



**Kiragu & 2 others v Kiragu & 7 others (Civil Appeal E471 of 2021)  
[2024] KECA 1600 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1600 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E471 OF 2021  
DK MUSINGA, MSA MAKHANDIA & A ALI-ARONI, JJA  
NOVEMBER 8, 2024**

**BETWEEN**

**JANE ALICE WAMBUI KIRAGU ..... 1<sup>ST</sup> APPELLANT  
SILAS MACHARIA KARIUKI ..... 2<sup>ND</sup> APPELLANT  
MARGARET WANGARI NGINYO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**BRENDA NYAMBURA KIRAGU ..... 1<sup>ST</sup> RESPONDENT  
SARAH MUKUHI NGINYO KARIUKI ..... 2<sup>ND</sup> RESPONDENT  
JAMES ANTHONY KARIUKI ..... 3<sup>RD</sup> RESPONDENT  
ROSE WANJIRU KARIUKI ..... 4<sup>TH</sup> RESPONDENT  
SCHOLASTICA NJERI KARIUKI ..... 5<sup>TH</sup> RESPONDENT  
ALEX NDORIA KARURI ..... 6<sup>TH</sup> RESPONDENT  
ALEX NDORIA KARURI ..... 7<sup>TH</sup> RESPONDENT  
WINFRED WANJIRU KARIUKI ..... 8<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at  
Nairobi (Mutuku, J.) dated 27th July 2021 in Succession Cause No. 336 of 2020)*

**JUDGMENT**

1. This is an appeal against the Ruling and Order of the High Court at Nairobi (Mutuku, J.), delivered on 27<sup>th</sup> July 2021 in Succession Cause No. 336 of 2020.



2. The proceedings that culminated in this appeal relate to the administration of the estate of one Lawrence Nginyo Kariuki (hereinafter to as “the deceased,”) who died on 24<sup>th</sup> February 2020 while receiving medical treatment at the Aga Khan Hospital. The parties to this appeal share a common heritage with the deceased by either being married to and/or being sired by the deceased.
3. During his lifetime, the deceased appears to have put his affairs in order if the Will dated 13<sup>th</sup> June 2014 is anything to go by. We say this in full cognizance of the objections pending before the High Court challenging the validity of the said Will. In the said Will, the deceased appointed Margaret Wangari Nginyo Kariuki (his widow), Jane Alice Wambui Kiragu (his eldest daughter), James Anthony Kariuki (his eldest son), Scholastica Njeri Kariuki (his daughter) and Silas Macharia Kariuki (his son) as his executors and/or trustees. The executors, vide Nairobi High Court Succession Cause No. 336 of 2020, which was commenced by way of a Petition for Probate of Written Will dated 5<sup>th</sup> June 2020, sought to have a grant of representation to the estate of the deceased issued in their favour. The affidavit in support of the said petition identified Margaret Wangari Nginyo Kariuki (Margaret) as the deceased’s widow, Jane Alice Wambui Kiragu (Jane), Rose Wanjiru Kariuki (Rose), Sarah Mukuhi Kariuki (Sarah), Scholastica Njeri Kariuki (Scholastica) and Brenda Nyambura Kiragu (Brenda) as daughters of the deceased. The sons of the deceased as per the said affidavit were James Anthony Kariuki (James), Silas Macharia Kariuki (Silas), Alex Ndoria Karuri (Alex) and Austine Wachira Karungo (Austine).
4. The publication of a notice in the Kenya Gazette on 4<sup>th</sup> September 2020 of the petition by the executors elicited the filing of objection proceedings. The first of this was by Brenda. She challenged the validity of the Will, alleging that it could not have been made, signed and/or prepared under the instructions and/or supervision of the deceased. She averred that if the deceased made the said Will, then it was not of his own free will and mind, and was therefore made under undue influence. The events which demonstrated undue influence, according to her, included the fact that the Will only listed the children of Margaret to the exclusion of all other children of the deceased; the fact that the Will was to be executed by Margaret and her three children and for their sole benefit to the exclusion of all the other children who do not belong to her; the fact that the purported Will did not contain a list of assets owned by the deceased at the time of making it; and the fact that not only did it not name Brenda, Alex and Austine, all of whom are biological children of the deceased, it did not provide anything for them.
5. The other grounds relied on by Brenda in her objection included the assertion that the purported Will was not attested to in accordance with the provisions of section 11 of the Succession Act; and that the entire petition was premised on misrepresentation and concealment of material facts.
6. Through separate objection proceedings which were commenced on 21<sup>st</sup> September 2020, Winfred Wanjiru Kariuki (Winfred), Alex and Austine objected to the making of a grant of representation in favour of the executors. Winfred averred that she was a widow of the deceased, having married him in 1984. She further averred that Alex and Austin, who are twins, are both biological children of the deceased; and that they all had been unjustifiably locked out either as survivors, executrix and/or beneficiaries of the deceased’s estate. They also challenged the validity of the Will on the basis that it was not signed by the deceased, and that the signature appearing thereon was fake and a forgery. Another argument brought forth was that the Will had not been attested to on every page and was therefore not in conformity with the provisions of section 11 of the [\*Law of Succession Act\*](#).
7. The proceedings culminating in the instant appeal arose from a notice of motion dated 24<sup>th</sup> August 2020 brought by Brenda, under the provisions of sections 34, 45, 47 and 83 of the [\*Law of Succession Act\*](#), Brenda sought several orders including: an order restraining the appellants (then as respondents), their agents, servants and or employees from intermeddling and or interfering with the deceased’s estate,



