



**In re Estate of Samuel Maritim Rator (Deceased) (Succession Cause 457 of 2005) [2024] KEHC 962 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 962 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 457 OF 2005  
HM NYAGA, J  
JANUARY 31, 2024**

**BETWEEN**

**BENJAMIN KIPNGENO NGETICH ..... BENEFICIARY**

**AND**

**GILBERT KIPKIRUI ROP ..... 1<sup>ST</sup> RESPONDENT**

**DOREEN JEPCHUMBA KAPTERIT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before Court is the one dated 19<sup>th</sup> June, 2023 by the Applicant. It is brought under Section 68 and 76(e) of the Law of Succession Act and Part VIII Section 44(i) of the Law of Succession Act. The Application seeks the following orders
  - i. Spent
  - ii. That pending the hearing and determination of this Application the Respondent herein be restrained by themselves, their agents, employees, servants and/or any other person claiming under them from entering, occupying, developing, cultivating, leasing, selling or otherwise adversely dealing with estate of the deceased herein.
  - iii. Spent
  - iv. Spent
  - v. That costs of this Application be borne by the estate of the Deceased.
2. The Application is premised on the grounds on its face and supported by an affidavit of Benjamin Kipngeno Ngetich, a beneficiary of the deceased's estate, sworn on the even date.
3. He deponed that upon the demise of the deceased grant of letters of administration intestate was made to Lucy Chelangat Rator and the same was confirmed on 28<sup>th</sup> July, 2008.



4. He averred that the administrator passed away on 27<sup>th</sup> February, 2021 before distributing the estate thus rendering the grant issued useless and inoperative by dint of Section 76 (e) of the [Law of Succession Act](#).
5. It was his averment that the respondents have unlawfully and forcibly entered into a parcel of land forming part of the deceased estate namely L.R. NO. 9721/25 Rongai and curved approximately 2 acres thereof purporting to be executing a decree issued against one of the beneficiaries namely Geoffrey Maritim in Nakuru MC-CC E018 of 2023.
6. He averred that the respondents are not beneficiaries of the deceased's estate and thus lack authority to have a say on the deceased's estate.
7. It was his deposition that the deceased's estate would go to waste should this Court decline to grant the orders sought.
8. In opposition to the application, Gilbert Kipkurui Rop swore a replying affidavit on 21<sup>st</sup> July, 2023 deponing that Nakuru CMCC No. E018 of 2023 was necessitated by fraudulent conduct of Geoffrey Maritim, who is a beneficiary of the deceased estate and who entered into a sale agreement with them for purchase of 2 acres of land to be excised from the deceased's parcel of Land Known as L.R NO. 9715/12 but despite being paid the full purchase price, he failed to honour his obligations of delivery of the said parcel of land.
9. He deponed that at the time of execution of the sale agreement and payment of purchase price thereof, the said Geoffrey Maritim with the consent of other family members allowed them into the deceased's parcel of land so as to secure and fence off their 2-acre piece of land to which the said Geoffrey Maritim was a beneficial owner pursuant to the intended distribution in the instant succession cause following the further demise of mother Lucy Chelangat Rator. Moreover, their interests do not affect the rights of the beneficiaries to inherit the deceased parcel of land.
10. He stated that they have not conducted execution proceedings as alleged and that the same would be highly un-procedural as the said civil suit is still pending.
11. He contended that there is no proof of the alleged ongoing execution and intermeddling and that the annexure marked as BKN3 only confirms existence of a house and fence on a piece of land but the same does not indicate who put up the said structures or the parcel of land captured therein.
12. It was his averment that this Court lacks jurisdiction to issue injunctive order sought because Civil Procedure Rules provides that a party whose property has been wrongfully attached in execution proceedings to lodge objection proceedings in the suit where the decree/ judgement emanates from.
13. The application was canvassed through written submissions. Only the Applicant's submissions are on record.

### **Applicant's Submissions**

14. On whether the respondents should be restrained from interfering with the estate of the deceased herein, the applicant submitted that pursuant to section 29 of the [Law of Succession Act](#), the respondents are neither creditors nor beneficiaries of the deceased's estate. and are therefore intermeddling with the deceased estate contrary to section 45 of the [Law of Succession Act](#).
15. The applicant argued that pursuant to section 82(b)(ii) of the [Law of Succession Act](#), the agreement between the respondent and Geoffrey Maritim for purchase of 2-acre parcel of land to be excised from the deceased parcel of land known as L.R No. 9715/12 was a nullity as it encompasses a sale of the deceased estate before the administration of the estate was concluded. In buttressing his submissions,



the applicant placed reliance on the case of Virginia Mwari Thurania vs Purity Nkirote Thurania [2017] eKLR.

16. The applicant argued that the applicant being an administrator to the deceased estate has the legal mandate to protect the entire estate until succession is concluded. In support of this proposition, reliance was placed on the case of Beatrice Kanzayire & Another v Adam Gasongo [2014] Eklr.
17. The applicant submitted that the actions of the respondent as demonstrated above warrant the granting of injunctive order sought.

### **Analysis and Determination**

18. The only issue for determination is whether this Court should grant the injunctive order sought.
19. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court restated the law 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.”

