



REPUBLIC OF KENYA



Edema & 2 others v Edema & 5 others (Miscellaneous Succession Cause E001 of 2022) [2022] KEHC 9960 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEHC 9960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
MISCELLANEOUS SUCCESSION CAUSE E001 OF 2022**

**JN NJAGI, J
JULY 6, 2022**

BETWEEN

**ALIMA HUSSEIN EDEMA 1ST APPLICANT
SHARON HUSSEIN EDEMA 2ND APPLICANT
EDEMA HUSSEIN EDEMA 3RD APPLICANT**

AND

**HABIBA HUSSEIN EDEMA 1ST RESPONDENT
BADILU HUSSEIN EDEMA 2ND RESPONDENT
AMINA HUSSEIN EDEMA 3RD RESPONDENT
BARISO HUSSEIN EDEMA 4TH RESPONDENT
ADAN HUSSEIN EDEMA 5TH RESPONDENT
JUMA HUSSEIN EDEMA 6TH RESPONDENT**

RULING

1. The Applicants herein have filed an application styled as “Summons to stop Intermeddling” dated 28th March 2022 seeking for orders that:
 1. Spent.
 2. That pending the hearing of this application inter-parties preservative order do issue restraining the Respondents by themselves, their agents or servants, employees or any other assigns or representatives from intermeddling in any way with the estate of the deceased.
 3. That pending hearing and determination of this application and confirmation of grant a preservative order do issue restraining the Respondents by themselves, their agents or servants,



employees or any other assigns or representatives from intermeddling in any way with the estate of the deceased.

4. That pending hearing and determination of this application and confirmation of the grant, the rental income generated from commercial plots in Township Sub-location in Marsabit forming part of the estate of the late Hussein Edema Bariso alias Bariso Hussein Edema be deposited in Court.
 5. That the Respondents herein be ordered to give an account of all the rent accruing from commercial plots in Township Sub-location in Marsabit forming part of the estate of Hussein Edema Bariso alias Bariso Hussein Edema from the month of May 2021 to date, all the motor vehicles left by the deceased and any other property under their control.
 6. That pending hearing and determination of this application and confirmation of grant, this Honorable Court be pleased to order production of the deceased's MPESA statements for mobile telephone Number 0712015439 for purposes of ascertaining all transactions undertaken from 5th May 2021.
 7. That the Officer Commanding Station (OCS) Marsabit Police Station be directed to assist the Applicants in the enforcement of the orders hereinabove.
 8. That the costs of and incidental to this application be costs borne by the Defendants/ Respondents.
2. The application is supported by the affidavit of the 1st Applicant on the grounds that the respondents have unlawfully and without any color of right intermeddled with the deceased's estate and there is reasonable apprehension that unless restrained by orders of this court, the Respondents will continue with acts of wanton wastage of the estate thus disinheriting the other beneficiaries of the estate. That since the month of May 2021 the Respondents have been collecting rent from the rental properties belonging to the deceased and have not accounted for the same. Further that the Respondents have already and illegally distributed the deceased's motor vehicles among themselves and they risk disposing them of. That the Respondents have unlawfully taken over Plot No. 274 Nyayo Road in which the 1st Applicant used to live since her marriage to the deceased. That they have converted the said house into a garage and a store, put up a fence and a padlock hence denied the 1st Applicant and the other Applicants their right to access the same.
 3. The application was accompanied by a petition seeking for grant of letters of administration ad litem limited for the purpose of filing suit to stop the respondents from intermeddling with the estate of the deceased herein.
 4. The application was opposed by the Respondents vide their grounds of opposition dated 4th May 2022 in which they argued that the application is defective as the applicants have no capacity to file the application for lack of grant of letters of administration. That no succession cause has been filed in the matter. That the issues sought in the application can only be granted in a substantive succession cause and not vide a miscellaneous application. That a grant ad litem cannot be applied retrospectively.
 5. The background to the application is that the 1st Applicant is the first wife of the deceased herein while the 1st Respondent is the second wife.

