



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 526 OF 2014

**IN THE MATTER OF THE ESTATE OF THE LATE KAMATU MWANTHI KAMATU Alias KAMATU MWANTHI-
DECEASED**

MARY KANINI KAMATU.....PETITIONER/APPLICANT

-VERSUS-

JANE WANJIRU GITONGA WACHIRA.....1ST RESPONDENT

FREDO GITONGA KAMATU.....2ND RESPONDENT

RULING

1. By Notice of Motion dated 25th September, 2019, the Applicant herein, **Mary Kanini Kamatu** seeks the following orders:

- 1) **THAT** this Honourable Court be pleased to issue an order directing the 1st and 2nd Respondents to avail to the Applicant the title documents to the Deceased's suit property namely Plot No. 3 Kisumu Ndogo Athi River and Plot No. 137 Makadara in Mavoko for the purpose of taking out summons for confirmation of the Grant.
- 2) **THAT** alternatively, this Honourable Court be pleased to issue an order directing the 1st Respondent to immediately take out summons for the confirmation of the Grant herein.
- 3) **THAT** the Court be pleased to direct that the total rental income unilaterally collected by the Respondents to the exclusion of the Applicant from the Deceased's estate following the demise of the Deceased on 4th March 2011 be taken into account in determining beneficiaries' shares during the distribution of the Deceased's estate.
- 4) **THAT** the Respondents be directed to render a true account of the collection from rental income in respect of the suit premises within fourteen (14) days of this Order.
- 5) **THAT** Alternatively, an independent auditor be appointed to prepare a detailed account of rental proceeds in respect of the suit premises within twenty one (21) days of this Order.

2. The Motion was premised on the following grounds:

- 1) **THAT** the Applicant and the 1st Respondent are co- administrators and beneficiaries of the Estate of the Deceased herein pursuant to the Grant issued by this Honourable Court on 25th June 2016.
- 2) **THAT** the 1st and 2nd Respondents have excluded the Applicant and unilaterally taken possession and use of the Deceased's estate including collection and use of rental income therefrom to the detriment of the Applicant since the demise of the Deceased on 4th March 2011, 9 years now.
- 3) **THAT** the rental income unilaterally reaped and other benefits enjoyed by virtue of the Respondents' unjust occupancy, possession and use of the Deceased Estate ought to be taken into account in determining the shares from the estate of the beneficiaries.
- 4) **THAT** the Respondents have custody of the necessary documentary evidence, including title documents to the deceased's

property which is crucial for taking out the summons for the confirmation of Grant herein.

- 5) **THAT** Respondents have deliberately declined to take out summons for the confirmation of Grant or avail the necessary information and title documents to the Deceased's Estate to the Applicant for the purpose of taking out the summons for confirmation of Grant.
- 6) **THAT** by the Grant issued on 25th June 2016, the Applicant and the 1st Respondent both undertook faithfully to administer and render a just and true account of the Estate of the Deceased whenever required by the law to do so.
- 7) **THAT** the purpose of the Grant was therefore to assure the Administrators and the beneficiaries of the estate of the Deceased of transparency and accountability in the administration of the estate pending the confirmation of the Grant.
- 8) **THAT** the Grant also vested in the Applicant and 1st Respondent as Administrators the powers to preserve the property and do anything legal to ensure the property was not wasted before and after the Grant is confirmed.
- 9) **THAT** however, the 1st and 2nd Respondents developed animosity and violated cooperation with the Applicant.
- 10) **THAT** the 1st and 2nd Respondents purported to administer the property to the exclusion of the Applicant and collected rental income to the exclusion of the Applicant.
- 11) **THAT** the Respondents have refused to cooperate with the Applicant in having the Grant issued on 25th June 2016 confirmed because they are solely benefiting from the Deceased's estate to the exclusion of the Applicant who is an administrator and beneficiary.
- 12) **THAT** it has been more than 3 years since the Grant herein was issued on 25th June 2016 and it is justiciable that the same be confirmed without further delay.
- 13) **THAT** the Respondents are unilaterally in possession and management of the Deceased's estate without regard to the Applicant despite a court order directing for deposit of the rental income on a joint account which order they have jointly frustrated.
- 14) **THAT** there are proceedings seeking accounts and contempt of court against the Respondents which is pending in this Court.
- 15) **THAT** the continued enjoyment of the estate of the deceased by the Respondents to the exclusion of the Applicant before the confirmation of Grant and distribution of the Deceased's estate is an act of impunity and affront to justice and ought to be held as such.
- 16) **THAT** Justice will be substantially served if the Grant herein is confirmed and property distributed to prevent acts such as of the Respondents' which amount to unlawfully disinheriting a beneficiary and this can only be done if the Respondents who have the custody of the necessary documentary information to the deceased's property take out summons for the confirmation of the Grant or hand over the title documents to the Applicant for that purpose.
- 17) **THAT** the 2nd Respondent who is son to the 1st Respondent has largely unduly influenced the 1st Respondent to sabotage the Applicant while in fact he was declared by this Court to be an intermeddler and to stop intermeddling in the Deceased's estate.
- 18) **THAT** substantial injustice will be occasioned to the Applicant who has suffered and continues to suffer injustice when the prayers sought herein are not granted.
- 19) **THAT** no prejudice will be occasioned to the Respondents who have unlawfully and irregularly reaped and continue to do so from the estate of the Deceased to the exclusion of the well entitled Applicant.
- 20) **THAT** it is in the interest of justice that the Orders sought in this Application be granted.

