



REPUBLIC OF KENYA



In re Estate of Peter Kariuki Kamau Chomba (Deceased) (Succession Cause E21 of 2020) [2023] KEHC 24169 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E21 OF 2020
JRA WANANDA, J
OCTOBER 27, 2023**

IN RE ESTATE OF PETER KARIUKI KAMAU CHOMBA (DECEASED)

BETWEEN

**ANGEL ANNE WAMBUI KIIRU 1ST BENEFICIARY
MWIHAKI KIIRU 2ND BENEFICIARY
PRINCE JOHN MUCHIRI KIIRU 3RD BENEFICIARY**

AND

**ALICE WAMBUI MUCHIRI AKA ALICE WAMBUI KIIRU 1ST
ADMINISTRATRIX
LUCY NGENDO NJOROGE 2ND ADMINISTRATRIX**

RULING

1. This deceased, Peter Kariuki Kamau Chomba died on 10/10/2020 leaving behind two widows, the 1st Respondent (1st wife) and the 2nd Respondent (2nd wife). The 1st Respondent has 3 adult children (the 3 Applicants) while the 2nd Respondent has 2 minor children.
2. Presumably as a sign of amicable relationship, and uncharacteristic of many polygamous scenarios, the two widows came together and on 20/11/2020 jointly applied for Letters of Administration intestate. The Petition was filed through Messrs Magare Musindi & Co. Advocates. This “honeymoon” however appears to have been short-lived since on 8/12/2020, barely 3 weeks later, “cracks began to emerge in the widows’ relationship when a Notice of Appointment was filed on behalf of the 1st Respondent appointing Messrs Kaka Kamau & Co. as her separate independent Advocates.
3. The Grant of Letters of Administration was then issued on 21/06/2021 to the two widows (1st and 2nd Respondents) jointly. On 28/09/2021, a Notice of Appointment was filed on behalf of the 3 Applicants appointing Messrs H. Kago & Co. to be their Advocates herein.



4. Now before Court is the Application brought by the 3 Applicants by way of the Summons dated 24/06/2022 seeking the following Orders:

- i. [Spent]
- ii. [Spent]
- iii. That this Honourable Court be pleased to direct and order that the estate of Peter Kariuki Kamau Chomba be preserved with the effect that the Respondents and indeed all the parties herein be and are hereby restrained from any further dealings with any of his properties and/or drawing from any of his Bank accounts including the Estate Account jointly held by the Administratrix being held at NCBA Bank as Account Number xxxxxxxxxxxx under Account Name [Particulars Withheld] as well as any other funds of the Estate including rents, pension and/or provident funds, emolument, profits, insurance and other benefits and/or as the case may be, without leave of this Court pending the hearing and determination of these proceedings.
- iv. That this Honourable Court be pleased to order and/or direct the Respondents jointly and/or severally to render comprehensive accounts under oath of any and/or all dealings relating to the estate so far including but not limited to rents, royalties, dividends, profits, bank transactions, proceeds, pension and/or provident funds, insurance and other benefits and/or emoluments.
- v. That this Honourable Court be pleased to order and/or direct the Estate Agents who are collecting rent from the properties that comprise the Estate of the deceased including but not limited to Joshua Noreh, Revent Holdings Limited, Light a Life Agency Limited and Highland Valuers Limited to give a comprehensive account of all rents collected from the properties and the manner of their appropriation and/or disposal.
- vi. That this Honourable Court do issue such further orders and directions as it may deem just and fit including but not limited to revocation of the Grant issued to the Respondents on 21st June 2021 on account of fundamental failure and/or neglect by the Respondents to render Account and to proceed diligently and with propriety in relation to the Administration of the Estate.
- vii. That the costs of this Application be in suit.

5. The Application is filed on 24/06/2022 through Messrs H. Kago & Co. Advocates and is stated to be brought under “Section 3 and 3A of the *Civil Procedure Act* Cap 21 and Sections 45(1), 47 and 76 of the *Law of Succession Act* Cap 160, Rules 49 and 73 of the *Probate and Administration Rules*, 1980 and all other enabling provisions of the law”.

6. The Grounds of the Application are as set out on the face thereof and the Application is supported by the Affidavit jointly sworn by all the 3 Applicants.

