



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Grace Nyambura Kungu (Deceased) (Succession Cause
E051 of 2021) [2025] KEHC 11251 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E051 OF 2021
HI ONG'UDI, J
JULY 31, 2025**

IN THE MATTER OF THE ESTATE OF GRACE NYAMBURA KUNGU (DECEASED)

BETWEEN

HIRAM KIMANI KAGIRI APPLICANT

AND

KAGIRI KUNG'U 1ST RESPONDENT

SERAH WANJIKU KUNG'U 2ND RESPONDENT

DAVID NG'ANG'A KUNGU 3RD RESPONDENT

FRANCIS NDEGWA KUNGU 4TH RESPONDENT

KUKA INVESTMENT LIMITED 5TH RESPONDENT

LITTLE VINEYARD AUCTIONEERS 6TH RESPONDENT

RULING

1. In the Notice of motion dated 27th February 2025 the applicant prays for the following orders;
 - i. – Spent.
 - ii. That this honourable court be pleased to restrain the respondents, by the appropriate orders of injunction pending hearing and determination of the summons for confirmation of the grant, from their ongoing illegal activities against the Applicant with intent of defeating the Applicant's interests and rights in estate particularly property known as LR. No. 2X9/2XX3 (Grant IR. 69XX8). Which actions will result in irreparable loss and damage incapable of being sufficiently compensated by an award of damages.



- iii. That pending hearing and determination of the notice of objection to making of a grant dated 18th June 2024 or this application *inter-partes* or until further orders of this Honourable Court, the respondents be restrained an order of injunction from dealing in a manner whatsoever with the Estate of the Late The Estate of Grace Nyambura Kungu (Deceased).
 - iv. Spent.
 - v. That orders of injunction be issued to restrain the Respondents their servants, officers, employees and or agents from harassing/causing anxiety to the Applicant by illegally exploiting him, including filing unwarranted proceedings in court or illegally attaching his properties as a way of intimidating him from pursuing the ongoing succession cause 18th February 2025 pending hearing and determination of this application and summons before your Ladyship.
 - vi. That orders of injunction be issued to restrain the Respondents their servants, officers, employees and or agents from harassing the applicant in any manner whatsoever until this application and the summons for confirmation/ suit regarding the disputed property Known as LR. No. 2X9/2XX3 (Grant IR. 69XX8) (Parkslandvilla Hotel) is heard and determined.
 - vii. That the court should stay any intended proceedings by the respondents that could subsequently jeopardize the ongoing succession cause.
 - viii. That orders of temporary injunction do issue to restrain the respondents from dealing in any manner with any part of the estate of the deceased pending the hearing and determination of the summons for confirmation of the grant.
 - ix. That the Probate and Administration court to invoke its jurisdiction and issue injunctive orders so as to preserve the status of the the disputed property Known as LR. No. 2X9/2XX3 (Grant IR. 69XX8) (Parkslandvilla Hotel) until the issue of the entitlement of the parties/ beneficiaries herein is reserved.
 - x. That the honourable court be pleased to remove the 1st and 4th respondents as administrators of the estate and appoint new administrators as they have continued to defy the honorable court's orders, harassing other beneficiaries and causing the matter to stall before your ladyship.
 - xi. That honourable court be pleased to issue to declare that the respondents have violated the terms of the grant and that they have not diligently administered the estate.
 - xii. Spent.
 - xiii. That the costs of this application be provided for.
2. The application is based on the grounds thereof and the appellant's affidavit sworn on even date. He deposed that besides this Succession Cause there is also succession cause No. E947 of 2015 pending before the High Court at Nairobi in respect of property known as LR. No. 2X9/2XX3 (Grant IR. 69XX8) (Parkslandvilla Hotel). He stated that the said property was in contention as the same was gifted to the applicant by the deceased hence did not form part of the estate.
 3. He further deposed that upon transfer of the said property to him by the deceased, he was instructed to provide a monthly upkeep to the late Grace Nyambura Kungu from the proceeds of the gift income. Subsequently, the late Grace Nyambura Kungu received a sum of KShs 300,000/= per month from the year 2015 until the year 2021 when she died. The respondents now claim that the said amount was rent payable to the estate of Grace Nyambura. He added that he enjoyed quiet possession of the suit



premises from 2013 until 2024 when the respondents emerged with a scheme to deprive him of his legal interest in the suit property.

