



REPUBLIC OF KENYA



In re Estate of Godfrey Wanyeki Kimeriah (Deceased) (Succession Cause 347 of 2012) [2023] KEHC 23949 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 347 OF 2012
G MUTAI, J
OCTOBER 13, 2023**

IN THE MATTER OF THE ESTATE OF THE GODFREY WANYEKI KIMERIAH (DECEASED)

BETWEEN

NICHOLAS WANYEKI KIMERIA APPLICANT

AND

BERNARD WAMBUGU WABURI 1ST RESPONDENT

STANBIC BANK KENYA LTD 2ND RESPONDENT

RULING

1. The applicant herein moved this court vide summons dated 25th July 2022 seeking the following orders:
 - a) That Bernard Wambugu Waburi and Stanbic Bank Kenya Limited, jointly and severally, be and are hereby found guilty of intermeddling in the estate of Godfrey Wanyeki Kimeriah (deceased);
 - b) That Bernard Wambugu Waburi and Stanbic Bank Kenya Limited, jointly and severally, be and are hereby ordered forthwith to account for and reimburse to Nicholas Wanyeki Kimeria, the sole beneficiary of the estate of the of Godfrey Wanyeki Kimeriah (deceased), the amount of Kes.1,625,923/- together with interest at court rates accrued thereon from 16th June 2015 up to the date of payment in full; and
 - c) That the costs of the application be borne by the Respondents jointly and severally.
2. The summons is premised on the grounds stated therein and also on the supporting affidavit of the applicant sworn on 25th July 2022.



3. The applicant stated that the deceased herein died testate on 24th April 2012, having named Bernard Wambugu Waburi (1st respondent) the executor of his last will. The will named the applicant and his grandmother, Phoebe Nyambura Wamwea, as the only legatees of the estate of the deceased. According to the will, all monies bequeathed to his grandmother were to devolve to him upon her death automatically. She died on 4th August 2012 leaving him as the sole beneficiary of the deceased's estate.
4. He averred that a grant of probate was issued to the executor on 4th October 2013. The same was revoked suo moto by the Court on 22nd September 2017 for want of prosecution. He later learnt that the executor and the 2nd respondent were intermeddling with the free property of the deceased in contravention of Section 45(1) of the *Law of Succession Act* by transferring Kes.15,092,835/- on 16th June 2015 from account no.[particulars withheld] to an undisclosed account held within the same bank. He then was forced to take the matter to court, and the application was compromised on 23rd November 2020 when it became apparent that the money was available for distribution.
5. He further stated that the grant was confirmed on 1st December 2020, and a consent order releasing the money to him was issued. The 2nd respondent transferred Kes.13,466,912/- to him, less Kes.1,625,923/- which is the outstanding amount. He has tried to settle the same out of court, but his efforts have proved futile, as the executor has refused to refund the outstanding amount.
6. He deponed that he is entitled to recover any lost assets from any party intermeddling with the estate. The 2nd respondent had a contractual and fiduciary duty to the estate to not release the funds to any person otherwise than through a court order or authority of a confirmed grant. It was thus complicit in the fraudulent intermeddling of the free property of the deceased. The executor breached his fiduciary duty to him by transferring the estate's funds to his personal account and utilising the same without authority.
7. He stated that the orders sought are necessary to vest the lost property of the deceased to him as the only beneficiary of the estate and urged the court to allow the application.
8. In response, the 1st respondent filed grounds of opposition dated 24th May 2023. The said grounds were to the effect that this honourable court lacks jurisdiction to hear and determine this application; that the application is an abuse of court process and is res judicata, the issues in contestation having been heard and determined; that the 1st respondent had already given a statement of account and delivered to the applicant, through his advocate, all relevant documents pertaining to the deceased estate; that the 1st respondent is mandated by the law to apply funds towards management and preservation of the deceased estate; that, in fact, it is the applicant who intermeddled with the property of the deceased by disposing of 2 of the deceased motor vehicles KBP 8134 and KAT 635 G, among other movables; that the application is malicious and without basis and was made in bad faith.
9. He therefore urged the court to dismiss the summons with costs.
10. Conversely the 2nd respondent filed a notice of preliminary objection and a replying affidavit, dated 10th May 2023, and sworn on 11th July 2023, respectively.
11. The 2nd respondent challenged the jurisdiction of this honourable court. It contended that this Court does not have jurisdiction to hear and determine the purported breach of contract between the 2nd respondent and the applicant because the same is founded on a contract between the deceased and the 2nd respondent bank and is thus outside the powers of the succession court. It further argued that the succession court is functus officio and cannot try questions outside the succession matter because the estate was fully distributed vide the certificate of confirmation grant issued on 1st December 2020 and there is therefore no property remaining to be dealt with by the succession court. The summons is



premature because the applicant had not applied for an order to compel the 1st respondent to produce a full and accurate account of all dealings of the deceased's estate as required by section 83(e), as read together with Section 83(h) of the Law of Succession Act, and that in the absence of proper accounts, this honourable court cannot determine liability arising from the alleged acts or omissions by the respondents. The applicant had not enforced previous orders for accounts. Reliance on Section 45 2(a) and (b) of the Law of Succession Act as a basis for the application was misconceived because restitution of the purported Kes.1,625,923 is not a remedy for intermeddling.

