



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 336 OF 2020

IN THE MATTER OF THE ESTATE OF LAWRENCE NGINYO KARIUKI (DECEASED)

BRENDA NYAMBURA KIRAGU.....APPLICANT

VERSUS

JANE ALICE WAMBUI KIRAGU.....1ST RESPONDENT

SILAS MACHARIA KARIUKI.....2ND RESPONDENT

MARGARET WANGARI NGINYO.....3RD RESPONDENT

AND

SARAH MUKUHI NGINYO KARIUKI.....1ST INTERESTED PARTY

JAMES ANTHONY KARIUKI.....2ND INTERESTED PARTY

ROSE WANJIRU KARIUKI.....3RD INTERESTED PARTY

SCHOLASTICA NJERI KARIUKI.....4TH INTERESTED PARTY

ALEX NDORIA KARIUKI.....5TH INTERESTED PARTY

AUSTINE WACHIRA KARUNGO.....6TH INTERESTED PARTY

RULING

The Applicant's Case

By a Notice of Motion (the Application) dated 24th August 2020 brought under Section 34, 45, 47 and 83 of the Law of Succession Act Cap. 160 Laws of Kenya, Brenda Nyambura Kiragu, the Applicant, seeks the following orders:

- 1. That the Application herein be certified urgent and be heard Exparte in the first instance.***
- 2. That pending the hearing and final determination of the Application herein the Honourable court be pleased to issue an order restraining the Respondents, their agents, servants and or employees from intermeddling and or interfering with the Deceased's estate including his bank accounts domiciled at Consolidated Bank of Kenya and I & M Bank Limited.***
- 3. That the Respondents be ordered to account for all funds and or proceeds they have collected and or received from the Deceased's estate since his demise on 24th February 2020 and how they were utilized, spent and or preserved.***
- 4. That the Honourable court be pleased to issue an order restraining the Respondents, their agents, servants and or employees from intermeddling and or interfering with the Deceased's estate including his bank accounts domiciled at Consolidated Bank of Kenya and I & M Bank Limited until Letters of Administration and a confirmed Grant in respect of the Deceased's estate is***

issued by this court.

5. That the Honourable court be pleased to order for a forensic audit of the Deceased's estate since his demise to be conducted by a reputable audit firm to be agreed upon by all the beneficiaries herein failing which the court to appoint one.

6. That the Respondents be ordered to refund all and any of the proceeds they have withdrawn from the Deceased's accounts and or misappropriated from the entire estate.

7. Costs be provided for.

The Application is supported by grounds on the face of it and in the Supporting Affidavit of the Applicant sworn on the 24th August 2020. The Applicant claims that immediately after the death of the deceased the Respondents took over the management of the Deceased's estate and have continued to collect rent, withdraw money from his accounts, take over his properties and make decisions affecting his estate without Letters of Administration, an order from the court and or involving other beneficiaries. She claims that the Respondents applied for and transferred Kshs. 1,158,000 from the Deceased's account number 10011200000914 held at Consolidated Bank of Kenya to be ordering the transfer of the money as the Lawrence Nginyo Kariuki who was deceased at the time having died on 24th February 2020. She claims that before he died the Deceased had agreed to purchase the property known as L.R No. 155/123 from John Kahara Ngugi, Christopher Njoroge Ndungu and Hezron Mwangi Karoga and that the 2nd Respondent Silas Macharia Kariuki, without Letters of Administration and or order of the court, issued instructions and is trying to divest and dispose off that property from the Deceased's estate to the 3rd Respondent.

The Applicant further claims that the Respondents continue to collect rental income, receive payments for and on behalf of the estate and misuse the same without accountability and or an order of the court as required and that these actions amount to intermeddling with the estate which is a criminal offence Section 45 (2) Law of Succession Act.

Further to the grounds advanced on the face of the application the Applicant has filed a Supporting Affidavit in which she deposes that she is a daughter of the deceased and a beneficiary of his estate; that the deceased has several assets both movable and immovable, rental income, interests in several companies as well as money in several banks particularly I & M Bank Limited, Consolidated Bank of Kenya, Habib Bank and Equity Bank Limited. The Applicant has reiterated her grounds in support of her application found on the face of it.

