that;

“Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

In interpreting the above provision of law, the Honourable Court in the case of **Alexander Mutunga Wathome –v- Peter Lavu Tumbo & Another [2015] eKLR (Machakos Succession Cause No. 80 of 2011)** noted that;

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”

14. Section **45 of the Law of Succession** is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

15. It is the court's view that the actions of the Respondent amount to intermeddling with the estate of the deceased. It is this court's view that the applicant is not yet an administrator to the estate of the deceased and he had the option of filing for a limited grant so as to seek the instant orders, therefore the court finds that the applicant is not properly before court to seek the orders sought.

16. Nevertheless the application has raised weighty issues that cannot be fully canvassed in this application, however the court is duty bound to prevent wastage of the estate of the deceased.

17. The power to do so is set out under the inherent jurisdiction of the court and under Section 47 of the Law of Succession Act and Rule 73 of the probate rules and to that end the Court has power to grant injunctive orders to meet the ends of justice. This was observed in the case of **The Estate of George M'Mboroki (Deceased) [2008] eKLR** where the court held that *“it holds such intrinsic authority so as to observe the due process of the law, to prevent the abuse of the process, to do justice between the parties and to secure a fair trial between them”*.

18. The celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** sets out the grounds for granting an injunction. On the first principle as set out in the case, I am satisfied that the applicant has established a prima facie case as described in **Mrao v First American Bank & 2 others [2003] KLR, 125**. It was evident from the facts tendered in court that part of the estate of the deceased had been wasted and the respondent has admitted to have been intermeddling in the estate by withdrawing cash without leave of court and or interim letters of

administration to the prejudice of other beneficiaries. Similarly the application for letters of administration is pending before the court. This position is fortified in the case of **the Estate of Veronica Njoki Wakagoto (Deceased) 2013 eKLR** where the court stated “*that 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*”.

19. I am satisfied that if the restraining order so sought is not granted, there will be irreparable loss and a miscarriage of justice. In **Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others 2016 eKLR**, court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages. The facts speak for themselves that the waste and destruction of the estate of the deceased cannot be compensated by way of damages for it is not known what the respondent does for a living.

20. From the foregoing, I am satisfied that the principles for granting injunctions have been set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd 1973 EA 358**. In considering the pleadings, there does exist a serious issue to be tried, one that forms the subject matter of this suit and in preserving it, would only culminate in meeting the ends of justice as sought by the parties. The applicant seeks an injunction against the respondent so as to preserve the property of the deceased pending the determination of the issue as to whether or not she is a beneficiary.

21. On the issue of the locus of the applicant, Section 54 of the Law of Succession Act that provides; “*A court may, according to the circumstances of each case, limit a grant of representative which it has jurisdiction to make, in any of the forms described in the fifth schedule*”. I would advise the applicant to utilize the said provision of the law so that the instant petition does not hang in abeyance, and after the same is done, the applicant may be free to apply for a review of the orders that are issued herein. In addition, I advise the applicant to accelerate the hearing of the instant petition.

22. On the same limb, I caution the respondent against intermeddling, for having established that she has committed the offence, the applicant is at liberty to approach the court for further redress if need be. The Respondent will also be at liberty to seek to participate in the Succession proceedings once they are fully lodged.

23. I therefore make the following orders:

i. The applicant is directed to file an application for limited grant for doing such acts as may be necessary for the preservation of the estate of the deceased and or fix the petition for hearing, whichever is the earliest.

ii. An order be and is hereby issued to preserve the deceased’s Estate pending the hearing and determination of the petition and the application mentioned in (i) above.

iii. An injunction shall issue restraining the respondent by herself, her servants, agents, representatives, and or employees or anyone claiming interest in the estate of the deceased howsoever, from transferring, interfering in any manner, alienating the estate of the deceased or any part thereof pending the hearing of the or petition pending the filing, and hearing of the applications mentioned in (i) above.

iv. The Respondent shall cease from intermeddling with the estate of the deceased and the applicant is at liberty to approach this court for redress if need be.

v. That in the alternative, the court hereby directs that the monies withdrawn by the respondent be deposited in court pending the hearing of the petition and or pending the filing and hearing thereof of the applications mentioned in (i) above.

vi. The Orders shall lapse in 30 days if the applicant fails to comply with the court directions hereto. Mention on 2nd May, 2019 for further directions.

vii. Costs in the cause.

Dated and delivered at **Machakos** this **1st** day of **April, 2019**.

D.K.KEMEI

JUDGE