The 2nd and 3rd Applicants and the 2nd - 6th Respondents are children of the deceased.



6. The applicants contend that after the death of the deceased, the Respondents have intermeddled with the estate of the deceased by appropriating and disposing of some of the estate property and have refused to give account of the same. They are thereby seeking for the intervention of this court.
7. The Respondents on their part deny intermeddling with the estate. They contend that the deceased had settled his family members among his various properties before his demise. That they are living and staying where the deceased left them. They deny taking possession of the deceased's motor vehicles, operating his MPESA account or withdrawing money from his bank account. They contend that it is not reasonable to make an order for the rent be deposited without making an order for provision of dependents. That the proper order to make in the matter is for the status quo to be maintained till a substantive succession cause is filed in court.

Submissions.

8. The application proceeded by way of written submissions. The advocates for the 1ST – 5TH Respondents, Leonard K. Ondari & Company Advocates, submitted that the applicants did not possess a grant of letters of administration when they filed the application. That in the premises they have no capacity to represent the estate of the deceased in any suit. That even if the applicants were issued with a grant the same cannot operate retrospectively. In this respect, the advocates referred to section 80 (2) of the [Law of Succession Act](#) that provides that:

“A grant of letters of administration with or without the Will annexed shall take effect only as from the date of such grant.”

9. Counsel submitted that any grant issued after the filing of this application does not cure the anomaly. That the applicants do not have *locus standi* in the case. The advocates cited the case of [Alfred Njau v City Council of Nairobi](#) (1983) KLR 625 where the Court of Appeal held that:

“.....locus standi literally means a place of standing and refers to the right to appear or heard in court or proceedings and to say that a person has no locus standi means that he/she has no right to appear or be heard in such and such proceedings”

10. Counsel cited the cases of [Julian Adoyo Ongonga v Francis Kiberenge Abano](#), Migori Civil Appeal No. 119 of 2015, where the court held the following on the issue of a party filing suit without having obtained a limited grant:

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case simply put, a party without locus in a civil suit lacks the right to institute and or maintain suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in suit without locus can be equated to that of a court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person, since in most cases the estate involves several other beneficiaries or interested parties.”

11. Counsel also relied on the cases of [Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 Others](#) (2021)eKLR and [Isaya Masira Momanyi v Daniel Omwoyo](#) (2017)eKLR where courts struck out suits that had been filed by parties prior to obtaining grants of letters of administration. Counsel urged the court to strike out the application with costs to the respondents.



12. The advocates for the Applicants Goko, Gichuki & Co. Advocates, on the other hand, submitted that the applicants have been granted a grant of letters of administration ad litem pursuant to the directions of the court issued on 28th April 2022. That the same has been annexed to the supplementary affidavit dated 15th June 2022 - shows to have been issued on 6th June 2022.

13. It was submitted that any beneficiary is entitled to protect their interest in the estate of a deceased person by moving to court and seeking orders to preserve the estate. In this respect the applicants relied on the case of *Re Estate of Benson Maingi Mulwa (deceased)* (2021)eKLR where Odunga J held that:

In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is properly entitled to protect his or her interest in the estate.

14. It was further submitted that the Applicants have shown in their application that the Respondents have intermeddled with the estate of the deceased herein contrary to the provisions of section 45 of the *Law of Succession Act* that provides that:

“(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 –

(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 both fine and imprisonment ...”

15. Counsel cited the explanation by Musyoka J. in *Veronica Njoki Wakagoto (Deceased)* (2013)eKLR that:

“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

16. Also cited was the case of *In Re Estate of M'Ngarithi M'Miriti* (2017)eKLR where the term “intermeddling” was elucidated to mean 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.”

17. It was submitted that the High Court has jurisdiction under the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate & Administration Rules to issue such orders and decrees as may be expedient and necessary for the ends of justice. That the court has power to issue orders for preservation of the estate suo moto. Counsel cited the case of John Marete Kirema & Another v Gladys Karimi Muthamia & 3 Others (2013)eKLR Makau J held that:

“My understanding of section 45 of the Law of Succession Act is that when the court finds the deceased property is in danger of being intermeddled with it can on its own motion issue appropriate orders to preserve the deceased estate pending regularization of any process that needs to be regularized...”

