REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3403 OF 2005

IN THE MATTER OF THE ESTATE OF DAVID KYULI KAINDI (DECEASED)

RULING

1. David Kyuli Kaindi, the deceased, died on 17th December 2004, and Muvisi Kyuli, hereinafter referred to as the respondent, a son of the deceased, petitioned for a grant of probate of written will, having been named as executor in a written will of the deceased made on 17th March 1987, hereinafter referred to as the will. The grant of probate of written will was made herein on 12th April 2006, and confirmed on 14th February 2011.

2. On 12th February 2014, Ann Amanga Nthale, hereinafter referred to as the 2nd applicant, a widow to one of the sons of the deceased, known as Nthale Kyuli, who passed away on 6th March 2011, and David Kyuli Chande, a son of Nthale Kyuli and grandson of the deceased, hereinafter referred to the 3rd applicant, filed an application seeking orders that the respondent be compelled to complete execution of the will in relation to properties bequeathed to Nthale Kyuli. On 21st July 2015, the court ordered the executor to complete administration of the estate within ninety (90) days. When it became apparent to the court that the said order was not complied with, the grant of probate issued to the respondent was revoked.

3. On 13th January 2017, the 2nd and 3rd applicants herein filed an application seeking to be appointed as administrators of the estate of the deceased with deceased's will annexed, stating that the other beneficiaries did not express willingness to be appointed as such. The said application was supported by Katilo Kyuli, one of the children of the deceased, who is hereinafter referred to as the 1st applicant, who stated that the respondent had failed to discharge his mandate as an executor. She stated that one of the children of the deceased should be appointed as an administrator. In a ruling delivered on 30th June 2017, the court appointed Katilo Kyuli, Anne Amanga Nthale and David Kyuli Nthale, the applicants herein, as the administrators of the estate of the deceased.

4. On 13th October 2017, the applicants filed an application dated 10th October 2017, seeking that the respondent be compelled to specifically identify and point out to the applicants all properties, including company share certificates of the estate of the deceased; stating, *inter alia*, that the respondent had refused or neglected to hand over to them all the title documents and information concerning the properties of the estate.

5. In his reply to the application, the respondent stated, *inter alia*, that he was dissatisfied with the decision of the court dated 30th June 2017, and had instituted an appeal against it in CACA No. 305 of 2017, and urged that the said application be held in abeyance to await outcome of the said appeal lest it be rendered nugatory. The respondent added that he did not have possession of some of the titles and share certificates listed by the applicants.

6. In a supplementary affidavit in reaction to the respondent's reply, the 3rd applicant averred, *inter alia*, that the respondent was concealing material facts from the court in respect of the whereabouts of the title deeds and that he was conducting himself in bad faith and frustrating the applicants' efforts to administer and distribute the estate.

7. On 10th March 2018, the applicants filed another application dated 28th February 2018 seeking *inter alia* that: -

a) The court do issue a temporary injunction restraining the respondent whether by himself, his agents, nominees, servants and/or employees from dividing, subdividing, fencing off, interfering, transferring, charging, disposing or in any way encumbering the properties referred to as Mavoko Municipality Block 6/23 and Kiteta/Ndituni/905 pending the hearing and determination of the said summons;

b) The court do issue an injunction restraining the respondent whether by himself, his agents, nominees, servants and/or employees from dividing, subdividing, fencing off, interfering, transferring, charging, disposing or in any way encumbering the properties referred to as Mavoko Municipality Block 6/23 and Kiteta/Ndituni/905; and

c) The court be pleased to order the respondent to transfer or cause to be transferred, at his cost, the two properties to the names of

the applicants as the aAdministrators of the estate of the deceased within a specified time the court may deem appropriate.

8. In reply, the respondent stated that he was the executor of the will at the time when Mavoko Municipality Block 6/23 was registered and that the lease was issued to him on 19th November 2015. He added that the property known as Kiteta/Ndituni/905 did not belong to the estate of the deceased, saying that the said property was clan property in respect of which he was holding the title in trust for the clan.

9. The matter proceeded by way of cross-examination of the deponents of the various affidavits. Thereafter written submissions were filed in respect of the applications.

