



REPUBLIC OF KENYA



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**In re Estate of Ezekiel Luyali Liyai (Deceased) (Succession Cause
187 of 2008) [2023] KEHC 2828 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 187 OF 2008**

G MUTAI, J

MARCH 27, 2023

**IN THE MATTER OF THE ESTATE OF EZEKIEL LUYALI LIYAI
(DECEASED)**

BETWEEN

**JAPHET MWAMBURI LUYALI AND ELIZABETH KHADIJA LUYALI
(APPLYING AS THE ADMINISTRATORS OF THE ESTATE OF JAMES
MICHAEL LUYALI) 1ST APPLICANT**

**BEATRICE LUVUNO KALINGA ALIAS BARIKA LUVUNO KALINGA
((APPLYING ON BEHALF OF OROBA MASITSA LUYALI ALIAS SWABRINA
MASITSA LUYALI, A BENEFICIARY) 2ND APPLICANT**

AND

IRENE JULIET OTINGA 1ST ADMINISTRATOR

ALEX SHIVACHI LUYALI 2ND ADMINISTRATOR

RULING

1. The late Ezekiel Luyali Liyai died intestate on February 18, 2008. His estate was the subject of litigation that culminated in the judgment delivered by the Court on January 29, 2016. The court determined the issue of beneficiaries, administrators and distribution of the estate as follows:-

Beneficiaries:-

- a. Horoba Liyai –Mother
- b. Irene Juliet Otinga –Widow
- c. Alex Shivachi –Son



- d. James Luyali- Son
- e. Lydia Luyali-Daughter
- f. Purity Luyali-Daughter
- g. Levis Luyali-Son
- h. Godswill Luyali-Son
- i. Oroba Masitsa Luyali-Daughter

Administrators:-

The court ordered that letters of administration to issue to Irene Juliet Otinga, Alex Shivachi and James Michael Luyali.

Distribution of the estate

- a. Horoba Liyai-9%
 - b. Irene Juliet Otinga-12%
 - c. Alex Shivachi-10%
 - d. Godswill Luyali-15%
 - e. Oroba Masitza-16%
 - f. James Michael Luyali -10%
 - g. Lydia Luyali-9%
 - h. Purity Luyali-9%
 - i. Lewis Luyali-10%
2. A certificate of confirmation of grant was issued on April 1, 2016 to the administrators above. Unfortunately, James Michael Luyali died before the completion of the administration of the estate. On September 19, 2019 his name was removed from the grant and a fresh grant issued to the two surviving administrators.
3. Being dissatisfied with the administration of the estate by the two administrators the applicants herein moved this court vide an application dated July 29, 2022. The same is supported by the affidavits of Japhet Mwamburi Luyali And Beatrice Luvuno Kalinga alias Barika Luvuno Kalinga all sworn on the same date. The application seeks the following orders:
- a. Spent
 - b. Spent
 - c. Spent
 - d. The estate of James Michael Luyali (Deceased) be solely managed and/or administered by its administrators and not any other unauthorized person including but not limited to the respondents herein.
 - e. The respondents herein do produce before this honourable court an accounts statements clearly indicating how the proceeds from the estate have been managed and how the



beneficiaries were awarded shares from the estate from the time they were conferred their managerial powers up to date.

- f. The respondents herein do produce before this court a full inventory of the estate detailing all the assets of the deceased and liabilities if any and how they have been managed from the time they were conferred with their managerial powers up to date.
 - g. An order that all the purported deductions being made by the respondents herein from the shares payable to the applicants herein under the estate are illegal, null and void ab initio.
 - h. An order barring the respondents herein from making any further deductions whatsoever from the shares of the applicants under the estate.
 - i. An order compelling the respondents herein to pay the applicants their share of the monies illegally withheld and/or deducted together with the interest accrued at commercial rates from the time such monies were payable.
 - j. This honourable court be pleased to grant any other further orders it may deem fit in furtherance of justice to this matter.
 - k. Costs of the application be provided for.
4. The 1st applicant's case is that they have not had a chance to administer their father's estate as the same was usurped by the respondents who do not have the best interest of the estate. He avers that respondents have committed injustices by not sharing the proceeds of the estate fully and on time. He further avers that only a section of beneficiaries have received their respective share of the estate. He argues that the share received from their grandmother's estate was not the correct share.
 5. The 1st applicant further stated that the 1st respondent demanded a compensation of Kes 6,000,000.00 from beneficiaries so as to consent to the sale of the property known as LR MN/1/7665 (which property was ultimately sold at Kes 140,000,000.00). Deductions were then made from the beneficiaries' shares of the proceeds of the said sale. He avers that the 2nd respondent informed them that a further deduction of Kes 25,000,000.00 would be made from their shares for the office block constructed by OLA Energy on the property. The 1st applicant argues that these further deductions were not provided for in the lease agreement.
 6. The 1st applicant stated that the administrators herein had failed in their duty to file accounts and inventory of assets and liabilities in court within six months as required by law.
 7. The 2nd applicant stated that upon the sale of property known as LR MN/1/7665 they were informed of deductions from their shares to form a cumulative sum of Kshs 25,000,000 to be paid towards the office block constructed by Ola Energy on the property. She stated that they were coerced to sign a consent to the deductions. She further stated that the deductions are unfounded and illegal as they are not provided for in the lease agreement. She urged the court to allow the application.
 8. In response the 1st respondent filed a replying affidavit sworn on August 30, 2022 and stated that all shares of each beneficiary are always forwarded to their respective advocates by her advocate for onward transmission to them. She averred that she has no role in the distribution of the same to the beneficiaries. She indicated that it was the 2nd applicant and the 2nd respondent who are best suited to give an explanation of the same. In respect to the estate of the late James Michael Luyali (deceased) she stated that the 10% share due to his estate is normally forwarded to the advocates who have been acting for the administrators of his estate all through and that the beneficiaries of the estate of James Michael Luyali (deceased) were paid immediately after obtaining the letters of administration.