12. The 2nd respondent urged the court to strike out the summons with costs.
13. Through its Legal, Litigation and Corporate Functions Officer, June Opiyo who swore the replying affidavit, it reiterated the position in its notice of preliminary objection and stated that it did not breach its fiduciary duty to the deceased's estate as it did not release any of the funds held in the deceased's account to any unauthorised person or otherwise misappropriate the funds of the deceased. The full amount of Kes 15,092,835/- was transferred to the 1st respondent's account no. [particulars withheld] on 16th October 2015.
14. She further stated that the 2nd respondent did not interfere with the estate of the deceased as it had lawful justification under Section 45 of the Law of Succession Act to release the funds to the 1st respondent, who at the time had a valid grant and was in the process of consolidating the estate of the deceased in accordance with section 83 of the Law of Succession Act.
15. The court directed that the matter be canvassed through written submissions. The applicant, through his advocates Gachiri Kariuki & Co. Advocates filed his written submissions dated 26th June 2023 and submitted on two issues, namely, whether the preliminary objection is merited and whether the application should be allowed.
16. On the 1st issue, counsel relied on the case of *Mukisa Biscuits Manufacturing Ltd versus West End Distributors Ltd* [1969] EA 696, where the court held that a preliminary objection consists of a point of law which has been pleaded 2, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.
17. On the objection to the jurisdiction on the ground that the application raises contractual issues between the deceased and the second respondent, which are outside powers of the Probate and Administration Court, counsel submitted that from the date of the demise of the deceased, the funds held in his bank account formed part of the deceased's estate. The said funds could only be accessed by a person with a confirmed grant or a valid court order authorising the release of funds to such a person, which is the purview of the Probate and Administration Court.
18. Counsel submitted that once death is confirmed, the assets of the deceased held by a third party form part of the assets of the estate and the third party holds it in trust for the beneficiaries of the estate. Thus, the third party cannot arbitrarily decide to distribute such assets. It was thus urged that this court has jurisdiction to hear and determine the application herein.
19. On the second point of objection. Counsel submitted that if a beneficiary finds that the estate is not intact, upon distribution, the only recourse he/she has is with the Probate and Administration Court that dealt with the matter.
20. On the summons being premature, counsel submitted that it is not a pure point of law as the alleged facts require to be ascertained.
21. On restitution of funds, counsel submitted that it is not a remedy for intermeddling under Section 45 of the Law of Succession Act.



22. Counsel submitted that the preliminary objection does not meet the criteria under the Mukisa Biscuits case (supra) and urged the court to dismiss the same with costs.
23. On the second issue for determination, counsel submitted that the respondents can be found guilty of intermeddling and the 2nd respondent ordered to refund the money transferred to the 1st respondent.
24. In conclusion, counsel urged the court to allow the summons.
25. The 1st respondent, through his advocates Ndegwa & Sitonik Advocates, filed his written submissions dated 7th July 2023.
26. Counsel submitted on the four issues raised in the notice of preliminary objection, namely whether this honourable court has jurisdiction to hear and determine the purported breach of contract between the 2nd respondent and the applicant; whether the succession court is functus officio and cannot try other questions outside the succession matter; whether the summons are premature; and whether reference to Section 45 2(a) and (b) of the Law of Succession Act as a basis for the application is misconceived.
27. On the first issue, counsel submitted that it is the deceased who held an account with the 2nd respondent bank and not the applicant. The applicant is not the legal representative of the deceased thus, there is no privity of contract between him and the 2nd respondent bank. The applicant has no locus standi to sue the bank for alleged breach of fiduciary duty and/or contract. Counsel relied on the case of Mark Otanga Otiende versus Dennis Odour Aduol [2021]eKLR in support of his contention that no privity of contract existed.
28. On the 2nd issue, counsel submitted that this court is functus officio and cannot try issues outside succession as the estate was fully distributed vide certificate of confirmation of grant issued 1st December 2020, and no property remained. To support this position, counsel relied on the case of in re estate of the late Kipngeny Arap Chepkwony(Deceased) [2021] eKLR.
29. On the third and fourth issues, counsel submitted that the remedies in Section 45(2) for intermeddling do not include restitution.
30. Counsel submitted that the summons herein is premature as the applicant has not sought production of a full and accurate account of all dealings of the deceased's estate as required under 83(e) as read with Section 83(h) of the Law of Succession Act. In the absence of proper accounts, this honourable court cannot determine liability arising from the alleged acts or omissions by the respondents.
31. In respect of the summons, counsel submitted on two issues, namely, whether the 2nd respondent breached its fiduciary duty to the deceased; and whether the 2nd respondent intermeddled with the estate of the deceased.
32. On the first issue, counsel submitted that the 2nd respondent did not breach its fiduciary duty to the deceased as it did not release funds to any unauthorised person or misappropriate the deceased's funds.
33. On the 2nd issue, counsel submitted that the 2nd respondent did not intermeddle with the deceased's estate as it acted within the purview of section 45 of the Law of Succession Act in releasing the funds to the 1st respondent, who had a valid grant.
34. In conclusion, counsel submitted that this court has no jurisdiction to hear and determine this matter and must down its tools, and if it finds it does have jurisdiction, it should find that the dispute on the outstanding amount is between the applicant and the 1st respondent, and only the 1st respondent is liable to pay the same.



