



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Mary Rose Wairimu Dames (Deceased) (Succession Cause 85 of 2019) [2022] KEHC 12998 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEHC 12998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 85 OF 2019
MM KASANGO, J
SEPTEMBER 22, 2022**

**IN THE MATTER OF THE ESTATE OF MARY ROSE WAIRIMU
DAMES ALIAS MARY WAIRIMU DAMES (DECEASED)**

RULING

1. There are two applications for consideration in this ruling. The applicants are same in both applications but the respondents are different.

Background

2. This estate relates to Mary Rose Wairimu Dames (deceased). She died on December 11, 2008. The chief of Umoja sub-location, Thika West, by a letter dated August 13, 2019 listed the beneficiaries, who are the children of the deceased. One of those beneficiaries, Margaret Esther Dames petitioned on August 15, 2019 for grant of probate of written will. She annexed a consent to petition presumably signed by the other beneficiary. I say presumably because some of the beneficiaries filed application objecting to the petition on the ground that their signatures were forged. Another application was filed by the beneficiaries, save for the petitioner seeking a determination that the will, the subject of this petition was a forgery. Indeed various applications have been filed including by purchasers who wish the property they claim as purchasers be excluded from this estate. On October 22, 2019 the court recorded a consent which compromised the applications. That consent was filed in court on September 23, 2019. The consent was that Margaret Esther Dames (hereinafter Margaret) and John Andrew Dames (hereinafter John) be and were appointed as interim administrators pending hearing of the probate cause. Following gazettement of this succession, on September 13, 2019 a grant of probate of written will was issued to Margaret on October 25, 2019. The issuance of that grant went against the consent which appointed interim administrators.
3. This succession is indeed riddled with intrigues because in the midst of the applications contesting signatures of other beneficiaries and the validity of the will, one of the witnesses to that will denied he witnessed or signed the will as a witness. The advocate who prepared the will filed an affidavit confirming that witness did indeed witness and did sign the will as a witness.



4. Margaret filed a summons dated May 6, 2020 for confirmation of grant of probate. A compromise was reached by the beneficiaries and accordingly they recorded a consent before court on October 28, 2019. Out of that consent came a partial confirmation of grant. That confirmed grant evidenced that the administrators were Margaret and John. The properties/and other assets of the deceased were distributed by that consent, which distribution was contrary to the written will. By that consent, amongst the other agreements between the beneficiaries, was that a joint account in the names of all beneficiaries be opened for the purpose of depositing all the estate's funds. The consent shows that there were various amounts the estate expected to be paid. One such payments was the balance of the sale proceeds of 7 acres (the title number was not revealed). The estate was represented in that transaction by the law firm of Ndungu Mwaura & Co Advocates.
5. It was also part of the consent that 20% of the funds due to the estate from the sale proceeds would be used to carter for all expenses and costs of running the estate plus the conveyancing costs, survey cost, legal fees and incidental.

Application Dated 9th August, 2021 (amended On 12th November, 2021)

6. This application is filed by five beneficiaries who are:-
 - 1) John Andrew Dames (John).
 - 2) William Henry Dames
 - 3) Christopher Woods Dames
 - 4) Caroline Kotil Seysener Dames
 - 5) Patrick Njubi Dames
7. The respondents are:-
 1. Margaret Esther Dames (Margaret)
 2. James Hoseah Gitau Mwaura t/a Gitau JH Mwara company.
 3. James Mwaura Ndungu t/a Mwaura and company.
 4. Geosuru Systems Ltd
8. The second and third respondents listed above are firms of advocates. The fourth respondent is a surveyor. The prayers of that application are as follows:-
 1. Spent.
 2. This honourable court be pleased to restrain the 1st respondent, 2nd and 3rd respondents from disposing of or dealing with payments received from the 3rd respondent relating to the proceeds of sale;
 3. This honourable court be pleased to compel the 3rd respondent to deposit the outstanding amount of nine million five hundred and fifty six thousand five hundred and ninety one and seventy two cents (Kshs 9,556,691.72) into the beneficiaries' joint bank account being the balanced of the proceeds of sale after payments made by him in accordance with payments instructions given to him by the 1st respondent;
 4. This honourable court be pleased to compel the 1st respondent Margaret Esther Dames to pay into the beneficiaries' joint bank account at her own cost the sum of Kenya shillings Three