10. I have perused through the applications, the affidavits of the various parties, the oral testimonies and the written submissions, and various issues for determination that I have identified as arising from the same are -

a) whether the respondent ought to be compelled to release and deliver all title documents and share certificates relating to the assets of the estate of the deceased to the applicants; and

b) whether an order of injunction ought to issue against the respondent restraining the respondent whether by himself, his agents, nominees, servants and/or employees from dividing, subdividing, fencing off, interfering, transferring, charging, disposing or in any way encumbering the properties referred to as Mavoko Municipality Block 6/23 and Kiteta/Ndituni/905.

14. In her oral testimony the 1st applicant relied on her two affidavits and testified that the 3rd applicant had informed her that the respondent had the title documents she was seeking and listed them in her affidavit in support of the summons dated 10th October 2017 as follows: Masii/Embui/384, 390, 392, 395, 397, 610 and 742; Muthetheni/Nyaani/37, 45, 49, 52, 58, 78, 157, 163, 249 and470; Muthetheni/Ngamba/66 and 390; Masii/Embui (now mortgaged with Standard Bank Machakos Branch); Masii/Embui (now mortgaged with Standard Bank Machakos Branch); LR No. 209/136/13; LR No 209/2763/6; LR No 209/2/255; LR No 36/2/23; LR No. 209/4844/19; LR No 209/5015; Plot No. 83 Wamunyu Market; Plot No. 101 Wamunyu Market; Plot No. 119 Wamunyu Market; Plot No. 17 Masinga Market; Plot No. 67 Matuu Market; Plot No. 104 Matuu Market; unsurveyed land situate at Masinga Location; Plot Yatta No. 55 B2; Plot Yatta No. 62 B2; Plot Yatta No. 64 B2; Plot Yatta No. 79 B2; Ndithini/Mananja Block 7/21, 7/41,7/25, 7/42 (all transferred by Nzii Farmers Company Limited to the name of the respondent); shares held at Kyanzavi Farmers Company Limited; shares held at British American Tobacco(K) Limited; shares held at Jogoo Shoe Polish Company Limited; 96,000 shares held at Car & General Company Limited; Parcels of land located at Tanna Ranching farm held by Matungulu Farmers' Cooperative Society Limited; six(6) shares held at Mavoloni Farmers Company Limited; and shares held at Wendano Matuu Farmers Company Limited. She stated that the respondent's reply that some titles were with Standard Chartered Bank was a lie as her advocate inquired and did not find any title documents at the said bank. She testified that she never asked her brothers Kaindi Kyuli and Itumbi Kyuli whether some title documents were with them as was alleged by the respondent. She testified that she did not know that some leases expired and that she had never asked the respondent for copies of title documents for Ndithini/Mananja Block 7/25 and Ndithini/Mananja Block 7/42. She stated that she did not know exactly where some of the assets or properties were, and wanted the respondent to point them out to her. She stated that the respondent should tell the applicants where the share certificates for Jogoo Shoe Polish Company Limited and Tanna Ranching farm held by Matungulu Farmers' Cooperative Society Limited were. She stated she did not know about the unsurveyed land situate at Masinga Location and whether the plots at Wamunyu, Masinga and Matuu had title documents. She said that he had not done an official search on the said assets. She stated on re-examination that none of the property bequeathed to her by the deceased had ever been transferred to her name as the title documents were with the respondent.

15. In his oral testimony the 3rd applicant relied on his affidavit in support of the application dated 10th October 2017, and stated that he was apprehensive over the respondent's unwillingness to release the title documents He added that in 2005 the respondent, while presenting the petition for grant of probate had attached copies of some of the title documents and must have had the originals at the time. He stated that there were some title documents that were not mentioned in the will which he believed the respondent had access to. He added that LR No. 209/136/197 was sold by the respondent on 18th March 2009 without the leave of court for a sum of Kshs. 35,000,000.00.00. He testified that the said transaction was not disclosed to court and yet the property was co-owned by the deceased and five other people and was not listed in the will. He stated that such property should have been sold and distributed equally among the beneficiaries. He testified that among the title charged to Standard Chartered Bank only one appeared to have been discharged.

16. In their written submissions, the applicants stated that the respondent, having been an executor for ten years, must have been seized with all documents relating to the estate. They submitted that the respondent had been evasive to their request of accounting to the Estate and that his claim that some that title documents relating to Masii/Embui/384, 390, 392, 395, 397 and 610 had been charged to Standard Chartered Bank, was controverted by searches from the Lands Registry. They submitted that during cross-examination of the respondent had admitted that he had some titles documents in his possession. They further stated that the respondent had been concealing material facts from the court and the beneficiaries. They submitted further that Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules give the court inherent powers to entertain any application in order to safeguard the interests of justice.