The Respondents' Case

The Application is opposed. Jane Alice Wambui Kiragu, the 1st Respondent, filed a Replying Affidavit sworn on 7th September 2020 in which she deposed that she is the eldest child of the deceased and that she swears the Replying Affidavit on behalf of the 1st, 3rd and 4th Interested Parties. She responds to the Applicant's Affidavit that this Cause was filed by the five executors, namely Margaret Wangari Nginyo, Jane Wambui Kiragu, James Anthony Kariuki, Scholastica Njeri Kariuki and Silas Macharia Kariuki seeking Grant of Probate with Written Will of the deceased who died on 24th February 2020. She deposed that as executors of the estate have power under section 80(1) and 83 of the Law of Succession Act to preserve the estate and pay out of the estate any outstanding debts; that she is aware of the duties of the executors to account to the court and to the beneficiaries all payments made in the course of their duties as executors and that they will faithfully render a true and just account as and when required to do so.

She deposed that the transfer of Kshs 1,158,000 was for the purposes of facilitating the continuance of the Kiambu Project which was in the name of the deceased and which had commenced during his lifetime. She deposed that she signed for the transfer of that amount after being advised by the relationship manager of the Consolidated Bank, Mr. Erastus Gachoya that she had the mandate to sign for the said transfer which mandate had been given to her by the deceased before his demise. She deposed that the deceased had expressed intention to buy L.R No. 155/123 but the deceased passed away before purchasing the said property and therefore this property does not form part of the estate of the deceased.

She averred that the Respondents are not in any way intermeddling with the estate of the deceased but are merely carrying out their duties as executors of the estate as expected of them as the Executors of the Will of the deceased. She asked this court to dismiss the application with costs.

Alex Ndoria Kariuki, 5th Interested Party, Austin Wachira Karungo, 6th Interested Party, as well as Winfred Wanjiru Kariuki, the Objector, did not file submissions in this matter. Mr. Ramadhan Abubakar, their counsel, chose to rely on the Replying Affidavit sworn by Winfred Wanjiku Kariuki on 6th October 2020. I have read this Replying Affidavit. It supports the Applicant's Notice of Motion. Winfred Wanjiku Kariuki claims that the Executors have withdrawn Kshs 1,158,000 from Deceased's Consolidated Bank Account without authorization from the court or consent of other beneficiaries. She claims that the actions of the Executors were illegal in nature and amounts to intermeddling with the estate and further that the court ought to intervene and protect the estate; that the executors are yet to be appointed or confirmed as executors by the court and therefore they lack authority to perform any task on behalf of the estate. She deposed that Section 79 as read with section 80(2) of the Law of Succession Act provides that before the executors can perform any duty the representation has to be first granted by court and that in this case a Grant of Probate has not been issued and that the Petition for the Grant of Probate is objected to.

Submissions

Directions were given by this court to the effect that the Notice of Motion dated 24th August 2020 be disposed of by way of written submissions. The Applicant has filed her submissions dated 5th November 2020. The Respondents, 1st, 3rd and 4th Interested Parties have filed their submissions dated 18th July 2021. I have read all the submissions and the cited authorities. I need not repeat everything said in those submissions but will highlight salient issues that each party has raised.

Mr. Mabachi, appearing for James Anthony Kariuki, informed the court that he came on record after the application under consideration had been filed and that he did not have instructions to file submissions in respect of it.

The Applicant has listed four (4) issues she has identified for determination, namely:

1. Whether the Respondents have and are intermeddling in the Deceased's Estate.
2. Whether the Respondents are in breach of their duty to avoid conflict of interest and as such guilty of intermeddling with the Deceased's shares and entire Estate.
3. Whether by virtue of Section 80 (1) the Respondents are free to intermeddle and or waste the Deceased's Estate.
4. Whether the court should order the Respondents to account and for a forensic audit to be conducted.

The Applicant has submitted on the issue of intermeddling with the Estate by the Respondents that there is no individual by the name of Erastus Gachoya and that by stating that the 1st Respondent was advised by this person to transfer Kshs 1,158,000 presupposes that she did not know she was a signatory which she claimed to be and that the documents she has attached to her Replying Affidavit refer to account number 511512 and not account number 10011200000914 which is the subject account and that even if this were true, the 1st Respondent does not claim to have transferred the funds as an executor and or after the family had made a decision to transfer the funds.

