In re Estate of Kisang Kisoo alias Kisang Arap Kisoo (Deceased) (Succession Cause 5 of 2023) [2025] KEHC 349 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 349 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

SUCCESSION CAUSE 5 OF 2023

JRA WANANDA, J

JANUARY 24, 2025

BETWEEN

WILLIAM CHERUIYOT KISANG ..... 1ST PETITIONER

DAVID KISANG ..... 2ND PETITIONER

CHARLES RUTTO KOMEN ..... 3RD PETITIONER

AND

SUSAN KIBET ..... 1ST OBJECTOR

VIOLET J. MUNEI ..... 2ND OBJECTOR

RULING

1. The deceased, Kisang Kisoo died on 14/04/2006 aged 96 years old. On 19/04/2021, 15 years later, the Petitioners, claiming as sons of the deceased, through Messrs Ngigi Mbugua & Co. Advocates, jointly applied for Grant of Letters of Administration Intestate in respect to the estate of the deceased. Apart from the 3 Petitioners, 2 widows and one other son were the only other people listed as survivors of the deceased. 2 parcels of land were also listed as comprising the estate. The Grant was then issued by the Court on 8/11/2021 to the Petitioners as prayed.

2. However, before an Application for Confirmation of the Grant could be filed, the Objectors, claiming as daughter and grand-daughter, respectively, of the deceased, on 4/10/2022, through Messrs Kipkorir Rono & Co. Advocates, filed the Summons of the same date seeking Revocation of the Grant. The grounds of the Application were basically, that the Petitioners misled the Court that the deceased had only 4 children yet he had 13, and that the 3rd Petitioner is a son of the deceased when he is actually a grandson. Fortunately, the Application was settled when by the consent recorded in Court on 26/06/2023, the 1st Objector, Susan Kibet, was appointed a co-Administrator. The Amended Grant was then issued on 27/06/2023.

3. Pursuant to further directions, the Chief, Lelan Location, also submitted a fresh letter dated 11/07/2023, giving an updated list of the family members of the deceased. The letter also now disclosed a 3rd wife, (though deceased) and also included her children. Upon receipt of the letter, I referred the matter for Mediation on the issue of distribution of the estate. Regrettably, the Mediation was unsuccessful. Around the same time, the 2nd Objector, Viola J. Munei, now represented by Messrs Ledisha J.K. Kittony & Co. Advocates, filed the Summons dated 8/04/2024 seeking orders as follows:

    1. [.....] spent

    2. Pending the hearing and conclusion of this Succession proceedings, this Honourable Court be pleased to issue an order for the preservation of the assets of the deceased herein, namely:

        i. Cherangany/Korongoi/39 measuring approx. 31.0 Ha

        ii. Lelan/Kaptalamwa/186 measuring approx. 93.6 Ha

    3. An order or temporary injunction be issued restraining the 1st, 2nd and 3rd Petitioners and/or beneficiaries from the 2nd and 3rd houses from leasing out, selling, disposing of, developing or in any other way intermeddling with the properties in paragraph *2* above, more so in a manner that is likely to be detrimental to other beneficiaries, pending the hearing and determination of this cause.

    4. This Court be pleased to make an order that the Respondents purported sale and or disposal of any part of the deceased estate during the pendency of these proceedings by any means is illegal.

    5. Costs be in the Cause.

4. The Application is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the 2nd Objector.

5. In the Affidavit, the 2nd Objector deponed that her mother, the late Flomena Munei was the 1st born daughter of the late Maria Teriki Kisang, 1st wife of the deceased and the deceased was therefore her grandfather. She deponed further that since the passing on of her mother, their house has been left out by other members of the family, that over time, the Petitioners and/or some members of the 2nd and 3rd houses have sold and/or leased out a number of portions of the said parcels of land to strangers who have constructed permanent houses thereon, and that this has been ongoing for some time in total disregard of the law against intermeddling and is intended to waste away the estate. She registered her apprehension that the culprits may have even caused transfer of the portions to the strangers before determination of the issues at hand and which action will complicate matters and also that the intermeddlers are intentionally doing this to secure best portions of the estate.

Response to the Application

6. The Application is opposed vide the Replying Affidavit sworn by the 3rd Petitioner, Charles Rutto Komen, and filed on 22/07/2023. In the Affidavit, the 3rd Petitioner deponed that on 14/09/2020, the family of the deceased held a meeting, chaired by an uncle, wherein the family agreed that before any sub-division could be undertaken, there was need to choose Administrators who would undertake and supervise the succession process. He deponed that such Administrators were accordingly identified and agreed upon and that ever since, the Administrators have been religiously following up on the matters, and that throughout the process, all family members have participated in the process. He termed as misleading and false the allegation of strangers being on the land, and insisted that only family members are in occupation. He deponed further that the allegation is based on mere speculation and that it is

only the family members who have constructed houses and are carrying out subsistence agriculture on the land. According to him, the Objectors are being economic with the truth as they are in occupation of 25 acres of Lelan/Kaptalamwa/186 and are also in control of Cherangany/Korongoi/39.

