



In re Estate of Zachary Mumbo Mosoti (Deceased) (Succession Cause E3450 of 2022) [2024] KEHC 8113 (KLR) (Family) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE E3450 OF 2022

HK CHEMITEI, J

JUNE 27, 2024

IN THE MATTER OF THE ESTATE OF ZACHARY MUMBO MOSOTI (DECEASED)

BETWEEN

PO OBJECTOR

AND

GKM PETITIONER

RULING

1. This ruling relates to the applications dated 20th March, 2023 filed by PO, the Objector/Applicant, seeking for orders that:
 - (a) Spent;
 - (b) This Honourable Court be pleased to issue an injunction order restraining the Respondent herein whether by herself, her agents, employees and/or anyone acting on her authority from trespassing, evicting, damaging, wasting, alienating or otherwise intermeddling with the estate of the deceased, which includes land parcel Nos. Nairobi/Block 83/14/xxx and Nairobi/Block 136/xxx pending the hearing and determination of this Application;
 - (c) This Honourable Court be pleased to issue an injunction order restraining the Respondent whether by herself, her agents, employees and/ or anyone acting on her authority from managing, collecting revenue, wasting, evicting, interfering, alienating and/ or intermeddling with the estate of the deceased, namely land parcel Nos. Nairobi/Block 83/14/xxx and Nairobi/Block 136/xxx pending the hearing and determination of the Petition for Letters of Administration Intestate filed herein;



- (d) The Respondent be ordered to account for all funds and/or proceeds collected and received from the deceased's land parcel No. Nairobi/Block 136/xx since his demise on 10th December, 2021.
 - (e) Further and/or in the alternative, this Honourable Court be pleased to issue compensatory damages and/or general damages and/or special damages as against the Respondent, and in favour of the Applicant, in the amount to be established according to proof plus interest;
 - (f) The OCS in charge of Ruai area to ensure compliance for this order;
 - (g) The costs of this Application be provided for, and such other and further relief as this Honourable Court may deem appropriate under the circumstances.
2. The application is supported by affidavit and further affidavit sworn by Peris Ondara on 20th March, 2023 and 7th July, 2023, respectively. She avers inter alia that she is the deceased's legal wife and that the deceased has 6 children, 4 with the applicant and 2 with the Respondent.
 3. That the deceased acquired land parcel number Nairobi/ Block 83/14/xxx during the pendency of their marriage and built their matrimonial home on it, where she currently lives with her 4 children. The deceased, being the registered owner of land parcel number Nairobi/Block 136/xxx had built rental houses on it, and that the income therefrom was used to pay for the children's school fees, general upkeep and the applicant's undergraduate school fees.
 4. She accused the Respondent of harassing her and her children at their matrimonial home using hired goons who attacked them and broke the gate. She said that the Respondent has been collecting rent from the rental units and not accounting for it.
 5. She deponed that she reported the matter at the Ruai Police Station vide OB No. 78/28/02/2023 and Acacia Police Station, Ruai vide OB No. 11/19/03/2023.
 6. She further stated that the Respondent was not the deceased's wife and has no right over the deceased's estate and that only her children can inherit from it.
 7. She went on to aver that the deceased was married to MNM and they divorced vide certificate of making decree nisi absolute issued on 6th March, 2019. He was never married to GKM.
 8. The application is opposed vide replying affidavit and supplementary affidavit dated 30th March, 2023 and 16th October, 2023, respectively both sworn by GKM. She avers that the objector has filed pleadings that have no legal limbs namely "summons for interlocutory injunction" which document does not exist within the law. She said that the objector is not the deceased's surviving wife. She is the valid and legally recognized wife of the deceased having married under civil marriage on 13th August, 1995
 9. The objector, she said, was not legally married to the deceased. There is no evidence of her divorce with the deceased. Upon the deceased's death, she obtained a valid burial permit and death certificate dated 17th December, 2021 of serial number 0247617 and 24th December, 2012 of serial number 130391 respectively. The death certificate produced by the objector according to her is not genuine because its content is different from the one dated 17th December, 2021.
 10. That the objector has no burial permit and she is not recognized in the chief's letter as the deceased's wife. Besides, the objector did not attend the deceased's burial because she is not recognized in the family as his wife and that the objector had only two children with the deceased. She got her first two



children with another man, who was her previous husband, before she met with the deceased. Her first two children should not therefore benefit from the deceased's estate.

11. She prayed that this court orders the examination of the birth certificates and authenticated certified copies from the Registrar of Persons be brought before this court which will substantiate that the applicant's first two children were not fathered by the deceased.
12. She went on and deponed that Nairobi/Block 14/xxx was bought by the deceased in the year 2007 and they built a matrimonial home and raised their children in holy matrimony which the objector later came to trespass and intrude without any colour of right.
13. The property with rentals is land parcel number Nairobi/ BLock 136/xxx situated at Umoja and she has the original certificate of lease which reads that she is the absolute proprietor of the subject land. She annexed certificate of lease dated 19th September, 2002 to that effect.
14. That the certificate of lease annexed by the objector is a forgery and it is a subject of criminal investigations for forgery and fraud as confirmed by letter dated 21st June, 2022 from the Directorate of Criminal Investigations confirming that the signature purported to be GKM's on the land transfer form dated 2020 was forged and that the probable suspect in the commission of this offence could have been ZMM who is deceased. The Chief Lands Registrar then requested to rectify the records of the green card and cancel the fraudulently issued title deed in the names of the late ZMM of ID No. xxxxxxx and revert ownership to GKM under section 79 (1) and (2) of the [Land Registration Act, 2012](#). A Gazette Notice No. 2267 dated 24th February, 2023 was issued to this effect.
15. That at the time of the deceased's death, they were not living together. She wanted to access her matrimonial home after his death and found the objector living there. She reported the matter vide OB No. 27/18/2/2022 as she had been denied access to the home and was threatened with goons on motorcycles an incident which she also reported vide OB No. 16/28/2/2023 after which she visited the home with the police from Ruai Police Station.
16. The police, she went on called the objector's counsel and they agreed that the tenants that had rented the house to vacate within 7 days. She made a follow up vide OB No. 15/19/03/ 2023 and went to the property with her brother in law. The objector attacked him and poured an acid like liquid that burnt him severely. Her life therefore was in danger.
17. Consequently, she prayed that the application dated 20th March, 2023 should be dismissed.
18. The objector has filed submissions dated 18th September, 2023 placing reliance on the following among others:
 - a. Order 40(1) (a) and (b) of the *Civil Procedure Rules* which provides:
 - (a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposal of the suit or until further orders.



