



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**SUCCESSION NO. 162 of 2013**

**IN THE MATTER OF THE ESTATE OF BEATRICE MKAWUDA KILILO (DECEASED)**

**BENSON MAKOTI MWANYALO .....APPLICANT**

**VERSUS**

**ELEGANT INVESTMENTS LIMITED .....1<sup>ST</sup> RESPONDENT**

**MARSDEN MWANDAGO NJORE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased to whose estate the proceedings herein relate is Beatrice Mkawuda Kililo, who died intestate on 29.4.13 at Ziwani Lasco. A Petition for a Grant of Letters of Administration was filed on 4.6.13 by Jestinah Wakesho Kililo and Benson Makoti Mwanyalo (“the Petitioners”) in their capacity as niece and nephew respectively of the deceased.

2. According to the Affidavit in Support of the Petition, the deceased was survived by the following:

Jestina Wakesho Kililo	niece
Benson Mwanyalo	nephew
Marsden M. Njore	brother
Rebecca M. Masinde	sister
Tonny Tole	grandson

3. The Petitioners listed assets forming the estate of the deceased with an estimated value of Kshs. 100,000,000/= and liabilities amounting to Kshs. 8,000,000/=.

4. By a Notice of Motion dated 17.6.13, one of the Petitioners Benson Makoti Mwanyalo sought restraining orders against Elegant Investments Limited the 1<sup>st</sup> Respondent and Marsden M. Njore the 2<sup>nd</sup> Respondent from evicting him alienating, transferring, collecting rent or in any other manner interfering or dealing with House No. 0018 Units 05/A and 08/B at Ziwani or any other property of the estate of the deceased. He also sought an order of provision for his and his family’s upkeep pending the issuance and confirmation of the grant of representation in respect of the estate. The Applicant also sought an order that all rent and other income due to the estate be deposited in an escrow account in the name of V. N. Nzioki & Associates Advocates. He further prayed that the Respondents be ordered to account for all rent

and any other income received from the estate since 29.4.13.

5. The Applicant claims that he is a nephew of the Deceased and depended upon her since 1989. He claims that prior to the demise of the deceased, he took care of some of the affairs of the Deceased including collecting rent and maintenance of the properties as well as running errands. The Applicant claims that the Deceased had no children of her own but fostered his Co-Petitioner Jestinah Wakesho Kililo ("Jestinah") who is also a niece of the Deceased. The Applicant claims that he lived in House No 0018 with his late father since 1987 without paying rent and even married and had children while living there. The Applicant avers that the 1<sup>st</sup> Respondent has demanded rent from him and his brother Daniel. That the Respondents are intermeddling with the estate by collecting rent from the properties of the Deceased and the estate is in danger of being wasted. The Applicant now seeks restraining orders against the Respondents.

6. By a Preliminary Objection dated 26.7.13, the Respondents oppose the Application on the grounds that the same is incompetent, misconceived, vexatious, scandalous and an abuse of the court process; that the Applicant is an imposter and does not have locus standi to file this application; that the Applicant has wilfully made a false statement on oath which is tantamount to perjury and further that there is a misjoinder, the Applicant having served a wrong party.

7. In his Relying Affidavit the 2<sup>nd</sup> Respondent a brother of the deceased avers that the Deceased was buried in his land in Kwale as per her wishes as they had a close relationship. He states that the Applicant and the said Jestinah clandestinely lodged a petition for grant of letters of administration for the estate of the deceased without the knowledge and consent of the 2<sup>nd</sup> Respondent and of the said Rebecca Mware Masinde, the surviving siblings of the Deceased. He avers that the 1<sup>st</sup> Respondent was appointed by the Deceased to collect rent and manage her rental properties and urged that the status quo be maintained in the interest of the estate. He further states that the Applicant paid rent to the deceased and produced the rent records to that effect.

