



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1212 OF 1998

IN THE MATTER OF THE ESTATE OF JOSEPH MAINGI MURIITHI (DECEASED)

RULING

Rebecca Wanjiru Muriith (the Applicant), one of the beneficiaries of the estate of Joseph Maingi Muriithi, has brought this application by way of Summons anchored on Section 83 and 94 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules as well as all other enabling provisions of the law. She seeks the following orders:

1. That the Administrator Benson Riitho Muriithi be ordered to render to the court a true and just account of status of the distribution of the Estate.
2. That the Administrator be ordered to complete the Administration of the Estate in respect of all the matters set out in the Certificate of Confirmation of Grant dated 19th March, 2008 and the consent order dated 28th November 2007 pursuant to the consent dated 30th October 2007 filed on 9th November 2007.
3. That the Administrator be ordered to produce to the court a full and accurate inventory of the liabilities of the deceased and a statement of settlement of the said liabilities and specifically an account of how the proceeds of the ten (10) acres excised out of L.R No. 7107/2 have been utilized.
4. That in default of the administrator completing the distribution within 60 days he be removed as such administrator and account for all the assets of the estate and make good the losses.
5. That the administrator be held personally liable for the costs of this application.

In support of the Summons, the Applicant has sworn an Affidavit in which she deposes that the estate of the deceased was distributed in accordance with a consent dated 30th October 2007 and adopted by the court as a court order on 14th November 2007 and the certificate of confirmation of grant dated 19th March 2008; that the administrator has failed to complete the distribution in accordance with the wishes of all the beneficiaries as specified in the consent order and certificate of confirmation. She deposes that the administrator has refused to account to the beneficiaries how he has utilized the proceeds of sale of ten (10) acres out of L.R. No. 7107/2 meant to settle the debts of the estate and the balance thereof to be shared equally between the beneficiaries. She states that the administrator has refused or failed to disclose to the beneficiaries all the debts of the deceased and the extent to which they have been settled.

She further claims that two of the assets of the estate which she names as L.R. No. 71-7/2 (Embakasi land) and L.R. No. 7287/2, 7387/10 and 7387/11 (Nyeri Land) have been distributed to her in less proportions than her entitlements under the certificate of confirmation. She claims that the administrator has refused or failed to distribute to her the share meant for her in property described as Land at Kamirithu Limuru and 3 acres and one plot in Kajjado. The Applicant claims that her efforts to have the administrator to resolve the outstanding issues of distribution of the estate the administrator has refused to do so.

The Applicant deposes further that she is aware that the administrator has misapplied some of the assets of the estate to the detriment of the beneficiaries and that he has sold or allocated 186 plots out of L.R. No. 7107/2(Embakasi land) to people who are not beneficiaries without consent of the beneficiaries and has failed to account for the proceeds.

She asks the court to give the administrator time limit within which to account for the assets of the estate and make good the losses resulting from his conduct and that the administrator be compelled to complete the distribution of the estate within 60 days.

The administrator, Benson Riitho Muriithi in his Replying affidavit sworn on 18th January, 2013 states that he together with his late brother David Wamae Muriithi were joint administrators by virtue of letters of administration issued on 7th October, 1999; that prior to the deceased's death the estate had been burdened with heavy financial liabilities ranging from outstanding rates, land rent, prohibitory orders,

caveats, income tax changes among other liabilities and that one parcel of land constituting the estate had been invaded by squatters; that a meeting of all family members was held and he was given full mandate to sub – divide L.R No 7107/2 Embakasi into portions of 40 acres and 10 acres and apply for change of user in respect of the 10 acres; that 10 acres were to further be subdivided in plots and sold with a view of clearing the outstanding debts and liabilities and that the property be sub-divided into sub-plots and distribution be on the basis of plots and not acreage; that he commissioned a surveyor by the name George Ogalo Oner of the firm of Geoner Systems Limited, to undertake the sub-division process and to secure deed plans.

He further states that the surveyor would issue progress reports and he would in turn issue the same to court so as each beneficiary would know the position; that the surveyor declined to surrender all deed plans and unlawfully sub-divided the public utility land to be surrendered to the government contrary to and in violation of the physical planning regulations; that as a result of this he filed suit against the surveyor being **ELC NO. 7 of 2012**, and further filed an application seeking cancellation of the entire sub-division; that the City council of Nairobi through a letter recommended the whole sub-division scheme be cancelled. That he has not failed to and/or refused to complete the distribution process and/or account to the beneficiaries as the beneficiaries have all along been aware of the predicaments and contingencies that have befallen the distribution process. He states that he has been unable to secure the title documents in respect of the Kamirithu Limuru property and efforts to ensure distribution have proved unsuccessful.

