



**Wang’Ombe v Wanjau (Succession Cause 1522 of 2007)
[2022] KEHC 403 (KLR) (Family) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1522 OF 2007**

MA ODERO, J

APRIL 22, 2022

IN THE MATTER OF THE ESTATE OF DAMARIS WAMAITHA WOKABI (DECEASED)

BETWEEN

WILSON WANG’OMBE APPLICANT

AND

BEN WANJAU RESPONDENT

RULING

1. Before this Court are two applications for determination. The first is the summons dated 2nd September 2021 by which Wilson Wang’ombe suing as the Administrator of the Estate of the Deceased (hereinafter ‘the Applicant) sought the following orders:-

“Spent.

2. That the Objectors/Respondents be ordered to render a full and accurate statement of Accounts of the rent proceeds in respect of the premises known as Plot No. E1112 in Dandora Phase 5 Nairobi, which is part of the estate of Damaris Wamaitha Wokabi (Deceased) for the period between 4th May 2007 to 30th November 2020 amounting to Kshs 2,487,000.00 within 30 days from the date of this order.
3. That the Objectors/Respondents be ordered to surrender and/or deposit the said proceeds in this Honourable court within 30 days of complying with Order 2 above.
4. Spent



5. That the Objectors/Respondents be restrained from managing, administering or collecting any rent in Plot No. E1112 Dandora which is part of the deceased's estate or intermeddling with any other deceased's property pending the confirmation of the Grant of the letters of Administration issued herein by this Honourable Court.
 6. That the Administrator/Applicant be at liberty to appoint an Estate manager with the concurrence of the beneficiaries herein to enable him execute his lawful duties pursuant to the Grant of Letters of Administration issued to him by this Honourable court.
 7. The costs of this Application be provided for.”
2. This first application was premised upon section 45, 79 and 81 of the *Law of Succession Act* Cap 160, Laws of Kenya, Rules 49 and 73 of the Probate and Administration Rules and was supported by the Affidavit of even date sworn by Wilson Wang'ombe (the Administrator/Applicant).
 3. The second application for consideration is the summons also dated 2nd September 2021 by which the Administrator/Applicant sought the following orders: -
 - “ 1. THAT the Objector/Respondents summons for Revocation of Grant dated 3rd March 2008 be dismissed by this Honourable court for want of prosecution.

That costs of the Application be provided for.”

4. The application which was premised upon section 49 of the Probate and Administration Rules was supported by the Affidavit of even date sworn by the Administrator/Applicant.
5. The Objectors Beth Njoki Wanjau and Ben Wanjau opposed both Applications through the Replying Affidavit dated 26th October 2021 sworn by the 1st Objector. Thereafter the Administrator filed a Replying Affidavit (a Further Affidavit) dated 15th November 2021 and the objectors also filed a Further Affidavit dated 1st February 2022.
6. The two applications were canvassed by way of written submissions. The Applicant/Administrator filed the written submissions dated 16th November 2021 whilst the Respondents relied upon their written submissions dated 15th December 2021.

Background

7. This Succession Cause relates to the estate of Damaris Wamaitha Wokabi (hereinafter 'the Deceased') who died interstate on 4th May 2007 at Kenyatta National Hospital in Nairobi. Following the demise of the Deceased two of her sons namely Wilson Wang'ombe (the Applicant herein) and one Sammy Waithaka Wokabi were on 18th September 2007 granted letters of Administration in respect of the estate. Unfortunately, one of the named Administrators Sammy Waithaka Wokabi passed away on 25th November 2016 leaving the applicant as the sole Administrator of the Estate.
8. The Estate of the Deceased comprised of only one asset being Plot No. E1112 Dandora Phase 5 Nairobi (hereinafter referred to as the 'suit property')