3. The Motion was supported by an affidavit sworn by **Mary Kanini Kamatu**, the Applicant herein sworn on 30th September, 2019. According to the Applicant, she is a daughter to the deceased while the 1st and 2nd Respondents are son and widow of the deceased respectively. While the 1st Respondent is the first wife the applicant's late mother was the deceased's second wife hence the applicant is a step daughter of the 1st Respondent while the 2nd Respondent is the applicant's step brother. The applicant then proceeded to reiterate the grounds outlined in the body of the application.

4. In response to the application, the Respondents filed a replying affidavit sworn by the 1st respondent herein in which, while confirming that the grant is yet to be confirmed, averred that the property identified as plot 3 Kisumu Ndogo has never been properly identified. It was her deposition that the applicant has not shown to this court any evidence to the effect of vesting of the said property as part of the deceased's estate. According to her, the said plot is the only rental premises subject to the proceedings but vide a judgement in Machakos ELC No. 89 of 2008, the property does not form part of the deceased's estate.

5. It was averred that Plot No. 137 is a family home where the 2nd Respondent resides with his family. According to the Respondents the application ought not to be allowed since the applicant is malicious towards the respondents and is not amenable to any arrangements that are or may be agreed upon.
6. In a rejoinder, the Applicant insisted that Plot No. 3 Kisumu Ndogo is part of the deceased's estate since no objections have been made in that regard. She deposed that the deceased and her late mother constructed and moved into the premises in 1977 when she was 7 years old and resided therein together at the time the 1st Respondent had fled and separated from the deceased. It was her deposition that the 1st Respondent only moved into the premises in 2006 when her late mother was hospitalised due to illness and has since declined to move out.
7. According to the Applicant, she is unaware of the nexus between the judgement in ELC No. 89 of 2008 and this case and averred that the same is extraneous and irrelevant as it does not affect the two properties in question. She however confirmed that plot no. 137 is matrimonial home of the deceased and her late mother and that the 2nd Respondent is unlawfully living there to her exclusion contrary to the court order of 17th May, 2016. According to her having separated from her husband she is also under financial pressure to take care of his family yet she is not in any income generating employment.
8. In her submissions, the applicant relied on the dicta **In re Estate of G K K (Deceased) [2017] eKLR** and submitted that the Respondents have declined to take out summons for the confirmation of Grant or avail the necessary information and title documents to the Deceased's Estate to enable her include the details to the Affidavit in support of her summons for confirmation of Grant. It was contended that the law permits this Honourable Court to intervene in circumstances such as this where delay for more than 3 years since the Grant was issued on 25th June 2016 has occasioned injustice; to direct an administrator, who is in the best position to immediately take out summons for the confirmation of Grant. In this regard the Applicant relied on section 71(1) of the ***Law of Succession Act***.
9. The Applicant submits that it is necessary for this Court to be satisfied as to the respective shares of the beneficiaries before ordering for the confirmation of grant and all the information as to the property is held by the Respondents hence the inability for her to personally apply for the confirmation of the Grant herein. The Applicant further relied on the *proviso* to section 71 of the ***Law of Succession Act*** which provides that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.
10. The Applicant contended that the Respondents have unlawfully and irregularly reaped and continue to do so from the estate of the Deceased to her exclusion since 2011 when the deceased passed away and that the 1st Respondent has allowed the 2nd Respondent who is not an administrator to intermeddle and deal with the estate of the deceased to his own and the 1st Respondent's benefit to the exclusion of the Applicant in clear breach of section 45(1) of the ***Law of Succession Act***. It was submitted that the property has been under the occupation and management of the Respondents who have unlawfully reaped rental income from the tenants thereon without disclosing the payable rent and the number of tenants and this has been unjustly happening since 2011 and despite the order of court dated 16th May 2016 stopping the 1st Respondent from intermeddling in the estate. It was the Applicant's case that the Respondents have persisted in breach of trust in the administration of the estate and hold the necessary information crucial for the efficient administration including the tenancies constituting income in-flow and out-flow and therefore must account for what they have misapplied and which should be considered in reducing their respective shares in the estate. In this regard, the Applicant relied on the case **In re Estate of Eliud Njoroge Kuria (Deceased) [2015] eKLR**.
11. The Applicant further submitted that as the 1st Respondent administrator abandoned her role to the 2nd Respondent intermeddler who has misapplied the rental income and benefits derived from the estate, both are liable in accordance with section 94 of the ***Law of Succession Act***.
12. It is the submission of the Applicant that the Respondents ought to avail a detailed account of the rental income and other benefits unilaterally obtained from the suit premises within fourteen (14) days of the orders herein to enable this court and the Applicant to ascertain the share of the estate that has been wrongfully wasted by the Respondents so as to be deducted from their entitled share during distribution.
13. In the likely event that the Respondents defy the directive to render a true account, and in the abundance of caution, the Applicant submits that this court ought to issue a conditional order appointing an independent auditor to help establish the true accounts. The Applicant submits that rendering a true account is part of the duties of the administrator and relies on the case of **M K M & 3 Others vs. B N M [2016] eKLR**.
14. The Applicant also relies on section 83(h) of ***Law of Succession Act, Cap 160*** and the case of **John Mbugua Kimari & Another vs. James Njoroge Kimari [2016] eKLR**.
15. Based on the above submissions, the Applicant prayed that the Application dated 25th September 2019 be allowed.
16. On their part the Respondents submitted that after the Respondents raised an objection to the inclusion of Plot No. 3 Kisumu Ndogo which was the subject of Machakos ELC Suit No. 89 of 2008 as part of the deceased's estate, the said property was vested in the Respondents herein. As regards plot no. 137 Mavoko, it was submitted that the 2nd Respondent resides therein as a result of the sacrifice he and his family made in leaving their respective places of income to take care of the deceased who was then ailing.
17. It was disclosed that the 1st Respondent is willing to call her family together in order to settle the succession matter amicably and that it is due to the numerous applications by the Applicant that the grant has not been confirmed. It was therefore the Respondents' case that the application ought to be dismissed.

