



REPUBLIC OF KENYA



In re Estate of Joseph Eric Owino alias Joseph Eric Owino Nyaburi -Deceased (Succession Cause 58 of 2020) [2022] KEHC 15453 (KLR) (18 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 58 OF 2020
RN NYAKUNDI, J
NOVEMBER 18, 2022**

BETWEEN

MARY ANYANGO ONYANGO ADMINISTRATRIX

AND

CHRISTINE OWINO 1ST RESPONDENT

EMMANUEL OTIENO OWINO 2ND RESPONDENT

MARY NABUSU OWINO 3RD RESPONDENT

AND

NATIONAL BANK OF KENYA LTD INTERESTED PARTY

RULING

1. Before are summons dated July 22, 2022 in which in the applicant seeks the following orders: -
 1. Spent.
 2. That pending the hearing and determination of the instant application, the honourable court be pleased to enjoin the National Bank of Kenya (NBK) to this proceedings as an interested party and consequently restrain the bank from auctioning either by public auction or private treaty, or selling and or in anyway dealing with deceased's property comprised in Eldoret municipality Block 13/305 valued at approximately kshs 55,000,000/= which property was allocated the 2nd house and as been charged with the said bank.
 3. That pending the hearing and determination of the instant application and thereafter this succession cause, Christine Owino and Emmanuel Otieno Owino the 2nd and 3rd administrators, their agents and or servants be restrained from administering the deceased's estate.



4. That pending the hearing and determination of the instant application and thereafter this succession cause, Christine Owino and Emmanuel Otieno Owino the 2nd and 3rd administrators, their servants and or agents be restrained from spending, wasting, misusing and or dealing with the proceeds of the deceased's estate generated from the rental income in manner that is detrimental to other beneficiaries and or intermeddling with the estate of the deceased and consequently be compelled to account for the rental income/ proceeds collected from the time the deceased passed on to date within reasonable time.
5. That consequently, in view of prayer 3 above, the honourable court be pleased to remove Christine Owino and Emmanuel Otieno Owino the 2nd and 3rd administrators respectively from the administration of the deceased estate.
6. That the honourable court be pleased to cite Christine Owino and Emmanuel Otieno Owino the 2nd and 3rd administrators/respondents respectively for contempt of court and consequently be committed to civil jail for a period not exceeding six months for failing to abide by the orders of the court issued on March 10th, 2022 which orders directed them to account for rental income/ proceeds of the estate herein.
7. That the honourable court be pleased to deny the said Christine Owino and Emmanuel Otieno audience in respect of their application dated March 29th, 2022 which application is seeking leave to appeal and stay execution until they purge the contempt of court herein.
8. That the honourable court be pleased to urgently affirm Mary Anyango Onyango and Mary Nabusu as the only administratrix of the deceased estate herein.
9. That the honourable court be pleased to order for the release of kshs 1,159,000/= from the estate account at Diamond Trust Bank (DTB) account no 5736350001 held in the joint names of the administrators herein to clear the arrears in favour of the National Bank of Kenya Ltd (NBK) the interested party herein for the charge against the deceased estate comprised in Eldoret municipality Block 13/305.
10. That the honourable court be pleased to order for the release of kshs872,900/= from the estate account at Diamond Trust Bank (DTB) account no 5736350001 held in the joint names of the administrators herein to premium valuers Ltd being the charges for valuation reports filed herein in respect of Eldoret Municipality Block 13/305 Eldoret Municipality Block 6/16 and Eldoret Municipality Block 14/74.
11. That Christine Owino and Emmanuel Otieno be condemned to pay costs.

The application is premised on the grounds therein and it is further supported by the affidavit of Mary Anyango Onyango, the 1st administratrix/applicant sworn on July 22, 2022.

The Applicant's Case

2. The applicant's case is that on March 10th, 2022 the court confirmed and issued the certificate of confirmation of grant distributing the deceased's estate amongst all the beneficiaries. The court further vide the ruling dated March 10, 2022 directed that the rent so far collected be accounted for by the administrators by way of rendering statements of accounts for purposes of distribution to the beneficiaries and paying of some of the liabilities incurred so far by estate.