On the issue of divesting the property known as L.R 155/123 it is submitted that this property forms part of the list of the assets annexed to the Petition for Probate filed by the Respondents and that the 2nd Respondent is trying to divest and dispose of this property. The Applicant cited **Giau and Two Others v Wandai and Five Others (1989) KLR 231** and **Re Estate of M'Ngarithi M'Miriti Succession Cause No. 108 of 2014** to emphasize that the acts by the Respondents amount to intermeddling with the estate of the deceased.

On the issue of intermeddling in the shares and breach of conflict of interest it was submitted that the deceased was the majority shareholder in Pema Holdings and the Respondents are Directors; that they held a meeting on 22nd June 2020 in their capacity as Directors with the agenda of discussing Kiambu Project and how to finance it. It is submitted that the Kiambu Project is the deceased's building erected on deceased's property Kiambu Township Block 1/58. She submitted that Pema Holdings Ltd cannot pass a resolution on the management of the estate of the deceased.

The Applicant submitted that Section 80 (1) cannot be read in isolation of Section 80 (2) which provides that **"A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant."** She also quoted paragraph 10 of the 5th Schedule of the Act which states that:

"Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate, and the administrator shall be subject to the immediate control of the court and shall act under its direction."

She further submitted that the Respondents have intermeddled in the estate of the deceased and ought to be held accountable by this court by making them to provide accounts to the court and other beneficiaries for the actions they have taken in regard to the estate and for forensic audit to be conducted. She cited **Re Estate of Geoffrey Mwangi Chege (Deceased) Succession Cause No. 905 of 2015** to support that argument. In that case it was stated that:

"Beneficiaries have the statutory right to obtain an account from the executors of the estate, and at any time they may ask for estate books and documents (In the Matter of the Estate of Anthony Gichigi Wairire (Deceased) HC P & A No. 32 of 1983 at Eldoret). This is because an executor or administrator is a trustee and is accountable to the beneficiaries for his handling of the estate administration. Further, the executor or personal representative is accountable to the court on how he deals with the estate of the deceased."

On her part, the 1st Respondent filed her submissions dated 18th January 2021. She has identified four (4) issues for determination, namely:

- (a) Whether the Respondents have and are intermeddling with the Deceased's estate.
- (b) Whether the Respondents should be ordered to account for all the funds and or proceeds they have collected and or received from the deceased's estate since his demise on 24th February 2020.
- (c) Whether a forensic audit should be conducted on the deceased's estate.
- (d) Whether the Respondents should be ordered to refund all and any of the funds and the proceeds they have withdrawn from the Deceased's accounts and or misappropriated from the entire estate.

On the first issue, the 1st Respondent based her arguments on Section 80 (1) and 83 of the Act and submitted that the executors of the estate of the deceased herein have power under these provisions to preserve the estate and pay out of the estate any outstanding debts. She cited **Re Estate of Thiong'o Nginyayu Muthiora (Deceased) [2013] eKLR** to support her arguments. She submitted that the powers of the executors, unlike those of the administrators, flow from the Will of the deceased and not from the grant of probate and that a grant of probate

is a mere evidence of the powers of the executors. She relied on **Kothari v Qureshi & Another [1967] EA 564**; and **Halsbury's Laws of England, 4th Edition, Vol. 17 Paragraph 729 and 730** to support that point.

She further submitted that the transfer of Kshs 1,158,000 was for purpose of facilitating the continuance of the Kiambu project and reiterated that she had been advised by the Relationship Manager of Consolidated Bank that she had the mandate to do so.

On the property L.R No. 155/123 , she submitted that the deceased passed away before purchasing this property although he had expressed interest to buy it and therefore this property does not form part of the estate of the deceased.

On the resolution by Pema Holdings to facilitate continuance of construction of Kiambu project, the 1st Respondent submitted that this matter is subject to a suit filed by the Applicant in the Commercial Division of this court being HC COMM No. E308 of 2020 and therefore this court is not the correct forum to discuss issues of corporate governance.

On the second issue, the 1st Respondent submitted that the executors are cognizant of their duty to account to the court and the beneficiaries all the payments made in the course of their duties as executors as the law, under Section 83 requires. She submitted that the executors are ready to render a true and just account as and when required to do so.