Hearing of the Application

7. It was then agreed that the Application be canvassed by Written Submission. On 3/06/2024, while giving directions, I gave the parties timelines for filing and exchanging Affidavits and Submissions and also granted the 2nd Objector, upon her Counsel's request, leave to file and serve a Further Affidavit within 14 days. However, by 30/09/2024, almost 4 months later, when the matter came up for Mention, the 2nd Objector had not yet filed such Further Affidavit and had also not filed her Submissions. I declined a further request by Counsel to extend the time to file the Further Affidavit but regarding the Submissions, I granted her 2 more days to file the same.

8. Pursuant thereto, the 2nd Objector filed her Submissions on 1/10/2024 while the Petitioners had filed theirs earlier on 24/09/2024. On her part, Ms. Kirigo, holding brief for Ms. Cheruiyot for the 1st Objector (now co-Administrator), informed the Court that the 1st Objector is in support of the Application and would therefore not be filing any Submissions.

2nd Objector- Applicant's Submissions

9. Counsel for the 2nd Objector pointed out that the Petitioners in their Replying Affidavit confirm that there was a family meeting on 14/09/2020 to discuss the issue of distribution of the estate but that a look at the list of members present as per the minutes attached, shows that the Objectors were not in attendance, and that those who were present discussed and agreed on how they would distribute the estate. She added that from the minutes, Charles Komen (one of the 3 grandchildren of the late Teriki Kisang) was to be given a share representing the late Teriki Kisang and that he would not share the same with anyone and that no reason was given as to why the Objectors should not receive a share in place of their late mother.

10. She then termed the Petitioner's Submissions as being purely on distribution and claiming that the Objectors have a share they are not satisfied with and want more. She observed that the Petitioners argue that they agreed to sell the estate to facilitate succession yet this was before the Succession is concluded. She also pointed out that the Petitioners shockingly confirm that they have already concluded distribution yet this Cause is still pending. Regarding the conditions for grant of an order for injunction, Counsel submitted that the Petitioners are treating the Application as though it were a civil suit, yet it is a Succession Cause in which the interest being protected is that of the entire estate, not of an individual.

11. Counsel submitted that the Petitioners have confirmed selling a share of the estate and justify the same as having the sanction of the family. According to her, the Objectors could not have agreed to an illegality (intermeddling) as they did not even participate in the meeting. On the prohibition against intermeddling, she cited Section 45 of the *Law of Succession Act*, the case of re estate of Edward Mutuku Mwando [2022] eKLR. On the Court's powers to grant the injunction, she cited Section 47 of the Act, Rule 73 of the Probate & Administration Rules, and also the case of In re estate of Kitur Chepsungulgei (Deceased) [2021] eKLR.

Petitioner's Submissions

12. On his part, Counsel for the Petitioners, for the purposes of identifying the parties herein, gave a description of the family tree of the deceased in terms of the 3 houses (wives) as follows:

1st House (the late Maria Teriki Kisang)	
Children	Grandchildren
The late Flomena Munei	Susan Kibet
	Viola Munei
The late Susan Komen	Charles Ruto Komen
2nd House (Teriki Kisang)	
Salina Kisang	
Ann Kisang	
Emmily Kisang	
David Kisang	
3rd House (Saniako Kisang)	
Paulina Kisang	
William Cheruiyot Kisang	
The late Johnstone Kipkoech Kisang	
Eunice Kisang	
Solomon Kimtai Kisang	
Veronica Kisang	

13. He then submitted that after the deceased died, the family convened a meeting in 2009 in regard to sub-division of the estate land, that the said Flomena Munei, mother to Susan Kibet and Viola Munei and the said Susan Komen, mother to Charles Ruto Komen, were present in the meeting, and that the 2 mothers are sisters to the 1st and 2nd Petitioners. He submitted that at the meeting, the family allocated 50 acres to the said Flomena Munei and Susan Komen (mothers to the Objectors) who agreed to take 25 acres each and that the same were transferred to them with no objection whatsoever. He contended further that thereafter, Flomena Munei and Susan Komen left to go and live elsewhere but both later died and that upon their deaths, their children (Objectors herein) took over the shares. He submitted that there was no complaint whatsoever until around 2020 when sub-division of the land to individual family members started and the Objectors started to claim that they had been short-changed.