7. In the Affidavit, the Applicants deponed that they are adult children of the deceased and consequently, beneficiaries of the estate whilst the Respondents are the joint Administratrix, the Respondents obtained a Grant of Letters of Administration on 21/06/2021 and to date have not applied for Confirmation of the Grant, the Applicants are all residents of the United States of America but



nonetheless participated in the Court annexed Mediation proceedings virtually wherein they called for transparency and accountability in the management and administration of the estate, in the end the Mediation did not yield fruit, in the course of the proceedings, it became apparent that the Administratrix had opened a joint bank account at NCBA in the Account Name: [Particulars Withheld], the Account was for purposes of holding deposits as well as proceeds and/or nominees relating and/or being generated from the estate including but not limited to rents, profits, interest and/or benefits therein, the 2nd Respondent has been unilaterally and arbitrarily drawing monies from the joint Account without accounting for the same.

8. The Applicants further submitted that the 2nd Respondent had unilaterally and arbitrarily instructed the estate agents tasked with the mandate of collecting rents from the properties and in particular one Mr. Joshua Noreh not to deposit the funds into the Account and in lieu deposit the same in her own personal account, there were pensions, insurance and other benefits and emoluments payable and paid in respect to the estate which amounts have seemingly been appropriated by the 2nd Respondent, the conduct of the 2nd Respondent who is a member of the County Assembly smacks of impropriety, impunity, arbitrariness, illegality and is a breach of statutory and fiduciary duty, despite demand and notice to the Respondents to cease and desist from the impugned conduct and to render Accounts, they have refused to do so, unless this Court intervenes, the estate will continue to be wasted to the prejudice of the beneficiaries, the illegality will continue to be perpetuated hence making a mockery of the Court's processes, no party will suffer prejudice since the orders sought are geared at ensuring smooth, transparent, accountable as well as legitimate management and administration of the estate.

2nd Respondent's Response

9. By the Notice of Appointment filed on 23/09/2022, Messrs Ngigi Mbugua & Co. Advocates came on record to act alongside Messrs Magare Musundi & Co. for the 2nd Respondent. The Application was then opposed by the 2nd Respondent vide the Notice of Preliminary Objection dated and filed on the same 23/09/2022 and also the Replying Affidavit sworn by the 2nd Respondent and filed on the same date. The Preliminary Objection is filed through Messrs Magare Musundi & Co. and the Replying Affidavit by Messrs Ngigi Mbugua & Co.
10. In the Preliminary Objection, the 2nd Respondent argued that the Application offends the Mediation Rules, 2015 and should therefore be struck out. The contention was that, contrary to the Mediation Rules, the Application places reliance on information obtained during Court annexed Mediation
11. In the Replying Affidavit, the 2nd Respondent deponed that besides the Applicants and the 1st Respondent, she belongs to the 1st house, she represents herself and her 2 children who are minors and beneficiaries of the estate as well, at some state and owing to disagreement between the Administratrix, the estate was referred to Mediation but the same did not yield a settlement, as part of Administration, the 1st and 2nd Respondents opened a bank account at NCBA Bank where they agreed to be banking rental income of the estate assets, this Account was to be operated by both Administratrix equally, pending distribution, the 1st Administratrix/Respondent who is also the mother of the Applicants gave instructions to the common agents of the estate to stop banking rental income in the estate Account with effect from August 2022.
12. She further deponed that although the Grant is supposed to operate for 6 months and be followed by confirmation and distribution, there are serious disagreements with the co-Administratrix over the sharing of rental revenue accruing from the estate which has delayed the process, although they have not finalized sharing the estate between the two houses, they have engaged family members and friends to help them agree, the last such meeting took place on 17/09/2022 and her co-Administratrix can attest



to that, as late as 28/07/2022 she had filed in Court Summons for Confirmation which was halted by the desire to attempt a settlement, it is therefore in bad faith for the Applicants who are represented by the 1st Respondent in the negotiations to come to Court with an Application targeting the 2nd Respondent whilst fully aware of what is happening, ever since filing of the Cause, she has discovered additional assets of the estate by going through the deceased's documents which she wishes to be included in the list of assets, it is true that she has collected pension and benefits of the deceased from LAP-TRUST which is the Fund Administrator on behalf of Local Authorities employees because she was named as the next of kin of the deceased and the beneficiaries were the 1st Respondent's two minor children, she can account for all monies that she received from the estate as she has been taking care of her sons, paying land rates and land rent for the estate, repairing and renovating rental premises, paying taxes on behalf of the estate business and paying staff salaries for Chomba Hotel.