including his bank accounts domiciled at Consolidated Bank of Kenya and I&M Bank Limited until Letters of Administration and a confirmed Grant in respect of the deceased's estate is issued; that the appellants be ordered to account for all funds and or proceeds they have collected and or received from the deceased's estate since his demise and how they were utilized, spent and or preserved; that the court be pleased to order for a forensic audit of the deceased's estate since his demise to be conducted by a reputable audit firm to be agreed upon by all the beneficiaries, failing which the court to appoint one; and that the appellants be ordered to refund all and any of the proceeds they may have withdrawn from the deceased's accounts and /or misappropriated from the entire estate.

8. In support of the said application, Brenda contended that immediately after the deceased's demise, the appellants took over the management of the deceased's estate and had continued to collect rent, withdraw money from his accounts, and that they had taken over his properties and made decisions affecting his estate without Letters of Administration or an order from the court, and that they did all this without involving other beneficiaries. She further contended that the appellants applied for and transferred Kshs.1,158,000/- from the deceased's account number 10011200000914 held at Consolidated Bank of Kenya, purporting to be ordering the transfer of the money as the Lawrence Nginyo Kariuki, who was already deceased at the time. It was further averred that before his demise, the deceased had agreed to purchase a property known as L.R. No. 155/123 from John Kahara Ngugi, Christopher Njoroge Ndungu and Hezron Mwangi Karoga and that the 2<sup>nd</sup> appellant was intent on divesting and/or disposing of the said property to Margaret without Letters of Administration and/or an order of the court.
9. In addition, that the appellants continued to collect rental income, receive payments for and on behalf of the estate, and that they had misused the rent and payments so received without accountability and their said actions amounted to intermeddling with the estate, which constituted an offence under section 45 (2) *Law of Succession Act*.
10. Jane, one of the executors of the deceased's estate, opposed the application vide a replying affidavit which she swore on 7<sup>th</sup> September 2020 on behalf of all the appellants and on behalf of the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents herein. She averred that the executors have power under sections 80(1) and 83 of the *Law of Succession Act* to preserve the estate and pay out of the estate any outstanding debts; that they were, at all times, cognizant of their duty to account to the court and to the beneficiaries all payments made in the course of their duties as executors; and that they would faithfully render a true and just account as and when required to do so.
11. Regarding the transfer of Kshs.1,158,000/- from the deceased's Consolidated Bank account, she averred that it was for the purposes of facilitating the continuance of the Kiambu Project which was in the name of the deceased and which had commenced during his lifetime. In any case, that she signed for the transfer of that amount after being advised by the Relationship Manager of the Consolidated Bank that she had the relevant mandate to sign, which mandate had been given to her by the deceased before his demise. As regards the property known as L.R No. 155/123, she averred that the deceased had expressed an intention to buy it but he passed on before purchasing it and therefore, it did not form part of his estate.
12. Lastly, regarding the allegation that the executors were intermeddling with the deceased's estate, she averred that the said allegation was untrue and that the executors were merely carrying out their duties under the law as expected of them as the executors of the deceased's Will.
13. Winfred, on her part, supported the application by Brenda as is evident from her replying affidavit sworn on 6<sup>th</sup> October 2020. The gist of her response was that the executors had withdrawn Kshs.1,158,000/- from the deceased's account at the Consolidated Bank without authorization from