14. He also submitted that during the meeting of 2009, the family agreed to sell 5 acres to cater for the Succession with each of the 3 houses contributing an equal share and that the Objector's mothers were agreeable thereto and never raised any objection, but that in 2023, the Objectors came back demanding

to be added a further 50 acres. According to him, that demand is out of place as the family has already concluded distribution of the estate in accordance with consanguinity upon which the land passed to the Objectors' mothers who never opposed or protested and after their deaths, the land was further passed to the Objectors and that what is pending is only confirmation to the beneficiaries.

15. Regarding the prayer for injunction, Counsel referred to the 3 principles to be established as set out in the case of Giella vs Cassman Brown (1973) E.A. 358 and reiterated in the case of Nguruman Limited vs Jan Bonde Nicision & 2 Others [2014] eKLR. Regarding the 1st requirement of establishment of a prima facie case, he submitted that the Objectors have no locus standi as the land passed first to their mothers who did not contest it and as such, the Objectors can only claim their respective mother's shares and not more. In respect to the 2nd requirement, namely, demonstration of irreparable injury, he cited the definition given in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR and submitted that the Objectors have their parcels of land which they are in control of and that all they want is much more acreage, not considering that there are many other beneficiaries some with smaller portion than the Objectors'. In respect to the 3rd requirement, namely, tilting of the balance of convenience, he again cited the case of Pius Kipchirchir Kogo (supra) and also the case of Paul Gitonga Wanjau vs Gathoni's Tea Factory Company Limited & 2 Others [2016] eKLR and submitted that such balance of convenience does not tilt in favour of the Objectors as they have their shares already and only want more.

16. Regarding the allegation that the Petitioners have made any sale of the estate during pendency of the Succession proceedings, Counsel reiterated that after consultations, the family members agreed to partition out 5 acres with each house contributing an equal share to cater for the Succession proceedings. According to him therefore, the same was agreed by all family members in unison and was therefore proper. In conclusion, he submitted that moreover, the Objectors have not attached any proof such as sale agreements, and that the attached photographs only show houses for dependents/ beneficiaries of the estate, a fact which the Objectors are aware of but have chosen to mislead the Court about.

Determination

17. The issue that arises for determination in this matter can be summarized as follows:

> "Whether sufficient material has been presented to warrant granting of temporary orders of injunction restraining the Petitioners from leasing out, selling, or disposing the estate property pending the hearing and determination of this Cause."

18. What the 2nd Objector is seeking are basically orders of interlocutory injunction. It is now agreed, as was held in the Court of Appeal case of Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR, that a Probate Court has powers under Section 47 of the *Law of Succession Act* and also Rule 73 of the Probate and Administration Rules to grant temporary injunctions.

19. Section 47 provides as follows:

> "The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

20. On its part, Rule 73 of the Probate and Administration Rules provides as follows:

> "Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

21. The principles guiding the handling of Applications for temporary injunctions are now well settled and are as was set out in the case of Giella vs. Cassman Brown & Co. Ltd [1973] EA 358 and also in American Cyanamid Co. v Ethicom Limited (1975) A AER. Following the said cases, the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR stated as follows:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

22. The important consideration before granting a temporary injunction is proof that the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or that the defendant threatens or intends to remove or dispose the property. The question that therefore arises is whether the present Application meets the threshold laid for the granting of orders of temporary injunction.

23. The Court of Appeal, in the case of Mrao Ltd v First American Bank of Kenya and 2 others, (2003) KLR 125, which it also cited with approval in its subsequent case of Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, defined a prima facie case as follows:

> "A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

24. Applying the above principles to the facts of this case, I may mention that preservation of the estate of a deceased person is a statutory command and does not even require any party to approach the Court for such preservatory orders whether in terms of injunction or otherwise. This is the import of Section 45 of the *Law of Succession Act* which describes any taking of possession or disposal of the property of a deceased person such as by way of sale or transfer thereof as "intermeddling" and which it in fact criminalizes. Section 45 aforesaid provides as follows:

> 45. No intermeddling with property of deceased person
>
> "(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-
>
> SUBPARA (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."

25. Regarding application of Section 45, Gikonyo J in the case of Re Estate of M'Ngarithi M'Miriti [2017] eKLR, stated as follows:

> "Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."