13. The 2nd Respondent added that the Applicants have rushed to Court before demanding information on how the estate funds were being applied, she is still digging into the deceased's documents and making discoveries of assets which were unknown to the Administratrix, such assets risk omission if the process is hurried as intended by the Applicants, even as they continue engaging with stakeholders it should be known that there are recurrent expenditure like livelihood, health and education of the beneficiaries which cannot be ignored, accounts cannot be called for in a selective and vindictive manner but have to be whole and specific to assets and the time required, the orders sought are meant to deprive her and her children of their livelihood that their patriarch worked so hard for.

1st Respondent's Response

14. On her part, the 1st Respondent swore the Replying Affidavit filed on 10/05/2023 through Messrs K. Mberia & Partners in which she apparently supported the Applicants.
15. In the Affidavit, the 1st Respondent deponed that she does not represent the Applicants as they have their own Advocates on record, herself and the 2nd Respondent were issued with a Grant of Letters of Administration on 21/06/2021, to avoid misappropriation or intermeddling of the estate, the 1st Respondent suggested that they open a joint Account with the 2nd Administratrix to deposit all the proceeds of the estate, in a bid to amicably resolve this matter, it was referred to Mediation wherein all parties including the 2nd Respondent agreed and were ready to sign a consent but at the verge of recording it, the 2nd Respondent refused to sign, the Mediation therefore failed, they opened the joint Account with the 2nd Administratrix but the 2nd Administratrix misappropriated the monies therein and could withdraw monies without involving the 1st Respondent or any of the parties and has to date failed to account for the same, the 1st Respondent would only receive messages when monies were withdrawn by the 2nd Respondent, she later came to learn that the 2nd Respondent had additionally issued instructions to the management company and/or estate agent who normally collects rent on behalf of the estate, to deposit all the proceeds to the 2nd Respondent's personal Account and not the joint Account, additionally, the 2nd Respondent received all the pension, insurance benefits, emoluments and other benefits and has failed to render account on the same.
16. The 1st Respondent deponed further that he has been instrumental in advocating that the parties come to an agreement on the administration and distribution of the estate but the 2nd Respondent has been hell bent on delaying the matter and constraining the efforts to have the properties distributed, the 2nd Respondent's assertions that she has used the monies to take care of her sons, paying land rates for the estate, renovating the premises, paying taxes and staff salaries are mere stand-alone averments, Chomba Hotel was jointly owned by the 1st Respondent and the deceased, upon demise of the deceased the 1st Respondent is the sole owner of the hotel under the doctrine of jus accrescendi which provides for the



rights of survivorship thus it is not up for distribution herein, the 1st Respondent has been personally paying land rates and taxes for the estate particularly for the said Chomba Hotel, the 2nd Respondent has not been involved in the management of the hotel, the 1st Respondent has also been managing the hotel ensuring that the salaries of workers and needs of the business for day to day operations have been met, the 2nd Respondent has completely ignored and refused to deposit and account for any proceeds from the estate and has not disclosed the proceeds of the estate. She added that the 2nd Respondent has not discovered any new properties to be included as all the properties she has listed are well known to the parties herein and are included in the schedule of properties to be distributed amongst the parties, the assertion that she is still investigating new properties for the estate is misleading and a tactic to delay the resolution of this matter, it is in the interest of justice that parties be ordered to apply for confirmation of the Grant to enable distribution less the amounts acquired and withdrawn by the 2nd Respondent.

Applicants' Supplementary Affidavit

17. On 10/05/2023, the Applicants filed the Supplementary jointly sworn by the three of them. In the Affidavit, they reiterated the matters already deponed in their earlier Supporting Affidavit and added that in her Replying Affidavit, the 2nd Respondent admits to have unilaterally and arbitrarily withdrawn monies from the joint Account, they were present throughout the Mediation proceedings together with their Advocate and were not represented by the 1st Respondent, there are no additional assets in the estate and the parties are familiar with all the assets the 2nd Respondent has listed in the Replying Affidavit, the 2nd Respondent has not produced any reasonable evidence or receipt on what the funds collected from LAP-TRUST were used for, she has not produced any receipts for any payments she made and that the 2nd Respondent's Replying Affidavit indicates that she has been intermeddling with the estate.