the court or the consent of other beneficiaries, and that the said bank account ought to have ceased being operational upon the deceased's death and until the succession process was completed. She therefore averred that the transactions affecting the deceased's bank account after his demise were by all means illegal. Lastly, she averred that the executors were yet to be appointed or confirmed by the court as per the provisions of section 79 as read with section 80(2) of the *Law of Succession Act*, and that they therefore lacked authority to perform any task on behalf of the estate devoid of the said appointment and/or confirmation.

14. Vide a ruling dated 27<sup>th</sup> July 2021, the High Court (Mutuku, J.) identified three issues for determination namely: whether there was intermeddling with the deceased's estate; whether the appellants should be ordered to account for the funds and or proceeds collected or received from the deceased's estate and if they should refund the same; and whether forensic audit should be conducted.
15. As regards the first issue, the court was categorical that under section 79 of the *Law of Succession Act*, a grant of representation vests all the property of the deceased in the executrix or the administrator appointed in intestacy. However, section 79 should be read together with section 80(1) of the same Act which stipulates that a Will takes effect upon the death of its maker, and that the grant of probate merely authenticates it and gives validity to any acts of the executrix carried out between the date of death and the date of the making of the grant. That would mean that the property of a testatrix really vests in the executrix from the date of death, and that such acts are not unlawful, so long as they are concomitant with the duties of an executor.
16. According to the learned judge, the acts of the executors complained of by the objectors would have been validated upon grant of probate being issued in their favour, but the obtaining circumstances are that the Will appointing them as executors had been challenged, which represented a challenge to their authority as executors of the deceased's Will. The court held that the authority of the executors having been challenged, the executors ought to have moved to court to seek the authority they required to deal with the estate of the deceased as they waited for the contested issues to be resolved. In the circumstances, therefore, their actions amounted to intermeddling with the estate of the deceased.
17. As regards the issue of tabling of accounts, the court held that since there was intermeddling, the only way the other beneficiaries of the deceased's estate could be satisfied as to how the funds withdrawn were utilized was to hold the appellants accountable. The court directed them to table full, accurate and audited accounts in respect of the operations of the estate from the date of the death of the deceased to the date of the ruling.
18. The dispositive orders by the court were that the appellants, their agents, servants and or employees were restrained from intermeddling and or interfering with the deceased's estate, including his bank accounts domiciled at Consolidated Bank of Kenya and I&M Bank Limited until Grant of Probate or Letters of Administration in respect of the deceased's estate were issued and confirmed; the appellants were ordered to account for all funds and or proceeds they had collected and or received from the deceased's estate since his demise and how they were utilized, spent and or preserved; the court ordered that a forensic audit of the deceased's estate since his demise be conducted by an audit firm to be agreed upon by all the beneficiaries, failing which the court to appoint one; failure to account as ordered, the appellants to refund to the estate all and any of the proceeds they had withdrawn from the deceased's accounts and or misappropriated from the entire estate.
19. The ruling precipitated the filing of this appeal by the some of the executors of the deceased's estate. Through their memorandum of appeal dated 18<sup>th</sup> August 2021, they contend that the learned judge erred in law and in fact by, inter alia: making a finding on intermeddling without stating the specific acts that constituted the alleged intermeddling; ordering a forensic audit based on erroneous finding