4. He urged the court to remove the 1st to 4th respondents as administrators of the estate and appoint new administrators as they continued to defy the court's orders and harass other beneficiaries. Further, he urged the court to stay any intended legal proceedings and issue injunctive orders so as to preserve the status of the disputed property until the issue of the entitlement of the beneficiaries is resolved.
5. In response to the application the 1st, 2nd and 3rd respondents filed a replying dated 10th March 2024. They described the applicant's application as a nonstarter incompetent, illegal, vexatious, malafides and without substance or merit. Thus, the same was just but an abuse of the court process. They averred that the subject property was not gifted to the applicant and he was a tenant who paid rent until December 2021 sometime after the deceased's demise when he started defaulting.
6. They further averred that the transfer instrument was deliberately and fraudulently prepared with the aim of hoodwinking the court to grant orders in the applicant's favour. Moreover, that no *inter vivo* agreement had been presented before the court in support of the said the transfer. They admitted that Succession Cause No. E947 of 2015 existed but the applicant did not object to it and the same was concluded and distribution done. They stated that levying of distress was legally conducted to recover rent owed by the applicant which stood at kshs. 7,700,000/=. They added that the applicant who was not a beneficiary to the estate had not made any justification as to why they should be removed as administrators. They concluded by stating that the applicant's application was premature, unmerited and an abuse of the court process.
7. The 4th respondent in response to the application adopted the 1st, 2nd and 3rd respondents' affidavit. He also filed grounds of opposition stating that the applicant lacked locus standi and the purported documents of claim by the applicant were not executed by the deceased and the same were not availed in Succession Cause No. 45 of 2011. He added that the said application was misconceived, bad in law and ought to be dismissed and/or struck out.
8. The application was canvassed by way of written submissions.

Applicant's submissions.

9. These were filed by Wamuiya Mohammed & Company Advocates and are dated 19th March 2025. Counsel gave brief facts of the case and identified two issues for determination.
10. On the first issue on whether this court has jurisdiction to hear and determine the instant application, counsel submitted that this court has jurisdiction to issue injunctive orders where appropriate, to preserve and safeguard the estate of a deceased person. He placed reliance on section 47 of the *Law of Succession Act* and the decision in *Millicent Mbattha Mulava & Another v Annah Ndunge Mulava & 3 Others* [2018] eKLR, where the court affirmed that the said section and Rule 73 of the *Probate and Administration Rules* grants the high court powers to issue protective measures including injunctions for purposes of preserving the estate of a deceased person. See also; *Floris Piezzo & Another v Giancarlo Falasconi* [2014] eKLR.
11. On the second issue as to whether the applicant has made out a case for grant of the injunctive orders sought, counsel submitted that the applicant had satisfied the three requirements in *Giella v Cassman Brown* [1973] EA 348 where the court held that an applicant must demonstrate that they have a *prima facie case* with a probability of success, demonstrate irreparable harm which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour.



12. Counsel while placing reliance on the decision in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR submitted that the applicant had an arguable case since the property in question was a gift *inter vivos* from the deceased. Thus, unless the orders sought are granted the applicant would suffer irreparable injury which could not be adequately compensated by an award of damages. He added that balance of convenience laid in favour of issuing the order of injunction in order to preserve the suit property pending hearing and determination of the summons for confirmation of grant. In conclusion, he urged the court to allow the application.

1st, 2nd and 3rd respondent's submissions.

13. These were filed by Sheth & Wathigo Advocates and are dated 28th March 2025. Counsel gave brief facts of the case and identified two issues for determination.