On the issue of forensic audit, she submitted that the executors have not intermeddled with the estate and therefore the requirement for a forensic audit is not necessary. The 1st Respondent cited **In re Estate of Karl Jacobs Ruedin (Deceased) [2018] eKLR** to emphasize that under Section 83 (h) of the Law of Succession Act, the court has powers to order for production of a full and accurate inventory of assets of the estate of the deceased either on its own motion or on application.

On the issue of refund of all or any of the funds and proceeds the Respondents have withdrawn from the deceased's accounts, it was submitted that the executors cannot be ordered to refund funds which they have used for the proper management of the estate of the deceased given that they have not intermeddled with the estate and therefore there has been no misappropriation of the estate of the deceased.

Analysis and Determination

To bring this matter into perspective, some little background is necessary. Following the death of the deceased on 24th February 2020, the Respondents, 2nd Interested Party, and 4th Interested Party filed for Petition for Probate of Written Will in respect of the Estate of the Deceased dated 5th June 2020. This Petition attracted two objections. The first Objection is dated 4th September 2020 by the Applicant herein claiming interest in the estate as daughter of the deceased and beneficiary and disputing the validity of the Will and the second Objection dated 21st September 2020 filed by Winfred Wanjiru, Alex Ndoria and Austin Wachira claiming to be widow and children of the deceased and disputing the validity of the will. The Petition further attracted two Petitions Pendente Lite. The first one is by James Anthony Kariuki, the 2nd Interested Party in this Application. The Petition is dated 7th October 2020. The second Petition is dated 9th February 2021 by the Applicant herein. There is also this Notice of Motion by the Applicant dated 24th August 2020 and a Petition for Limited Grant Ad Litem dated 21st January 2021 brought by Margaret Wangari Nginyo, Silas Macharia Kariuki, Jane Alice Wambui Kiragu and Scholastica Njeri Kariuki. All these matters, other than the Notice of Motion under consideration herein, are pending hearing and determination.

The contestation between the parties is simple. On the one side is the Respondents, 2nd and 4th Interested Parties, who are basing their pleadings on a Will dated 13th June 2014 by the deceased. Their claim is that the deceased died Testate and that they are named as executors in the Will and that it was their duty as executors, with powers flowing from the Will, to take certain actions in respect of the estate of the deceased, even before the grant of probate was obtained. On the other side is the Applicant herein and the Objectors who contest the validity of that Will and claim to have been left out, as beneficiaries, on the issues touching on the estate of the deceased. They contest the validity of the Will and term the actions by the Respondents as intermeddling with the estate.

When I took over this matter I found the former Judge handling this matter had directed parties to file submissions in respect of this Application. I found the only pending issue being the Ruling in this Application and directions on how to handle the other pending pleadings.

In determining this matter, I have carefully read the Notice of Motion and the supporting documents in support of the Applicant's case. I have read the Replying Affidavit by the 1st Respondent opposing the Notice of Motion and the annexed documents. I have read the rival submissions and considered all cited cases. To my understanding, the following are the outstanding issues that require my consideration and determination:

1. Whether there is intermeddling in the Estate of the Deceased.
2. Whether the Respondents should be ordered to account for the funds and or proceeds collected or received from the Estate of the Deceased and further whether they should refund the same.
3. Whether forensic audit should be conducted.

The provisions governing intermeddling in the estate of a deceased person is Section 45 of the Law of Succession Act. This Section is worded: "**No Intermeddling with property of deceased person**". The section provides that:

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

This section needs no emphasis that taking possession of, disposing of, or otherwise intermeddling in any free property of a deceased person in ways that are not authorized by the Law of Succession Act or any other written law or by a grant of representation under the Law of Succession Act is a criminal offence punishable under Section 45 (2). The 1st Respondent in her submissions has cited **Benson Mutuma Muriungi v C. E. O, Kenya Police SACCO & another [2016] eKLR** where the court defined ‘intermeddling’ as follows:

“There is no specific definition of the term intermeddling provided in the Law of Succession Act. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as; “for any purpose” and “or otherwise intermeddle with” in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as; taking possession, or occupation of, or disposing of, transferring, 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 or any other written law. I do not pretend to close the list either or to make it exhaustive. The list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law.”