Mr. Stephen Maingi Muriithi a beneficiary, filed a Replying Affidavit on 19th October, 2012 in support of the Respondent. In that affidavit, he states that the process of administration of the estate has been crippled by so many factors including numerous suits which are pending in court involving the administration of the estate and the surveyor who has unlawfully defrauded the estate of some of the properties. He states that after the death of the deceased there were various court cases which were pending in court one of which the deceased had been sued for recovery of rates by the Nairobi city council; that the 50-acre parcel of land situated in Embakasi being L.R No 7107/2 was to be subdivided into portions of 10 acres and 40 acres out of which 10 acres was to be used to settle liabilities of the estate and the remainder subdivided among the beneficiaries; that he is satisfied with the manner in which the administrator has been carrying out the affairs of the estate and thus oppose any attempt being made to remove the current administrator. He states that the administrator has been keeping them informed of the status of the estate and the steps being undertaken to secure and protect the interest of the estate.

Likewise, in support of the Respondent, Charles Mugambi Githenya a beneficiary, filed a Replying Affidavit on 19th October, 2012, in which he opposes the Application filed by the Applicant and states the administration of the estate has been impeded by numerous suits that have been filed in court; that he is satisfied with the manner in which the administrator is administering the estate and that indeed the administrator has taken diligent measures to ensure that the interest of the estate is well taken care of.

In compliance to the directions of this court on 18th January 2021 that this application be disposed of by way of written submissions, the Applicant filed her submissions dated 15th February 2021.

The Applicant has also filed submissions dated 15th February 2012 I which she identifies two issues for determination namely:

- a. Whether the Administrator intermeddled with the estate of the deceased; and
- b. Whether the respondents were liable and had unlawfully failed, to render accounts of the administration of the estate.

On the first issue she submits that the administrator has allowed intermeddling of the estate of the deceased, specifically L.R. No. 7107/2 contrary to the law. The Applicant submits that the property of deceased person can only be dealt with in the manner authorized by the law. To that issue the Applicant cited **Veronica Njoki Wakagoto (Deceased) [2013] eKLR** where the court stated that:

“The effect of this [section 45] is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

She submits that administrator has allowed other people to intermeddle in and plunder the estate of the deceased. She cited **In Re Estate of Krishan Murti Maini (Deceased) [2011] eKLR** and Section 82 of the Law of Succession Act to support her submissions that the law does not allow personal representatives to delegate powers granted to him/her to administer the estate to another person and that the Administrators’ action in allowing other people to intermeddle with the estate went against the provisions of Section 45 and 82 of the Law of Succession Act. The Applicant asks this court to exercise its jurisdiction under Section 47 of the Law of Succession Act and make a finding that the estate is in danger of intermeddling and make appropriate orders to regularize the situation.

On the second issue it is submitted that Section 83 of the Law of Succession Act spells out duties of a personal representative, which include:

- (a).....
- (b).....
- (c).....
- (d)
- (e) **within six months from the date of the grant, to 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;**

(f).....

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, 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;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

She submitted that personal a representative has a duty to account to the beneficiaries which duty arises both in Equity and the law governing succession and that failure, after due notice and without reasonable cause, to produce to the court within the time prescribed any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular, is one of the grounds for revocation of grant under Section 76 of the Law of Succession Act. She submits that the Respondent be ordered to provide a full inventory of the assets and liabilities of the estate of the deceased.

When I took over the proceedings in this matter on 24th November 2020 and the subsequent dates when this matter came up for mention, one of the issues that has come up is the statements of accounts regarding the estate. This court was informed that the application under consideration was pending. Directions were given on 18th January 2021 that the application should proceed by way of written submissions. Parties were allowed time to file respective submissions and a date, 10th March 2021, was given to confirm compliance. On 10th March 2021 only Mr. Macharia for the Applicant appeared in court. Mr. Amalemba for the Respondent did not attend nor did his client. On the same date this court confirmed that only submissions of the Applicant were in the file. I directed that court would proceed to prepare ruling on the Application.

I have had time to read the proceedings in this matter. I have noted as far back as 30th July 2018, the issue of audited statement of accounts in respect of this estate was a live issue. On that date this court (Onyiego, J) recorded a consent order directed at the administrator to submit an audited statement of accounts within 45 days from that date. As of 2nd October 2018 this order had not been complied with. The court extended the time to comply for another 21 days. On 4th December 2018 the court was informed that an interim report of accounts had been filed but the accounts had not been audited. Mr. Amalemba undertook to file a full report of audited accounts within 30 days from 4th December 2018. As of 11th March 2019 the court order to file full audited accounts had not been complied with. Summons issued to the Administrator to show cause why the orders of the court had not been complied with. He appeared in court on 2nd April 2019 and explained that the property had been subdivided and was awaiting title deeds. He was ordered to produce full inventory of the estate and an audited statement of accounts within 30 days. As of the time I took over these proceedings, the full inventory and statement of audited accounts had not been filed.