14. On the first issue on whether or not the subject property was gifted to the applicant by the deceased, counsel submitted that in terms of section 42 of the *Law of Succession Act* the characteristics of the gifts *inter-vivos* are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. He placed reliance on *Halsburys Laws of England* 4th Edition Volume 20(1) at paragraph 67 where it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

15. Counsel further submitted that the subject property was not gifted to the applicant and the documents allegedly in support of his claim, particularly the transfer instrument were prepared fraudulently with the aim of convincing the court to grant orders in his favour. Further, that having failed to raise issue with the subject property in Succession Cause no. E947 of 2015, which he was aware of and participated in, the applicant was stopped by law from making such a claim now. He placed reliance on the decision in *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, as cited in the case of *Carol Construction Engineers Limited & another v National Bank of Kenya* [2020] eKLR where the Court held that:

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

16. He asserted that the subject property was not gifted to the applicant and the same formed part of the estate for distribution. He relied on the decision *In Re Estate of Chesimbili Sindani* (*supra*): where it was held:

“There was no gift *inter vivos* to any of the children of the deceased, and, therefore, the entire estate of the deceased comprises of free property available for distribution by the court in these confirmation proceedings. I am persuaded that the deceased had only licensed the sons to utilize certain assets, and as a result they had put structures on those assets



and distribution of the assets ought to take into account those assets and ensure that the particular sons are allocated shares in the parcels of land where they have put up structures.” (emphasis added)”

17. Regarding the second issue on whether or not the applicant is entitled to the orders sought, counsel submitted that the subject property formed part of the estate of the deceased. Thus, the administrators had proceeded to levy distress for rent arrears owed by the applicant. He referred to the decision *In Re Estate of Damaris Njeri Kimani (Deceased)* [2015] eKLR, where the court held that the administrator’s duties included collection of rent and getting it to the estate.
18. Counsel submitted that the applicant had not established any of the grounds provided for under section 76 of the *Law of Succession Act* and as such he was not eligible to orders for revocation of grant. He placed reliance on the decision in *Prisca Onayo Nande Deceased* [2020] eKLR as cited in the case of *In Re Estate of Samuel Kariuki Kiragu (Deceased)* Succession Cause 78 of 201 2023 KEHC 26573 KLR (Family) (15 December 2023) (Ruling) where it was stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the person applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

19. He urged the court to dismiss the application dated 27th February, 2025 with costs.

Analysis and Determination.

20. I have considered the application, the affidavits and the submissions by the parties. The main issue I find falling for determination is whether the applicant is entitled to the orders sought.
21. The applicant in his application has sought for several orders, under prayers 2 to 6, 8 and 9 where he seeks for orders of injunction against the respondents. The *Law of Succession Act* Cap 160, Laws of Kenya does not have any provision dealing specifically with issuance of conservatory or injunctive orders. However, several authorities have held that Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* grants a probate court wide discretionary powers to issue protective orders in respect of the estate of a deceased person. Additionally, by virtue of Rule 63 of the *Probate and Administration Rules* courts are allowed to rely on the provisions of the *Civil Procedure*



Act in particular the “Oxygen Rules” espoused by Section 1A of the Civil Procedure Act which provides that the overriding objective of the Civil Procedure Act and Rules, is to facilitate the just, expeditious, proportionate and affordable resolution to disputes.

22. Section 47 of the Law of Succession Act 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.”

23. Similarly, Rule 73 of the Probate and Administration Rules provides that: -

“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.”

24. Further, Rule 63 of the Probate and Administration Rules provides as follows: -

“(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

25. The jurisdiction to issue injunctive orders in a succession cause was settled in the case of Floris Piezzo & Another -vs- Giancarlo Falasconi (*supra*) also relied on by the applicant where the Court of Appeal while considering whether an injunction can issue in a succession cause expressed itself as follows: -

“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with the testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders including injunctions where appropriate to safeguard the deceased’s estate.



This section must be read together with Rule 73 of the [Probate and Administration Rules](#) which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders."

26. The applicant claimed that the respondent LR. No. 2X9/2XX3 (Grant IR. 69XX8) (Parkslandvilla Hotel) was gifted to him by the deceased hence did not form part of the estate. He further claimed that he enjoyed quiet possession of the said property from 2013 until 2024 when the respondents emerged with a scheme to deprive him legal interest in the subject property.
27. On their part, the respondents argued that the subject property was not gifted the applicant and he was just a tenant who paid rent until December 2021 sometime after the deceased's demise when he started defaulting.
28. The principles upon which a temporary injunction may be granted were set out in the celebrated case of [Giella v Cassman Brown & Co \(supra\)](#) as follows: -
 - i. The applicant must establish a *prima facie case* with a probability of success.
 - ii. The applicant must show that he is likely to suffer irreparable loss or damage if the relief being sought is not granted.
 - iii. In case of any doubt the balance of convenience should tilt in favour of the applicant.

