



REPUBLIC OF KENYA



**In re Estate of Saulo Wakalikha Masoni (Deceased) (Succession Appeal
40 of 2001) [2024] KEHC 768 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION APPEAL 40 OF 2001**

DK KEMEL, J

JANUARY 31, 2024

IN THE MATTER OF THE ESTATE OF SAULO WAKALIKHA MASONI (DECEASED)

BETWEEN

JOHNSTONE MUSAMALI WAKALIKHA 1ST PETITIONER

PATRICK MASONI WAKALIKHA 2ND PETITIONER

AND

JACOB MUKOYANI APPLICANT

AND

MARTHA NAFULA NASONGO PROTESTOR

RULING

1. Vide summons dated 26th September 2023 and filed in Court on an even date pursuant to section 45, 47, 55 & 82 of the [Law of Succession Act](#), Rules 49, 59(5) and 73 of the [Probate and Administration Rules](#) and all other enabling provisions under law, the Applicant sought the following orders:
 - i. Spent;
 - ii. That Bungoma Succession Cause No. 40 of 2001 be re-opened;
 - iii. Spent;
 - iv. That injunctive orders do issue restraining the 2nd Petitioner from interfering with the Applicant's use and occupation of all that parcel of land originally known as Ndivisi/Ndivisi/606 pending hearing and determination of the succession cause;
 - v. That the Applicant be appointed administrator to the estate of the deceased herein pursuant to the Judgement/decree of the Court made on 21st July 2016;



- vi. Spent;
 - vii. That the subdivision and subsequent transfer on land parcel Ndivisi/Ndivisi/606 and all other subsequent transfers be cancelled and the same to revert to the original title registered in the name of the deceased.
 - viii. That the subdivision and subsequent transfer on land parcel Ndivisi/Ndivisi/647 and all other subsequent transfers be cancelled and the same to revert to the original title registered in the name of the deceased.
 - ix. That the current registration of title numbers Ndivisi/Ndivisi/547 and Ndivisi/Ndivisi/596 be cancelled and the ownership revert to the name of the deceased for purposes of succession.
 - x. That on granting of prayer vii, viii and ix above, an order to issue to Bungoma County Land Registrar prohibiting any dealings with the register of all that land known as parcel number Ndivisi/Ndivisi/547, 596,604,606 and 647 pending the hearing and determination of the succession cause.
2. The application was supported by the grounds set on the face of it and the supporting affidavit sworn by the Applicant herein, Jacob Mukoyani on 26th September 2023. In a nutshell, he averred that the deceased herein was survived by two wives (now deceased) and 8 children (3 now deceased). According to him, he is the grandson of the deceased as his father was Joseph Mukoyani Wakalikah (deceased). He averred that subject to the Judgment of the Court dated 21st July 2016, members of the 1st house nominated him for appointment as an administrator. He told the Court that the 2nd Petitioner fixed the matter for hearing on 2nd June 2021 but due to lack of service and absence of parties the file was closed. He averred that the estate of the deceased remains un-administered with a large portion of the same wasted and alienated by the 2nd Petitioner. He averred that the deceased's assets include: Ndivisi/Ndivisi 606, 596, 574, 604,649 but on conducting an official search on the same he established that some were already subdivided with new titles generated to that effect, and that the only parcel that is still under the deceased's estate is Ndivisi/Ndivisi/604. He averred that the estate of the deceased has been inter-meddled with by the 2nd Petitioner.
 3. On 7th November 2023, the Protestor herein made it clear before the Court that she did not oppose the Applicant's application.
 4. The 2nd petitioner herein opposed the application and filed a replying affidavit sworn on 2.11.2023 wherein he deposed inter alia; that this court lacks jurisdiction to entertain the matter as the prayers sought fall under the jurisdiction of the Environment and Land Court; that the father to the applicant had earlier sold part of the land to some purchasers and further that the applicant has also sold some portion of the land to third parties; that the applicant cannot be made an administrator yet he has not obtained consent from the family and further that he has not obtained grant of letters to act on behalf of the estate of his late father; that the subject land has already been closed on sub-division into several parcels and registered to several people some of whom are alive while others are deceased.
 5. A replying affidavit dated 2.11.2023 was also filed by an interested party named Stephen Wanjala Wabukechi who averred inter alia; that he had purchased land from one Selina Liambila who had already obtained title on LR Ndivisi/Ndivisi/647 and that he already has title in his name; that he stands to suffer if the titles are cancelled yet the dispute is between the applicant and the 2nd petitioner.
 6. Vide Court directions issued on 7th November 2023, parties were directed to canvass the application dated 26th September 2023 vide written submissions. The applicant and 2nd Petitioner duly filed and exchanged submissions.