Hearing of the Application

18. It was then directed, and agreed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Applicants and the 1st Respondent both filed their Submissions on 10/5/2023 while for the 2nd Respondent, the date of filing is not clear since the Court stamp is not legible. The same is however dated 8/06/2023.
19. I also note from my perusal of the file that on 28/07/2022, about a week after the present Application was filed, the 2nd Respondent filed the Summons dated 30/06/2022 seeking confirmation of the Grant.
20. Further, I note that on 23/09/2022, a Notice of Appointment was filed on behalf of one Joshua Noreh appointing Messrs Bungei & Murgor & Co. to be his Advocates in this matter. The said Joshua Noreh, I presume, is the person described in the Application and in the respective Affidavits as the estate and/or management agent tasked by the Respondents, as Administrators, with the responsibility of collecting rental income on behalf of the estate and remitting it accordingly.

Applicants' Submissions

21. Before I recount the Applicants' Submissions, I may just mention that the font size and spacing used therein is so minute and tiny that one has to really strain to read through it. It is just logical that Counsels should ensure that whatever they present to the Court is always easily legible to the Judge.
22. Counsel submitted that the Applicants have met the threshold for grant of injunctions as required under the case of *Giella v Cassman Brown*, this Court has a duty to prevent wastage of the estate and the powers to do so are illustrated under the inherent jurisdiction of this Court and under Section 47 of



- the *Law of Succession Act* and 73 of the *Probate Rules*. He cited the *case of George M'Mboroki (Deceased)* [2008] eKLR as quoted in the case of *re Estate of Daniel Muthami Kiema (Deceased)* (2019) eKLR and *Mrao Ltd v First American Bank of Kenya* and submitted that, being beneficiaries, the Applicants filed the Application on grounds that the Respondents, and in particular, the 2nd Respondent has been unilaterally and arbitrarily drawing monies from the joint Account established by both the Respondents and haemorrhaging the funds without accounting for the same, the 2nd Respondent has also admitted that she has been collecting pension and benefits of the deceased from LAP-TRUST.
23. He again cited the case of *re Estate of Daniel Muthami Kiema* (supra) and *Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another* [1990] KLR 557 as cited in the case of *Banis Africa Ventures Limited v National Land Commission* [2021] eKLR and submitted that the Applicants have a right to benefit from the distribution however through the actions of the Respondents, and in particular the 2nd Respondent, they stand to suffer a travesty of justice and irreparable harm.
 24. Counsel submitted further that it is only fair and in the interest of justice that the Respondents, being the Administrators, render comprehensive accounts under oath of dealings relating to the estate and that the duties and responsibilities of Administrators are explicitly outlined in Section 29, 82 and 83 of the *Law of Succession Act*. He cited the cases of *Esther Wanjiku Machatha v Timothy Njeri Gitura & Others* (2015) eKLR, *Paul Rono Pymto & Another vs Giles Tarpin Lyonnet* [2014] eKLR and *Titus Mbaabu M' Racha v Justus Muthamia*, Succession Cause 155 of 2001.
 25. Counsel added that the beneficiaries/Applicants are resident in the United States of America, actions of the Respondents, in particular the 2nd Respondent, are questionable, she either does not want the beneficiaries to know all the assets of the deceased or she assumes that the beneficiaries do not have a right to benefit from the estate, the *Law of Succession Act* clearly indicates the position where a deceased had died interstate and was polygamous under Section 40(1). He cited the case of *Rono v Rono*, Civil Appeal No. 66 of 2002 and further submitted that it is unfair for the 2nd Respondent to take the issue of distribution upon herself and start paying and repairing, as she alleges, the premises of the deceased without consent from the beneficiaries and that the Respondents obtained a Grant of Letters of Administration on 21/06/2021 however to date they have not applied for confirmation thereof.
 26. Regarding the Preliminary Objection to the effect that the Application offends the Mediation Rules 2015, Counsel submitted that the Mediation did not yield settlement and thus the parties resolved to settle their issues in Court.