Million One Hundred and Eighty Thousand Six Hundred and fifty eight (Kshs 3,180,658) paid to her by the 3rd respondent from the proceeds of sale being the amount over and above the Kenya shillings two million sixty nine thousand seven hundred and fifty six (Kshs 2,069,756) due to her under paragraph 3, item 13 of the court order and certificate partial confirmation of grant dated October 28, 2021;

5. This honourable court be pleased to compel the 2nd respondent, Gitau JH Mwara & Co Advocates to pay into the beneficiaries' joint bank account at their own cost, the sum of Kenya shillings eleven million two hundred thousand (Kshs 11,200,000) being the payment made to them by the 3rd respondent that was not specified in the court order or certificate of partial confirmation of grant dated October 28, 2021;
6. This honourable court be pleased to compel the 2nd respondent, Gitau JH Mwara & Co Advocates to address and submit their bill of costs to both executors of the estate of consideration and agreement as per paragraph 2(o) of the court order and if agreement on the bill of costs is not reached between the 1st respondent and the applicants, this honourable court be pleased to compel to compel the 2nd respondent, Gitau JH Mwara & Co Advocates, to file their bill of costs to be taxed in court;
7. This honourable court be pleased to compel the 1st respondent to verify her expenses with receipts or any other credible proof of payments and to submit the same to the beneficiaries consideration, and if agreed, for payment by the joint account signatories;
8. This honourable court be pleased to compel 4th respondent Charles Gathogo of Geosuru Systems Ltd to pay into the beneficiaries' joint bank account, at his own cost, the sum of Kshs Four million six hundred and thirty two thousand nine hundred and fifty four (Kshs 4,632,954.00) being the payment made to him by the 3rd respondent that was not specified in the court order or certificate of partial confirmation of grant dated October 28, 2021;
9. This honourable court be pleased to compel 4th respondent Charles Gathogo to address and submit his invoices to both executors of the estate of consideration and if agreed, for payment from the 20% set aside for the administration of the estate;
10. This honourable court be pleased to determine that the balance of proceeds of sale be deposited into the beneficiaries' joint bank account is as stipulated in paragraph 2(1) of the court order;
11. This honourable court be pleased to determine that all expenses related to the administration of the estate be catered for by 20% of the balance of proceeds of sale as stipulated in paragraph 2(m) of the court order;
12. This honourable court be pleased to determine that after deducting 20% of the proceeds of sale for the administration of the estate, the remainder of the funds be divided equally among the eight beneficiaries;
13. The 1st respondent be found in contempt of court for:-
 - a. Instructing the 3rd respondent to distribute the proceeds of sale in a manner contrary to paragraph 2(1) of the court order which required the 3rd respondents to deposit the balance of proceeds of sale into the Joint bank account for making the specified deduction;
 - b. Instructing the 3rd respondent to distribute the proceeds of sale in a manner contrary to paragraph 2(m) of the court order, which required 20% of all funds to cater for "all



