



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NUMBER 42 OF 2018**  
**IN THE MATTER OF THE ESTATE OF PAUL RUGU ITOTIA (DECEASED)**

**RULING**

1. The application before me is the Chamber Summons dated 19<sup>th</sup> May 2020 seeking orders;

*(a) That the application be certified as urgent and be heard on a priority basis.*

*(b) That pending and hearing and determination of the application inter-partes Stephen Mwangi Waithera and Caroline Wairimu be ordered to give accounts of rents collected from January 2018 up to date.*

*(c) That the honourable court do grant leave to the applicant to collect rents from the deceased's rental premises for a period similar to the one Lilian Kirigo collected that is from January 2018 up to December 2019.*

*(d) That pending the hearing of this cause Lilian Kirigo do give the accounts of the West Commercial Stores shop and the Customs and Badges factory at Industrial area.*

*(e) That Lilian Kirigo produces motor vehicle registration number KBM 198W in court or the proceeds of its sale.*

*(f) That costs be provided for.*

It is based on the following grounds on the face of the application:

*1. That the applicant represents the first house of the late Bernadette Wairimu Rugu who pre-deceased their father.*

*2. That the deceased Bernadette Wairimu Rugu was running West Commercial Stores from its inception up to the time she passed away on 17<sup>th</sup> November 2008.*

*3. That the court's orders by consent clearly stated that earnings from the West Commercial Stores and Customs and Badges factory at Industrial area was to be deposited in the Kenya Commercial Bank Account No 1268504254 opened in the joint names of Newton Itotia from the 2<sup>nd</sup> house and Peter Itotia from the 1<sup>st</sup> house.*

*4. That Stephen Mwangi Waithera and Caroline Wairimu who are agents who collect the rent from deceased's rental premises in Nairobi have not been depositing the full monthly rent which is approximately Kshs. 500,000/= monthly but has fallen far behind the said amount.*

*5. That there is fear the two agents who have been collecting rent from January 2018 and surrendering it to Lilian Kirigo are sabotaging the rent collection.*

*6. That it's only fair and just that the applicants to allowed to collect rent for two years to bring them to an equal footing like Lilian Kirigo the widow.*

*7. That great injustice has been caused to the first family which had never enjoyed the rents from the rental premises or proceeds from the two shops since the death of the deceased in January 2018.*

The application is supported by the affidavit of Peter Itotia Rugu sworn on the same date.

2. On 22<sup>nd</sup> May 2020 the following orders issued;

1. That pending the hearing and determination of this application inter-partes Stephen Mwangi Waithera and Caroline Wairimu to give accounts for the rents collected from January 2018 to date: Similarly Lilian Kirigo to account for the income from West Commercial Stores and Customs and Badges Factory in Industrial Area.

2. That the application be served on the other parties within three days hereof, to respond within seven days of service.

3. That mention on 3<sup>rd</sup> June 2020 to confirm compliance with order (1) above and for directions on hearing.

4. That the Court file be availed to the judge for perusal before then.

5. The Deputy Registrar to make arrangements for the mention.

3. On 5<sup>th</sup> June 2020 when the matter came for mention Mr. Imbwaga for respondent sought time to file Replying Affidavit, I granted the orders:

1. Mr. Imbwaga to file and serve Replying Affidavit within seven (7) days hereof.

2. Corresponding leave to the applicant file further affidavit within seven (7) days of service.

4. The matter was fixed for mention on 22<sup>nd</sup> June 2020 to confirm compliance. Mr. Imbwaga again sought an adjournment, seeking fourteen (14) more days to file the replying affidavit. The same was not opposed I allowed this application and fixed matter for 14<sup>th</sup> July 2020 for directions on hearing.

5. By then Mr. Imbwaga had not filed any Replying Affidavit and submitted that on the same morning he had filed Grounds of Opposition, but had not served the same. He wanted another adjournment to file and serve his grounds of opposition and for the court to give parties time to file written submissions. Ms. Njoroge opposed the application on grounds similar to those on the face of the application.

6. In response, Mr. Imbwaga submitted that the Grounds of Opposition were basically that this application was seeking to short circuit orders already on record. He pointed that similar orders had been issued and those orders were still in force. That there was already a consent order on how the rents ought to be collected, and that the rents were to be deposited in a joint account from which neither of the parties had access. That an auditor had been appointed the Deputy Registrar, to carry out an audit but this had not been done because due to COVID 19. He was of the view that the would be resolved by hearing of the main suit.

7. Ms. Njoroge raised issue with this, wondering what COVID 19 had to do with the auditor carrying out his work. That the other side of the family was taking advantage of the situation. She urged the court to take charge pending the hearing of the main suit.

8. I have carefully considered the submissions by Mr. Imbwaga, as grounds of opposition to the application. The matters he raised are on the record. True there is a consent for parties to open a joint account. This was on 11<sup>th</sup> December 2019. The parties agreed;

1. By consent an account be opened at Kenya Commercial Bank Kenyatta Avenue Nakuru Branch on 13<sup>th</sup> December, 2019 at 9.00 a.m. by the following people

1. Peter Itotia Rugu

2. Josephine Nyambura

3. Lucy Kirigo Rugu

4. Newton Itotia

2. All the rents from the deceased properties, income from the shop and the factory be deposited in that account with effect from 1<sup>st</sup> December, 2019.

3. The 1<sup>st</sup> and 2<sup>nd</sup> family do appoint a joint accountant to do account for the West End Commercial shop and the factory on Bedi street from when the 2<sup>nd</sup> house started operating the two to date. The account be submitted to both advocates one month from the date of appointment of the accountant.