3. The applicant contends that the 2nd and 3rd administrators, who were in charge of collecting rental income on behalf of the estate herein have either neglected, refused and or declined to account for the rent collected from the time the deceased passed on to date and as such are liable for contempt of court.
4. The applicant maintains that as much as the said administrators have since preferred to appeal against the distribution of the estate herein, they are yet to prefer an appeal against the order of the court directing them to account for estate proceeds. The applicant argues that in light of the aforementioned that the said administrators should be cited for contempt.
5. The applicant argues that the 2nd and 3rd administrators have caused the estate herein to incur loss and damages since pending liabilities are yet to be settled. That some of the liabilities include the Premium values Ltd valuation fees amounting to kshs872,900/=. This is respect to the following parcels of land, Eldoret Municipality Block 13/74, Eldoret Municipality Block 13/305 and Eldoret Municipality Block 6/16. The applicant deposed that on November 5, 2021 the court ordered for the valuation of the deceased's properties and directed that the valuation fees be paid from the proceeds of the estate.
6. The applicant maintains that parcel of land known as Eldoret Municipality Block 13/305 valued at kshs 55,000,000/= was charged to National Bank Ltd and has a loan arrears of kshs 1,159,000/= which property was allocated to the 2nd house. The applicant argues that despite the 2nd and 3rd administrators having been aware of the said loan arrears over they subject land. They declined, neglected and/ or refused to service the said loan while they collected rental income from the deceased's estate.
7. The applicant maintains that before the deceased passed on, he had entered a consent with NBK to settle the arrears in question amicably. The applicant further argues that at one of the family meetings, it was resolved that the rental income from the deceased's estate was to service the said loan. The applicant deposed that as at July 1, 2022 the loans on the said property stood at kshs 1,159,000/=.
8. The applicant's case is that in view of the said arrears, NBK has since issued the forty days statutory notice of sale and yet they still continue to manage the rental proceeds of the deceased estate. The applicant maintains that unless this court restrains the (NBK) from selling the said property, the deceased's estate stands to suffer loss.
9. The applicant deposed that on September 3, 2021 the court directed the court directed the administrators to open an estate account to be held in the joint names of the administrators which account has since been opened at the Diamond Trust Bank (DTB), Eldoret branch. The applicant seeks to have the court direct the said bank to release kshs 1,159,000/= from the estate account to clear the loan arrears being claimed by the (NBK).
10. The applicant maintains that from the time when the estate account was opened, on or about November 1, 2021 the rental income deposited in the said account was approximately over kshs 2,501,996/=. The applicant argues that since the demise of the deceased in 2018 to November 2022, the 2nd and 3rd administrators mismanaged the deceased estate by failing to account for the rental income for the said period. In light of the aforementioned, the applicant argues that the said administrators should be held to account and should be removed from the administration the said estate.
11. According to the applicant parcel of land known as Eldoret Municipality Block 6/16 generates rental of over kshs 500,000/= per month with over ten tenants but only a few of them are remitting the rent to the joint account held at (DTB) while the rest pay the 2nd and 3rd respondents directly. The applicant argues that the 2nd and 3rd respondents have continued to illegally collect rental income from the estate of the deceased against the court's directives.



The Interested Party's Case

12. The interested party filed grounds of opposition dated October 27, 2022 together with the replying affidavit sworn by Chrispus N Maithya on October 27, 2022. The ground of opposition as can be summarized as follows; that the application is incurably defective, bad in law, incompetent and an abuse of court process, that the applicant has not given any valid reasons to warrant the orders sought and that the interested party will be highly prejudiced if the application is allowed.
13. In the affidavit, the interested party deposed that the issues herein revolve around the family and estate of the deceased and having nothing to do with it.
14. The interested party maintains that the relationship between it and the deceased is a contractual one in where by a loan facility was advanced to the deceased but he paid to repay. The interested party maintains that its only objective is to safeguard its interests in the charged property being Eldoret Municipality Block 13/305 as security for the outstanding loan that continues to accrue interest. The interested party argues that it has the right to exercise its statutory power of sale as the loan amount is yet to repaid and continues to accrue interest.
15. The interested party argues that the applicant has not demonstrated any justifiable reason to stop the interested party from exercising its statutory power of sale over the charged property. The interested party argues that the mismanagement of deceased's estate does not preclude it from paying the outstanding loan amount.

The respondents did not file any written submissions.

- 16 The applicant also file submissions on November 14, 2022.

Determination.