1st Respondent' Submissions

27. The 1st Respondent's Counsel began by challenging the Preliminary Objection filed by the 2nd Respondent to the effect that the Application offends the Mediation Rules. He submitted that the matter was referred to Mediation around December 2021, the Mediation Rules provide that Mediation proceedings shall be concluded within 60 days and that time may be extended for a further period but not exceeding 10 days, the 2nd Respondent stifled the mediation proceedings and the Mediator then concluded that the Mediation failed, the matter is therefore not subject to any Mediation process. He then cited the case *Mukhisa Biscuits v West End Distributors* (1969) EA 696 and submitted that the Preliminary Objection is not properly before the Court as it has to be ascertained whether the Mediation proceedings were concluded and whether it failed, the Mediation failed and was concluded thus the matter is not subject of Mediation, in any event, it has been over one year since the matter was referred to Mediation while the Rules stipulate that Mediation should be concluded within 60 days.
28. On the merits, Counsel submitted that the 2nd Respondent acted contrary to her obligations as an Administrator by misappropriating and failing to account for the monies she has admitted to have



withdrawn. He cited Section 83 of the [Law of Succession Act](#) and the cases of [In re Estate Julius Mimano \(Deceased\)](#) [2019] eKLR, [In re Estate of David Kvuuli Kaindi \(Deceased\)](#) [2015] eKLR and [In re Estate of Daudi Owino Olak \(Deceased\)](#) [2022].

2nd Respondent Submissions

29. Regarding the Preliminary Objection, Counsel for the 2nd Respondent cited the case of *Mukisa Biscuits (supra)* and submitted that a point of law should raise a pure point of law, that it is argued on the assumption that all the facts pleaded are correct and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. He added that the Mediation has never properly taken off, the same was held in limbo and suspended, the process was not conclusively decided upon and as such the Preliminary Objection is properly before the Court.
30. On the merits, Counsel submitted that the Application is laced with misinformation and half-truths with an intent to defame the character of the 2nd Respondent and paint her in a bad picture with the final motive of removing her as an Administrator after which the Applicants would have a field day in running the affairs of the estate, throughout the Administration, the 2nd Respondent has been acting in the best interest of the estate so as to ensure it does not go to waste, a case in point is the fact that in liaison with the 1st Administrator, a joint Account was opened at NCBA Bank where it was agreed that all rental income from the estate shall be deposited to await final distribution of the estate, it is in fact the 1st Respondent who also happens to be the mother of the Applicants who is misappropriating the proceeds from the estate, the 1st Respondent in August 2022 ordered the agents to stop banking rental income into the estate Account and bank the same to her personal Account.
31. He added that the Applicants cannot “have their cake and eat it”, that while on one hand they have filed the instant Application, they are on the other involved in Mediation proceedings and settlement conferences, the 2nd Respondent is more than ready to account for every penny, Section 82 of the [Law of Succession Act](#) gives powers to personal representatives to sell or otherwise turn to Account so far as seems necessary in execution of their duties, clothed with the said powers, the 2nd Respondent has only used proceeds from the estate to cater for necessary and immediate needs to ensure the estate does not go to waste, such include repairing and renovating rental premises, paying taxes and rates on behalf of the estate and payment of salaries, Section 83 of the [Law of Succession Act](#) equally outlines the duties of personal representatives which captures the issues of collection of free property including debts owing to the deceased as well as to ascertain and pay out of the estate all the deceased’s debts, Section 83 also gives the personal representative a duty, within 6 months from date of the Grant, to produce to the Court a full and accurate inventory of the assets. He cited the case of [In re Estate of Julius Mimano \(Deceased\)](#) 2019 eKLR.

Analysis and Determination

32. Upon examining the record and the pleadings herein, including the Affidavits and respective Submissions, I find that the issues that arise for determination to be as follows:
 - i. Whether the alleged breach of the “confidentiality” provision of the Court Annexed Mediation Rules falls within the threshold of what should constitute a “Preliminary Objection” and whether the Application offends such “confidentiality” provision.
 - ii. Whether orders should be issued to restrain the parties from further dealings with the properties of the estate and for accounts and whether the Application offends such “confidentiality” provision



33. I now proceed to analyze and determine the said Issues.

Whether the alleged breach of the “confidentiality” provision of the Court Annexed Mediation Rules falls within the threshold of what should constitute a “Preliminary Objection”

34. In the Preliminary Objection, the 2nd Respondent has argued that the Application offends the Mediation Rules insofar as it allegedly places reliance on information obtained during a Court annexed Mediation.

