



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION (PROBATE AND ADMINISTRATION) CAUSE NO. 58 OF 2020**

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH ERIC OWINO**

**ALIAS JOSEPH ERICK OWINO NYABURI- (DECEASED)**

**EMMANUEL OTIENO OWINO.....1<sup>ST</sup> PETITIONER**

**CHRISTINE OWINO.....2<sup>ND</sup> PETITIONER**

**RAMSI NYABURI OWINO.....3<sup>RD</sup> PETITIONER**

**MARY NABUSI OWINO.....4<sup>TH</sup> PETITIONER**

**AND**

**MARY ANYANGO ONYANGO.....OBJECTOR**

**RULING**

1. The applicants have moved this Court by way of a notice of motion dated 22/9/2020 urging this Court to issue an injunction order against the 1<sup>st</sup> and 2<sup>nd</sup> petitioners/respondents from evicting her from the matrimonial home situated at Elgon View parcel no. Eldoret Municipality Block 13/305; further the respondents be restrained from wasting the deceased estate; the monthly provision be enhanced from ksh.26,000/= to at least ksh. 120,000/=; the Court do order that the rental income be held in a joint bank account and that Mary Anyango Onyango be appointed as a co-administrator.

2. The application is premised on the grounds that the deceased Joseph Erick Owino died on the 11<sup>th</sup> June 2018 intestate. The deceased died leaving two families; the 1<sup>st</sup> widow with 5 children and the 2<sup>nd</sup> widow with 6 children. That her children are still going to school and the amount being given to her is so little, yet the estate generated ksh.450,000/=.

3. The motion was supported by an affidavit sworn by Mary Anyango Onyango who reiterated the grounds on the notice of motion.

**Response**

4. A replying affidavit was sworn by Christine Owino who deposed that she had read the application and had been advised by her advocate on record that the application was in bad faith and was a misrepresentation of facts. The objector's matrimonial house is not situated in land parcel no. Eldoret Municipality Block 13/305 which she forcefully entered into after the demise of the deceased. The estate has continued to provide for the minors expenses including school fees and the objector is given monthly upkeep. In addition, the family held a meeting and appointed the objector's son. Further affidavit was sworn by Emmanuel Otieno Owino dated 4<sup>th</sup> December 2020 in support of the averments by Christine Owino.

**Further supporting affidavit**

5. In addition to her affidavit, the objector deposed that service was effected on her advocate 3 days late. In addition, she deposed that the petitioners were not honest in disclosing the income from the rent. Further that the family meeting was held in her absence and her son Ramsi Nyaburi proposed as an administrator.

**Submissions**

### Applicant's/objector's submission

6. The court was urged to rely on section 27 and 28 of the Law of Succession Act and exercise its discretion. The income of the deceased estate has to be considered. The objector and her children fully depended on the deceased and therefore the amount should be enhanced to ksh120,000/= monthly. In RNM V. RMN [2017] eklr, the applicant was given a lump sum of cash to enable her meet her share of responsibility as regard to the children.

7. Further one of the petitioners Christine Owino collects rent through her advocate yet she deposed that the same was being deposited in the deceased account. The petitioner was not allowed by law to collect rent since the court had not appointed an administrator. The court was referred to Re Estate of Makokha Idris Khasabuli (deceased) eklr.

8. The court has been urged to appoint the objector as one of the administrators pursuant to section 66 of the Law of Succession Act since she is one of the surviving spouses. In Re Estate George Ragui Karanja(deceased) [2016] eklr the court held that priority is given to surviving spouses followed by other beneficiaries. The Court is urged to further appoint other three administrators namely Emmanuel Otieno, Christine Owino, Mary Anyango Onyango and Mary Nabusu Owino.

9. In addition, it was urged that the 1<sup>st</sup> and 2<sup>n</sup> petitioners be restrained from evicting the applicant from the home situated at Elgon View on land parcel no. Eldoret Municipality Block 13/305. The allegation that the said house used to generate rent to the estate has not been proved. Finally, the court was urged to allow the application.

### Respondents submissions.

10. Mr. Omusundi, the counsel for the respondents highlighted his submissions and urged that he opposed the application. He submitted that the application had been made in bad faith. The deceased business was being managed by his firm prior to his death. In the presence of the objector it was agreed that she be given ksh. 13,600/= for monthly upkeep and the same was increased to ksh.38,000/=.

11. The objector had forcefully entered into the house, which was not a matrimonial home though no one had threatened to evict him. The firm could account for the income-received contrary to what the objector had alleged.

### Analysis and determination

12. The Court has considered the application, the responses, the submissions and authorities relied on. The issue that arise for determination is:-

#### **i. Whether the applicant is entitled to the reliefs sought:**

13. The applicant herein stated that she is the 2<sup>nd</sup> wife to the deceased. She comes to this court seeking for the petitioners to be restrained from evicting her. The petitioners highlighted in Court that they did not complain of her moving into the house. As it is, the objector is only apprehensive, as there is no threat of an eviction.

14. This is also the ground on which they alleged that since the objector is not paying rent, she cannot ask for more money. This was objected to by the applicant who attached fees structures for the minors and other dependants. As was held in RNM V. RMN (supra), the parental responsibility is shared between both parents. The applicant herein has not shown the Court whether she is contributing towards raising of her children, if she has any income or whether she wholly depended on the deceased.

15. On the issue of being included as part of the administrators, section 73 of the Probate and Administration provides as follows: ***"Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

16. Section 45(1) of the Law of Succession provides that;

***"Except so far as expressly authorized by his 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."***

The applicant deposed that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners had meddled with the estate of the deceased. The petitioners too have averred that the applicant had moved into one of the houses which brought in rental income and they were both on the wrong in regard to the above provision.

17. For fair, objective and proper administration of the Estate, Mary Anyango Onyango, a widow to the deceased, should be made a co-administrator of the estate as prayed. As a co-administrator, she should be able to contribute a solution to most if not all the complaints she has raised in the application.

Costs be in the cause.

**RULING READ VIRTUALLY AND SIGNED IN ABSENCE OF BOTH ADVOCATES WHO HAD NOTICE, THIS 19TH DAY OF APRIL 2021.**

**S. M GITHINJI**

**JUDGE**

Parties be notified.

**S. M GITHINJI -JUDGE**

**19<sup>TH</sup> APRIL, 2021**