4. Mention on 17<sup>th</sup> February, 2020 to confirm compliance with the consent.

5. If any of the 4 appointees does not appear at the Bank on 13<sup>th</sup> February 2019 at the agreed time, those who will be present, to open the account.

9. An application dated 30<sup>th</sup> January 2020 was filed under certificate of urgency and placed before Ng'etich J. It sought orders;

(a) That the application be certified as urgent and be heard on a priority basis.

(b) That the honourable court do appoint an independent auditor to carry out the audit of the deceased's properties that is the West Commercial Stores & the badge making factory in Industrial area.

(c) That the court do order that Lilian Kirigo do provide all the documents required by the auditor towards the accounting exercise being carried out.

(d) That Lilian Kirigo Rugu do give access to the auditor and Peter Itotia unlimited access to the shop and factory to enable the audit exercise be carried out.

(e) That the Bank Managers of SIDIAN BANK account number 01004020000786, POST BANK account number 0309040091692, POST BANK account number 030904009169, POST BANK account number 0309040125277, EQUITY BANK account number 031017020056 and Safaricom Mpesa Account 0721607002 to provide statements of the deceased's account upto date.

(f) That costs be provided for.

On the grounds:

1. That a consent order was recorded on 11<sup>th</sup> December 2019.

2. That the house wrote to the Advocates of the 2<sup>nd</sup> house on engagement of an auditor.

3. That no objection was raised but the attempts by the auditor to access the West Commercial Stores and his request for important documents was repulsed.

4. That in view of the above we request the court to appoint an auditor to carry out the exercise in presence of one representative from both houses.

5. That in the interest of justice the shop at Pandit Nehru road and the factory be closed to ensure the proper carry out of the Audit exercise.

10. The application was fixed for mention before me on 18<sup>th</sup> February 2020.

11. On 17<sup>th</sup> February 2020, the matter was mentioned to confirm the position of the consent. It was reported to court that the consent could not be effected and an application had been filed for the appointment of an auditor. The matter was fixed for 18<sup>th</sup> February 2020 when it was agreed that the Deputy Registrar would appoint an auditor, and bank managers were to provide statements of deceased's accounts. The application dated 30<sup>th</sup> January 2020 was allowed with a mention before the Deputy Registrar on 24<sup>th</sup> February 2020 for the appointment of the Auditor.

12. The record shows that on 24<sup>th</sup> February 202 the Deputy Registrar made the following orders;

***I have appointed Mr. Fredrick Omondi Oluoch of mobile phone number [redacted] to be the auditor and he will do a report to the court to be used by the court.***

13. On 9<sup>th</sup> March 2020 the matter was mentioned in the presence of both counsel and the above confirmed. The matter was to be mentioned on 23<sup>rd</sup> March 2020 for further orders. COVID 19 happened and what followed was the application at hand.

14. Clearly therefore Mr. Imbwaga's submissions are factual, because the record speaks for itself. The applicant sought orders for a bank account to be opened. He got the orders to open the joint account or just open the account and furnish the court with the same for directions. He never did so. He sought orders for an auditor to be appointed, he got the orders by consent, and an auditor was appointed to deal precisely with the issues raised in the current application. The applicant has not pursued those orders to their logical conclusions.

15. The applicant sought orders for the bank managers to provide statements of the deceased's accounts, again those were granted and the applicant did not pursue those. It appears to me therefore that the applicant has obtained orders but those orders have not been pursued to their logical conclusion to warrant fresh orders.

16. It is my view that the applicant had actually opened the account as he had sought on 11<sup>th</sup> December 2019, this court would have made specific orders on the rents, but despite having that choice the applicant never opened that account. If the applicant had followed up the orders sought in the application of 30<sup>th</sup> January 2020, there would be no need for orders sought in the current application.

17. Having said that I find that the orders made on 19<sup>th</sup> of May 2020 ought not to have issued as there were other orders in force. In the circumstances the following orders issue:

***1. The orders granted on 19<sup>th</sup> May 2020 are hereby vacated.***

*2. The applicant to enforce the orders made vide the application dated 30<sup>th</sup> January 2020.*

*3. To enforce (2) above the auditor appointed on 24<sup>th</sup> February 2020 to be served with the order to carry out his job within thirty (30) days hereof and file a report with the court. The matter be mentioned before the Deputy Registrar for compliance.*

*4. That the said Lilian Kirigo, Stephen Mwangi Waithera and Caroline Wairimu to give access to the auditor to carry on his job to enable him file the report within 30 days hereof.*

*5. That an order do issue to the banks named in the application dated 30th January 2020 issue for availing of statements of account of the accounts of the deceased from time of death to date within 30 days hereof. The banks are:*

*i. SIDIAN BANK account number 01004020000786,*

*ii. POST BANK account number 0309040091692,*

*iii. POST BANK account number 030904009169,*

*iv. POST BANK account number 0309040125277,*

*v. EQUITY BANK account number 031017020056 and*

*vi. Safaricom MPESA Account 0721607002.*

*6. Mr. Imbwaga submitted that there is a joint account where the rents are being deposited. I direct that his client avails the particulars and accounts of that account to this court within thirty (30) days hereof.*

*7. Mention 2<sup>nd</sup> September, 2020 to confirm compliance.*

**Delivered, dated and signed at Nakuru this 24<sup>th</sup> Day of July, 2020.**

**Mumbua T Matheka VIA ZOOM**

**Judge**

**24/7/2020**

**In the presence of:**

**Court Assistant: Edna**

**Mr. Kariuki for Ms. Njoroge**

**Mr. Yogo for Mr. Imbwaga**