The Applicant has claimed that the Respondents have intermeddled in the estate by making withdrawals from the deceased’s bank accounts and making resolution and advancing money as Directors of Pema Holdings Ltd. She has argued that the Respondents had no authority to do so given that they did not have a grant of representation. The 1st Respondents has responded and given explanation that they were acting as executors of the estate whose power to so act flowed from the Will of the deceased. The Applicant is required to tender evidence in support of her allegations as he who alleges must prove. She must prove that the Respondents did acts that fall within the ambit of the list of acts that can be defined as intermeddling in the estate as specified in the **Benson Mutuma case above**. Has she discharged the burden of proof on that issue of intermeddling?

I have considered the response by the 1st Respondent to the allegations by the Applicant. She has explained that there was no intermeddling but instead the executors were discharging their legal duty under the Act and under the terms of the Will. To respond to the issue, it is contended, further, that the powers of an executor is derived from the Will and that a Grant of Probate is mere evidence of the powers of the executor That argument is supported by the case of **Kothari v Qureshi & Another** was cited on this point where the court stated as follows:

“When a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of the death of the testator, unless the executor renounces the executorship, and if he had intermeddled in the estate he cannot renounce the executorship.

.....

It is elementary law that an executor’s title dates from the death of the deceased and springs from the will not from the grant of probate.

.....

An executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as is possible until he has to prove his title, when of course he must be able to establish the grant of probate because that is the proof or evidence of his title. His rights exist as from the death of the testator and the grant is only required as evidence of this.”

Further, the 1st Respondent has cited **Halsbury’s Laws of England, 4th Edition** on paragraph 729 on the “source of the executor’s title”. It is stated that:

“Source of executor’s title: The executor derives his title under the will, if he has been appointed or is deemed to have been appointed executor by the will, but not if he has been appointed by the court under statutory powers. His title under the will is aided in the case of real property by statute and the testator’s property vests in him as from the date of death without any interval of time. The probate itself is a mere authentication of his title; but, if it affects the legal estate in land, it is also a document of title.”

Section 3 of the Law of Succession Act defines "personal representative" to mean the executor or administrator, as the case may be, of a deceased person.

Under Section 79 of the Act, a grant of representation vests all the property of the deceased in the executrix or the administrator appointed in intestacy. The effect of Section 79 is that the property of the deceased in this matter has not vested in the executors because no grant of probate has been issued. But Section 79 should be read together with section 80(1) of the Act which provides that:

80. (1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

My understanding of this sub-section is that a grant of probate validates all acts of the executor(s) in respect of the estate of the deceased done prior to the issuance of the grant of probate. This position agrees with what is stated under paragraph 730 of Halsbury's Laws of England 4th Edition in the following terms:

“Acts done before probate: An executor may generally do before probate all things which pertain to the executorial office. He may pay or release debts, get in and receive the testator's estate, assent to a legacy, and generally intermeddle with the testator's goods. He may distrain for rent, demise, grant a next presentation or release an action. He make a conveyance or assignment or personality or of realty but although before probate he can give valid receipt of money payable upon an assignment, he cannot compel a purchaser to complete until after the probate has been obtained.”

In the case of **In re Estate of Fanice Mary Khanali Aura (Deceased) [2019] eKLR**, Justice Musyoka had this to say on the effect of Section 80 (1) of the Act:

“According to section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, a grant of representation vests all the property of the deceased in the executrix or the administrator appointed in intestacy. That would suggest that the property in this case is yet to vest in the executrix. However, Section 79 should be read together with section 80(1) of the Act, which establishes that a will takes effect upon the death of its maker, and that the grant of probate merely authenticates it and gives validity to any acts of the executrix carried out between date of death and the date of the making of the grant. That would mean that the property of a testatrix really vests in the executrix from the date of death, and that such acts are not unlawful so long as they are concomitant with the duties of an executor.”

In the matter under consideration, the validity of the Will of the deceased is contested. The ideal situation would have been that there is no dispute over the validity of the Will. This would mean that the acts of the Respondents from the date of the death of the deceased to date are validated upon grant of probate being issued. This ideal situation is the one advanced by the 1st Respondent. She has cited authorities to support that situation. But circumstances are different in this case. The validity of the Will is being challenged. This means that the very foundation of the authority the Respondents believed they had to act in respect of this estate has been challenged. It cannot be business as usual. Without authority to support their actions, I am constrained to make a finding that the acts by the executors or Respondents in dealing with the estate as they did, amounts to intermeddling in the estate of the deceased. There was nothing standing in the way of the Respondents to move to court to seek the authority they required to deal with the estate of the deceased as they waited for the contested issues to be resolved.