9. The Applicant alleges that despite the issuance of the Grant to himself and his late brother, the only Objectors (who are the daughter and grandson of Deceased) have intermeddled in the estate by continuing to collect rental proceeds from the suit property to the tune of Kshs 2,487,000 to date.
10. The Applicant further avers that soon after the burial of the Deceased the family held a meeting at which the 1st Objector was present. That in that meeting it was decided that the rental income derived from the suit property would be banked in an account to be operated by the Administrators of the Estate. However contrary to that family resolution the objectors have proceeded to collect, retain and utilize (to the exclusion of all other beneficiaries) all the rental income collected from May 2007 to date. That as at 30th November 2020, the amount so utilized was at Kshs 2,487,000.
11. The Applicant contends that as the sole surviving administrator of the estate, the management of the suit property being the only asset of the estate should be handed over to him. Further that the objectors ought to be compelled to account to the estate for all the rental income collected and utilized exclusively by themselves. Hence the Application seeking relevant orders.
12. On their part in opposing the first application the objectors allege that the Deceased did not die intestate but left a written will in which she appointed the 2nd Objector as executor. That the Deceased in said written will left the suit property to her grandson (the 2nd Objector).
13. The Objectors assert that the two applications filed by the Applicant are null and void as they have been filed without the authority of the Co-Administrator. They fault the Applicant for failing to file a summons to have the Deceased Administrator substituted as required by law.
14. The 1st Objector avers that the bequests in the Will have been overtaken by events as the suit property was transferred by the Deceased to the 2nd Objector during her lifetime. That therefore the suit property having been lawfully transferred to the 2nd Objector cannot be said to form part of the estate of the Deceased.
15. The 1st Objector whilst conceding that she attended the family meeting which was held shortly after the burial of the Deceased, denies that any agreement was reached during said meeting. She avers that the meeting was highly acrimonious and no agreement was reached and the 1st Objector denies that the minutes relied on by the Applicant are a true replication of the deliberations of said meeting.
16. The Applicant in her Further Affidavit denies the claim that the Deceased left a written Will and denies that the suit property was transferred to the 2nd objector during the lifetime of the Deceased. He states that it was he and his late brother who raised funds to put up six (6) rental units on the suit property, from which the Deceased collected rental income which she utilized for her own upkeep until she died aged 102 years.

DIVISION - Analysis and Determination

17. I have considered the two applications dated 2nd September 2021, the Replies filed by the Objectors as well as the written submissions filed by both parties.
18. The Objectors have challenged the locus standi of the Applicant to bring the two applications as Administrator of the estate of the Deceased. It is not in dispute that the Applicant herein and his late brother Sammy Waithaka Wokabi were duly appointed as Administrators of the Estate of the Deceased vide the Grant of Letters of Administration Intestate dated 18th September 2007. A copy of said Grant appears as Annexure BNW '1' to the Affidavit sworn by the 1st objector in support of the summons for Revocation of Grant dated 3rd March 2009.



19. Likewise it is common ground that the Co-Administrator Sammy Waithaka Wokabi passed away on 25th November 2016. A copy of his Death Certificate appears as Annexure WW-‘1’ to the Applicants supporting Affidavit dated 2nd September 2021. Contrary to the submissions of the Objectors the law does not require surviving Administrator to seek and/or obtain a substituted Grant from the court upon the demise of a co-Administrator.
20. Sections 81 of the *Law of Succession Act* provides as follows:-
- “Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them. Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him”. (own emphasis)
21. The Grant issued in respect of the estate of the Deceased remains valid. The same has not been revoked. Only one out of the two Administrators appointed by the court has passed away. I find that the Applicant as the validly appointed administrator of the estate of the Deceased has requisite locus to file suit on behalf of the estate. Thus the two applications were properly filed.
22. The objectors refer to a will left by the Deceased and also allege that the suit property was lawfully transferred to the 2nd Objector by the Deceased during her lifetime. The Objectors have not exhibited any transfer document signed by the Deceased. There is no document to prove that ownership of the suit property now vests in the 2nd Objector. The Administrator maintains that the property is still in the name of the Deceased. Despite their claim that the suit property was bequeathed to the 2nd Objector in a will left by the Deceased, the Objectors have never bothered to file a summons to seek Grant of Probate under said written will. The Will allegedly left by the Deceased is yet to be proved in court. When the Applicant sought Grant of Letters of Administration the Objectors did not produce the alleged nor did they file any objection to the issuance of the grant. It is only after the Grant was issued that the objectors filed a summons for revocation of Grant.
23. Section 79 of the *Law of Succession Act* provides as follows:-
- “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”. (own emphasis)
24. *In Re Estate of Ndiba Thande (Deceased)* [2013] eKLR, Musyoka J stated as follows: -
- “Except so far as authorized by this Act... 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”.
25. The court went on to state as follow:-
- “Quite clearly, a holder of a grant of representation has authority to handle the property of dead person, but not so a person without such grant. A person who handles estate property without authority is an intermeddler.....



The effect of Section 79 of the *Law of Succession Act* is to clothe the administrator of the estate of the deceased with all the rights that the deceased had over his property, and similarly impose upon the administration all the duties that the deceased had over his property. It is on the basis of section 79 that the administrator can sue or be sued on behalf of the estate, can enter into contract with third parties with respect to estate property, and can enforce causes of actions for an on behalf of the estate or the deceased. It is for that reason that the administrator is the personal representative of the deceased. He can practically do anything that the deceased would have legally done were he alive”.