Determination

18. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.

19. Section 71(1) of the *Law of Succession Act* provides as follows: -

After the expiration of a period of six months or such shorter period as the court may direct under subsection (3) from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

20. It is expected that a person to whom a grant of representation has been made would immediately get in and commence the process of administration of the estate by identifying the assets and liabilities of the estate and preserve the same for the purposes of distribution in order to ensure that the estate is not wasted. Failure to do so would lead to consequences provided for in section 94 of the *Law of Succession Act* which states as follows:

When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

21. **In re Estate of Eliud Njoroge Kuria (Deceased) [2015] eKLR** the court stated that:

“On the income collected by the estate agents, it must be stated that such agents are trustees. The income collected by them should be accounted for. It is not their property and they collect it on behalf of others. They must account for it. Of course, the relationship between them and the estate is founded on agency, but on all accounts it is one of trust. They are bound to account for what they have collected and for how they have applied the funds.”

22. This position is based on section 83 of *Law of Succession Act, Cap 160* which provides for the duties of the personal representatives as follows:

Personal representatives shall have the following duties—

(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) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(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.

23. In the case of **M K M & 3 Others vs. B N M [2016] eKLR** the court, in summarizing the duties of the administrator stated as follows:

“The respondent, as trustee, was to hold the estate for the applicants and beneficiaries. She was supposed to deal with the property in the estate for the benefit of the Applicants. This was not her property which she could deal with as she wished.”