8. At the hearing, the parties called several witnesses each. Jestinah Wakesho Kililo one of the Petitioners stated that the Deceased was a sister to her late father Mwandawiro Kililo. The deceased had other siblings namely, Rufence Kina, Emmanuel Mwanyalo, Tony Tole, all deceased. The surviving siblings are Marsden Mwandango Njore and Rebecca Mware Masinde. All the siblings of the Deceased had children of their own. She stated that the Deceased was like a mother to her. The Deceased educated her from high school up to university. During this time, she lived with the Deceased in Majengo, opposite Olympic in Mombasa. She now works and lives in Nairobi with her husband.

9. Jestinah claims that she applied for a grant of letters of administration because the Deceased was like a mother to her and that she wished to take care of the property of the Deceased as the Deceased would and to help those in need. The Deceased had taken her in as her own child and even when she was getting married, the dowry ceremony was held at the home of the Deceased. The estate is managed by the 2<sup>nd</sup> Respondent while rent is collected by the 1<sup>st</sup> Respondent. She stated that no family meeting was held to agree on her and the Applicant as administrators. The decision was made between the two of them. She wishes to be appointed as administrator to ensure that the wishes of the Deceased are carried out. She has no objection being appointed with others.

10. The Applicant stated in his testimony that he is the son of the late Emmanuel Mwanyalo, a brother to the Deceased. He and his family live in Ziwani in a house owned by the Deceased. It is a Swahili house with 7 rooms. He occupies 2 rooms while his brother Daniel Mwanyalo occupies 1 room and they do not pay rent. Other rooms are occupied by tenants. The Applicant's father stayed in the said room until his retirement whereupon the Applicant now took over the same. He states that the Deceased picked him to assist her in managing her properties by carrying out repairs and collection of rent on her behalf. He lived closely with her since 1989 and also assisted her when she was unwell. He confirmed that the Deceased appointed the 1<sup>st</sup> Respondent to collect rent and to manage the properties. That since the demise of the Deceased, the relationship between family members has not been good. He further confirmed that the decision to apply for the grant of representation herein with Jestinah was made just by the 2 of them.

11. Maryam Majala Mwandachan testified that she was a tenant of the Deceased since around 1996 and occupied the ground floor while the Deceased lived 2 floors above her. Not only was she a tenant of the Deceased but a friend also having come from the same village. She testified that she knows the family of the Deceased well. She stated that Jestinah lived with and was educated by the Deceased from when she was young. The Deceased wanted Jestinah to manage her property. According to her, Tony, a nephew of the Deceased was closest to the Deceased. Dorothy, a daughter of the 2<sup>nd</sup> Respondent stayed with the Deceased while the Applicant ran errands for the Deceased.

12. Another tenant Ethel Mkiwa testified that she knew the Deceased and her family well. She too stated that Jestinah was educated by the Deceased and that the Applicant is the one the Deceased relied on most.

13. For the Respondents, Jerusha Irene Suero testified that she knew the Deceased since 1978 and they were friends and confidants. When the witness lost her sister, she advised the Deceased to write a will. She accompanied the Deceased to Gikandi advocate who asked the Deceased to prepare a draft and return. She does not know if the will was done. According to her, the Deceased wanted her brother the 2<sup>nd</sup> Respondent to be in charge of her property.

14. Pastor Betty Nzioki Ndiku of Miracle Revival Fellowship, Mariakani also testified. She came to know the Deceased in 2005 when she was sick at Aga Khan Hospital. She was the Deceased's pastor in her illness. That the Deceased died in her arms and in the presence of her sister Rebecca. She stated that the Deceased told her she wanted to be buried at the 2<sup>nd</sup> Respondent's homestead and also wished for him to take care of her properties and determine who was to get what. She however stated that the Deceased did not write down her wishes. She knows some members of the Deceased's family but not all. Dorothy stayed with the Deceased and managed her property while the Applicant was an errand boy. She stated that Deceased gave the Majengo property to Vivian but does not know if Deceased gave the title to Vivian.