17. The respondent in his oral testimony maintained that he did not have the title documents to all the properties listed by the applicants. He said that he had only found ten (10) share certificates from his documents. He added that the deceased had several homes and that some documents were held by the banks and others were scattered in different places. On LR No. 209/136/197, he stated that he had the capacity as executor to sell off the land. On cross-examination, he agreed that the 1st applicant's advocates wrote to his advocates asking for the title documents on the assets bequeathed to her. He stated that he only had possession of three original property documents which he had not released to the 1st applicant. He testified that some of the titles had been charged to Standard Chartered Bank. When he was referred to the 1st applicant's affidavit of 11th December 2017, he conceded that some of the listed properties such as Masii/Embui/392, 397, 610 and 742 did not have any charges registered against the title as per the official searches annexed by the 1st applicant. He also failed to produce any letter from the bank confirming his position that the titles had charges registered against them. He further added that there were some properties that were not reflected in the will, such as LR 209/136/197. He said that the sale of that property was done before the grant to him was confirmed and that none of the beneficiaries were ever paid any money out of the proceeds of that sale. He further testified that none of the beneficiaries consented in writing to the sale. He said that the money was held by the advocates who were acting for an entity called African Housing where the deceased had shares and was entitled to be paid proportionately to his shares. The law firm holding the money was said

to be Riunga Raiji & Co Advocates, and it was stated that the firm had held the said money since 18th March 2009. He stated that he was still pursuing the deceased's share from the proceeds, and that every member of the deceased's family had a copy of the sale agreement. He denied having in his custody all the documents related to the estate. He stated that there was a Nissan pick-up, KAH 733H, which was sold and the five sons of the deceased received Kshs. 20,000.00 each from the sale proceeds of the said vehicle; the daughters did not get a share. He stated that the deceased's Car & General shares account was operated by Stephen Kaindi and Christopher Muinde Kyuli, who had been authorized to operate the said account by the deceased. He stated that some of the title documents for the property in Gikomba were given to some beneficiaries. He said that he gave the 1st applicant some title documents for some of the Gikomba plots, and he denied being selective in the release of the documents. He stated that he would want determination of the instant applications to await the determination in the Court of Appeal. He suggested that the family meets and agrees on the distribution of the proceeds of sale of LR 209/136/19. He asserted that estate was not entitled to the whole of the sale proceeds from the said sale. He said a 10% deposit of the purchase price was paid but he never received anything from the said deposit and that the estate is entitled to Kshs. 16,000,000.00 after completion of the sale. He stated that he had not signed any transfer forms on behalf of the estate, and that he did not understand how the transfer was done without him signing any forms. On the Nzii farm, he stated that 950 acres was what was due to the estate. On Plot No 25, he stated that the title deed was issued in 2013 but said that he did not have it when he swore his affidavit in 2014. He added that the title deed for Plot No. 21 was also issued in 2013 but he got it in 2014, and it was in his name when he was executor. On Plot No. 42, he said that he got the title on 9th December 2013. He stated that he got the said assets registered in his name so that they could be transferred to the beneficiaries. He stated that the parcels were to be subdivided so that each beneficiary got a portion. He stated that he had no vendetta against the 2nd applicant and her children as they had already been given ½ share of the property along Kirinyaga Road, and two motor vehicles. He reiterated his testimony that three title documents were with the bank and others are held by individuals who he did not name.

18. In his submissions, he reiterated that he =did not have title documents to the properties listed by the applicants since most of them had been given to respective beneficiaries as per the will of the deceased. He further submitted that the applicants, having been appointed administrators of the estate should take it upon themselves to identify properties of the estate rather than seek an order compelling him to point out the properties. He cited Sections 82 and 83 of the Law of Succession Act on the duties and powers of personal representatives.

19. Section 79 of the Law of Succession Act provides that:

> *'The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.'*

20. Section 82(b) and (d) of the Law of Succession Act provides that:

> *'Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*
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> *(a) …*
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> *(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*
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> *Provided that—*
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> *(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and*
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> *(ii) no immovable property shall be sold before confirmation of the grant;*
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> *(c) …*
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> *(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:*
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> *Provided that except so far as otherwise expressly provided by any will—*
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> *(i) no appropriation shall be made so as to affect adversely any specific legacy;*
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> *(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.'*

21. Section 83(b) of the Law of Succession Act states that one of the duties of personal representatives is "to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death."