- b. *Giella v Cassman Brown Co. Ltd* 1973 E.A. 358 where it is provided that, “First, an application must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”
 - c. *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 which stated, “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. That is clearly a standard, which is higher than an arguable case.”
19. The Respondent has filed submissions as well dated 16th October, 2023 placing reliance on the following:
- a. *Giella v Cassman Brown* where the court set out the conditions that a party must satisfy before applying for an injunction as follows:
 - a) That it is a *prima facie* case with a high probability of success
 - b) That there is irreparable injury that cannot be compensated with damages, and
 - c) That there is a balance of convenience in favor of the applicant.
 - b. *Nguruman Limited v Jan Bonde Nielsen & 2 Others* CA No.77 of 2012 (eKLR 2014), the learned judge stated that:

“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) ally any doubts as to b), by showing that the balance of convenience is in his favor.

Analysis and Determination:

20. Having gone through the application before this court, the responses and submissions filed by the parties, the issues for determination as crafted by the parties are as follows:
- a. Whether the applicant/ objector has satisfied the conditions necessary for the grant of interlocutory orders sought?
 - b. Whether the Respondent/ petitioner is liable to the applicant/ objector – and other beneficiaries of the deceased’s estate to the extent that rental income of Nairobi/Block 83/14/xxx passes through her hands?
 - c. Whether the objector has the capacity to sue on behalf of the estate of the deceased and intermeddle with the deceased property thereof;
 - d. Whether the objector has met the legal threshold for injunctive orders over the property belonging to the Petitioner being land parcel No. Nairobi/Block 83/14/136; and



- e. Whether the documents adduced by parties to this suit ought to be subjected to forensic document examiners for authentication and verification of authenticity by an order of this honorable court.
21. In *Raphael Mulinge Muthusi & 2 others v Mary Ndila Nyolo* the court stated as follows:
- “ 14. The principles for grant of temporary injunction pending appeal are settled. In the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, the court gave the following principles as governing grant of temporary injunction pending appeal:-
- a. “An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict great hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.”
22. What is evident at this juncture is that between the applicant and the objector there are two sets of marriage certificates dated 18th April, 2019 and 13th August, 1995 respectively. Both certificates have been certified as true copies of their originals by the Registrar of Marriages. There is nothing on record showing that the deceased had divorced the Respondent prior to marrying the objector.
23. Based on the above two certificates their legalities or otherwise shall only be tested during the substantive hearing of this matter. There was no evidence led by either of the parties to suggest that the deceased divorced either of the parties.
24. Further the objector avers that all her 4 children belong to the deceased and has produced birth certificates and medical cards to support her position. The Respondent avers that only the objector’s last two children belong to the deceased. There is no evidence on record to support her position save for the averments that she the objector was married to another man and they got the first two children before she met with the deceased
25. Again this allegation is very dicey. There must be sufficient and even at most scientific evidence to support or rebut these point of view taken by the applicant. Suffice to state that she acknowledges that the last two children belonged to the deceased.
26. What then should be the position of the prayers sought in light of the above weighty issues.? I think the best way is to subject the entire cause to oral evidence. It is essential to prove whether or not the objector is the deceased wife and whether the four children are indeed deceased’s or for that matter dependents.
27. Regarding the property, it appears that the deceased as at the time of his death stayed with the objector/ applicant in the matrimonial house and the petitioner stayed elsewhere. This is buttressed by the Respondent’s effort to access the said home after the deceased had died.
28. As regards the property namely Nairobi block 136/xxx there is *prima facie* evidence that the same belonged to the Respondent. This is buttressed by the letter from the Lands Ministry as well as the



report from the Criminal Investigation Department. I find that pending the determination of this cause the Respondent ought to enjoy the use of the same.

29. Further it shall not be necessary not to have an administrator in this estate. Both the applicant and the Respondent shall be the joined administrators. They should be able to steer the estate to its conclusion on their behalf and those of the children and any other dependents.
30. The issues raised above bedeviling the two shall be determined during the substantive hearing.
31. The application is thus allowed and directed as hereunder;
 - (a) Both the applicant Peris Ondara and the Respondent KM are hereby appointed as joint administrators of the deceased estate herein.
 - (b) Pending the determination of this cause the applicant Peris Ondara shall continue staying and utilizing the matrimonial home situate at Nairobi/Block 83/14/xxx.
 - (c) Pending the hearing and determination of this cause the Respondent GKM shall use and utilize as well as collect rents from land parcel number Nairobi/Block 136/xxx and further directed to keep proper records and accounts.
 - (d) Each of the parties shall not waste, sale, charge or in any other way deal with the two above respective properties pending the determination of this cause.
 - (e) the parties should proceed to gazette forthwith this matter.
 - (f) costs shall await the outcome of the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 27TH DAY OF JUNE 2024.

H K CHEMITEI

JUDGE