26. In light of the strict provisions of Section 45 aforesaid, since all parties agree that the parcels of land in question comprise the estate of the deceased and are "free property" of the deceased, there is no reason for the Objectors to again approach the Court for injunction orders restraining sale, charge or transfer of such parcels of land, which are the same actions prohibited under Section 45. That is categorized as "intermeddling" and is already automatically prohibited under Section 45. In the event of any breach of the law by any person, all that the Objectors or any interested party would need to

do would be to record a complaint with the relevant authorities for possible criminal prosecution, and/or at that point, to move the Court to nullify such act of intermeddling. Only in cases such as where there is a dispute on whether or not a property belongs to the estate would there be necessity to seek preservatory orders from the Court pending determination of such ownership. Another scenario would be where there is no dispute that the property belongs to the estate but there is a dispute on its use or occupation or where any person is interfering with a beneficiary's use or occupation of such property during pendency of the Succession Cause. Needless to reiterate therefore, any dealings with the property of a deceased person contrary to the provisions of Section 45 would be null and void for all intents and purposes and would be of no effect. Of course, I am not saying that the Probate Court cannot generally give an interlocutory injunction restraining intermeddling with the estate of a deceased person. All I am saying is that in the circumstances and facts of this case, there does not seem to be any basis for the Court to grant injunction orders whose effect is merely to restate the law. I should not therefore be misunderstood or taken out of context on this issue.

27. In any event, even if a basis for grant of an injunction had been established, still I may also mention that in the 2nd Objector's own words, the prayer for injunction is clearly only based on mere "apprehension". That is insufficient as a ground for seeking an interlocutory injunction. Without evidence or at least some adequate basis, the Court cannot grant an injunction. In this case, although the 2nd Objector is seeking orders to restrain the Petitioners from selling or transferring estate property, no single piece of evidence has been presented to demonstrate that the Petitioners are indeed about or desirous to sell, charge or transfer any such property. In any case, if the properties are still in the name of the deceased, then, since this Succession Cause is still pending, any purported sale or transfer would be null and void and the Lands Office would have no justification to register it. Any such registration would amount to a forgery and thus a criminal act.

28. The other prayer made by the 2nd Objector is that any sale and/or disposal of any part of the estate during the pendency of this proceedings be declared illegal. The Objectors however do not seem to possess any proof of such sale, if any, not even the identity of the purchasers. They also do not seem to know whether such purchasers have already acquired title documents since no supporting document has been exhibited apart from the verbal allegations. In response however, the Petitioners have readily admitted that indeed, 5 acres of one of the properties has been sold but claim that such sale was as a result of a mutual agreement by all family members, including the respective mothers of the Objectors but who are now both deceased. They allege that the family had already agreed on distribution of the estate amongst the beneficiaries and that all beneficiaries, including the Objectors' respective mothers, were allocated shares and all that was being awaited was confirmation, adoption and sanction of the distribution by the Court.

29. They also allege that the purposes of such sale of 5 acres was to cater for the costs of this Succession Cause. They have also exhibited minutes of meetings in which the alleged resolutions were passed. They therefore wonder why the Objectors, who are grandchildren, would now emerge at this point in time and purport to contradict or challenge what their late mothers had already agreed to during their lifetime. What has not however been explained is whether the sale to the third parties has been formalized by way of sub-division and/or transfer and if, so, how such sub-division or transfer was achieved when the property was still registered in the name of the deceased and the Grant herein is yet to be confirmed.

30. In light of the insufficient information laid before the Court by both parties on the issue of the sale, I would be hesitant to make a declaration of nullity of any such sale, if any, at this interlocutory stage, and would rather wait for the hearing of the Objection and/or Summons for Revocation of the Grant or determination of this Cause.

31. In light of all the matters stated hereinabove, I am not satisfied that the Applicant has sufficiently established a prima facie case at this stage. The Court will make conclusive determinations after hearing of the pending matters herein. No threat or risk of sale, transfer or charge has been demonstrated at this stage and even if such actions were to be purported to be undertaken, they would be null and void. I will therefore only order the parties to maintain the status quo prevailing.

32. For the above reasons, I will not consider the remaining limbs of Giella v Cassman Brown (supra), namely, existence of irreparable loss and the balance of convenience.

Final orders

33. In the premises, I rule and order as follows:

    i. The 2nd Objector's Summons dated 8/04/2024 is dismissed due to, inter alia, lack of sufficient information or particulars of the grievances alleged, and because the actions alleged to cause apprehension, risk or threat are already prohibited by law, if proved. The following is however directed:

        a. All parties are ordered to maintain the status quo prevailing as regards the estate properties, namely, Lelan/Kaptalamwa/186 and Cherangany/Korongoi/39, pending determination of this Succession Cause or further directions to be given by the Court. Consequently, there shall be no sub-division, sale or transfer of any portion of the estate properties in the interim.

        b. All parties are also reminded of the provisions of Section 45 of the *Law of Succession Act* which prohibits, and declares criminal, any acts amounting to intermeddling with the property or estate of a deceased person before confirmation of the Grant of representation or by authority of the Court.

    ii. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY 2025.

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ngigi Mbugua for the Petitioner

Korir for the 2nd Objector

N/A for other Objectors

Court Assistant: Mr. Kuto