22. In re *Estate of Andrew Kisa Saikwa (Deceased)* [2018] eKLR**,** it was held that:

> *'…In a nutshell, the Executor conducted sale of the suit property contrary to…and failed to explain the necessity and desirability in selling the suit property in execution of his duty without consulting and obtaining consents from the beneficiaries. The Executor being involved in all proceedings and activities engaged in material non- disclosure to beneficiaries with a view to…. deprive beneficiaries their interest in the suit property.'*

23. In *re Estate of Francis Waita Mbaki (Deceased)* [2018] eKLR**,** it was said that:

> *'The relationship between personal representatives of a deceased and his heirs is one of fiduciary. The administrators herein are in a fiduciary relationship with the beneficiaries (including minor interests) of the deceased, a duty to account arises both in Equity and under the Law of Succession … Section 94 of the Law of Succession Act makes it unlawful (apart from being a criminal offence under section 95(1) (a) of the Act) to neglect to get in estate property as follows:*
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> *"94. Neglect or misapplication of assets by personal representatives*
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> *When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned."'*

24. In *re Estate of Jaswant Singh Boor Singh Dhanjal (Deceased)* [2016] eKLR, it was stated that:

> *'In the cited case of Peter Ombui Nyangoto v. Elizabeth Matundura & Another [2013] eKLR, in which the property of the deceased therein was transferred before a grant was issued, the Court of Appeal opined*
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> *"The second respondent's active consent in the transaction that ended in complete violation of the Law of Succession Act did not and cannot make that transaction legal. It remains illegal and all who participated and/or could have participated in such illegality would still have taken part in an illegal activity."*
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> *Likewise, in the instant case, the Settlement Agreement which purported to deal with the assets of the estate of the deceased before grant was issued was in complete violation of the law of Succession Act and the acquiescence of the Applicant did not and cannot make it legal … The Law of Succession Act jealously guards and protects estates of deceased persons and has made very specific and clear provisions as to how such estates are to be dealt with. Any dealings with the estate of the deceased person herein without the Grant of representation were not only void but illegal.'*

25. On the issue of how to deal with property that had not been listed in the will, it was said in In *re Estate of Philip Nthenge Mukonyo (Deceased)* [2018] eKLR**,** that:

> *'It must in this respect be emphasized that the grant of probate will only be made with respect to the property that the will and codicil provides for, and where the will or codicil did not dispose of all of the Deceased's properties, then the Petitioners and Objectors will have to proceed by way of intestacy with respect to any outstanding properties by way of a separate application or proceedings.'*

26. In *Bob Njoroge Ngarama vs. Mary Wanjiru Ngarama & another* [2014] eKLR, it was stated that:

> *'Similarly, section 82(b) (ii) of the Law of Succession Act provides that personal representatives do have the power to sell any asset vested in them with the proviso that*
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> *"(ii) no immovable property shall be sold before confirmation of the Grant."*
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> *…Therefore, in selling this property the petitioner/respondent breached the law in two respects – Firstly she sold of the immovable asset before the Grant had been confirmed by the court and secondly there is no evidence that the consent of all the beneficiaries or of the court was obtained before such sale. The petitioner/respondent was behaving as if this plot was her personal property yet she was merely an administrator and was holding the same in trust on behalf of the beneficiaries to the estate.'*

27. On whether an order of injunction ought to issue against the respondent restraining him from dividing, subdividing, fencing off, interfering, transferring, charging, disposing or in any way encumbering the properties referred to as Mavoko Municipality Block 6/23 and Kiteta/Nidituni/905, the applicants submitted that the property Mavoko Municipality Block 6/23, (the Athi River property), was under threat of being disposed by the respondent as the said property was registered in his name. They sought that the title should not continue to be registered in his name as he was no longer an administrator. It was their further submission that property Kiteta/Nidituni/905, (the Kiteta property), was not clan property as contended by the respondent and that the said property was actually property that formed part of the estate, at least as per official records at the Makueni Lands Registry.