26. Therefore the legal position is that upon the appointment of the Applicant as Administrator of the estate of the Deceased all assets comprising said estate now vests in the Administrator, any rent due from the suit property may only be collected by the Administrator and utilized to the benefit of the entire estate.
27. The objectors have not denied that they have been collecting the rent from the suit property. Any person who handles estate properly without authority is known as an intermeddler. In the case of *John Kasyoki Kieti vs Tabitha Nzivulu Kieti & another* Machakos Civil Case No. 95 of 2001, the Court held that any person dealing with the property of a Deceased person ought to have a Grant of Probate or Administration. One of the objectors holds any such grant. The Objectors’ dealings with the suit property therefore amounts to intermeddling.
28. I therefore find and hold that by collecting and utilizing the rental income, the objectors have been intermeddling in the estate of the Deceased. In the Ndiba case (Supra) the court also held as follows:-
Under Section 45(2) of the *Law of Succession Act*, an intermeddler is answerable to the rightful administrator to the extent with which he has intermeddled with the estate. I have already found that the respondent has intermeddled with estate property, by virtue of Section 45(2) he has become answerable to the rightful administrator, Esther Wambui Ndiba”. (own emphasis)
29. The Applicant alleged that the objectors have collected and utilized rent to the tune of Kshs 2,487,000. The Applicant has annexed to his application a sheet of paper marked ‘WW-2’ headed ‘Dandora House Rental Income’ containing calculations of rent collected from the year 2007 to 2016. It is not clear who authored the document. No receipts have been attached to prove the monies allegedly paid as rent. Neither does the document indicate who collected the sums of money indicated thereon. The document is not conclusive proof that a sum of Kshs 2,487,000 was collected as rent.
30. That having been said, I do find that the objectors have an obligation to account to the estate for the rents they have collected over the months. In order to protect and preserve the estate from further intermeddling, I further direct that the lawful Administrator open an account with a reputable bank within thirty (30) days of the date of this Ruling into which account all rental income derived from the suit property Plot No. E1112 Dandora Phase 5 is to be paid.
31. The second application also dated 2nd September 2021 sought for the dismissal of the summons for Revocation of Grant dated 3rd March 2008 filed by the Objectors for failure to prosecute the same.
32. In opposing this particular application the Objectors submit that they did not deliberately fail to prosecute the summons but that they were unable to set down their application for hearing as the court file had gone missing from the Registry and that all efforts to trace the original file had been futile.
33. It is not in dispute that the summons for revocation of Grant was filed way back in March 2008. It is also not in dispute that to date that said summons has never been set down for hearing. The objectors claim that they were unable to list down the summons for hearing because the file went missing in the



Registry and was only been re-activated by Hon Lady Justice Ali-Aroni on 17th April 2018. That as such the delay on prosecuting the summons for revocation is an administrative lapse, which cannot be blamed on the Objectors.

34. A look at the record reveals that in fact it was the Applicant whose Advocate made efforts to have the summons for revocation heard. The Objectors have annexed to their Replying Affidavit five letters (Annextrues 'BNW-1') all written by the law firm of Ndungu Githuka & Company Advocates, who represented the Administrators inviting the Objectors to take a date for hearing. The letter dated 24th May 2011 written to the Deputy Registrar of the Family Division, seeking to have the court file availed was also written by the law firm representing the Administrators.
35. There is therefore no evidence to show that the Objectors took any steps to list their summons for hearing nor did they write any letters seeking to have the court file availed. It was clear that having filed the summons for Revocation of Grant the Objectors went to sleep. Furthermore, the file was traced in the year 2018. Still the objectors have not bothered to prosecute the summons close to four (4) years after the file had been traced.
36. It is manifest that the Objectors took no steps not to prosecute the summons because it served their interests to do so. In that way they could continue to intermeddle with the estate of the Deceased undisturbed. The objectors are clearly indolent litigators. They only sprung into action after the Administrators filed the two applications now under consideration.
37. However, I have perused the summons for revocation of Grant and in my view, it raises triable issues. The duty of the Probate Court is to ensure that the estate is distributed to the genuine beneficiaries and to prevent any intermeddling with the estate. In order to finalize this Succession Cause it is necessary that the summons for Revocation be heard and determined. I direct that the objectors set the same down for hearing within sixty (60) days. Therefore the application seeking dismissal of the summons for Revocation of Grant is not allowed.
38. Finally the court makes the following orders: -
 1. The Objector/Respondent are hereby directed to render a full and accurate statement of accounts of the rental proceeds in respect of the premises known as Plot No. E1112 in Dandora Phase 5 which forms part of the estate of the Deceased for the period between 4th May 2007 to 30th November 2020.
 2. That the administrator is hereby directed to open an estate account with a reputable bank within 30 days of date hereof into which all rental income derived from the houses standing on Plot NO. E1112 in Dandora Phase 5 Nairobi shall be paid.
 2. That the funds held in the said account shall be utilized only for purposes, beneficial to the estate of the Deceased.
 3. That no payment shall be paid out of the said account without leave of the court.
 4. That this matter shall be mentioned after 30 days for compliance purposes.
 5. That the costs for the two applications dated 2nd September 2021 to be met by the Objectors.

Dated in **Nairobi** this 22ND day of **April 2022**.

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MAUREEN A. ODERO

JUDGE