20. Ringera, J (as he then was) in Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001 stated:

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an



interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

21. According to the Court of Appeal in *Esso Kenya Limited. vs. Mark Makwata Okiya* Civil Appeal No. 69 of 1991:

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the Court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the Court. The merits or demerits of granting injunction orders deserve greater consideration. The Court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the Court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the Court ought in all cases to be regulated, but in no case will the Court grant an interlocutory injunction as of course...The Court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt Court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

22. What constitutes a prima facie case? The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it 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.”

23. In *Re Estate of Simon Kimendero (Deceased)* [2020] eKLR, the Court noted that of specific significance to preservatory order in respect of estate property is that: -

- a. The applicant has an arguable case;
- b. The property is estate property; and
- c. The property is likely to be dissipated or wasted away.



24. In the instant application and as noted above, prima facie, the applicant has an arguable case considering that he is the son of the deceased and therefore having an interest in the property of the deceased. Moreover, there is no doubt that the land in question belongs to the deceased person and therefore forming part of the estate of the deceased.
25. The Applicant submitted that the respondents herein have unlawfully and forcibly entered into a parcel of land known as L.R No. 9721/25 Rongai forming part of the deceased estate and curved about approximately 2 acres thereof purporting to be executing a decree issued in Nakuru CMCC No. E018 of 2023.
26. The respondents have denied the Applicant's case however they admit the existence of the said civil suit and having entered into a sale agreement with one Geoffrey Maritim who is one of deceased beneficiaries for a purchase of 2 acres parcel of land to be excised from the said land. It was the respondent's averment that on the strength of the said sale agreement and consent of family members of the deceased, they entered into the land so as to secure and fence off their 2-acre piece of land pursuant to the intended distribution in the instant cause.
27. The applicant attached a photograph of the alleged parcel of land marked as BKN3. The same shows a house and a fence erected thereon. The Respondents alleged that the said annexure do not confirm who put up the said structures and the land parcel in issue.
28. The standard of proof in civil cases is on a balance of probabilities. Considering the Applicant's case vis a vis the Respondent's case, I find that it is highly improbable that the respondents entered the land "unlawfully" as alleged. I will give my reasons.
29. The respondents have stated that Geoffrey Maritim, one of the beneficiaries of the estate, sold a portion of the land and with the consent of the other family members they were allowed to occupy the said land.
30. Curiously, the said Geoffrey has not filed any affidavit to deny this allegation. Nothing would have been easier than him doing so.
31. Further it is curious that the application for injunction was filed at the time the new administrator was just appointed. What prevented the applicant from moving the Court earlier, yet the former administrator died in February 2021?
32. The above observations suggest that there is more than meets the eye.
33. In reality and by law, the alleged sale of land by Geoffrey to the respondents was a nullity. As much as the former was a surviving son of the deceased and is thus entitled to part of the estate he had no authority, before his share had crystallised and vested in him, to deal with any part of the estate.
34. In *Virginia Mwari Thurania vs Purity Nkirote Thurania* (supra) the Court observed that: -

“The said sale agreement is null and void for violating Section 82(b)(ii) of the *Law of Succession Act*, as the said Julia Thurania had not obtained letters of Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representatives and constitutes the estate of the deceased person. It is only the legal representatives of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of written law or order of the Court.”
35. Section 45 is to the effect that no person should handle, take possession, dispose off, or otherwise intermeddle with the free property of a deceased person unless authorized to do so or by a grant of



representation. Section 45(2)(a) makes it a criminal offence to intermeddle with an estate without legal authorization and the same is punishable with a fine, imprisonment or both. By virtue of section 45 of the *Law of Succession Act*, therefore, alleged transaction between the said Geoffrey Maritim and the respondents amounted to intermeddling with the estate of the deceased and respondents are deemed to have engaged in criminal activity.

36. Having stated the above, the question that arises is whether it is fair to let Geoffrey collect money from the respondents and now try to deny them from the same land he sold them.
37. It is true that an illegal transaction cannot create binding duties on a party. However, this is a situation that is common in Kenya. In my experience, at times beneficiaries approach 3<sup>rd</sup> parties for funding with the promise that they will transfer their shares of the estate to the 3<sup>rd</sup> parties upon confirmation.
38. Having stated the above, I am of the view that the respondents have no claim against the estate. Their claim ought to be against the said Geoffrey and his entitlement to a share of the estate. They cannot therefore enter the land without the consent of the administrator.
39. Since the said Geoffrey has not disputed the sale of his entitlement to the respondents, it is only fair that the administrator should take account of the same when distributing the land to Geoffrey. That issue is not before the Court.
40. Clearly, there is need to preserve the property of the deceased pending the hearing and determination of the succession cause, which is at the distribution stage.
41. Consequently, in order to preserve the estate pending distribution, I hereby restrain the Respondents whether by themselves, their servants, agents, employees and or anyone acting on their authority from entering, occupying, developing, cultivating, leasing, selling or otherwise adversely dealing with the property of the deceased known as L.R No. 9721/25 Rongai.
42. There shall be no orders as to costs.
43. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 31<sup>ST</sup> DAY OF JANUARY, 2024.**

**H. M. NYAGA**

**JUDGE**

**In the presence of;**

C/A Jeniffer

Mr. Murithi for Respondent

No appearance for the Applicant