28. In her oral testimony, the 1st applicant stated that the respondent had plans to sell both the Athi River and Kiteta properties but she did not have a copy of any sale agreement to support her contention. She stated that the Athi River property had been in the respondent's name since 2015 when it was issued to him. the 3rd applicant testified that he had conducted a search on the Kiteta property and had obtained a

green card which indicated the deceased as the owner in an entry made on 24th April 1999. On the Athi River property, he testified that it was not in the will of the deceased and the current owner is the Respondent as from 16th November 2015. He stated that there was an allotment letter issued to the deceased on 24th March 1979 and did not understand how the property was transferred to the respondent. He was apprehensive that the Athi River property might be disposed of as it is in the name of the respondent, the same with the Kiteta property where the respondent is the registered owner.

29. It was the respondent's submission that the applicants did not adduce any evidence as proof that indeed the he was in the process of transferring, charging or disposing both the Athi River and Kiteta properties. He did not dispute that the Athi River property title was issued on 19th November 2015 that he has never attempted to divide, sub-divide, fence off, charge or dispose of the same as at 1st March 2018 when the instant application was filed. He relied on the case of *Giella vs. Cassman Brown* (1973) EA 358, submitting that the applicants had not established a *prima facie* case with a probability of success so as to obtain the orders of injunction sought in the application. It was his further submission that the Kiteta property was clan land belonging to the great grandfather of the deceased and therefore should not form part of the estate of the deceased. He testified that as an executor, he took over from where the deceased left off in following up on title deed for the property, and had been given that responsibility by members of the clan. On cross-examination he stated that the property's green card did not indicate that the property was owned by the clan. On the Athi River property, he testified that the said property was in his name but the title document did not indicate whether he was holding the property in trust for the estate of the deceased and that an official search would not reveal information that the property was being held in trust On cross-examination, he stated that he had two certificates of lease for the Athi River property, one in his name, and the other in his capacity as executor of the estate. He stated that he did not notify the Registrar of Lands about having two certificates for the same property, although he said that it was not his intention to keep both certificates.

30. In the case *Hassan Zubeidi vs. Patrick Mwangangi Kibaiya & another* [2014] eKLR it was stated that:

> *'I do not wish to re-invent the wheel. The primary legal dimensions for the grant of interlocutory injunctions were set Giella vs. Cassman Brown but they have subsequently been developed by case law; a fact that has been 'recognized by many courts such as in the case of Jan Bolden Nielsen vs. Herman Phillipus Steyn also known as Hermannus Phillipus Steyn & 2 Others (2012) eKLR where Mabeya J remarked as follows: -*
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> *"I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs. Amboseli Resort Ltd (2004) eKLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus: -*
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> *'…counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago. In Giella vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781: - "A fundamental principle of…that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" …."*
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> *Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella vs. Cassman Brown the court has had to consider the following questions before granting injunctive relief.*
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> *-Is there a prima facie case….*
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> *-Does the applicant stand to suffer irreparable harm…*
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> *-On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice… The Court goes on to cite Ringera J (as he was then) in Waithaka vs. Industrial & Commercial Development Corporation (2001) KLR page 381, where he stated as follows: -*
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> *"As regard damages, I must say that in my understanding of the law, it is not inexorable rule that where damages may be an appropriate remedy an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.*
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> *By using the word "normally' the court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to say 'money is not everything at all times and in all circumstances and don't think you can violate another citizen's right only at the pain of damages …."'*

31. The Court of Appeal, in the case of *Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & another* [2015] eKLR stated that:

> *'With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon*

Limited [1975] AC 396 stated thus,

"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."'

It also said *Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited & 3 others* [2015] eKLR, stated that:

'The granting of an interim injunction is an exercise of judicial discretion and as an appellate court, we shall not readily interfere with the exercise of discretion by the High Court, unless we are satisfied that the discretion has not been exercised judicially. In United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] EA 898, Madan JA (as he then was), aptly explained the essence of this approach as follows, at page 908:

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

(See also Hasmukh Khetshi Shah vs. Tinga Traders Ltd, CA No 326 of 2002).

'In Habib Bank Ag Zurich vs. Eugene Marion Yakub, CA No. 43 of 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

The same caution was repeated in National Bank of Kenya vs Duncan Owour Shakali & Another, CA NO. 9 of 1997 when Omolo JA stated:

"The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed."

Yet again in Agip (K) Ltd vs. Vora [2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:

"With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit." (Emphasis added).

'More recently in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 this Court echoed the same sentiments in the following terms:

"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."'