17. I have carefully considered the application, the affidavits both in support and in opposition and the submissions on record. The following are the issues for determination: -
 - a. Whether the interested party should be restrained from auctioning the property known as Eldoret Municipality Block 13/305?
 - b. Whether the court should direct that monies being held at DTB Bank account no 5736350001 held in the joint names of the administrators be released to National Bank of Kenya (NBK) with the view of settling kshs 1,159,000/= being the loan arrears?
 - c. Whether the court should that order that that monies being held at DTB Bank account no 5736350001 held in the joint names of the administrators be released to Premium Valuers Ltd being the charges for the valuation reports filed in respect of Eldoret Municipality Block 13/305 Eldoret Municipality Block 6/16 and Eldoret Municipality Block 14/74.
 - d. Whether the 2nd and 3rd administrators should be cited for contempt?
 - e. Whether the 2nd and 3rd administrators should be removed as administrators?

Whether the interested party should be restrained from auctioning the property known as Eldoret Municipality Block 13/305?

18. In order to exercise its statutory power of sale, the Bank must issue a notice under section 90 of the [Land Act](#) when the chargor defaults in any of its obligations under the charge. Such obligations include payment of interest or any other periodic payment or any part thereof due under the charge. If the



chargor does not comply with the demand within 90 days after service of the notice, the chargee may proceed to sell the charged property. It is at this point that it is said the statutory power of sale has crystallised. Upon crystallization of the power of sale, the chargee is required to issue and serve on the chargor a 40-day notice to sell under section 96 of the *Land Act*.

19. In the present case there is also no doubt that the property was charged to the Bank during the lifetime of the deceased, and that by the time of her death, the charge on the property had not been discharged. Section 90 of the *Land Act* states;

- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - a) the nature and extent of the default by the chargor;
 - b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

Section 92(2) of the *Land Act* states;

Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

20. The applicant does not deny the existence of the said loan facility and she even acknowledges that the interested party has since served its notice with the view of exercising its statutory power sale. In my view there is default on the part of the deceased's estate which is yet to be made good. These proceedings cannot therefore be used curtailed the interested party's statutory power sale where the bank's statutory power of sale has crystallised.

Whether the court should order that monies being held at DTB Bank account no 5736350001 held in the joint names of the administrators be released to National Bank of Kenya (NBK) with the view of settling kshs 1,159,000/= being the loan arrears?

21. From the record, however it is indeed true that at the time when the court was making its resolution regarding the distribution of the deceased's estate, none of the parties disclosed to the court that there



was a pending charge on the property known as Eldoret Municipality Block 13/305 which was to be wholly shared by the 2nd House. In light to the said omission, order 45 of the Civil Procedure Rules provides the parties with avenue to review the said order.

22. Under order 45 of the Civil Procedure Rules, review can only be allowed under the following circumstances:
 1. Discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.
 2. Mistake or error apparent on the face of the record.
 3. Any other sufficient reason which may make the court to review its order.

23. In the case of John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another [2016] eKLR
The court held;

...the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time.

Clearly, order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in order 45 of the Civil Procedure Rules.

24. Upon review, parties can then in accordance with the provisions of section 74 of the Law of Succession Act and rule 43(1) of the Probate and Administration Rules, seek to rectify the certificate of confirmation of grant that was issued on March 14, 2022.

Whether the court should that order that that monies being held at DTB Bank account no 5736350001 held in the joint names of the administrators be released to Premium Valuers Ltd being the charges for the valuation reports filed in respect of Eldoret Municipality Block 13/305 Eldoret Municipality Block 6/16 and Eldoret Municipality Block 14/74. ___

25. The court in Re Estate of Mukhobi Namonya (Deceased) [2020] eKLR stated that, “the omission of persons who claim to be claimants from or creditors of the estate is not a ground for revoking a grant. After all, creditors of an estate are entitled to have their debts settled. It is for this reason that debts and liabilities are given priority over distribution of the estate. Debts and liabilities ought to be settled first. Distribution is of the net estate, after the debts and liabilities have been met. The administrators have a duty to identify the creditors of the estate and to pay them off before proposing distribution, or to make provision for them at confirmation of grant. Such claimants and creditors have an obligation to place their claims before the administrators, and should the administrators fail to settle the same or acknowledge them, move the Environment and Land Court to prove their claims, since the High Court no longer has jurisdiction to determine questions around ownership of immovable property in view of articles 162(2) and 165(5) of the Constitution.
26. Who exactly is the creditor of the estate or what ought to be treated as a liability of the estate. The most obvious candidates are individuals or entities that transacted with the deceased during his lifetime.