I agree with my brother judge in the case of **In re Estate of Fanice Mary Khanali Aura**, cited above where the judge reasoned as follows:

“In this matter the validity of the will is challenged. Much as the executrix is entitled to exercise the powers and discharge the duties of an executor, even before grant of probate is made, where the validity of the will, which allegedly appoints her, is under challenge it would mean that the foundation of her authority to act as such would be shaky, and it would be prudent not to assert the right to act as such prior to determination of the question. Where the question arises after a grant has been made, the executor or grant-holder would be entitled to continue acting as such until the court rules on the validity of the will. Where the issue arises prior to the making of the grant then the proper thing to do would be to proceed under paragraph 10 the Fifth Schedule to the Law of Succession Act, which states as follows.”

This authority is persuasive and I agree totally with the reasoning therein.

Section 83 of the Act specifies and lists the duties that a personal representative can perform as follows:

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;***
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;***
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);***
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;***
- (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)***
- (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.

But these duties are performed where there is grant of probate or grant of letters of administration. Some of the duties can be performed by an executor where the source of his authority is solid. This Section therefore does not come to the aid of the Respondents.

I agree with the Applicant that there are objections in this Cause and therefore there is a pending suit as envisioned in paragraph 10 the Fifth Schedule to the Law of Succession Act.

The issue touching on the property known as L.R No. 155/123 requires proof through evidence that can be tested through cross examination in the correct forum. As it stands, it is the word of the Applicant against that of the 1st Respondent. Purchase of property and its transfer involves exchange of documents which is proof of such transaction. While I appreciate that this court, sitting as Probate Court, may not be the correct forum to litigate this issue, it is important to point out in this ruling that the evidence presented before me did not show the true position regarding this property. The questions still remain whether it is or it is not an asset of the estate of the deceased in this case. However, having found intermeddling proved, this issue has been addressed as far as intermeddling is concerned.

Turning to the second twin issues of accounts and forensic audit, the 1st Respondent is amenable to rendering accounts given that the law demands it but sees no point in having a forensic audit conducted arguing that the executors have not intermeddled in the estate of the deceased. She also argues against refund of the funds withdrawn from the bank accounts of the deceased. It her argument that the funds were not misappropriated but were utilized in paying debts owed by the estate. The Applicant insists that they must account and refund the money.

I have considered this matter. It is my view that with the allegations made by the Applicant and the explanations given by the 1st Respondent, and given my finding that there has been intermeddling in the estate of the deceased, the only way this court and the other beneficiaries can be satisfied on how the funds withdrawn were utilized is to hold the Respondents accountable. They must table before the court full, accurate and audited accounts in respect of the operations of the estate from the date of the death of the deceased to date. This will become necessary because the Will of the deceased, among other issues in this estate, is contested.

The issue touching on Penam Holdings Ltd is under litigation in the Commercial Division of this Court as this court has been informed. It is the subject in HC COMM No. E0308 of 2020. It is important to let that court deal with the issues therein and conclude because that is the correct forum. I will therefore not deal with the issues touching on that entity raised in this application.

In conclusion, this Notice of Motion succeeds. I proceed to grant the following specific orders:

1. Spent.

2. Spent.

3. That the Respondents, their agents, servants and or employees are hereby restrained from intermeddling and or interfering with the Deceased's estate including his bank accounts domiciled at Consolidated Bank of Kenya and I & M Bank Limited until Grant of Probate or Letters of Administration in respect of the Deceased's estate is issued and confirmed by this court.

4. That the Respondents are hereby ordered to account for all funds and or proceeds they have collected and or received from the Deceased's estate since his demise on 24th February 2020 and how they were utilized, spent and or preserved.

5. That this Honourable court hereby orders that a forensic audit of the Deceased's estate since his demise to be conducted by an audit firm to be agreed upon by all the beneficiaries herein failing which the court to appoint one.

6. That failure to account as ordered in order No. 5 above, the Respondents shall refund to the estate all and any of the proceeds they have withdrawn from the Deceased's accounts and or misappropriated from the entire estate.

7. This being a family dispute, each party is ordered to bear own costs.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 27TH JULY 2021.

S. N. MUTUKU

JUDGE