



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. E104 OF 2021

IN THE MATTER OF THE ESTATE OF JULIUS MAINA MWANGI (DECEASED)

JOSEPH GITHAIGA MAINA.....1ST APPLICANT

NAOMI WANJIKU MAINA.....2ND APPLICANT

VERSUS

LUCY NDUTA GITAHU.....RESPONDENT

RULING

1. The deceased Julius Maina Mwangi died intestate on 21st September 2020. On 22nd January 2021 two of his children petitioned this court for the grant of letters of administration intestate. They are the petitioners/applicants Joseph Githaiga Maina and Naomi Wanjiku Maina. The grant was issued to them on 13th May 2021.

2. There is no dispute that among the properties that form the estate of the deceased are Plot No. B-170 in Matopeni Kayole and Plot No. 1000/2 Kenya Cooperative Creameries in Kariobangi South. These properties have rental income, and are in the possession and control of the respondent Lucy Nduto Gitahi. The respondent is also in possession of all the original documents of the properties of the deceased.

3. In the notice of motion dated 29th June 2021 by the applicants, they sought the following orders:-

“2) That an order do issue against the Respondent either by herself and or through her agents servants representatives, employees and associates prohibiting and or restraining them from collecting rent on the rental property of the deceased including but not limited to the following properties: plot no. B-170 of the deceased in Matopeni Kayole and Kenya Co-operative Creameries Plot No. 1000/2 in Kariobangi South Area, which form part of the estate of Julius Mwangi Maina (Deceased) or in any way dealing interfering, alienating, intermeddling or dealing in any manner whatsoever with the estate of the deceased.

3. That the Honourable Court be pleased to order that the rental income from the rental properties of the estate of Julius Mwangi Maina (Deceased) be deposited in the joint account of the applicants/administrators herein namely: Joseph Githaiga Maina and Naomi Wanjiku Maina.

4. That the Respondent herein be ordered to deposit into Court all original documents for the properties of the deceased.”

4. The applicants' case was that they were the lawful administrators of the estate of the deceased but that the respondent had refused to surrender the two properties to them and had refused to surrender rental income therefrom. Instead, she was collecting rent and using it. They claimed that her actions amounted to intermeddling with the estate of the deceased. Further, in their capacity as administrators of the estate of the deceased, they were the ones entitled to have all documents relating to the estate. But, that the respondent was the one holding them.

5. The respondent's response was that she was the deceased's widow who was entitled to participate in the administration of the estate; but that the petition had been filed and the grant issued without reference to her. She stated that she shares the rental income with the 1st

applicant, and she produced her mpesa account to prove that. She made reference to the other properties of the deceased that the applicants were managing and benefitting from to her exclusion.

6. The applicants swore a further affidavit to state that when the petition was filed their advocate served it on the respondent who took no action to defend it. They denied that the respondent was the deceased's widow. They stated that she was only a cohabitee.

7. The application was brought under **sections 45 and 47 of the Law of Succession Act, rules 49 and 73 of the Probate and Administration Rules and sections 1A, 1B, 3A and 63(b) and (e) of the Civil Procedure Act.**

8. It should be pointed out that in the chief's letter that introduced the applicants to court, it was indicated that the deceased –

“cohabited together with Lucy Nduta Gitahi of ID No. 39443549 as husband and wife.”

The affidavit in support of the petition indicated that the respondent was one of the persons who had survived the deceased. In the application dated 29th October 2021 seeking the confirmation of the grant, the applicants named the respondent as the deceased's dependant and made provision for her. It is evident from the applicants' pleadings that the respondent was more than the deceased's cohabitee. But that is not the issue under consideration.

9. Section 45 of the **Law of Succession Act** provides that:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or 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.”

10. It is trite that any person who has no authority under the **Act**, or under any other written law, or is not an executor or administrator of the estate of the deceased, or has no order of the court, takes possession of or disposes the free property of the deceased or does any act that dispossesses the executor or administrator of the estate of the deceased, is guilty of intermeddling with the free property of the deceased (**Jane Kagige Geoffrey –V- Wallace Ireri & 2 others [2016]eKLR; Gitau & 2 Others –v- Wandai & 5 others [1989]KLR 23; In the Matter of the Estate of David Julius Nturibi Mithinji (Deceased) [2012]eKLR**).

11. When the applicants were issued with the grant of letters of administration on 13th May 2021 they obtained the authority to collect and take into possession all the free properties of the estate of the deceased and manage and deal with them in accordance with **sections 82 and 83 of the Act**. From 13th May 2021, the respondent was obliged to surrender the two properties in question, and all original documents relating to the properties of the deceased, to the applicants. That she is still holding onto the properties and the documents of these and the other properties of the deceased, and still collecting and managing rent from the properties in question, all go against **section 45 of the Act**, and interferes with the powers of the applicants over the estate of the deceased.

12. That being the case, I allow the application dated 29th June 2021 in the following terms:-

a. the respondent shall forthwith surrender all original documents relating to the properties of the estate of the deceased to the applicants;

b. the respondent shall immediately surrender possession of Plot No. B-170 Matopeni Kayole and Plot No. 1000/= Kenya Cooperative Creameries in Kariobangi South to the applicants;

c. the respondent shall immediately cease course the collection of rent over the properties in (b), and such rent shall henceforth be collected by the applicants; and

d. the respondent shall within 21 days respond to the application dated 29th October 2021 for the confirmation of the grant, and the matter be mentioned on 25th April 2022 for directions on hearing.

13. This is a family dispute. Given the facts that the application has disclosed, I make no order as to costs.

DATED and SIGNED this.....day of MARCH 2022

A.O. MUCHELULE

JUDGE

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF MARCH, 2022

A.O. MUCHELULE

JUDGE