



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 32 OF 2018**

**SILVERIUS KITHINJI NGOROI.....APPELLANT/APPLICANT**

**VERSUS**

**DICKSON NJUE NGOROI.....1<sup>ST</sup> RESPONDENT**

**EUNICE WAMUGO NGOROI.....2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling is for the application dated 28<sup>th</sup> August 2018 in which the applicant seeks for orders compelling him and the 1<sup>st</sup> respondent to open a joint bank account whereas the income derived from commercial Plots Nos. 3 and 25 Kianjakoma market should be banked to be shared among individual beneficiaries at the end of each year pending the determination of the instant appeal.
2. It is the applicant's case that the said plots were distributed to individual houses in this case but the income generated from therein presently is unevenly distributed to the beneficiaries and it is only equitable and fair that pending the determination of the instant appeal the orders herein are granted.
3. The applicant further states that Plot No. 3 in Kianjakoma market was owned by the deceased in common with two other partners and that Plot No. 25 is co-owned with 4 other partners.
4. In rejoinder, the 1<sup>st</sup> respondent, the administrator of the estate of the deceased herein deposed that the applicant cannot claim to be enjoined and an account opened in the joint names of himself and the 1<sup>st</sup> respondent while his surviving mother is alive and has been getting income equivalent to the share of the deceased in Plot No. 25 on behalf of the 2<sup>nd</sup> family to which the applicant belongs.
5. The 1<sup>st</sup> respondent further states that the applicant is the only member of the deceased's family who refused to attend a meeting called to discuss the mode of distribution that was captured in the judgement delivered on 5/04/2018 by the magistrate's court hence the instant appeal which he has filed.
6. The parties argued the application orally before the court.

**B. Analysis & Determination**

7. This is an application that requires the court's exercise of its discretion. **Rule 73 of the Probate and Administration Rules** provides that:

***“73. 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.”***

8. My reading of the above sections is that the High Court is clothed with wide powers to do what is necessary to ensure that the ends of justice are met.
9. In the instant case the applicant seeks orders compelling the respondents to open a joint bank account for the purposes that the income being derived from commercial Plots Nos. 3 and 25 Kianjakoma market the benefit of the two houses of the deceased to be shared among individual beneficiaries at the end of each year pending the determination of the instant appeal.

10. In rejoinder, the 1<sup>st</sup> respondent, opposes the application on the grounds that deceased's 2<sup>nd</sup> house is adequately provided for as the proceeds of rent from the deceased's shares from Plot No. 25 were surrendered to the applicant's mother who is alive on behalf of the 2<sup>nd</sup> family.

11. The respondents state that the first family was given the shares of the deceased in Plot No. 3 and their mother was collecting the rent before she passed on. One of their brothers Gilbert Githinji took over from his mother when she died. Gilbert also constructed some units on the plot and became a shareholder. After the death of Gilbert, his wife Mary Njeri Nyaga collects rent for the share of the first family with their consent and for the share of Gilbert her late husband.

12. The respondents further state that the 2<sup>nd</sup> house and the applicant herein collect rent from Plot No. 25 given to them by the deceased during his lifetime. The mother of the applicant is the one who collects the rent.

13. The respondents depose that the two houses are comfortable with the existing mode of operation except the applicant who has been uncooperative and refused to attend family meetings that discussed distribution and is the one who has now filed this appeal to challenge the distribution of the estate.

14. It is noted that the applicant has not given any particulars of the rent collected in any of the two plots. He has not disclosed to the court that the deceased had already given his shares in the plots to his respective houses and that his wives were the ones collecting rent at that time. The mother of the applicant is still alive and continues to partake of the rent in respect of the deceased's share in Plot No. 25.

15. The applicant has not joined his mother as a party to this application and neither has he joined Mary Njeri Nyaga who collects rent for Plot No. 3. The whole family of the deceased seem comfortable with the arrangement of collection of rent in regard to both Plot No. 3 and No. 25.

16. In my view the applicant is the one who alleges that rent is collected by the respondents which has proved to be incorrect. The applicant has a duty to prove his allegations against the respondent by way of tendering evidence either documentary or oral but has failed to discharge this obligation. This court has no information of how much rent is collected from the two plots and how it is utilized and by who. Both the applicant's supporting and supplementary affidavit of the subject income and the supplementary affidavit contain no particulars for this court to consider in determining this application.

17. Consequently, I find no merit in this application and it is hereby dismissed.

18. There shall be no order as to costs.

19. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29<sup>TH</sup> DAY OF JANUARY, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Applicant present**

**1<sup>st</sup> and 2<sup>nd</sup> Respondents**