9. The 1st respondent further stated that this court authorised the release of the money held at Family Bank Account No xxxx (for Horoba Liyai). The 1st Respondent averred she collected her share, and that of Godswil Tsavayi Luyali, whereas that for the other beneficiaries was collected by Alex Shivachi as requested by them. She was not aware how the amount payable therein was distributed.
10. On the sale of the property the respondent stated that all the parties consented to the proposed sale except her. The consent was signed in the offices of Madzayo Mrima & Jadi & Company Advocates.
11. She deposed that the allegations that the beneficiaries did not consent to the deductions of Kes 6,000,000.00 is not true. She averred that she was not privy to any agreement or consent to contribute Kes 25,000,000.00 towards the OLA Energy (K) Limited office block.
12. The 1st applicant filed a further affidavit sworn on November 15, 2022 wherein she stated that the respondents gave wrong figure of the money alleged to be the accumulated sum in respect of the account of the estate of Horoba Liyai. She stated that the respondents paid Paul Wambua Valuers twice for valuation of the same property with the first being that of 2016 at Kes 200,000.00, and the second of Kes 100,000.00 which, she argued, was meant to swindle the estate. She further stated that the 1st respondent deducted Kes 340,000.00 from the estate as payment for negotiating the lease. It was argued that the said amount was exaggerated.
13. The 1st applicant averred that the administrators don't give them a chance to express their concerns. The administrators have been reluctant to give them their share of the estate. Further the administrators are administering the estate to their exclusion. It was alleged that the administrators are incompetent to administer the estate and ought to be removed for equality and equity to be achieved.
14. The 1st applicant averred that the administrators failed to file statements of accounts in court within six months as provided under section 83 of the *Law of Succession Act*. The 1st applicant was unhappy that the administrators have been paying them through advocates who then deduct huge sums of money from their shares without justification whenever a payment is done.
15. The applicant through their advocates Khaminwa & Khaminwa Advocates filed their written submissions dated November 15, 2022. Counsel submitted that property known as LR MN/1/7665 was leased to Libya Oil Kenya limited (now known as Ola Energy Kenya Limited) in the year 2016. Payments due to the estate of Horoba Liyai, from the lease payments, it was argued, was Kes 3,080,124.00. That notwithstanding they were informed by the administrators that the cumulative sum was Kes 700,000.00 was payable. Counsel urged the court to compel the administrators to account for the sum of Kes 1,948,880.00 in respect of the estate of Horoba Liyai. An order for administrators to account for Kes 100,000.00 payable under the lease was also sought. The court was also asked to direct the respondents to release 10% of Kes 431,244.00 and Kes 39,900.00 meant for the beneficiaries of the estate of James Luyali from their grandmother's share. The court was further asked to direct the respondents to refund Kes 10,000.00 said to have been illegally deducted from Oroba Masitsa's share. Counsel further submitted that the estate of James Luyali is yet to get its share out of the sale of the property of the estate.
16. Counsel submitted that the actions and or conduct of the 1st administrator has never been in good faith as she has intermeddled with the estate. It was urged that her intention is to make profit out of the estate. Counsel further urged the court to issue an order criminalizing the deduction of Kes 6,000,000.00 from the estate and for the 1st administrator to be charged for intermeddling with the estate.
17. Counsel submitted that respondents have been exaggerating alleged charges for conveyancing, valuation and advocates legal fees and urged the court to compel the respondents to file a statement of