of intermeddling; making a finding of intermeddling in the absence of a forensic audit first being conducted; misdirecting herself as to her jurisdiction under sections 45 and 47 of the Law of Succession Act; failing to find that the 1<sup>st</sup> respondent had not discharged the burden of proof as she had not provided any evidence of intermeddling; making erroneous interpretations of the provisions of section 80 (1) and 83 of the Law of Succession Act; granting orders that allowed Brenda, Winifred, Alex and Austine access to financial matters of the deceased before their rights to such information had been determined through their respective objection proceedings; and failing to find that the payment of Kshs.1,158,000/- was paid to settle a liability of the deceased's estate and therefore could not have amounted to intermeddling with the deceased's estate, and that in any case, the said payment was made before the objections to the deceased's Will were filed.

20. At the hearing of this appeal, learned counsel Mr. Chacha Odera appeared together with learned counsel Ms. Kadima for the appellants and the 5<sup>th</sup> respondent. The 1<sup>st</sup> respondent was represented by learned counsel Mr. Juma, while senior counsel Ms Janmohamed appeared together with learned counsel Mr. Kere for the 2<sup>nd</sup> and 4<sup>th</sup> respondents. Mr. Mabachi, learned counsel was present for the 3<sup>rd</sup> respondent. The 6<sup>th</sup> and 7<sup>th</sup> respondents were represented by learned counsel Mr. Abubakar, while Mr. Tambo, learned counsel appeared for the 8<sup>th</sup> respondent.
21. Highlighting the appellants' written submissions dated 18<sup>th</sup> March 2022, which he also adopted in respect of the 5<sup>th</sup> respondent, Mr. Chacha sought to draw a distinction between grant of probate as per the provisions of section 80 (1) of the Act and a grant of letters of administration under section 80 (2) of the same Act. He cited the text by William Musyoka in Law of Succession, LawAfrica Publishing (K) Ltd, 2006, where the learned author posits that administrators of estates derive their authority to administer the estate from the grant of letters of administration while the executors derive their authority from the Will and that since they derive their authority from the Will, the executors can begin to administer the estate from the date of the deceased's death and that the grant merely confirms their authority.
22. Regarding the trial court's finding on intermeddling with the deceased's estate, which is the gravamen of this appeal, counsel made reference to the provisions of section 45 (1) of the Act which prohibits an act which may be construed as intermeddling with the estate of a deceased person, and contended that a person could only be said to have intermeddled with a deceased person's estate where they are not authorized by the Act or any other written law, or by a grant of representation made by the court. In this connection, counsel contended that a person who is authorized to deal with the estate cannot be said to be an intermeddler. The decision of *Re Estate of Husseinbhai Karimbhai Anjarwalla* [2000] eKLR, was cited for the proposition that section 45 of the Act cannot apply to one who is lawfully allowed to deal with the affairs of the estate.
23. In urging us to find that the executors of the deceased's estate were not intermeddlers as held by the trial court, counsel cited the provisions of section 80 (1) of the Act which provides that a grant of probate shall establish the Will as from the date of death and shall render valid all intermediate acts of the executor or executors to whom the grant is made, consistent with his or their duties as such. Counsel relied on several decision such as *Kothari vs. Qureshi & Naor* [1967] 1 EA (HCK), *Re Estate of Barasa Kanenje Many (Deceased) (Succession Cause 263 of 2002)* [2020] KEHC 1 (KLR), *Re Estate of Kimutai Tiony (Deceased)* [2019] eKLR, and *Re Estate of Agwang Wasiro (Deceased)* [2020] eKLR, for the argument that an executor represents the estate of the deceased from the date of death of the, and that a grant of probate merely authenticates any acts of the executor done between the date of death and the date of the making of the grant.



24. Counsel contended, therefore, that the executors having been appointed under the Will of the deceased and the Will having not been invalidated, they were under a duty to take all the necessary steps to preserve the estate of the deceased, and that they did not require authority of the court to deal with the estate of the deceased. It was submitted that the trial court erred by making a finding to the effect that nothing stopped the executors from moving to court to seek authority to deal with the estate of the deceased.
25. As to who bore the burden proof of intermeddling, it was contended that as per the provisions of section 107 and 108 of the *Evidence Act*, the burden lay with Brenda. It was submitted that having failed to discharge the said burden, her application ought to have been dismissed. In this connection, it was submitted that the appellants in their response to the application by Brenda explained the purpose of the money drawn from the deceased's bank account which aligned with the powers of executors to pay debts of the estate as provided for under section 82(b) of the Act.
26. Regarding the order on forensic audit, it was submitted that a basis was not laid before the trial court that there were illegal activities taking place for an audit to be ordered. It was submitted that as per the provisions of section 83(e) of the Act, executors are required, within six months from the date of grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. Counsel also relied on the decision of *Re Estate of Julius Mimano (Deceased)* [2019] eKLR, where the court explained that executors have a duty to render accounts in the first six months of the administration and at the completion of administration. Counsel therefore argued that there was no obligation on executors to provide an account before a grant is issued and therefore the trial court erred by ordering a forensic audit of the deceased's accounts. In addition, that the trial court erred by failing to indicate who was to conduct the audit and how they would be paid.
27. Lastly, counsel cited William Musyoka in *Law of Succession* at page 45 where the learned author states that personal representatives are only obliged to account to the true heirs and beneficiaries and they are therefore entitled to require proper identification by the person seeking the information that they are indeed heirs and beneficiaries. According to the appellants, the entitlement by Brenda, Alex and Austine could only have crystallized upon their objections being allowed and therefore the orders issued by the trial court were in their very sense, premature.
28. Senior counsel Janmohamed on her part indicated that her clients, the 2<sup>nd</sup> and 4<sup>th</sup> respondents, were in support of the appeal and did not file any written submissions.
29. Highlighting the 1<sup>st</sup> respondent's written submissions dated 10<sup>th</sup> May 2022, Mr. Juma submitted that Brenda, Alex and Austine, being children of the deceased as confirmed through DNA testing, were entitled to information about their father's estate, despite having been born outside marriage. He relied on the provisions of Article 27 of *the Constitution* which guarantees the right to non-discrimination and equality to all persons before the law, and Article 53 which establishes equal rights to children whether or not their parents are married to each other. To buttress the argument that Brenda, Alex and Austine are not lesser children of the deceased compared to the deceased's children with Margaret, counsel cited the decision of *L.N.W. vs. Attorney General & 3 others* [2016] eKLR, where the court held as follows:

“The equality provisions in Article 27 require that there should be no legislation that affords different treatment to children on account of their birth. Thus, the rights guaranteed to children under Article 53, as well as all the other rights contained in *the Constitution*, must be accorded to all children, whether born within or outside marriage. This is what our Article



27 and 28, on non-discrimination and right to dignity, seek to avoid in according children born outside marriage enjoy the same right to equality and dignity as children born within marriage.”

30. Regarding the trial court’s finding on intermeddling, counsel contended that the provisions of section 80(1) of the Act only applies to and is envisaged in an ideal situation where the Will upon which the executors base their authority is not challenged. It was submitted that in light of the two objections already on record, the trial court was correct in holding that the duties under section 83 of the Act are performed where there is a grant of probate and that some of the duties thereunder can only be performed by an executor where his authority is solid, which was not the case herein.
31. It was further submitted that if the executors wanted to administer the estate of the deceased pending determination of the two objections, then they ought to have approached the court under paragraph 10 of the Fifth Schedule to the Act. According to the 1<sup>st</sup> respondent, without checks and balances such as in section 80 (2), any party would be at liberty to create a Will or present dated Wills that suit their interests and immediately begin utilizing the deceased’s assets to the detriment of other beneficiaries and /or creditors, and that paragraph 10 of the Fifth Schedule is very clear, making a provision for a temporary grant (Pendente Lite) to be issued to an administrator under the control of the court with the rights and powers of a general administrator where there is a pending suit challenging the validity of a Will.
32. As regards the actual acts of intermeddling by the executors, counsel cited the withdrawal of Kshs.1,158,000/- from the deceased’s bank account at the Consolidated Bank based on the advice from the Relationship Manager at the said bank that she had the mandate to sign. Counsel contended that the manager did not provide any evidence to support the allegations by the 1<sup>st</sup> appellant and that in any case, it was suspicious that the 1<sup>st</sup> appellant did not at all times know that she was a signatory to the said account for the reason that her becoming a signatory would have meant signing the necessary forms from the bank and her providing a specimen signature to the bank. The other act of intermeddling related to the property known as LR. No. 155/123 which the executors intended to transfer to Margaret without letters of administration. According to the 1<sup>st</sup> respondent, the court having analysed all these actions by the executors arrived at the correct decision that there was indeed intermeddling with the deceased’s estate.
33. Lastly, on the issue of rendering accounts, it was submitted that pursuant to the provisions of section 83(h) of the Act, the court either on its own motion or on an application of any interested party in the estate shall order a full and accurate inventory of all assets and liabilities of the deceased and a full and accurate account of all dealings up to the date of the account. The trial court was therefore right in ordering for an account which was in conformity with the provisions of section 83(h) of the Act.
34. Mr. Mabachi highlighting the 3<sup>rd</sup> respondent’s written submissions acknowledged that his client was one of the executors named in the Will, but that he did not participate in the actions that led to the filing of the application by Brenda. It was submitted that since some of the executors were acting without the involvement of the 3<sup>rd</sup> respondent, their actions necessitated the filing of a Petition for Grant of Letters of Administration Pendente Lite by the 3<sup>rd</sup> respondent on 7<sup>th</sup> August 2020 in recognition of the need for him to be properly empowered to deal with the estate in a manner that would ensure its preservation. According to counsel, personal representatives must act together. He cited the decision



of the court in Civil Case No. 252 of 2012, Peter Kimani Nene vs. Nation Newspapers Limited where the Court held, inter alia, as follows:

“...it follows that the personal representatives, that is, administrators or executors must act together since it is the grant of representation that gives them authority to sue and do all things in the name of the estate.”

35. According to the 3<sup>rd</sup> respondent, by acting without consensus of all the executors, the appellants were in effect acting in their personal capacities rather than as executors of the estate and therefore their actions amounted to intermeddling.
36. On his part, learned counsel Mr. Abubakar, while associating himself with the submissions made on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> respondents, submitted that duties of executors are fiduciary in nature and must be performed with utmost good faith. Counsel relied on the decision of Family Bank Limited vs. Panda Co-operative Savings and Credit Society [2022] eKLR, where the Court provided the definition of fiduciary duty as per the Black’s Law Dictionary, 11<sup>th</sup> Edition as a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent’s principal or the beneficiaries of the trust).
37. Regarding the trial court’s finding of intermeddling with the estate of the deceased, counsel cited the provisions of section 82 of the Act where the powers of personal representatives are clearly listed, as well as the provisos to the exercise of those powers. According to counsel, one of the provisos is that no appropriation shall be made so as to affect adversely any specific legacy, the other one being that no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent. It was submitted that in all the appropriations that were instigated by the executors in terms of the bank withdrawals, there was no consent of the beneficiaries. Counsel contended that once the deceased passed on, everything should have stopped and no investment should have continued unless all the beneficiaries reached that agreement. Since the executors did not have authority to undertake the acts constituting intermeddling, the finding of the trial court that there was intermeddling cannot therefore be impugned.
38. Regarding the jurisdiction of the trial court to grant the orders made in the impugned ruling, counsel cited the provisions of section 47 of the Act which provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under the Act, and to pronounce such decrees and make such orders therein as may be expedient. Counsel also cited the decision of this Court in Floris Plezzo & Another vs. Giancarlo Falasconi (2014) eKLR, where the Court held, inter alia, that section 47 of the Act gives the High Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and orders as may be expedient, and that it could not be said that such decrees and orders would exclude injunction orders.
39. As to the issue whether Brenda, Alex and Austine were entitled to the financial information touching on the deceased’s estate, counsel cited the decision in Re Estate of Kitele Kitingu (Deceased) [2021] eKLR, where the court held that beneficiaries have the statutory right to obtain an account from the executors of the estate and at any time they may ask for estate books and documents owing to the reason that an executor or administrator is a trustee and is accountable to the beneficiaries for his handling of the estate administration. It was therefore submitted that the trial court made a correct finding by ordering a forensic audit of the deceased’s estate.
40. Mr. Tambo associated himself with the submissions made earlier by counsel in opposing this appeal. He submitted that the application giving rise to the impugned ruling had met the threshold as per Giella vs. Cassman Brown (1973) EA 358.