15. Crescencia Waleghwa Mwakisha testified that the Deceased was her sister in law. According to her, the Deceased's wishes were that she be buried in her brother's (2<sup>nd</sup> Respondent) home in Kwale. The Deceased told her that she left her property in the hands of the 2<sup>nd</sup> Respondent who was to use it to take care of the family just as the Deceased did in her lifetime. The Deceased called the witness to her house in April 2011 and shared with her these wishes.

16. Patrick Sawau Maghanga an employee of the 1<sup>st</sup> Respondent confirmed that they have been managing the Deceased's properties from 1997 to date. The Deceased had informed them that she had a brother Marsden Njore (2<sup>nd</sup> Respondent) and a sister Rebecca Mwari. When the 2<sup>nd</sup> respondent visited them after the demise of the Deceased, they advised him to take out letters of administration. However before this was done, they were served with the Application herein. The witness further stated that the 1<sup>st</sup> Respondent manages 1 house in Changamwe, 3 in Ziwani and 1 in Wundanyi. He confirms that he served notice on the Applicant and his brother Dan to pay rent on instructions from the 2<sup>nd</sup> Respondent. He however did not execute the notice as there was controversy.

17. Rebecca Mware Masinde, a sister of the Deceased told the Court that out of the 7 siblings, only she and the 2<sup>nd</sup> Respondent are alive. She and the Deceased were very close. She stated that the Deceased came to Mombasa and worked for Kenya Breweries. She then began the business of selling alcohol. She did well and acquired properties. She assisted the entire family including the extended family. She educated the children of her siblings. The witness stated that the Applicant and Jestinah applied for a grant of representation for the estate of the Deceased but omitted some beneficiaries namely the families of Ruffence and Tony Tole. Her relationship with Jestinah is not good and she claims that Jestinah hates her. She wished that she and the 2<sup>nd</sup> Respondent be appointed administrators as they are the surviving siblings of the Deceased.

18. Marsden Njore, the 2<sup>nd</sup> Respondent confirmed that only he and Rebecca are the surviving siblings of the Deceased. He testified that he and the deceased were close. One day he and his brother Tony visited

the Deceased and she told them that she wished to be buried in his land in Kwale. This was done according to her wishes. He claims that the deceased told him to take house on Pot XII/109. The Deceased had a very good relationship with her nephews and nieces. After the funeral, the family has not met to decide on the distribution of the estate. The witness stated that he called a family meeting on 22.11.14. 4 houses attended but the house of Mwandawiro ie Jestinah and the house of Emmanuel ie the Applicant and his brother Dan did not attend. He confirms that he gave instructions to the 1<sup>st</sup> Respondent to demand rent from the Applicant and his brother Dan. He stated that his relationship with his nephews and nieces is not good. He stated that the list of beneficiaries in the petition for grant of representation is incomplete. He wishes that he and his sister Rebecca be the administrators and that all beneficiaries be included.

19. In submissions filed on behalf of the Applicant, it was contended that the Petition for grant is properly before the Court. The Petitioners being nephew and niece of the Deceased are beneficiaries of the estate and thus well within their rights to apply for a grant. It is argued that the relationship between the Petitioners and the 2<sup>nd</sup> Respondent deteriorated upon the demise of the Deceased. That the 1<sup>st</sup> Respondent on instructions of the 2<sup>nd</sup> Respondent demanded rent from the Applicant and his brother yet no rent was due from them hence the need to protect their interests.

20. It was further submitted that the Petitioners' interest in the estate has been threatened by the Respondents and hence it would only be fair and just if they were appointed administrators of the estate to enable them preserve the legacy of the Deceased and protect their interests in the estate. It was further urged for the Petitioners that they were prepared to amend any error or omission in the Petition and to comply with such orders as may be deemed necessary to achieve the ends of justice.

21. The Petitioners submitted that being children of the siblings of the Deceased, they were entitled under Section 39 of the Law of Succession Act to a share of the estate. They are also dependants within the meaning of Section 29 of the Act as the Deceased had taken them in as her own. Further that the Respondents have not filed a Cross Application despite the gazettement of the Petition herein on 11.10.13.