- account detailing how the proceeds from the estate were dealt with. The court was requested to compel the 1st respondent to refund Kes 340,000.00 deducted from the estate for negotiating the lease.
18. Counsel submitted that the administrators have grossly mismanaged the estate and that it would only be fair and just if they are removed and new administrators are appointed.
 19. In conclusion counsel urged the court to allow the application as prayed.
 20. The 1st respondent through her advocates Munyithya, Mutugi, Umara & Muzna Co Advocates filed her written submissions dated January 27, 2023 vide which it was submitted that payments in respect of the estate of the deceased is usually made to her advocates who then compute the same according to the shares of each beneficiary. The same is then forwarded to the respective advocates to distribute to their clients or beneficiaries. It was therefore submitted that it was illogical for the applicants to ask her to account for money sent to the applicants' advocates. 1st respondent submitted that she is not involved in the administration of the estate of the estate of James Michael Luyali.
 21. It was further submitted that the request for the inventory of all assets, liabilities of the estate and how they have been managed is a fishing expedition as this matter has gone up to the Court of Appeal and the applicants have participated in the same all along. List of all assets and liabilities, it was submitted, was filed at the point of filing this succession cause.
 22. Counsel submitted that the 1st respondent is not aware of any deductions from the shares of the applicants and has no accounts to render and that all monies were distributed as per the certificate of confirmation of grant.
 23. In regard to the deduction of Kes 10,000.00 from the 2nd applicant's share, counsel submitted that all beneficiaries paid Kes 10,000.00 to the firm of Munyithya, Mutugi, Umara & Muzna Co Advocates as legal fees for the negotiation of the lease and drafting of the same and that the total amount paid to the said advocates was Kes 100,000.00. It was submitted that the 2nd applicant attended the meeting and cannot claim a refund seven years later.
 24. On the 10% from the sale proceeds counsel submitted that each beneficiaries share was forwarded to their respective advocates and thus the 1st respondent cannot be asked to explain what happened thereafter.
 25. On the deduction of Kes 6,000,000.00 counsel submitted that all beneficiaries including the applicants herein conceded to the same by signing an agreement and thus cannot claim coercion. It was further submitted that the agreement was signed willingly. In any case, it was urged, the 1st respondent was not a party.
 26. On the legal fees and valuation charges counsel submitted that if the applicants are dissatisfied with what they paid then they ought to challenge the same in the right forum under the relevant legal provisions.
 27. In conclusion counsel urged the court to dismiss the application with costs.
 28. I have considered the application, the responses thereto and the rival submissions of both counsels and the issues that emerge for determination are:-
 - a. Should the respondents be compelled to provide statement of account of the estate of the deceased?



29. Before I delve into the main issues I must note the applicants have introduced new issues and prayers in their submissions. It's trite law that parties are bound by their pleadings. I am guided by the case of *Daniel Otieno Migore versus South Nyanza Sugar Co Ltd [2018] eKLR* where the court stated: -

' It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.'

30. On whether the applicants should be compelled to provide statement of accounts of the estate of the late Ezekiel Luyali Liyai, the applicants argument is that the shares received by the beneficiaries is not the correct amount and that it is always paid late.

31. On the other hand, the 1st respondent submitted that whenever a payment is made to the estate, each beneficiary's share is sent to their respective advocates. It was further submitted that firms of Messrs Kadima & Company Advocates and Messrs Madzayo Mrima & Jadi Company Advocates for the applicants are the ones best suited to explain how the money sent to them on behalf of the beneficiaries by her advocates Messrs Munyithya, Mutugi, Umara & Muzna Co Advocates has been distributed. That the money sent to Messrs Kadima & Company Advocates was for Alex Shivachi, estate of James Michael Liyali, Purity Mushele Liyali and Lewis Liyali while money sent to Messrs Madzayo Mrima & Jadi Company Advocates was for Oroba Masitsa.

32. On December 10, 2019 this court directed that the share due to Oroba Masitsa be paid to the firm of Messrs Madzayo Mrima & Jadi Advocates pending the hearing and determination of the application dated November 8, 2019. Further the court in its ruling delivered on May 5, 2020 in respect to the said application held that the administrators of the estate of Ezekiel Luyali Liyai, have no power or authority to withhold any funds or moneys due to Oroba Masitsa Luyali as per the Certificate of Confirmation of grant.