Debts that the deceased left unsettled are a burden that the administrators of his estate ought to take care of. Transactions that he left incomplete, such as for sale of land by him or to him, should be completed by the administrators. The administrators are able to do so through the powers conferred upon them by section 82 of the *Law of Succession Act*, being mindful of section 79, which vests the assets of the estate in the administrator. Section 83 imposes a duty on administrators to settle such debts before distributing the estate.....

27. One of the duties of administrators, set out in section 83(d) of the *Law of Succession Act*, is to ascertain and pay out of the estate all the debts of the deceased. Ascertainment of the debts of the estate is about identifying them, in terms of finding who the creditors were, how the debts were incurred, what documentation is available, before pay out can be done. If the debts arose during administration, and were necessitated by the exigencies of administration, such as where funds were needed to pay for the administration process, in terms moneys for court fees, advocates costs, land rents and rates, taxes, and attendant expenses, then section 83(c) of the *Law of Succession Act* would be relevant. That provision requires administrators to pay out of the estate all the expenses of obtaining the grant and all other reasonable expenses of the administration. Where estate assets have been dissipated to address the expenses envisaged in section 83(c) then it must be stated what these expenses were, how they arose and how they were settled. The same would apply where certain debts and liabilities of the estate needed to be settled and estate assets had to be sold to facilitate the settlement of such debts. Section 83(d) of the *Law of Succession Act* requires administrators to ascertain and pay, out of the estate, all the debts of the deceased. In addition, section 83, at paragraph (e), requires the administrators to render accounts of their administration within six months of their appointment.”
29. In light of the foregoing, the administrators herein have the duty pay out of the estate all the expenses of obtaining the grant and all other reasonable expenses of the administration. Once charges for the valuation reports have been assessed and verified then the administrators are duty bound to pay the said Premium Valuers Ltd for the expenses incurred by them for the services rendered.

Whether the 2nd and 3rd administrators should be cited for contempt and they should be removed as administrators?

30. The application before court seeks to have the 2nd and 3rd administrators cited for contempt of this court’s order of March 10, 2022 requiring them to render the statements of accounts with respect to the deceased estate and to be committed to civil jail for a period not exceeding six months.
31. Contempt of court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order.
32. Section 83(e) requires an administrator to within six months from the date of the grant, 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. Under section 83(g) an administrator is obligated to complete the administration of the estate in respect of all matters within six months from the date of confirmation of the grant and to produce to the court a full and accurate account of the completed administration. The application herein was filed on July 25, 2022. As at that time (6) months had not lapsed since the grant was issued. To my mind also the said order was not selectively directed to the 2nd and 3rd administrators herein but rather to all the administrators of the deceased’s estate.



33. In view of the foregoing, it is therefore clear that I cannot conclusively find that the 2nd and 3rd respondents have breached the said orders; they were aware of its terms and that they willfully and deliberately disobeyed it. For the 2nd and 3rd administrators to be held in contempt, the applicant must demonstrate that there was willful disobedience of the order.
34. The production of accounts however is a key component of the administration process of a deceased person's estate. From the moment a grant is issued to a personal representative of a deceased person, the grant holder becomes responsible to the court in the carrying out of the duties of administrator. Accounts are an accountability tool that will tell the court whether the administrator has been faithful to the role entrusted to him or her. When an administrator fails to file accounts as required, questions as to the integrity of the process are bound to arise as in the present case. The law has empowered the court on either of its own motion or on the application of any interested party in the estate, to order an administrator to produce 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.
35. Rule 73 of the *Probate and Administration Rules* gives the court power to make orders to meet the end of justice. In view of the foregoing and in the interest of substantive justice, the court shall not at this particular juncture order the removal of the 2nd and 3rd administrators. But, rather direct that the administrators in the estate of the late Joseph Eric Owino do file a statement of accounts within the next twenty-eight (28) days rendering an accurate inventory of the assets and liabilities of the deceased from the time of his demise to date. It is not disputed that the administrators in this case were lawfully appointed by this court for the purpose of managing the estate of the deceased. There is therefore no doubt that restraining them from exercising the powers of their office would in essence defeat the purpose for which they were appointed.
36. The applicant further claims that the 2nd and 3rd administrators failure to account for the rental income/proceeds collected from the time the deceased passed on amounted to intermeddling with the deceased's estate. The claim was however not substantiated by any evidence.
37. In the end the court finds that this application lacks merits and is hereby dismissed.
38. Each party shall bear its own costs noting that the claim herein is a succession cause involving members of one family.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 18TH DAY OF NOVEMBER, 2022.

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R. NYAKUNDI

JUDGE

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