



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 24 OF 2020

IN THE MATTER OF THE ESTATE OF SAMUEL MUNDATI GATABAKI (DECEASED)

RULING

1. This succession cause relates to the **ESTATE OF SAMUEL MUNDATI GATABAKI** (deceased). The deceased's wife, **NANCY WANJA GATABAKI**, and their two daughters (collectively the petitioners) petitioned hereof for Grant of Letters of Administration Intestate of the deceased's estate. Before a Grant was issued by this Court, the petitioners applied for and were granted Limited Grant, limited for the sole purpose of the petitioners substituting or defending, for the deceased's estate, cases NRB HCCC 30 of 2020, NRB JR 187 of 2017, NRB HCCC 77 of 2016, NRB HC COMM. E165 of 2019, NRB HC COMM. 276 of 2012, NRB HC COMM 760 of 2012, NRB HC COMM 151 of 2017, NRB HC COMM. 272 of 2017 AND NRB. Court of Appeal CA 213 of 2018.

2. A full Grant was issued by the court on 13th January, 2021 after the gazettment on 2nd October, 2020 of the petition.

3. Before me for consideration is the summons dated 23rd December, 2020 filed by the petitioners. They seek the following prayers:

(a) *THAT leave of this Honourable Court be granted to commence and prosecute this application by the administrators of the Estate of the late Dr. Samuel Mundati Gatabaki.*

(b) *THAT a temporary order be and is hereby issued restraining and/or prohibiting any 3rd parties from illegally intermeddling and/or interfering with the applicants' management, occupation and rent collection of all the residential houses belonging to the Estate of the deceased in all that residential Estate known as Fourways Junction (as particularly set out in paragraph 19 and 20 of the Supporting Affidavit herein) pending further orders.*

(c) *THAT a permanent order be and is hereby issued restraining and prohibiting any 3rd parties from illegally intermeddling and/or interfering with the applicants' management, occupation and rent collection of all that residential Estate known as Fourways Junction (as particularly set out in paragraph 19 and 20 of the Supporting Affidavit herein) pending hearing and final determination of these proceedings.*

4. The court record shows that the application was served, for hearing on 22nd June, 2021, upon **SURAYA PROPERTIES GROUP LTD** and **EQUITY BANK**. The orders that the petitioners seek will affect **MUGA DEVELOPMENT LTD** and its joint Receiver Manager namely, **MUNIU THOITHI** and **GEORGE WERU**. They however were not served and for that reason alone the prayers in the application cannot be granted.

5. There was no opposition filed by the parties served and that notwithstanding and the fact that **MUGA DEVELOPMENT LTD** and the Joint Receiver Manager were not served, I am of the view that the prayers sought cannot or are not available to be granted by a Family Court. I will therefore proceed with the matter.

6. I draw attention once again to the prayers of the application reproduced above. The petitioners seek to restrain un-named third parties whom they allege are intermeddling with the properties of this estate. **Section 45** of the **Law of Succession Act Cap 160** clearly demonstrate how serious it is to intermeddle with the property of a deceased person. The section is in following terms:-

"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.

(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 find 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." (Emphasis mine).

7. Although the above section does not define what amounts to intermeddling, in the case In re ESTATE OF M'NGARITHI M'MIRITI (2017) eKLR the court enlightened us as follows:-

"See GLADYS NKIROTE M'ITUNGA vs. JULIUS MAJAU M'ITUNGA[2016] eKLR that:-

'Whereas the law of succession does not define what intermeddling with the property of the deceased is, there is ample judicial decisions on acts which may amount to intermeddling. For instances, in the case of BENSON MUTUMAMURIUNGI vs. C.E.O. KENYA POLICE SACCO & ANOTHER [2016] eKLR the court observed that:-

"Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, 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. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under Section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."

8. A close look at **Section 45 of Cap 160** will reveal that intermeddling can only be in respect to the deceased's free property. **Section 2 of Cap. 160** defines free property as:-

"In relation to a deceased person, means the property of which the person was legally competent freely to dispose during his lifetime, and in respect to which his interest has not been terminated by his death."

9. With the above in mind, I will begin to set out what is the basis of the prayers the petitioners seek.

10. As stated before, the petitioners are widow and two daughters of the deceased. They bring forth by this application an intricate intertwined facts. They go along the following line, that the deceased and his wife purchased 205 acres of land, being LR. NO. 5980 and 6.5 acres of land in L.R. No. 4508/1. In the year 2007, they entered into a joint venture agreement with **MR. PETER MURAYA** and his wife **SUE WACHEKE MURAYA**. To this end, they formed a company known as **MUGA DEVELOPMENT LTD**. The joint venture provided that the deceased and his wife would provide the land which was equivalent to 50% shares of **Muga Ltd**. and **Mr. & Mrs. Muraya** were to provide the financing equivalent to 50% share in **Muga Ltd**. The joint venture birthed a development known as **Fourways Junction Estate**, along Kiambu Road. There has been a lot of litigations before different courts relating to disputes surrounding that joint venture, which litigations is still ongoing to date. In the case NRB HC COMM Case No. 151 of 2017 filed by the deceased reveals that the deceased is not the registered owner of the apartments, totalling 51, which the petitioners alleged by their application that third parties are intermeddling with. Indeed, in that case, NRB HC COMM No. 151 of 2017, the deceased pleaded that **MUGA LTD** and **SURAYA SALES LTD** and **SURAYA PROPERTY GROUP LTD** had failed to effect transfer of the sub-leases of those apartment. That pleading is denied by the defendant, **SURAYA PROPERTIES GROUP** who alleged some apartments were transferred to the deceased but not all that are the subject of the application.

11. From that short outline of the dispute presented by the application under consideration, it becomes obvious the application is ill suited to be considered by a family court. I draw support in making that statement from the case TERESIAH WAMBUI GAKUO & ANOTHER VS. REGINA WANGUI MWAURA & OTHERS (2021) eKLR where it was stated:-

"I refer to the case of In re ESTATE OF SOLOMON MWANGI WAWERU (DECEASED) (2018) eKLR thus: -

"12. The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. (See MURIUKI MUSA HASSAN VS. ROSE KANYUA MUSA & 4 OTHERS). In ALEXANDER MBAKA VS. ROYFORD MURIUKI RAUNI & 7 OTHERS [2016] eKLR the Court held that:-

'It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it."

12. To compound the matter, the properties cited by the petitioner, which as stated before, seem not to be free property as stated in **Section 45 of Cap 160**, are the subject of the Receivership and the Joint Receivers have already been appointed by **Equity Bank**. On the Receiver Manager being appointed, the charge crystallised over the properties owned by **Muga Ltd** which would seem to include the properties, the subject of the application. That receivership can only be challenged by a party showing the appointed Receiver Managers, have acted

oppressively or not in accordance with the recognized principles of Law and of Commercial Practice. Such challenge cannot be brought in the family court, as stated before.

13. It is as a result of the above discussion that I find that the summons dated 23rd December, 2020 is unmerited. It is dismissed with no orders as to costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 23RD DAY OF SEPTEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assista nt : Ndege

For the Petitioners : Mr. Mwangi holding brief for Mr. Gathemia

For the Equity Bank : N/A

For Suraya Properties Ltd : N/A

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE