



In re Estate of Shem Liheeli Ndenga (Deceased) (Succession Cause E013 of 2025) [2025] KEHC 15416 (KLR) (31 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE E013 OF 2025**

AC BETT, J

OCTOBER 31, 2025

IN THE MATTER OF THE ESTATE OF SHEM LIHEELI NDENGA (DECEASED)

BETWEEN

**PETER KIPTANUI SANG 1ST PETITIONER
FLORENCE MBONE SIMIYU 2ND PETITIONER
MARGARET NDENGA 3RD PETITIONER**

AND

**MORRIS MULONGA NDENGA 1ST RESPONDENT
EDWIN NDENGA 2ND RESPONDENT
FREDRICK ILAVUNA ALIAS FREDY 3RD RESPONDENT**

RULING

1. This is a ruling on an application by the Petitioners seeking preservative orders against the Respondents, freezing any dealings, disposal, leasing or intermeddling with land, namely L.R. No. Kakamega/Lumakanda/270 measuring 12.6 Ha. which they aver, forms part of the deceased's estate.
2. They pray that the status quo pertaining to the estate of the deceased remains the same and all the beneficiaries of the deceased to plough, utilize or cultivate the subject parcel of land pending the hearing of the petition for the grant of probate of the estate and the final distribution of the same.
3. In their supporting affidavit, the third Applicant avers that the deceased, who died on 23rd February 2024, left a valid will dated 5th January 2022 and that the Respondents are now intermeddling with the deceased's estate by leasing out land L.R. Parcel No. Kakamega/Lumakanda/270 to third parties to the detriment of the other beneficiaries.



4. She claims that the Respondents have barred the Applicants from utilising the land contrary to the deceased's wishes. She avers that a preservative order and an order maintaining the status quo would be in the interest of justice.
5. In reply, the Respondents aver that they have been utilising the land for a while with the full knowledge of the Applicants and that their usage of the property was in tandem with the deceased's wishes, who wanted the beneficiaries to use it. They deny that strangers were using the land, as alleged by the Applicants, and aver that the Applicants have not submitted any tangible evidence to support their claim.
6. They pray that the application be dismissed and that they be allowed to continue cultivating in accordance with the deceased's wishes.

Applicants' Submissions

7. In their submissions dated 2nd April 2025, the Applicants raised two issues for determination. On the first issue of whether they had made out a case for the grant of the preservative orders, they quoted Section 47 and Rule 73, where this court is vested with the power to ensure the ends of justice are met. They relied on the case of Millicent Mbatha Mulavu, another vs. Annah Ndunge Mulavu & 3 others [2018] 5276 (KLR). Whether the Respondents had intermeddled with the deceased's estate, they aver that the deceased had died, leaving a valid will indicating how the suit land ought to be utilised.
8. They asserted that the Respondents had admitted that they had utilised the land by ploughing and further leased out the parcel to a third party contrary to the deceased's wishes and quoted the Estate of the late Sospeter Kimani Waithaka succession cause 341 of 1998.
9. They contended that the Respondents' actions had been detrimental to them since they had been utilising the parcel of land for commercial purposes without involving the other beneficiaries, which amounted to intermeddling. They prayed that, in the interest of justice, the preservative orders be issued and the status quo be maintained pending the determination of the probate proceedings.

Respondents' Submissions

10. The Respondents filed their submissions on 4th April 2025, in which they raised one issue: whether the Applicants had established their claim on a balance of probabilities.
11. They relied on sections 107-112 of the *Evidence Act*, arguing that it was up to the Applicants to provide evidence as the burden of proof lay on the person who alleges. They quoted the case of Anne Wambui Nderitu vs Joseph Kiprono [2005] eKLR and averred that they had been utilizing the said parcel with the full knowledge of the Applicants, who never protested, and in accordance with the wishes of the deceased. They denied the allegations that they had leased the land to strangers, contrary to the claims by the Applicants, who never produced any documentary evidence. They argued that the Applicants had not met the requirements for preservation of the deceased estate, such as proving that the deceased estate is at risk of being disposed of, alienated, or transferred to a third party.
12. They further contended that the Applicants had failed to prove that the refusal to grant the orders of inhibition would render the application nugatory, as the property is still intact and not at risk of being sold.
13. On the third element of whether the Applicants have an arguable case for the court to issue a conservatory order, they posited that the Applicants had not presented evidence to support their allegations to prove that they had a strong case, and further that the Applicants had not established



a prima facie case or demonstrated that they had suffered any irreparable harm. Additionally, they contended that the balance of convenience had not tilted in the Applicants' favour, asserting that they are utilising the property per the wishes of the deceased. In support of their argument, they quoted the case of *In re estate of Paulo Kiplagat Boiwo (deceased)*, [2012] eKLR and *Nguruman Limited v Jane Bonde Nielsen and 2 others*, Nairobi CA Civil Appeal No. 77 of 202 (2014) eKLR.

14. On the last limb as to whether the standard of proof to establish that there was intermeddling, they relied on section 45 of the *Law of Succession Act*, holding that the standard of proof was higher than the balance of probabilities. They relied on the case of *Veronica Njoki Wakagoto (deceased)* [2013] eKLR. They asserted that the application lacked merit and, as such, the court should dismiss it.

Analysis and Determination

15. From the application, affidavits, and submissions, this Court identifies the following issues for determination:-
 - a) Whether the Applicants have established a prima facie case for the grant of preservative orders under Section 45 of the *Law of Succession Act*.
 - b) Whether the Respondents' actions constitute intermeddling with the deceased's estate.
 - c) Should the status quo be maintained pending the determination of the probate proceedings?
16. The application is anchored on Section 45 of the *Law of Succession Act*, which provides:-
 - “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine... or to a term of imprisonment... or to both.”
17. Section 47 of the *Law of Succession Act* grants the High Court jurisdiction to entertain applications in succession matters and issue appropriate orders. At the same time, Rule 73 of the Probate and Administration Rules reinforces the court's inherent powers to make orders necessary for the ends of justice.
18. In succession matters, the court must also ensure that the estate is preserved to prevent waste or dissipation pending the grant of probate or administration, as held in *Millicent Mbatha Mulavu & Another v. Annah Ndunge Mulavu & 3 Others* [2018] KEHC 5276 (KLR).
19. On the burden and standard of proof, Sections 107–112 of the *Evidence Act* place the burden on the party alleging a fact to prove it on a balance of probabilities. However, in cases of intermeddling under Section 45, courts have held that clear and cogent evidence is required due to the penal consequences of intermeddling.
20. The Court of Appeal in *Mary Wanjiku Gachigi v. Ruth Wambui Muthami* [2020] eKLR emphasized that preservative orders in succession matters are granted to protect the estate from waste, alienation, or intermeddling pending determination of the grant. In granting the orders, the court must balance the interests of all beneficiaries.



21. In *John Mwita Chacha v. Kennedy Ogega Nyambati* [2022] eKLR, the Court of Appeal clarified that a valid will, if undisputed, guides the administration of an estate, and unauthorized actions contrary to the will may constitute intermeddling.
22. On whether the Applicants have established a prima facie case for preservatory orders, they must demonstrate that they have a genuine claim with a reasonable probability of success, that the estate is at risk of intermeddling, and that preservatory orders are necessary to protect it. The Applicants assert that the deceased left a valid will dated 5th January 2022, with specific details on how L.R. No. Kakamega/Lumakanda/270 should be utilised and distributed. They claim the Respondents are going contrary to the will and the wishes of the deceased by leasing the land to third parties and barring them from its use.
23. In their response, the Respondents admit to ploughing the land but deny leasing it to strangers. They argue that their actions align with the deceased's wishes and that the Applicants have not provided evidence of leasing or exclusion. The Respondents further contend that the Applicants have not shown a risk of alienation or irreparable harm.
24. In *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Limited v. Jane Bonde Nielsen & 2 Others* [2014] KECA 606 (KLR), the Court of Appeal held that a prima facie case requires a genuine and arguable claim supported by evidence. The allegation of leasing to third parties by the Applicants is unsupported by documentary evidence, such as a lease agreement or witness testimony. However, the Respondents' admission of ploughing the land to the exclusion of the other beneficiaries named in the will without a grant of representation points to intermeddling contrary to Section 45.
25. The Applicants' claim that they have been barred from utilising the land suggests a potential violation of their rights as beneficiaries, pending confirmation of the will. In *Mary Wanjiku Gachigi v. Ruth Wambui Muthami* (supra), the Court of Appeal upheld preservatory orders where there was evidence of unauthorised dealings with estate property. While the Applicants' evidence is not supported by any documentary evidence, the Respondents' admission of ploughing without a grant establishes a prima facie case of potential intermeddling.
26. On irreparable harm, the Applicants argue that the Respondents' actions deprive them of their beneficial interest in the estate, and the unauthorised usage of the land of the parcel would prejudice the Applicant's rights. In *Millicent Mbatha Mulavu & Another v. Annah Ndunge Mulavu & 3 Others* (supra), the court granted preservatory orders to prevent intermeddling with an estate pending probate proceedings and noted that such actions could irreparably harm beneficiaries, hence the continued ploughing or potential leasing without a grant satisfied this ground of irreparable harm.
27. On the balance of convenience, the Court must weigh the prejudice to the Applicants if the orders are not granted against the Respondents' interests in continuing to utilise the land. Given that the probate petition is pending, maintaining the status quo ensures that the estate remains intact for equitable distribution and the balance tilts in favour of preserving the estate.
28. On whether the Respondents' actions constitute intermeddling, Section 45 of the [Law of Succession Act](#) prohibits any person from taking possession, disposing of, or intermeddling with a deceased's estate without a grant of representation. Intermeddling includes unauthorised cultivation, leasing, or other dealings with estate property, as held in *Re Estate of George Mwaura Mburu (Deceased)* [2017] eKLR.
29. The Respondents admit to ploughing the land but claim it aligns with the deceased's wishes and was done with the Applicants' knowledge. However, without a grant of probate or letters of administration, such actions are premature and potentially unlawful.



30. In the Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR, the court held that intermeddling requires clear evidence due to its penal consequences. While the Applicants' evidence of leasing is insufficient, the Respondents' cultivation without a grant meets the threshold for intermeddling, as it risks altering the estate's status before distribution.
31. On whether the status quo ought to be maintained, the Applicants seek an order to maintain the status quo, prohibiting further ploughing, utilisation, or leasing of the land pending the probate petition. The status quo, in this context, refers to the state of the estate at the time of the deceased's death, free from unauthorised dealings.
32. The Respondents' ongoing cultivation, even if consistent with past practice and in full knowledge of the Applicants, lacks legal authority without a grant; hence, maintaining the status quo ensures that the land remains intact pending distribution as per the will and the wishes of the deceased.
33. The Court finds that maintaining the status quo is necessary to prevent further intermeddling and protect the interests of all beneficiaries.
34. In conclusion, this court finds that the Applicants have established a prima facie case for preservatory orders, demonstrating a risk of intermeddling based on the Respondents' admitted cultivation of the land without a grant. While the evidence of leasing to third parties is insufficient, the Respondents' actions constitute intermeddling under Section 45 of the Law of Succession Act, as they lack legal authority pending the grant of probate.
35. As beneficiaries, the potential harm to the Applicants justifies preservative orders to prevent further dealings that could diminish the estate's value or prejudice their rights. The balance of convenience favours maintaining the status quo to ensure equitable distribution per the deceased's will or the law.

Orders

36. For the foregoing reasons, the Court makes the following orders:
 - a) The Applicant's application dated 13th March 2025 is allowed.
 - b) A preservatory order is hereby issued restraining the Respondents, their agents, servants, or assigns from ploughing, cultivating, leasing, disposing of, or otherwise intermeddling with L.R. No. Kakamega/Lumakanda/270, pending the hearing and determination of the petition for the grant of probate and final distribution of the estate.
 - c) The status quo as it existed at the time of the deceased's death on 23rd February 2024 be maintained.
 - d) The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF OCTOBER 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Parties

Court Assistant: Polycap