33. The 1st applicants have also argued that only a few beneficiaries, claiming under the estate of James Michael Luyali, received their share from the estate of Horoba Liyayi. Horoba Liyayi died before accessing her share which included cash held by the administrators in the bank. The administrators sought for an order of release of the same and for the monies to be distributed to the surviving beneficiaries, each according to his or her share. The court disallowed the application on the grounds that the share of the late Horoba Liyayi could only devolve to her heirs. The Court was of the view that in the alternative an amendment of the confirmed grant could be made to remove the name of the deceased beneficiary from the certificate so that her share could then be distributed to the other beneficiaries. The parties then moved the court for release of the said monies vide summons filed on February 10, 2022. As a result, the court in its orders of March 15, 2022 ordered for the release of the said monies for distribution to the beneficiaries of the estate of Ezekiel Luyali Liyai (deceased).

34. The *Law of Succession Act* Section 83 provides for duties of personal representatives as follows: -

' Personal representatives shall have the following duties: -

- a. To provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
- b. To get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;



- c. To pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- d. To ascertain and pay, out of the estate of the deceased, all his debts;
- e. Within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- f. Subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- g. Within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- h. To produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- i. To complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

35. On the duties of personal representatives, the court in the case of *In Re Estate of Julius Mimano (Deceased)* [2019] eKLR stated: -

' Section 83 of the Act imposes duties on personal representatives to pay for the expense of the disposal of the remains of the deceased, to get in or gather or collect the assets of the estate, to pay for the expenses of the administration of the estate, to ascertain and pay out all debts and liabilities, and eventually to distribute the assets amongst the persons beneficially entitled. The discharge of these duties would naturally attract an account, in terms of the personal representative stating whether they discharged the said duties and disclosing the expenses that they incurred in the process of discharge. In addition, section 83 of the Act has imposed a positive duty on personal representatives to specifically render accounts at two stages. The first instance is in the first six months of the administration. It is at this stage that they ought to account as to whether they spent any funds from the estate for the purpose of disposing the remains of the deceased and, if so, how much. State whether they got in or gathered or collected or brought together all the assets that make up the estate. The getting in of the estate is critical, it should precede settlement of debts and liabilities and distribution of the assets. Indeed, these duties can only be discharged if there are assets sufficient to settle debts leaving a surplus for distribution. It would also be from the assets collected that the estate would have a pool of resources for administration expenses. Section 83(e) commands the personal representatives to produce in court a full and accurate inventory of the assets and



liabilities, no doubt generated from the exercise of getting in the assets and ascertaining the debts of the estate. There is also an obligation to render an account of all their dealings with the assets and liabilities up to the point of the account. The second occasion for rendering accounts is at the completion of administration. The duty is stated in section 83(g) of the Act. The object of the second and final account is to give opportunity to the personal representative to demonstrate that they have complied with the duty in section 83(f) of distribution of the estate to the beneficiaries. The duty to account on those two occasions is imposed by statute. It envisages an account to the court, not even to the beneficiaries. The powers exercised by the personal representative's flow from a court instrument, the court is entitled to know whether those powers have been properly exercised, and whether the duties imposed have been properly discharged. Being a statutory duty to account to the court, the personal representative does not have to wait for a court order directing them to render account, they must render the accounts as a matter of course. The matter of the duty to render accounts is so critical that default to do so is listed in section 76(d) (iii) of the Act as one of the grounds upon which the court may consider revoking a grant.'

36. From the above cited case it's evident that the law commands rendering of accounts by personal representatives whether the deceased died testate or not. No exception is extended to any person or under any circumstances. It is therefore my view that the administrators herein have a duty to render account of their dealings with the assets and liabilities of the estate of the deceased.
37. I find and hold that once the accounts are provided the Court will then be able to delve into any other question as to whether there have been unfair or unlawful deductions. The Court is unable to make any determinations regarding such questions at this point.
38. The upshot of the foregoing is that the application dated July 29, 2022 is allowed in part as follows: -
 - a. The Administrators, Irene Juliet Otinga And Alex Shivachi Luyali, shall within 60 days render true and just account on the status of the distribution of the estate of the deceased herein;
 - b. The Administrators, Irene Juliet Otinga And Alex Shivachi Luyali, shall complete the administration of the estate in respect of all matters set out in the certificate of confirmation of grant dated April 1, 2016 within 6 months;
 - c. The Administrators, Irene Juliet Otinga And Alex Shivachi Luyali, shall produce in court within 60 days a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate *audited* account of all dealings therewith up to the date of the account; *and*
 - d. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 27TH DAY OF MARCH, 2023

.....
GREGORY MUTAI
JUDGE

In the presence of:-

Winnie Migot – Court Assistant

Mr. Yose for the Applicants

No appearance for the Respondents