35. I have considered the summons, the responses thereto, the preliminary objection and rival submissions by both counsels and the issues that emerge for determination are: -

- a) Whether the notice of preliminary objection should be upheld; and
- b) Whether the respondents have intermeddled with the estate of the deceased.

36. The 2nd respondent raised a preliminary objection on four points which I will discuss.

37. The first point of the objection was on the jurisdiction of this court to deal with this matter and its summons. The 2nd respondent's objection is based on the ground that this court has no jurisdiction to hear and determine the purported breach of contract between itself and the applicant as the same is founded on a contract between the deceased and the 2nd respondent bank which is outside the jurisdiction of the Probate and Administration Court. In the locus classicus case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA stated: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

38. Further the Supreme Court in the case of *Samuel Kamau Macharia & another versus Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated: -

“A Court's jurisdiction flows from either *the Constitution* or legislation, or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

39. The applicant submitted that the 2nd respondent transferred funds of the estate to the personal account of the executor without a valid court order or confirmed grant authorizing the transfer. The funds were not intact during distribution, and thus this court has jurisdiction.

40. The Probate and Administration Court derives its jurisdiction from Section 47 of the *Law of Succession Act* and Probate and Administration Rules Rule 73, which provides: -

Section 47 of the *Law of Succession Act* states that: -

“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:

Provided that the High Court may, for the purpose of this section, be represented by Resident Magistrates appointed by the Chief Justice.”



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.”

41. The applicant herein is the son of the deceased and the sole beneficiary of the estate. The amount in question forms part of the assets of the deceased's estate, held in the deceased's bank account no.[particulars withheld] with Stanbic Bank (2nd respondent), amounting to Kes.15,092,835/-. Accordingly, it is my view that this court has jurisdiction to hear and determine this matter.

42. The second point of objection is that this court is functus officio and cannot try other questions outside the succession matter as the estate was fully distributed vide the certificate of confirmation of grant issued on 1st December 2020.

43. The Supreme Court, in the case of *Raila Odinga & 2 others versus Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR stated that: -

“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

44. Upon the confirmation of the grant on 1st December 2020, the parties agreed by consent to have the funds relating to the estate released and paid to the beneficiary (the applicant herein). The 2nd respondent then had already transferred the estate amount of Kes.15,092,835/- to the executor (1st respondent). The 2nd respondent then proceeded to recover a sum of Kes.13,466,912/- from the executor's (1st respondent) account and paid the same to the beneficiary. The balance, that is to say, Kes.1,625,923/-, which wasn't availed to the applicant, has led to the current summons. The respondents have not disputed the same.

45. Accordingly, the 2nd respondent cannot be heard to say that the distribution of the estate was finalised or the court is functus officio while still withholding part of the estate's assets. Thus, it's my finding that this court is not functus officio.

46. The third point of objection is that the application is premature as the applicant has not applied for an order to compel the 1st respondent to produce a full and accurate account of all dealings of the deceased's estate as required under section 83(e) as read together with section 83(h) of the *Law of Succession Act*.

47. The court in the case of *Rebecca Chumo versus Christina Cheptoo Chumo* [2021] eKLR cited the case of Mukisa Biscuits Manufacturing Ltd versus West End Distributors Ltd (1969) EA 696 wherein their



Lordships discussed the correct circumstances a preliminary objection may be raised when they stated that: -

“a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issue, and this improper practice should stop”.