41. As to the issue of intermeddling, counsel relied on the decision in *Benson Mutuma Muriungi vs. C.E.O. Kenya Police Sacco & another* [2016] eKLR, where acts of intermeddling were said to include taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge of the free property of a deceased person in contravention of the Act or any other written law. Counsel cited the withdrawal of money from the deceased's bank account domiciled at Consolidated Bank as being an act of intermeddling as rightly held by the trial court.
42. On the question whether the respondents were entitled to access the financial matters of the deceased estate before the determination of their rights by the trial court, counsel submitted that was a non- issue in view of the decision of the court in *Re Alice Mutua (deceased)* [2007] eKLR, where the court stated that the *Law of Succession Act* and the rules made thereunder are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets among the survivors and the persons beneficially interested. Counsel also cited the decision of *Re Estate of Benson Maingi Mulwa (Deceased)* [2021] eKLR, where the court stated that any person interested in the estate of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. In this regard, it was contended that the orders issued by the trial court were not to protect the 8<sup>th</sup> respondent specifically or their claim to the estate but the entire estate, and that the court in recognizing the right of beneficiaries and all interested persons was right in ordering for accounts to be rendered by the executors.
43. We have considered the entire record, the respective submissions by counsel and the applicable law. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the trial court both on points of law and facts and come up with its own findings and conclusions. See *Peters Vs. Sunday Post Limited* [1958] EA 424.
44. This appeal in our view turns on the singular issue; whether the trial court made the correct finding that the executors of the estate of the deceased had intermeddled with it to warrant the restraining orders. Our finding on this issue will invariably answer the next question: whether the trial court was right in ordering for a forensic audit of the deceased's estate since his demise to be conducted.
45. The law regarding intermeddling with the estate of a deceased person is well codified in the Act. Section 45 of the Act provides as follows:
  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 not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
    - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”



46. The Act under section 3 does not provide a definition for the word “intermeddling”. At page 973 of the Black’s Law Dictionary, 11<sup>th</sup> Edition, the definition of the word ‘intermeddler’ makes reference to an officious intermeddler whose definition is provided for at page 1310 as follows:

“Someone who confers a benefit on another without being requested or having a legal duty to do so, and who therefore has no legal grounds to demand restitution for the benefit conferred.”

47. What then constitutes intermeddling? Gikonyo, J. in the decision *Benson Mutuma Muriungi vs C.E.O. Kenya Police Sacco & another* (supra) stated thus:

“There is no specific definition of the term intermeddling provided in the *Law of Succession Act*. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as; “for any purpose” and/or “otherwise intermeddle with” in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as; taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act* or any other written law. I do not pretend to close the list either or make it exhaustive. The list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law.” [Emphasis added]

48. We fully adopt that definition. What we deduce from the provisions of section 45 of the Act and from the aforementioned decision of the High Court is that intermeddling occurs where administrators or any person interested in the estate of a deceased person as a beneficiary or otherwise, deals with the said estate without any lawful authority and in a manner as to diminish such an estate.