32. I take note of the fact that there is a pending appeal at the Court of Appeal, but no orders were placed before me from the appellate court warranting a halt to these proceedings pending hearing and determination of the said appeal. Having perused the parties' submissions, testimonies, evidence and authorities cited above, it is my finding that the respondent has not been totally honest and co-operative with the administrators of the estate in respect of the property title documents being sought. The averment by the respondent that some properties had been charged to Standard Chartered Bank and therefore the said bank held the original title documents was as the applicants controverted that testimony with evidence from official searches from the lands registry that indicated otherwise. I agree with the applicants, and the respondent's own admission, that he must be seized of some title documents of properties of the estate, being the executor, and it is in the interest of justice and administration of the estate that such properties be vested in the current administrators. He even admitted to 'discovering' some ten share certificates in respect of investments in some firms by the deceased from his documents. I partly agree with the respondent that during the period he was executor, he held the estate property in trust for the beneficiaries and it was well within his province and powers to have the deceased's property registered and hold legal title in his name for eventual distribution to the beneficiaries as indicated in the will. Now that respondent is no longer in charge of the estate, he cannot enjoy the same powers and privileges of personal

representative under sections 79 and 82 of the Law of Succession Act and various provisions of the Trustee Act, Cap 167, Laws of Kenya.

33. I am in further agreement with the applicants in holding that properties Athi River property and Kiteta property are in danger of being disposed, charged or transferred as long as they are registered in the name of the respondent which could be detrimental to the estate and affect eventual distribution. It is not lost that the respondent has two certificates of title to the Athi River property registered in his name with one of the certificates not indicating that he held the said property as an executor. The respondent failed to explain how he acquired two certificates of title for the said property which imputes an improper motive on his part. I further note that as per an official search exhibited by the applicants the Athi River title has a restriction registered on 4th September 2017 where the Registrar of Lands states that there can be no dealings on the property pending investigations of forgery as the applicants claimed that the said property already had title document issued.

34. However, Mavoko Municipality Block 6/23, Kiteta/Ndituni/905, LR No. 209/136/197 and other assets are not listed in the will, and they can only be distributed through separate intestacy proceedings, for as an administrator of assets subject to a will can only administer the property listed in the will. No orders can therefore be made in these proceedings relating to assets that are not subject to the will, since the said assets are not before the court. It will also be noted that the respondent admitted that he engaged in the sale of LR No. 209/136/197 without the authority of a grant of representation, or before his grant had been confirmed which is an infraction of Section 82 (b) (ii) of the Law of Succession Act, which would mean that the said sale is void *ab initio.* Anyhow, the said property is not before me, and I cannot make any orders with relation to it as intimated above.

35. There is a sense in which I feel that the applicants herein, as newly appointed administrators, should settle down and focus on their duties as such instead of unduly focusing on the failings of the executor. The office of administrator is onerous. It requires the administrators to go out and carry out tasks. Upon being appointed, the administrators ought to go out and identify assets, preserve them and perfect any that need perfection. It is what administration entails. It should be their duty to seek out documents of title to assets that are said to belong to the estate. That is what ascertaining assets is about. The applicants have no demonstrated to me that the executor ever had access to all the documents of title. They have not stated what they themselves have done in terms of ascertaining the assets and getting the title documents. There are ample provisions in land legislation relating to what ought to be done where title documents are lost or cannot be traced. The applicants risk falling into the same trap that the executor found himself in, of being in office without exactly understanding what it all entails.

36. In conclusion, I shall dispose of the applications dated 10th October 2018 and 28th February 2018, after considering all the relevant factors herein, the evidence in totality, the law and supporting authorities, in the following terms: -

(a) That the respondent shall, in the next thirty (30) days deliver the original title documents of all the assets of the estate subject to the will of the deceased made on 17th March 1987 that are in his possession;

(b) That the matter shall be mentioned after thirty (30) days for compliance;

(c) That the parties are at liberty to petition for letters of administration intestate in respect of the assets of the estate not disposed of in the will of the deceased;

(d) That the costs of the application to be borne by the estate; and

(e) That any party aggrieved by the orders made herein has a right of appeal to the Court of Appeal within twenty-eight (28) days.

DATED AND SIGNED AT KAKAMEGA THIS 24th DAY OF April 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED AT NAIROBI THIS 10th DAY OF May 2019

A ONGERI

JUDGE