7. I have considered the application, rival affidavits and submissions presented. It is not in dispute that this succession cause had been ongoing and which culminated into the judgement dated 12.7.2016 wherein the grant that had been issued was revoked and the parties ordered the beneficiaries to appoint two administrators within seven days. It is also not in dispute that at the time when the Applicant filed this application seeking for interlocutory orders against the 2nd Petitioner, this Court had already revoked the Grant of letters of administration that were issued to the 1st and 2nd Petitioners herein as no consent was obtained from the beneficiaries of the estate of the deceased herein and that there was no record of agreement on the mode of distribution of the estate of the deceased. It is also not in dispute that the beneficiaries have not appointed the administrators to date. The Applicant has filed this application for purposes of preventing further intermeddling and wastage of the estate of the deceased, and his subsequent appointment as one of the Administrators of the estate of the deceased. The issue for determination therefore is whether the application has merit.
8. It is noted from the record that on 21st July 2016, this Court revoked the grant that had been issued to the Petitioners dated 15th August 2001 due to lack of consent from all other beneficiaries at the time of Petitioning the Court as well as lack of an agreement on the mode of distribution of the estate of the deceased. This Court found that the same was irregularly obtained and ordered that the two houses surviving the estate of the deceased do appoint two administrators whose names were to be forwarded to the Court within seven days. The Petitioners fixed the matter for hearing on 2nd June 2021, but failed to serve the other parties leading to non-attendance in Court and subsequent closure of the file. It is clear that no action has been taken towards reopening the court file to enable parties to take further action in the matter. It is also not in dispute that at the time when the Applicant filed this application seeking for interlocutory orders against the 2nd Petitioner, they did not possess a grant of letters of administration in respect to the estate of the deceased herein or a grant in respect of his deceased father.
9. It is trite law that a suit filed before the Applicant is issued with a grant of letters of administration in respect to the estate of a deceased person is an incompetent suit. In the cases of *Daniel Njuguna Mbugua v Peter Kiarie Njuguna* (2021) eKLR & *2 Others and Isaya Masira Momanyi v Daniel Omwoyo* (2017) eKLR, the Courts struck out suits that had been filed by parties prior to obtaining grants of letters of administration. The Courts separately held that the Plaintiffs in the cases lacked capacity and/or locus standi to file the suits on behalf of the estates of the deceased persons. In the latter case the Court stated that the suit was incompetent and an abuse of the process of the Court.
10. Similarly, *In the matter of the Estate of Geoffrey Meitamei lonina – Deceased* (2012) eKLR where the Applicant was seeking for interlocutory orders in circumstances that were similar as in this case, Dulu J., held as follows:

“Indeed, under section 45 (1) & (2) of the *Law of Succession Act* (Cap 160), this court has powers to protect the assets of a deceased person. However, in my view, only an administrator or an interested party in an existing administration cause, can apply for protection of the deceased’s assets. In the present matter, no application for letters of administration has been filed under sections 51, 53 or 54 of the *Law of Succession Act*. Therefore, in my view, the provisions of section 45 of the Act cannot be brought into play by the applicant. She has no legal standing in law to bring the present application. On that account, I find that the application is misconceived.

Even if the application was filed under the *Civil Procedure Act*, (Cap 21), it would still not succeed. This is so because, the application is filed without any existing cause or proceedings. It stands on its own as a Chamber Summon, and asks for interlocutory orders.



An interlocutory application cannot stand on its own. Nor can substantive orders be given in such an application."