35. I am aware that the Mediation Rules, 2015 have since been replaced with the 2022 Rules which is the version currently prevailing. I therefore believe that the parties have made reference to the 2015 Rules because it is evident that the 2022 Rules came into effect on 18/08/2022, long after this matter had been referred to Mediation in December 2021. I have also looked at the 2015 Rules and noted that the provision on “confidentiality” is in fact Rule 12, not Rule 15 as argued by the Advocates. The said Rule 12(1) provides as follows:

“All communication during mediation including the mediator’s notes shall be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings.”

36. The 1st Respondent’s Counsel challenged the Preliminary Objection filed by the 2nd Respondent and submitted that the matter was referred to Mediation around December 2021, that the Mediation Rules provide that Mediation proceedings shall be concluded within 60 days, that such time may be extended for a further period but not exceeding 10 days and that for this reason, the matter is not presently under any Mediation process and, as a result, the Preliminary Objection is misplaced. He further submitted that the Preliminary Objection is not properly before the Court as it has to be ascertained whether the Mediation proceedings was concluded and whether it failed, that the Mediation failed and was not concluded thus it is not subject of Mediation, that in any event, it has been over one year since the matter was referred to Mediation while the Rules stipulate that Mediation should be concluded within 60 days.

37. On his part, the 2nd Defendant’s Counsel argued that the Preliminary Objection is properly before the Court because the Mediation has never properly taken off, that the same was suspended and held in limbo and that the process was not conclusively decided upon. Counsel for the Applicants supported this argument and submitted that the Preliminary Objection is valid because Mediation did not yield any settlement and thus the parties resolved to settle their issues in Court.

38. The law on Preliminary Objections is well settled. In the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors* [1969] EA 696, it was guided as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raised 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.”

.....

“..... So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded at which by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”



39. In light of the foregoing, my finding is that the grounds set out in the Preliminary Objection do not disclose specific pure points of law. As correctly argued by the Applicants and the 1st Respondent, the matters raised require calling in of evidence and thus cannot be said to be pure points of law.
40. Be that as it may, the weightier aspect is the fact that, apart from merely arguing that the Application places reliance on information obtained during the Court annexed Mediation, the 2nd Respondent made no effort whatsoever to take the Court through this allegation nor specify which exact information she was referring to. Since Mediation proceedings are never shared with the Court, I have no way of interrogating this allegation.
41. Therefore, apart from failing to meet the threshold of matters constituting “Preliminary Objections”, the Preliminary Objection is itself unexplained and left hanging. In light of the foregoing, the only result is that I overrule the Preliminary Objection.

Whether orders should be issued to restrain the parties from further dealings with the properties of the estate and for accounts

42. The powers and duties of personal representatives are set out at Section 82 and 83 of the [*Law of Succession Act*](#) as follows:

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

- (a) 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;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that -

- (i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
 - (ii) no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
 - (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or



share in his estate, whether or not the subject of a continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation:

Provided that, except so far as otherwise expressly provided by any will -

- (i) no application shall be made so as to affect adversely any specific legacy;
- (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.”

83. 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.”

43. It is obvious that the relationship between the two Administrators has severely broken down. Each one places blame on the other with allegations of misappropriation of funds and intermeddling with the estate “flying in” from all sides. It is no wonder that the Court Annexed Mediation failed. While the Applicants and the 1st Respondent have produced substantial evidence indicating the existence of serious question marks in respect to the 2nd Defendant’s dealings with the estate, the 2nd Respondent, on her part, has only made bare allegations against the 1st Respondent.

44. I sympathise with the Applicants, since in as much as they may want to only target the 2nd Respondent, they find themselves in the enviable position that their own mother, the 1st Respondent, being a co-Administrator, is technically “joined at the hip” to the 2nd Respondent. As a result, and although no serious evidence of misappropriation has been presented against their mother, it is apparent that the



Applicants have been at pains to extricate their mother from the accusations splashed across the 2nd Respondent's face.