- expenses and costs of running the estate, conveyancing costs, survey costs, legal fees and incidental costs”;
- c. Instructing the 3rd respondent to distribute the proceeds of sale in a manner contrary to paragraphs 2(n), 2(o), 2(p) and paragraph 3, items 12,13,14 and 15 of the court order, which stipulated payments “to be effected by the joint account signatories.”
 - d. Colluding with the 2nd respondent and 3rd respondent to pay the 2nd respondent from the proceeds of sale contrary to paragraph 2(o) which required his outstanding legal fees and disbursements of first “agreed” by the parties or be “taxed in court” before payment is effected by the joint account signatories.
 - e. Instructing the 3rd respondent to distribute the proceeds of sale to those not specified in paragraph 2(l), contrary to paragraph 2(m) of the consent order, which directed such payments to come out of the 20% set aside for the administration of the estate.
 - f. Disinheriting the other beneficiaries in instructing the 3rd respondent to pay from the proceeds of sale, her unverified expenses incurred and to be insured in the alleged administration of the estate without prior discussion with her co-executor and/or the beneficiaries, contrary to paragraph 2(s) of the court order and to her fiduciary duties to the beneficiaries.
 - g. Contrary to paragraph 2(s) of the court order the 1st respondent repeatedly acting unilaterally in the administration of the estate and deliberately neglecting her duty to cooperate with her co-executor and to consult all other beneficiaries before making financial decisions regarding the estate.
14. The 2nd respondent found in contempt of court for knowingly and brazenly disobeying the same by refusing to avail to the co-executor, John Andrew Dames, with his fee notes to facilitate agreement of his legal fees and disbursements in accordance with paragraph 2(o) of the court order despite numerous requests to do so.
 15. The 3rd respondent be found in contempt of court for:-
 - a. Distributing the proceeds of sale to those not specified in paragraph 2(l) of the court order;
 - b. Acting beyond his mandate set out in paragraph 2(l) of the court order in distributing the proceeds of sale to those not specified in paragraph 2(l) contrary to paragraph 2(n), 2(o), 2(p) and paragraph 3, items 12, 12, 14 and 15 of the court order which stipulated payments “to be effected by the joint account signatories.”;
 - c. failing to deposit the proceeds of sale into the joint bank account contrary to paragraph 2(l) of the court order.
 16. This honourable court to be pleased to find the 1st, 2nd and 3rd respondents in contempt of court orders made on October 28, 2021 and the said respondents and the said respondents be sentenced to a jail term not exceeding six (6) months for each count and to a fine not exceeding Kenya shillings two hundred thousand (Kshs 200,000/=) for each count of contempt;
 17. This honourable court be pleased to remove the 1st respondent forthwith from the office of the executrix of the estate of the deceased;
 18. The costs of this application be borne by the respondent.



9. The prayers reproduced above indeed are, voluminous. They however amount to John requiring explanation how the actions taken by the respondents, over the estate of his deceased mother compared to the consent dated August 10, 2020. That consent was adopted as an order of this court on October 28, 2019.
10. I have considered the affidavit filed herein and what is stated thereof has greatly concerned me. It is more of a concern because two of the respondents are advocates of the High Court. It is expected that they, more than anyone else, understand the provisions of the law and they being officers of the court have a responsibility to ensure that the rule of law is upheld and justice is served to all who seek it. In the case *ronder v worsely* (HL/PO/JU/4/3/1157) in the House of Lord's decision, one of the judges stated an advocate has an abstract duty to justice and professional honour.
11. The court record shows that following the parties consent being signed, it was presented to this court and it was adopted by the court. The essence of the agreement in that consent was reproduced in the partial confirmed grant. That partial confirmed grant appointed two people as administrators namely, Margaret and John.
12. John's complaint and hence the application before this court is that, the respondents collectively disobeyed the order of the court which order adopted the consent and also the partial confirmed grant. The Court of Appeal in the case *Cheruiyot v Korir* (Civil Appeal No 131 of 2017) [2021] Keca 222 (klr) (5 November 2021) (Judgment) had this to say on consent:-

“In *Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd* [1982] KLR 485, Harris, J, correctly held, inter alia, that –

‘A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement...’