22. For the 2<sup>nd</sup> Respondent, it was submitted that the Petitioners clandestinely filed the Petition and did not involve him or other beneficiaries of the estate of the Deceased nor obtain their consent as is required under Rule 26(2) of the Probate and Administration Rules. Failure to obtain such consent would render any grant issued herein liable for revocation. It was further contended that the 2<sup>nd</sup> Petitioner resides in Nairobi and this would make it difficult for he to discharge her duties as administrator. He prayed that the Petition be dismissed with costs.

23. Having considered the Petition, application, testimony and submissions herein, a number of facts come out as undisputed. The Deceased was never married nor had any children during her lifetime. Her only surviving siblings are the 2<sup>nd</sup> Respondent and Rebecca Mware. The Petitioners are a niece and nephew to the Deceased being children of her 2 brothers also deceased. One of the Petitioners, Jestinah lived with and was educated by the Deceased from high school to university. The Deceased being a woman of reasonable means and of a generous heart assisted the entire family during her lifetime. Upon the demise of the Deceased, the relationship between the Petitioners and the siblings of the Deceased became strained. The family is no longer in harmony.

24. In their petition, the Petitioners seek to be appointed administrators of the estate of the Deceased in their capacity as her nephew and niece. The Deceased was survived by 2 siblings, the 2<sup>nd</sup> Respondent and Rebecca Mware as well as nieces and nephews, children of her other siblings. In spite of this, the Petitioners did not involve other beneficiaries or inform them of their intention to apply for representation. This is contrary to Rule 26 of the Probate and Administration Rules which provides:

***“26. Grants of letters of administration***

**(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**

**(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”**

25. The Petitioners were under an obligation to give notice to all other persons entitled in the same degree as or in priority to them of their application for grant. They were also required to obtain the consent of these beneficiaries.

26. Section 39 (i)(c) of the Act ranks the Petitioners and the 2<sup>nd</sup> Respondent and Rebecca Mware in the same degree of entitlement both to the estate and to representation as follows:

**39. (i) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—**

**(a) ...**

**(b) ...**

**(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none**

**(d) ..**

27. Each of the parties herein went to great lengths in their evidence to show that they were the most entitled to the grant of representation to the estate herein. The Act however clearly sets out the order of priority in Section 66 as follows:

**“66. Preference to be given to certain persons to administer where deceased died intestate**

**When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—**

**(a) surviving spouse or spouses, with or without association of other beneficiaries;**

**(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**

**(c) ...”**

28. The order of priority set out in Section 39 of the Act is just a guide and Section 66 ultimately gives the Court final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made.

29. I now turn to the Application dated 17.6.13. On the Application for injunction against the Respondents, the onus is on the Applicant to satisfy the court that it should grant the orders sought. The Respondents did prosecute the Preliminary Objection dated 26.7.13. The principles for interlocutory injunctions were clearly set out in the celebrated case of Giella v Cassman Brown & Co Ltd [1973] EA 358. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the

Court is in doubt, it will decide an application on the balance of convenience. In the instant Application however, the Applicant has not made any attempt to convince the Court that he is deserving of the orders sought. As indicated above, the focus at the hearing and even in submissions was on the suitability of the Petitioners as administrators and their entitlement to the estate. In the circumstances, I find that the Applicant has not satisfied the test for granting an injunction as prayed.

30. Under Section 47 of the Act this Court has jurisdiction to pronounce such decrees and make such orders as may be expedient. Consequently, I do hereby invoke the inherent power of the Court and make the following orders that are necessary for the ends of justice:

- a) The Application dated 17.6.13 is hereby dismissed.
- b) Marsden Mwandago Njore and Jestinah Wakesho Kililo are hereby appointed joint administrators to the estate of the deceased.
- c) The administrators shall within 30 days of the date hereof file a Summons for Confirmation of Grant of Letters of Administration listing all the survivors of the Deceased and clearly setting out the mode of distribution of the estate.
- d) This matter shall be mentioned on 20.6.17 to confirm compliance.
- e) In the meantime, status quo to be maintained.
- f) This being a family matter, there shall be no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 12 day of May 2017**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**