I have considered this matter. The Applicant claims intermeddling of the estate and lack of accounting by the administrators. I have considered the law and the cited authorities. Section 45 of the Law of Succession Act provides as follows:

45. (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.

The issue of intermeddling has been a subject of consideration in our courts as evidenced by the authorities on the issue including **Veronica Njoki Wakagoto**, cited above; **In Re Estate of Krishan Murti Maini (Deceased) [2011] eKLR**; **Machakos High Court Civil Case No. 95 of 2001 Jon Kasyoki Kieti vs. Tabith Nzivulu Kieti & another** and **Benson Mutuma Muriungi vs. C.E.O Kenya Police SACCO & another [2016] eKLR**. It is also worth noting that the Applicant does not plead intermeddling of the estate in her application dated 1st October 2012. This issue has only popped up in her submissions.

In the latter case(**Benson Mutuma Muriungi**) the court stated that intermeddling refers to any act or acts which are done by a person in relation to the free estate of the deceased without the authority of any law or grant of representation to do so. The court further went on to categorize the offensive acts that may constitute intermeddling to include taking into possession of or occupation of, or disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act.

In **Christopher Maina Kimaru v. Josephine Wairimu Ngari & another [2016] eKLR**, this court (Mativo, J) stated as follows in regard to burden and standard of proof:

“I reiterate that it is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of Miller vs Minister of Pensions Lord Denning said the following about the standard of proof in civil cases:

‘The...{standard of proof} .. is well settled. It must carry a reasonable degree of ‘probability.... If the evidence is such that the tribunal can say: ‘We think it more probable than not’ burden is discharged, but, if the probabilities are equal, it is not’

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.”

The law is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

With this in mind, I have considered the Affidavit of the Applicant in support of her Application and her written submissions. I fail to see evidence of what the Respondent has done to amount to intermeddling of the estate. The Applicant has failed to provide this court with material showing that the Respondent has intermeddled with the estate. Other than stating that the Respondent has failed to complete administration of the estate and that he has failed to give her the complete shares of her estate and that the Respondent has failed to provide statement of accounts, the Applicant has not provided evidence of alleged intermeddling in the estate either by the Respondent or any other person. This claim by the Applicant lacks merit.

On the issue of rendering accounts on the administration of the estate, I find that this issue has merit. As I have stated above, this issue is live. Although the Respondent filed an interim report as shown in these proceedings, it was not audited. His undertaking to file full audited accounts through his lawyer Mr. Amalemba has not been honoured. As indicated above in this ruling, the law takes the issue of accounts and inventory quite seriously. Under section 83 of the Law of Succession Act the personal representatives are under a duty to give full and accurate inventory of the completed administration of the estate within 6 months from the date of confirmation of the grant. A personal representative is also under duty to produce to court if required to do so by the court on its own motion or on application full and accurate inventory of the assets and liabilities of the estate. This is a pending issue in this matter.

The Respondent did not file submissions but from his Replying Affidavit he states that the estate has a lot issues that remain unresolved, hence the delay in completing the administration. This is an old matter and full administration of the estate has taken a long time to complete. It is upon the personal representatives to move with haste and resolve whatever issues bedevil this estate. By his own indirect admission, the Respondent has failed to complete the administration of the estate. It is upon him to do so. That is what the law dictates.

In conclusion of this matter, it is my finding that it is my considered view that the application succeeds and fails in certain respects. I proceed to grant the following orders and directions:

- 1. That the Administrator, Benson Riitho Muriithi, shall within 60 days from today’s date render true and just account on the status of the distribution of the estate of the deceased herein. Further, the Administrator shall disclose to this court the part of the estate that is involved in court cases.**
- 2. That the Administrator, Benson Riitho Muriithi, shall complete the administration of the estate in respect of all matters set out in the certificate of confirmation of grant dated 19th March, 2008 and the consent order dated 28th November 2007.**
- 3. That the Administrator, Benson Riitho Mureithi, shall produce in court within 60 days from today, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate *audited* account of all dealings therewith up to the date of the account.**
- 4. That in default any party shall be at liberty to apply.**
- 5. That each party bears their own costs.**

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF APRIL 2021

S. N. MUTUKU

JUDGE