



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KERUGOYA**

**(CORAM: R. MWONGO, J)**

**SUCCESSION CAUSE NO. E 018 OF 2021**

**IN THE MATTER OF THE ESTATE OF GEOFFREY KAMAU alias**

**GEOFFREY KAMAU alias GEOFFREY KAMAU GICHUHI (DECEASED)**

**AND**

**TABITHA MUKAMI KAMAU.....APPLICANT**

**VERSUS**

**JORAM MURIUKI KAMAU.....RESPONDENT**

**RULING**

### **Introduction & Parties' Cases**

1. In the application before me by way of summons dated 3<sup>rd</sup> March 2022, the applicant seeks that:

- a) The money received as rent and other income for the premises belonging to the deceased and deposited in a joint family account number xxxxxxxxxx at Equity Bank, Mwea Branch and the account at Family Bank, number xxxxxxxxxx be withdrawn and shared equally by Tabitha Mukami Kamau, Joram Muiruri Kamau, Cecily Njoki Kamau and Hellen Wanjiku Kamau; and
- b) The income generated from rental rooms, lodgings and family business be deposited in the Equity Joint Family account to be shared by the family members, equally.

2. The application was filed under certificate and certified urgent for two reasons. First, that one of the children of the deceased, namely, Cecily Njoki Kamau was in urgent need of funds for medical reasons. She had donated a kidney to the deceased and had developed heart and kidney problems. Any delay in affording her medical attention it is contended, would have serious repercussions. The second reason given was that money deposited in bank accounts at Faulu Bank and Equity Bank by the family was intended *“to go to the four children of the deceased equally”*.

3. By way of background, the deceased died on 24.7.2018. His first wife Mary Nyambura pre-deceased him having died on 5<sup>th</sup> April 2018. His second wife Cecily Wanjiku survived him. Of eight children borne of the two wives, two are deceased and the others survived the deceased. In July 2020, a citation was filed in High Court Succession No. 4/2020 to prompt commencement of administration proceedings. However, parties entered into amicable arrangements, and consented to commence administration proceedings in the present file.

4. One of the amicable arrangements entered into in High Court Succession No.4 of 2020 was reduced into a court order on 14.1.2021 before Mulwa, J, as follows:

***“That by consent, all rental income from the estate be deposited into the Joint Accounts particulars to be provided by the parties on the 26.1.2021 pending hearing and determination of the application on 22.4.2021”.***

5. That order having been issued, no further substantial activity occurred in file High Court Succession No. 4/2020. Thus, on 24.11.2021, the citation was marked as withdrawn, and it was recorded that a petition was in the process of being filed. The petition is the one in the present file.

6. Coming back to the present application, in the supporting affidavit of the applicant, she states that the accounts at Equity Bank and Faulu Bank were credited with monies received from family properties. In particular, she includes rents received from the family's Bata Shop, and from rental rooms and lodging from the family premises known as Joyland Wang'uru. She asserts that the moneys from these properties were to be shared equally between her and her sisters Cecily Njoki and Hellen Wanjiku together with the brothers.

7. She averred that her brother the respondent, declined to be making deposits from Joyland and premises known as Mugumo Lodge, into the family account since 2018. In addition, she alleges that the respondent starves his siblings of moneys they are equally entitled to, despite being aware that Cecily Njoki Kamau constantly needs money for medical attention.

8. Finally, the applicant avers in paragraph 7 of her supporting affidavit, that:

***"...it is a family agreement that all incomes generated from the properties of our parents be shared by the four of us equally".***

9. The Respondent opposes the application. In his replying affidavit of 8th February 2022, he however concedes that the Faulu Bank and Equity Bank accounts were opened and take deposits. He further avers that all rental income for the deceased's estate is deposited into the joint accounts. He exhibited the court order issued in High Court Succession No.4 of 2020, earlier referred to.

10. In addition the respondent set out the history of how the accounts came to be set up; he denied that Cecily Njoki is always in dire need of funds, but instead asserted that she is the beneficiary of Ksh.47,000/= monthly rent from Plot No. 121 Wang'uru; that the applicants run and control Joy Rice Millers and its income; and that income from some of the properties is shared between the two families.

11. Further, the respondent asserted that the deceased's properties, comprising twenty-four (24) assets listed on the petition and valued at Kshs. 50,000,000/=, are for the benefit of all beneficiaries listed in the petition who survived the deceased. The assets include the deceased's accounts, namely:

- a) Co-operative Bank A/c No. xxxxxxxxxxx
- b) Faulu Bank A/c No. xxxxxxxx
- c) Sidian Bank A/c No. xxxxxxxxxxxxxx
- d) Kenya Commercial Bank A/c No. xxxxxxxxxxx
- e) Equity Bank A/c No. xxxxxxxxxxx

These accounts are clearly not the accounts which the court ordered should be set up by the court's order, as they pre-existed the order.