24. The Respondents contend that the reason why they have not sought to have the estate confirmed is because of the several applications that the Applicants have made. According to the Respondents in Machakos ELC Civil Suit No. 89 of 2008, that Court decreed that Plot No. 3

Kisumu Ndogo Athi River did not form part of the estate of the deceased. I have perused the said judgement which is part of the proceedings in this cause. The said judgement arose from a claim made by the deceased herein who was later substituted by the 1st Respondent herein and one **Wambua Mwithi Kilovoo**. The claimants were seeking for a declaration that Plot No. 337/648 Athi River Township be registered in their names as the proprietors thereof by way of adverse possession. That claim was however disallowed. There is no evidence before me that Plot No. 3 Kisumu Ndogo Athi River and Plot No. 337/648 Athi River Township are the same property. When these proceedings were commenced, two properties were identified in the affidavit in support of the petition sworn by the 1st Respondent herein and those properties were Residential Houses on Plot No. 3 ay Kisumu Ndogo Athi River Town and Residential Building at Makadara Area within Athi River (Plot No 137 – Mavoko Subcounty). There is no evidence that any person has object to the grant issued in the cause. Accordingly, it is my view and I find that as long as the position remains as it is those properties are part of the estate of the deceased. The Applicant has claimed that the Respondents have been collecting rents in respect of Plot No. 3 ay Kisumu Ndogo Athi River Town and that claim has not been expressly denied.

25. Since the Respondents are the ones against whom the claim has been made with respect to collection of rents, the 1st Respondent in particular has a duty to account to the Applicant for the amounts she has been collecting either by herself or through the 2nd Respondent. **In re Estate of Eliud Njoroge Kuria (Deceased) [2015] eKLR** the court stated that:

“On the income collected by the estate agents, it must be stated that such agents are trustees. The income collected by them should be accounted for. It is not their property and they collect it on behalf of others. They must account for it. Of course, the relationship between them and the estate is founded on agency, but on all accounts it is one of trust. They are bound to account for what they have collected and for how they have applied the funds.”

26. As regards Plot No. 3 ay Kisumu Ndogo Athi River Town and Residential Building at Makadara Area within Athi River (Plot No 137 – Mavoko Subcounty), there is no doubt that it forms part of the deceased’s estate. The fact that the 2nd Respondent went into its possession and developed it before the grant was confirmed would not entitle him to the same to the exclusion of the Applicant. To the contrary such an action amounts to intermeddling with the estate of the deceased. This is so because sections 45 provides as follows:

45. No intermeddling with property of deceased person

(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.

27. I associate myself with the opinion of **Musyoka, J** in **Veronica Njoki Wakagoto (Deceased) [2013] eKLR** that:

“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised 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.”

28. I also agree with the position in **re Estate of M’Ngarithi M’Miriti [2017] eKLR** 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.”

29. It follows that any action taken by a person whose effect would be to interfere with a property of a deceased intestate without being authorised to do so by the court amounts to intermeddling with the estate under section 45 of the **Law of Succession Act**. Absence an order from this court, no one is lawfully authorised to interfere with the estate of a deceased.

30. In this case, it is contended which contention is not denied that the 1st respondent together with the applicant are administrators of the estate of the deceased. In my view the substance of the applicants’ complaint is that the estate of the deceased is not being properly administered and that the respondents have excluded her from the administration. Where there are more than one administrators of the estate

of a deceased, all the administrator must act jointly. This is so because an administrator is in the position of a trustee for the benefit of the beneficiaries. Just like other trustees, he must act in the best interests of the beneficiaries. It was therefore held in **Willis Ochieng Odhiambo vs. Kenya Tourist Development Corporation & Another Kisumu HCCC No. 51 of 2007** based on *Lewin on Trusts* 16th Ed at 181 that:

“In the case of co-trustees of a private trust, the office is a joint one. Where the administration of the trust is vested in co-trustees they all form as it were one collective trust and therefore must execute the duties of their offices in their joint capacity.”

31. In my view unless an administrator acts in accordance with the instrument that appointed her, in this case jointly, she may well be considered to be intermeddling with the estate since her powers and authority must always be jointly exercised.

32. It is clear from the depositions of the parties herein that the estate of the deceased which is yet to be distributed is being administered in a manner not contemplated under the Act and the Rules.

33. Section 83(h) of the Act provides that the legal representatives are liable:

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.

34. There is no evidence that any such accounts have been rendered. In the premise the order which commends itself to me and which I hereby make is that the 1st respondent prepares and files in this cause statements of accounts showing the monies, if any, which have come into her hands in respect of the suit premises and how, if at all, that income has been spent within a period of 45 days from the date of this order. Further orders of this Court will be made after compliance with the said order.

35. Since administration is a joint venture and since there is no evidence that the estate of the deceased has been lawfully distributed, an order of injunction is hereby issued restraining the said administrators from directly receiving any rents arising from the suit properties and that there be a joint account to be opened in the joint names of the said administrators wherein the said income is to be deposited pending further orders of this court.

36. It is so ordered.

Read, signed and delivered in open Court at Machakos this 29th day of April, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Geoffrey