In a more recent decision in *Intercountries Importers And Exporters Limited Vs Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR, this court pronounced itself as follows:-

‘Essentially, the above cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside...’ (Emphasis ours)”

13. It ought to be noted that the respondents have not denied undertaking acts in the estate of the deceased without involving John the second administrator. Instead, the respondents gave the reason for not involving John as that he is uncooperative. It needs to be mentioned that although Margaret was issued with a grant of probate with written will, that grant was never confirmed by this court. Instead, parties engaged in family meeting/s from which sprang the consent which became an order of the court. That consent produced a partial confirmed grant which appointed two administrators. I wish to repeat there are two administrators of this estate. No one of those administrators has a superior right to determine how to distribute the estate without the involvement of the other. That is what I find happened here. Margaret with the encouragement of the other respondents has handled this estate as though she is sole administrator. Margaret's action from the various documents before me, seems that they were



influenced by advice she obtained from the respondents. This brings to my mind the statement made in the case *In re Estate of Haji Mohamed (deceased)* [2016] eKLR where the judge stated:-

“ 16. Kimaru, J in *In re Estate of Krishan Murti Maini (deceased)* [2011] eKLR had occasion to consider the issue of delegation of power bestowed by a Grant and had this to say:-

‘It is therefore clear that when a court issues letters of administration or grants a probate of written will, such letters or grants are issued personal to the person applying to administer the estate of the deceased. The person applying for letters of administration or grant of probate cannot on his part delegate the powers granted to him by the court to someone else to administer the estate (in the case where the deceased died intestate) or to execute the will (in the case where the deceased left behind a written Will) on his behalf.’”

14. If indeed the respondents have acted contrary to the order of this court capsulated in the partial confirmed grant, then they are in breach of section 45 of the *Law of Succession act*, cap 160. That section criminalises actions that is not expressly authorised by the act or by another written law, or by a grant of representation. That section forbids acts in respect to the estate, that are not authorised as stated before and further states:-

“ ... no person shall for any purpose take possession or dispose, or otherwise intermeddle with any free property of deceased person.”

15. Even if, as stated by Margaret, some titles are now registered in the names of the beneficiary, this court as provided in section 47 of cap 160, has power which is not limited. That section provides:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this act and to pronounce such decrees and make such orders herein as may be expedient.”

16. The respondents have argued that administration was undertaken and the beneficiaries have been paid their share of the proceeds of sale. The question that needs the response of the respondents was whether the action of administration undertaken was as spelt out in the consent and the partial confirmed grant. The respondents in their responses have skirted around that issue and this court will not permit that issue to remain unanswered.

The Summons Dated 10Th November, 2021

17. John seeks orders that Margaret and the 2nd respondents are in contempt of court order, amongst other orders. The prayers in this application are replicated in the summons dated July 9, 2021 (amended on November 12, 2021). This court therefore will not consider that application in any greater depth.

18. Having considered the applications and before making a final determination, I will require the respondents to file into this court and for this court’s consumption detailed account of all acts undertaken by each one of them in respect to the deceased’s estate and set out therein, how those acts were in conformity of the consent order and the partial confirmation of grant.

Disposition

19. In respect to the summons dated July 9, 2021 (amended on November 12, 2021) and dated November 10, 2021, I order as follows:-



- (a) Each respondent, individually shall within 14 days from this date hereof file a detailed account of all acts undertaken in this estate and in that account shall set out how those acts conform to the consent dated August 10, 2020 and the partial confirmed grant dated October 28, 2020.
- (b) That account stated in (a) above shall be served upon all the applicants within 15 days from this date hereof. On being served, the applicants are granted 14 days from the date of service to file and serve their response.
- (c) At the reading of this ruling, a date shall be fixed when the court shall confirm receipt of those accounts and shall give further directions if need be.

20. It is so ordered.

RULING DATED AND DELIVERED AT KIAMBU THIS 22ND DAY OF SEPTEMBER, 2022.

MARY KASANGO

JUDGE

In the presence of

Coram:

Court Assistant : Mourice

For Applicants: - Mr. Ngugi Kariuki

For Respondents:- Mr. Gitau

RULING delivered virtually.

MARY KASANGO

JUDGE