12. The respondent avers that the two accounts from which the applicant seeks to withdraw are income accounts. He finally accuses the applicants of attempting to intermeddle in the estate as follows:

***"25 That the withdrawal and sharing of the income proposed by the Applicant would amount to intermeddling with the estate of the deceased".***

13. In their oral submission in court the parties essentially reiterated the contents of their affidavits.

14. The applicant argued that no prejudice will be suffered by the respondent if the prayers sought are granted; that the deceased had settled his property before death; that the accounts will continue to earn income; that the estimated medical costs required by the applicants amount to about Ksh. 150,000/=, and that payment made from the accounts would amount to equal distribution.

15. The respondents reiterated that in the absence of a grant any distribution of the money in the accounts would amount to intermeddling with the estate; that the respondent had assisted the applicant with Kshs. 45,000/= which was admitted; and that the accounts from which the applicants seek to draw are held by the siblings and are not therefore, strictly, funds of the estate.

16. At the close of submissions, the court directed the parties to file evidence of the existence of the said accounts, the amounts held therein, the names of account holders and signatories. The parties complied.

17. At the mention held on 24<sup>th</sup> March 2022, bank statements were exhibited by the applicants as follows: -

- a) Equity Bank A/c xxxxxxx; Balance Kes CR 721, 267.50.

Signatories: Joram Muiruri Kamau, Hellen Wanjiku Kamau and Tabitha Mukami Kamau.

- b) Faulu Bank Embu A/c No. xxxxxxxxxxx; Balance Kes CR 406,088.81

Signatories: Joram Muiruri Kamau, Tabitha Mukami Kamau, Stephen

Kuria Kamau (now deceased), Hellen Wanjiku Kamau and Cecily Njoki Kamau.

### **Analysis and Determination**

18. I have carefully considered the parties' representations and documents availed. I have also perused the files for High Court Succession No. 3 of 2020 Estate of Mercy Nyambura Kamau and High Court Succession No. 4 of 2020 Estate of Geoffrey Kamau Gichuhi.

19. The only issues I have to determine are:

- a) Whether there is a proper basis laid for allowing the application and ordering the equal distribution of the funds in each bank account to the family members equally.
- b) Whether to order money generated from rental rooms and lodgings to be deposited with the Equity Bank Account and then shared equally between family members.

### **Distribution of funds from the Bank Accounts**

20. It is not in question that the two bank accounts in issue are credited with income generated from the deceased's capital assets. It is also not in dispute that the accounts are in the names of, and operated by, family members. It is further not contested that the said accounts were operated pursuant to orders of Mulwa Judge issued on 14.1.2021.

21. In addition, it is also not in dispute that the petition for the grant of Letters of Administration was filed on 9<sup>th</sup> December 2021. This followed amicable discussions between the two houses of the deceased, after citations had been filed in respect of the estates of Geoffrey Kamau, deceased, and Nyambura Kamau, the deceased's first wife.

22. The petition in the deceased's estate has not yet been advertised and therefore a grant is yet to be issued in respect of the administration of his property. The petitioners named by the families are Tabitha Mukami Kamau and Joram Muiruri Kamau for the first house, and Cecily Wanjiku Maina the deceased's second wife. When the grant is issued, these will be the formally appointed administrators of the deceased's estate.

23. Having looked through the three files, two with citations and the present file with the petition, I must commend the families for the serious efforts they have made to reach consensus on the petitioners, and the opening of the income accounts, as part of the negotiated process. I encourage the parties to maintain this spirit to pre-empt the incurrence of high costs with inevitable results in diminishing the deceased's estate and festering distrust.

24. I note, however, that the opening of the two income accounts in issue has resulted in removing the income arising from the deceased's property away from the purview and control of the proposed administrators. This is at a time when no grant has been issued. To that extent, the court has allowed room for lack of legal accountability by the persons ultimately, statutorily, recognized to account to the court for the deceased's estate.

25. In this regard, I have not seen any instrument or writing documenting what precisely is to be placed into the said accounts, or from which source or sources, and describing the terms and conditions under which such accounts and such money are to be held. This absence of clarity means that the accounts are essentially owned by the account holders on such terms as they may at any time agree, subject to the bank's conditions. The account holders are perhaps in this instance best described as fiduciary trustees of the deceased's income in those accounts.

26. **Section 45** of the LSA provides:

***“(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 26 CAP. 160 Law of Succession***

***(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.***” (Emphasis supplied)

27. It is clear from that provision, that no person is entitled to take possessions of or dispose of any “free property” of a deceased person unless the LSA or any other law expressly so provides or a grant of representation so provides. Accordingly, handling any free property of the deceased without the recognized instruments amounts to intermeddling on the estates, which is a criminal offence and attracts a fine under **Section 45 (2) LSA**.