11. In the instant application, I hold the view that the application is incompetent for having been filed before a grant of letters of administration was obtained. It is a grant of letters of administration that gives a person the mandate to deal with the property of a deceased person. This is made clear by section 82(a) of the [Law of Succession Act](#) which lists the powers of a personal representative to include –

“to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.”
12. In the case of [John Marete Kirema & another v Gladys Karimi M Muthamia & 3 others](#) (2013) eKLR where it was argued that the Applicant did not require a grant of letters of administration to pursue an application under section 45 of the [Law of Succession Act](#) and in that case Makau J. (as he then was) held that:

“....an intended administrator or a person who has made a petition to be appointed as administrator is not a personal representative of the deceased person and therefore has no locus standi to bring any action independent or within the petition until a grant of letters of representation has been made to him or her as case may be. I therefore do not agree as this is a petition cause and not a civil suit as submitted by the counsel for the applicant, he does not require grant of letters of administration to pursue the application under Section 45 of the [Law of Succession Act](#).”
13. In the absence of a grant, the Applicant herein has no locus standi to deal with the property of the deceased in any manner. He cannot move the court for the orders sought with a view to administering the estate of the deceased because of the lack of capacity. The Applicant has annexed a copy of family minutes wherein he has been selected to be appointed as an administrator. The same cannot give him the locus since he has to be appointed first and then be able to take up his role as an administrator and be in a position to mount the claim as herein.
14. Further to this, there is no grant in place even to enable the surviving petitioner (2nd Petitioner) to have the locus standi to respond to the applicant’s application on behalf of the estate. After this court revoked the initial grant on 21.7.2016, the petitioners failed to galvanize the two houses to nominate the two persons to be appointed as administrators and hence, the estate is without an administrator currently. There is a vacuum in that the applicant does not have a locus standi while there is no administrator to be sued and to attend to the issues raised by the Applicant herein. The interlocutory orders sought cannot be granted in the absence of locus standi by the Applicant. It is evident that the file herein was closed when there was no action on the orders of the Court as issued on 21st July 2016. The only way the beneficiaries of the estate of the deceased can approach the court is by seeking to reopen the file and present the names of the proposed petitioners as ordered by the court on 21.7.2016. In the premises, i find that the application is fatally defective and the orders sought cannot issue.
15. The Applicant alleges that the Petitioners intermeddled with the estate of the deceased. The 2nd Petitioner did not deny the allegation by way of filing a replying affidavit but filed grounds of opposition. Even though the applicant has been found to lack locus standi to file the application, this court being the succession court and mandated with the duty of distributing the estate of the deceased must act and deal with the unfolding scenario even if there are no administrators in order to protect and preserve the estate from wastage before the same is finally distributed to the beneficiaries.



16. It is an offence under section 45 of the [Law of Succession Act](#) to intermeddle with the free property of a deceased person. There is no dispute in this matter that the Petitioners were issued with grant of letters of administration which were deemed irregular by this Court and was revoked on 21.7.2016. Going by the supporting affidavit of the Applicant, there is likelihood of the estate being wasted further before appropriate measures are taken. It is the duty of the Probate Court to protect the estate of the deceased where there is likelihood of it being wasted before a fresh grant is issued. This power emanates from the provisions of Rule 73 of the Probate & Administration Rules that gives the Court inherent power to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court.
17. It has transpired that the petitioners herein have really intermeddled with the estate if the averments in the rival affidavits is anything to go by. There is evidence that titles have been issued. This is quite astonishing and that the petitioners whose grant was revoked by the court on 21.7.2016 must offer an explanation as to how they managed to effect the transfers of titles without the grant being issued and confirmed. The surviving petitioner vide submissions has argued that the matter is no longer with this court but the Environment and Land Court yet he does not explain how he managed to do that without this court confirming the grant. This could be the reason why he is quick to raise the issue of jurisdiction so as to avoid being called upon to render an explanation as to how he managed to distribute the estate without the grant being issued and confirmed. This was in total disregard to the clear warnings found in section 45 of the Law of Succession Act which provides as follows:

S.45

- (1) Except so far as expressly authorized by this Act or 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 the 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 of ten thousand shillings or to imprisonment not exceeding one year or to 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 in the due course of administration.
18. From the foregoing, it is clear that what the petitioners and beneficiaries have done is a violation of the law as far as the estate of the deceased is herein is concerned. The documents availed herein clearly show that new titles have been issued to some of the beneficiaries and third parties yet there is no confirmed grant on the court record as the petitioners and beneficiaries did not present themselves in court for purposes of confirmation of the grant. They also failed to nominate two administrators as ordered on 21.7.2016 so that the issue of the confirmation and eventual distribution is concluded. It is like the administrator have taken the law into their hands and purported to distribute the estate without the sanction of the court. Clearly, that is illegal and hence the court must put its foot down and put the 2nd petitioner and beneficiaries plus third parties on notice that any intermeddling of the estate before confirmation of grant will attract serious consequences. Even though learned counsel for the 2nd petitioner and interested party has urged the court not to interfere with the status quo, i find that this court, being the succession court mandated to distribute the estate of the deceased who died intestate, must take charge and call all the parties to heel. The business of the court in distributing the estate is not over yet. If there are any actions or activities taken by the parties without the court's sanction, then the same must be declared null and void. The petitioners and beneficiaries were fully aware that



they had to obtain a confirmed grant before proceeding to subdivide the property of the deceased. Likewise, any third parties were expected to have conducted proper and due diligence before engaging in any transaction with the beneficiaries. The most surprising thing is that there is no certificate of confirmation of grant issued by this court and hence even the official at the lands registry could not have okayed the sub division of the assets of the deceased without such a crucial document. This court has no option but to intervene by cancelling the titles obtained unprocedurally as it has jurisdiction to do so.

19. In view of the fact that the orders sought herein cannot issue due to the defect in the application, it is desirable that the Court makes orders for the preservation of the estate pending the issuance of fresh grant and subsequent confirmation of the grant. The order that commends itself to me is for all dealings including transfers of the title to the suit property to be declared null and void since the same were acquired by a defective grant of letters of administration. This means that the suit property reverts to the estate in question herein. The Court notes that the suit properties might have already changed hands and it is currently in the hands of beneficiaries and third parties who might have purchased the said properties in the belief that the petitioners had a genuine grant. The said persons were expected to have done proper diligence before engaging in the transactions. They have themselves to blame and cannot seek refuge under section 93 of the Law of Succession Act since the grant was and has never been confirmed by this court. A perusal of some of the annexures in the affidavit of the applicant herein shows that the alleged transfers of land took place around 2019 and 2023 yet the court had already revoked the grant on 21.7.2016 and hence it is clear that the transactions were done without a confirmed grant. This court has powers under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to make such orders are necessary to meet the ends of justice and prevent abuse of the court process.
20. In view of the foregoing observations, I proceed to make the following orders:
 - i. The order dated 2.6.2021 closing this file is hereby vacated and that the file is reopened.
 - ii. The Applicant's application dated 26.9.2023 is dismissed with no order as to costs.
 - iii. The two houses of the deceased to nominate one administrator each as ordered on 21.7.2016 within seven (7) so as to pave way for the issuance of a fresh grant.
 - iv. That upon issuance of the fresh grant, the new administrators to file summons for confirmation of grant within 14 days thereafter.
 - v. That all dealings including transfers of the title of assets forming part of the estate of the deceased are declared null and void since the same were acquired by a defective grant of letters of administration and the same revert to the estate of the deceased.
 - vi. That the subdivision and subsequent transfers on land parcel numbers Ndivisi/Ndivisi/574, 596, 604, 606 and 647 and all sub divisions and subsequent transfers be and are hereby cancelled and the same to revert to the original titles in the name of the deceased Saulo Wakalikha.
 - vii. That upon the cancellation of the titles and registration in the names of the deceased Saulo Wakalikha, the Bungoma County Land Registrar do prohibit any dealings with the register of all the deceased's five land parcels pending the conclusion of this succession cause.
 - viii. The status quo on the ground as of the date hereof be preserved in respect of occupation of the parcels of land forming part of the estate of the deceased pending conclusion of the succession cause.



ix. Mention on 15.2.2024 for directions and further orders.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024.

D. KEMEI

JUDGE

In the presence of:

Shilihu for Lunani for Applicant

No appearance Wattangah for 2nd Petitioner/Respondent

.....for Interested Party

..... for Protestor

Kizito Court Assistant