49. The acts by the executors complained of by Brenda in her application giving rise to the impugned ruling included the collection of rent, withdrawing of money from the deceased’s bank accounts, taking over the deceased’s properties and making decisions affecting his estate without Letters of Administration, an order from the court and/or without involving other beneficiaries. The appellants, who are the executors of the deceased’s Will, counter this argument and contend that all the acts complained of by Brenda were acts authorized under the Act and done for the benefit of the said estate and/or its beneficiaries and dependants of the deceased.

50. The question that arises from these rival arguments is how personal representatives ought to deal with the estate of a deceased person. The starting point for us in answering this question lies in section 79 of the Act which provides thus:

“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.”

51. Section 80 of the Act provides for the taking effect of a grant. It provides thus:



1. A grant of probate shall establish the Will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.
2. A grant of letters of administration, with or without the Will annexed, shall take effect only as from the date of such grant.”
52. Our reading of the provisions of section 80 yields the interpretation that a Will takes effect upon the death of its maker and the grant of probate merely authenticates it and gives validity to any acts of the executrix carried out between the date of death and the date of the making of the grant. In essence, therefore, the property of the deceased who dies testate really vests in the executors from the date of death, and the acts of the executors in respect of the estate are not unlawful, so long as they are related with the duties of an executor.
53. It is upon vesting of the property of the deceased in the personal representatives that they became entitled to exercise the powers that are set out in section 82 of Act which are analogous to those of an owner of the property. However, the said property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof who are named in the Will, in cases of testate succession, and those identified by the court upon confirmation of a grant, in cases of intestacy. Under section 82, the personal representatives can sue or be sued over the property, they can sell or enter into contracts in respect of any part of the estate, among others.
54. Applying the provisions of section 79, 80 and 82 to the circumstances of this case, the Will states that the appellants together with the 3<sup>rd</sup> respondent were appointed as the executors of the deceased’s Will. By virtue of the provisions of section 79 and read with section 80 (1) of the Act, the property of the deceased vested upon the executors upon the demise of the deceased. The executors did not need the authority of the court to deal with the deceased’s estate since their authority is derived from the Will itself and not from a grant of probate. We take cognizance that two objections were filed before the trial court challenging the validity of the Will. However, the Will, as it stands, remains valid until the trial court determines otherwise. The trial court therefore erred by making a finding that the executors ought to have moved to court to seek the authority they required to deal with the estate of the deceased as they waited for the contested issues to be resolved.
55. Having made a finding that the executors had the requisite authority to deal with the deceased’s estate as derived from the Will, and the deceased’s properties having vested in them by virtue of the provisions of section 79 of the Act, the issue which we must determine is whether the acts complained of by Brenda were within the powers and duties of personal representatives under the sections 82 and 83 Act or if they amounted to intermeddling. The acts complained of by Brenda and more specifically the withdrawal of money from the deceased’s Consolidated Bank account were acts done by the executors of the deceased and do not appear to us as acts done with the aim of diminishing the estate of the deceased, as to amount to intermeddling. In any case, the 1<sup>st</sup> appellant in her replying affidavit to the application by Brenda averred that the money drawn from the deceased’s bank account was for the continuation of the Kiambu Project which had been initiated by the deceased during his lifetime. There was no ulterior motive on the part of the executors which was demonstrated by Brenda in her application. After all, the executors are bound to provide a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith within six months from the date of the grant and at the completion of administration. Therefore, there is no room for adverse dealing with the estate of the deceased to go unnoticed.
56. Taking from the above, the acts by the executors were not acts performed in bad faith, neither can the said acts be said to have been in contravention of the Act for them to amount to intermeddling. The



trial court therefore erred by making a finding that the executors had intermeddled with the deceased's estate.

57. Having made a finding that the executors acted within their authority and that their acts could not have amounted to intermeddling, it follows, therefore, that the restraining order and the order directing forensic auditing of the deceased's estate were in their very nature premature and were not based on any proved facts.
58. Consequently, this appeal is merited. Accordingly, we allow the appeal and set aside the ruling and orders of the trial court dated 27<sup>th</sup> July 2021. Bearing in mind the ties between all parties herein in relation to the deceased and the fact that the objections before the trial court are yet to be determined, we direct that each party bears its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER 2024.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