18. I have considered the grounds in support of the application and the grounds in opposition thereto. The Applicants filed a petition with this court on the 19th April 2022 seeking for grant of letters of administration *ad litem* in respect to the estate of the deceased herein limited to purposes of filing suit against the respondents. The application was accompanied by an application seeking for interlocutory orders against the respondents to restrain them from intermeddling with the estate of the deceased herein together with some other related orders. The respondents thereupon filed grounds in opposition to the issuance of the orders sought on the grounds that the application was fatally defective in that the applicants did not possess grant of letters of administration when they filed the application.

19. It is not in dispute that no succession cause has been filed in the case. It is also not in dispute that at the time when the applicants filed the application seeking for interlocutory orders against the respondents, they did not possess a grant of letters of administration in respect to the estate of the deceased herein. The Applicants have since the filing of the application obtained the subject grant of letters of administration *ad litem*.

20. The issues for determination in the application are –

- (1) Whether the application is incompetent for having been filed before the applicants obtained a grant of letters of administration in respect to the estate of the deceased and without there being a succession cause in existence.
- (2) Whether any orders should issue.

Whether Application is Incompetent

21. The applicants filed the instant application before they were issued with a grant of letters of administration and without there being a succession cause filed in the case. 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 & 2 Others and Isaya Masira Momanyi v Daniel Omwoyo (*supra*), 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.

22. 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.”

23. 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.”

24. 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*, 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*.

25. In the absence of a grant the applicants herein have no locus standi to deal with the property of the deceased in any manner.

26. The applicants were subsequently issued with a grant of letters of administration ad litem on the 6th June 2022, which was way later after the application was filed. However, the same cannot be used to support an application filed before the grant was issued. Section 80(2) of the *Law of Succession Act* is categorical that a grant only takes effect as from the date of issue and not earlier. A grant therefore does not operate retrospectively. The subsequent grant thereby cannot cure the defect.



27. Further to this, no succession cause has been filed in respect of the estate of the deceased. The net effect is that the application is not anchored on an existing suit. The interlocutory orders sought cannot be granted in a vacuum in the absence of an existing suit. In the premises I find that the application is fatally defective and the orders sought cannot issue.

Whether any orders should issue

28. The applicants allege that the respondents have intermeddled with the estate of the deceased. The respondents have denied the allegation and contend that they are living as settled by the deceased before he died.

29. 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 respondents have not obtained a grant of representation over the estate of the deceased. The deceased herein died in May 2021. One year has now lapsed and no succession cause has been filed in the matter. Going by the affidavit of the 1st Applicant, there is likelihood of the estate being wasted before appropriate measures are taken. It is the duty of the Probate Court to protect the estate of a deceased person where there is likelihood of it being wasted before a succession cause is filed. 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. 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 filing of a succession cause in the matter. The order that commends itself to me is for the current *status quo* to be maintained pending the filing of a succession cause in the matter.

30. The upshot is that the application dated 28th March 2022 is found to be without merit on the grounds that the applicants had no *locus standi* to file the application for lack of a grant of letters of administration and there being no existing suit. The application is hereby stuck out. However, the court makes an order for the current status quo, as of the date hereof, to be maintained in respect to the estate of the deceased herein pending the filing of a succession cause in the matter. The orders will last for one month from the date hereof and if no succession cause is filed by any of the parties within that period, the orders will stand vacated.

Orders accordingly. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 6TH DAY OF JULY 2022.

J. N. NJAGI

JUDGE

In the presence of:

N/A for Applicants

Mr. Ouma HB for Mr. Ondari for 1st - 5th Respondents

Applicants - 1st Present

Respondents - 1st and 5th Present

Court Assistant – Peter

30 days R/A.