45. Regarding possible misappropriation of the estate funds, the evidence presented indeed points to the fact that regular withdrawal of funds from the joint Bank Account at NCBA is being unilaterally made by the 2nd Respondent without consultation with nor concurrence of the 1st Respondent, her co-Administrator, or other beneficiaries. It has also been stated that the Administrators have at different times, separately instructed the estate or management agents to deposit rent collected from the estate properties into their respective personal Bank Accounts, instead of the joint Bank Account opened for that purpose.
46. Each of the Administrators claims to be utilizing the estate income to service estate liabilities. For instance, each claims to be the one paying for land rent and/or rates for some of the properties. The 2nd Respondent has gone further to claim that in addition, she has been utilizing the estate income to pay taxes, renovate and/or repair estate properties and pay salaries, among other expenses. However, rather than present Receipts and similar supporting evidence in an intelligible, easy to follow, tabulated and well-particularized sequence, the parties have simply thrown copies of alleged supporting documents at the Court in a haphazard and an unstructured manner. The Court is then left to ruffle, sieve through and decipher unexplained documents. To my mind, this appears to be a deliberate ploy to throw the Court off-guard and render it incapable of making conclusive determinations.
47. Regarding “intermeddling” as defined in Section 45 of the *Law of Succession Act*, Hon. Justice Gikonyo “*in Re Estate of M’Ngarithi M’Miriti* [2017] eKLR, stated 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.”

48. In light of the foregoing, it is clear that the Respondents are on the brink of being declared to be intermeddling. It is clear that the estate is at risk and there is need to protect it for the sake of all the beneficiaries. Lack of proper accounting and organization has led to possible waste and suspicion of misappropriation. Section 83 of the *Law of Succession Act* stipulates the duties of Administrators which includes rendering a full account of all dealings of the estate and an inventory of assets and liabilities.

Final Orders

49. In light of the above findings, the Application dated 24/06/2023 partially succeeds with the result that I make the following orders:



- i. Pending distribution of the estate herein or determination of this Cause or further orders of the Court:
 - a. The Bank mandate for the joint Account No. xxxxxxxxxxxx held at the NCBA Bank in the name of the two Administrators - Lucy Ngendo and Alice Muchiri - shall be amended so as to require that at all times, both the Administrators must sign for any withdrawal of monies from the Account.
 - b. Withdrawal of monies from the said Bank Account for the purpose of administering and/or maintaining the estate shall therefore be only upon agreement of the two Administrators.
 - c. All estate income, including the rent collected by the estate or management agents for the estate properties, namely, Joshua Noreh, Revent Holdings Limited, Light a Life Agency Limited and Highland Valuers Limited, and/or any other agent so appointed, must at all times be deposited into the said Bank Account referred to above.
 - d. No Administrator, party or any other person shall sell, transfer, charge, mortgage or in any way intermeddle with the estate property. Leasing or renting out of properties may however continue but with the concurrence of both Administrators and on the condition that rental income therefrom shall be deposited in the said Bank Account as directed above.
- ii. Within forty-five (45) days from the date hereof, each of the two Administrators shall separately, each file her own individual Affidavit before this Court supplying an inventory of the assets and liabilities of the estate and a comprehensive account of all financial dealings relating to the estate which that individual Administrator has handled or engaged in since appointment, including an account of all monies received or spent by that Administrator on behalf of or in respect to the estate. Such inventory and account shall be clearly particularized, well explained and/or tabulated and supported by sufficient documentary evidence.
- iii. Within forty-five (45) days from the date hereof, the said estate or management agents for the estate properties, namely, Joshua Noreh, Revent Holdings Limited, Light a Life Agency Limited and Highland Valuers Limited, shall each file its own individual Affidavit before this Court giving a comprehensive account of all rent collected from the estate properties since appointment, including explanation on the manner in which such rent collected has been disbursed.
- iv. This matter shall be mentioned after lapse of the said forty-five (45) days of this Ruling to confirm compliance with the orders issued above.
- v. Within sixty (60) days from the date hereof, the Administrators shall jointly or separately file Application or Applications for Confirmation of the Grant issued herein and submit their proposed modes of distribution.
- vi. Breach or non-compliance by any person, including the Administrators, with the said orders may lead to a finding of contempt of Court and consequently, imposition of severe punitive action against any such person and also, if an Administrator, removal and/or substitution from such appointment or revocation of the Grant of Letters of Administration altogether.
- vii. Costs of the Application shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 27TH DAY OF OCTOBER 2023.



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WANANDA J. R. ANURO

JUDGE