48. Accordingly, it is my finding that this point is not a pure point of law and cannot therefore be raised as a preliminary objection.
49. The fourth point is that the reference to Section 45 2(a) and (b) of the [Law of Succession Act](#) as a basis for the application is misconceived because restitution of the purported Kes.1,625,923/- is not a remedy for intermeddling.
50. It is my view that this point does not meet the threshold of a preliminary objection either, as it is not a pure point of law. In any case, section 45(b) of the said Act provides that in addition to the criminal sanction, the intermeddler shall be liable to account to the rightful executor or administrator. In my view, being answerable or accounting to the rightful executor or administrator includes restitution of the sums that have been wrongly taken away.
51. On whether the respondents have intermeddled with the estate of the deceased, the applicant, in paragraph 18 of the supporting affidavit, stated that the 2nd respondent was complicit in the fraudulent intermeddling of the free property of the deceased when it allowed funds from the deceased's account no.0100000573846 held by it to be transferred without the grant having been confirmed and proceeding therefrom to close the said account; or, in the alternative, it was grossly negligent in doing so.
52. Intermeddling is provided for in the [Law of Succession Act](#) in Section 45. The said Act provides that: -
 - “No intermeddling with property of deceased person
 - (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 to both 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 made in the due course of administration.”

53. The court in the case of *In the Matter of the estate of Veronica Njoki Wakagoto* (Deceased) [2013] eKLR stated: -

“The law on intermeddling is section 45 of the *Law of Succession Act*, which states -

- (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 ...”

The effect of this 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.”

54. Further the court in the case of *Benson Mutuma Muriungi versus C.E.O. Kenya Police Sacco & another* [2016] eKLR stated: -

“There is no specific definition of the term intermeddling provided in the *Law of Succession Act*. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as; “for any purpose” and “or otherwise intermeddle with” in the Act portends that the category of the offensive acts which would amount to intermeddling is not hermetically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as; taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act* or any other written law. I do not pretend to close the list either or make it exhaustive. The list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law.”

55. The 2nd respondent, in its application dated 11th January 2022 seeking to be discharged from the proceedings, raised similar arguments as in this case and listed steps taken in transferring the funds from



the deceased's account to that of the executor. This honourable court, in its ruling of 16th December 2022, per Onyiego, J, in dealing with the issue held: -

“There is no doubt that the applicant herein (Stanbic bank) had no authority whatsoever to withdraw and transfer funds from the deceased's account to the executor's account. The executor was not a beneficiary under the will hence had no duty transferring the money to his account. If the intention was to safe guard the estate or it's funds, the executor should have had the full amount intact in his account and not to spend it. No amount of admission of an illegality will cure an illegality.

The executor and the bank through its legal department should have known better that without a certificate of confirmation of grant, the executor had no power nor did they have authority to transfer the said amount. It is trite that once an act is void, then, it is in law a nullity. It is not only bad, but incurably bad. These were the wise words of Lord Denning M. R in the case of *Macfoy versus United Africa Co. Ltd* (1961) 3 ALL ER 1169.”

56. In dismissing the 2nd respondent's application the learned Judge held that: -

“...the only remedy available is for the bank (applicant) to restore the balance of the unrecovered funds to the estate. To that extent, the applicant cannot be discharged from these proceedings as completion of the administration of the estate will depend on their restoration of the illegally withdrawn money to the estate.”

57. The respondents have not complied with the orders of this court of 16th December 2022, neither have they given any sufficient reason as to why they have not done so. Thus the administration of the estate is yet to be completed. Accordingly, it is my finding that they intermeddled with the deceased's estate.

58. On the second prayer in the summons, it is my view that the same is res judicata, as the court already dealt with the remedy applicable to the applicant in its ruling of 16th December 2022. I am guided by the case of *Invesco Assurance Company Limited & 2 others versus Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* [2020] eKLR where the court stated: -

“The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- (i) The suit or issue raised was directly and substantially in issue in the former suit;
 - (ii) That the former suit was between the same party or parties under whom they or any of them claim;
 - (iii) That those parties were litigating under the same title;
 - (iv) That the issue in question was heard and finally determined in the former suit;
- and



- (v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

59. In conclusion, it is the finding of this court that the preliminary objection has no merit. I find and hold that Prayer 1 of the said summons has merit and allow the same. I thus find and hold that the 1st and 2nd Respondents, jointly and or severally, intermeddled with the estate of the deceased person. Having found that prayer 2 is res judicata, I dismiss the same. In the interests of justice, I order the 2nd respondent to comply with the orders that this honourable court issued on 16th December 2022, forthwith, without further delay.
60. The Family Court does not ordinarily award costs to litigants. However, given the conduct of the respondents, it is necessary that they be compelled to pay costs. The respondents shall therefore pay costs of this application to the applicant.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of:

Mr. Karina for the 2nd Respondents

No appearance for the applicant/beneficiary