28. “Free Property” is described in **Section 2 LSA** as follows:

***“Free Property’ in relation to a deceased person means the property of which that person was legally competent to freely dispose during his lifetime, and in respect of which his interest has not been terminated by his death”.***

Thus, all un-encumbered property of the deceased whether it is in form of capital or income, is free property of the deceased provided he was legally competent to freely dispose it in his lifetime.

29. Under what circumstances can an interest in a deceased’s estate be distributed? The answer to this question is to be found in Section 55 of the LSA which provides as follows:

***(1) No grant of representation, whether or not limited in its terms,***

***shall confer power to distribute any capital asset constituting***

***a net estate, or to make any division of property, unless and***

***until the grant has been confirmed as provided by Section 71.***

***(2) The restriction on distribution under subsection (1) does not***

***apply to the distribution or application before the grant of***

***representation is confirmed of any income arising from the***

***estate and received after the date of death whether the income***

***arises in respect of a period wholly or partly before or after the***

***date of death.***

30. This Section is clear. First, without a confirmed grant no distribution or division of the deceased’s property is permissible. Even a limited grant does not allow such distribution or division.

31. Secondly, under sub-section 2 of that section, income generated by the estate, whether partly before or partly after the deceased’s death, may be distributed as it is exempted from the restriction in subsection (1). Even then, however, such distribution is only capable of being effected before confirmation of grant but whilst there is a grant of representation extant. So that, in effect, the income of a deceased’s estate may not be distributed or divided unless there is in existence a grant, and not before then.

32. A final point needs to be made concerning handling of the deceased estate, whether capital or income. **Section 79** of the LSA provides:-

***The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.*** (Emphasis supplied)

33. What is significant from the foregoing section is that the law recognizes a person who is an appointed executor or administrator as the one in whom all the property of the deceased vests as personal representative. No other person is recognized as having a vested interest on the estate of the deceased. This buttresses my view that the account holders of the two bank accounts herein can only be considered transient trustees of the deceased’s estate without any power to divide or distribute the income held therein.

34. The obvious and direct consequence of Section 79 is that the only persons who have a statutory legal obligation and responsibility to the court to account to the estate of the deceased to manage, administer and distribute the estate, is or are, the duly appointed administrators and executors.

35. To answer the first issue therefore, I would declare as follows: Unless and until a grant has been issued, there is no proper basis in the Law of Succession Act for ordering, as sought in this case, for the equal distribution of the income held in the two banks accounts herein.

36. This leads me to the second issue: Deposit of income from rental room and its equal sharing.

37. After carefully perusing the material availed in court, I was not able to see any concrete evidence as to which were the specific properties and what were the rental amounts generated by the said properties. I have of course perused the petition and seen the list of the deceased’s assets under paragraph 6 of Form P & A 5. Items 1- 6 and items 19 - 23 appear to be immovable properties and rice mills.

38. I note from the Applicant’s supporting affidavit at various paragraph as follows:

- Paragraph 5: Plot 133 Wang’uru rent being collected by the respondent.

- Paragraph 6 & 7: Plot 96 Wang'uru known as Joyland receives rent but the plot is not identified in form P & A 5.
- Paragraph 8: refers to Joyland & Mugumo Lodge and rental houses without availing details of rents or income thereof.
- Paragraph 13: refers to rental from all properties belonging to the deceased and his deceased wife without specificity.

39. The replying affidavit of Joram Muiruri Kamau states at various paragraphs as follows:

- Paragraph 12: That the Mugumo business is run jointly by the two household who should decide thereon.
- Paragraph 14: That the applicants are running and are in control of Joy Rice Millers and the income thereof.
- Paragraph 16 That income from Plot No. 133 Wang'uru is shared between the two families.

40. From the foregoing paragraphs of the parties' affidavits, it is not clear to me precisely which is the income being generated that is not already being shared that should now be deposited into the Equity Bank Account. It is also not clear how much the said income is.

41. Further, even if it was clear that (x) amount was being received for properties (a), (b) or (c), it would be improper for the court to issue the order sought in paragraph 3 of the summons for the moneys thereof to be shared equally by the family members. Such an order cannot lie until there is a grant of representation that has been issued and in effect was provided by Section 55 LSA.

42. As earlier pointed out Section 55 (1) (2) LSA permits income to be distributed only under a grant: and this may be done prior to confirmation of such grant. There is however, no power to distribute income before a grant is issued.

#### **Disposition**

43. In light of all the foregoing, none of the prayers sought in the summons filed on 3<sup>rd</sup> March, 2022 can properly be allowed. The same are hereby dismissed with no orders as to costs.

Orders accordingly.

**DATED AT KERUGOYA THIS 31<sup>ST</sup> DAY OF MARCH, 2022**

**RICHARD MWONGO**

**JUDGE**

**Delivered in the presence of:**

1. Mr. Kagio for the Applicant
2. Mr. Ombachi for the Respondent
3. Murage Court Administrator