Also see: [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] KECA 606 I KLR.

29. Regarding the first ground that the applicant must establish a *prima facie case* with a probability of success.

The definition of a *prima facie case* was given in the case of [Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others \(supra\)](#) as follows: -

"In Civil Cases a *prima facie case* is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie case* is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. This is clearly a standard which is higher than an arguable case."

30. As proof of these allegations the applicant annexed to his supporting affidavit a copy of the gift agreement between him and the deceased and a transfer instrument.
31. In the case of [Re Estate of Ruth Wanjiku Karugu \(Deceased\)](#) 2021) eKLR the court cited the case of [Re Estate of the late Gedion Manthi Nzioka \(Deceased\)](#) 2015 eKLR, where the court gave guidance as to the requirement of Law as far as a gift *inter vivos* was concerned. The learned judge stated as follows;

"In Law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). Section 31 of the [Law of Succession Act](#) provides as follows with respect to gifts made in contemplation of death:....For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of declaration in trust by the donor, or by way of resulting trusts or the presumption of Gifts of Land must be by way of registered transfer,



or if the land is not registered it must be in writing; by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid.” (Emphasis mine)

32. Having perused the gift agreement relied on by the applicant, it is my considered view that the same establishes there was an offer and acceptance between the applicant and the deceased. However, I note that the transfer instrument is not registered and as observed from the authority cited above gifts of land must be by way of registered transfer or a declaration of trust in writing. *In re Estate of the Late Sawe Maina* (Succession Cause 350 of 2015) [2023] KEHC 3743 (KLR) (19 April 2023) (Judgment) the court held as follows;
- “20. Generally, a gift in form of a parcel of land ought to be effected by way of a written memo or a transfer or declaration of trust in writing showing that the land was gifted to the sons of the deceased *inter vivos* or *causa mortis*. But, if a gift rests purely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise.” (Emphasis mine).
33. As such there was no registered transfer or declarations of trust issued in writing tabled as evidence by the applicant in respect of LR. No. 2X9/2XX3 (Grant IR. 69XX8) (Parkslandvilla Hotel). Simply put, the alleged gift did not satisfy the said requirement and the gift agreement does not amount to a transfer or declaration of trust. I am therefore satisfied that a *prima facie case* warranting grant of injunctive orders has not been established by the applicant.
34. The applicant under prayer 7 has sought for stay of any intended proceedings by the respondents that could subsequently jeopardize the ongoing succession cause. This court is of the view that the applicant has not demonstrated clearly why the said stay should be granted. Normally, stay is granted in the interests of expedient justice when there are two proceedings for which the subject matter is similar. Stay will be granted to avoid the potential of having conflicting decisions touching on the same property. The applicant failed to produce any evidence in support of his allegations that there existed another Succession cause No. E947 of 2015 in respect of the property in question. According to the respondents that Succession Cause was finalized and the estate distributed.
35. Lastly, the applicant also sought for removal of the 1st and 4th respondents as administrators of the estate and appointment of new administrators, for the reason that the respondents have violated the terms of the grant and they have not diligently administered the estate. This is a very serious accusation which must be proved by way of evidence. Upon perusal of the annexures in the application, I note that there is no proof of the said administrators misappropriating the assets in the estate of the deceased or them not willing to have the distribution of the estate concluded within the timelines provided for by law or they not being willing to have accounts rendered to court as required by section 83 of the *Law of Succession Act*. It is therefore my finding that the applicant has not advanced sufficient reason to have the 1st to 4th respondent removed from the position of administrator.
36. The upshot is that the applicant’s application dated 27th February 2025 lacks merit and is dismissed with costs.
37. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 31ST DAY OF JULY, 2025 IN OPEN COURT AT NAKURU.



H. I. ONG'UDI
JUDGE

