



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 4 OF 1986

IN THE MATTER OF THE ESTATE OF JOSPHAT DAUTI KIBANGA (DECEASED)

JOSEPH MUTEGI KIBANGA..... PETITIONER

VERSUS

EUNICE IGOKI KIBANGA.....OBJECTOR

IMELDA KARENDI MBURUGU ADMINISTRATOR

AND

JOSEPHINE IGOKI KIBANGA 1ST RESPONDENT

LEONARD MUTHEE2ND RESPONDENT

AND

JANE KAIMURI MWANGI 1ST APPLICANT

JOYCE TIRINDI KIBANGA 2ND APPLICANT

REBECCA GACHOGA MUTEGI..... 3RD APPLICANT

R U L I N G

1. On 9/04/2019, it was ordered by consent of the parties that: -

“a) Jane Kaimuri and Joyce Tirindi Kibanga do pay Imelda Karendi Mburuga a total sum of Kshs. 8 million being the value of her interest in Meru Municipality/Block II/30.

b) The said amount be paid as follows:

i) Kshs. 3,250,000/- on or before 15/05/2019.

ii) Kshs. 3,250,000/- on or before 15/11/2019.

iii) The balance of Kshs. 1,500,000/- on or before 30/01/2020.”

2. On 9/03/2020, **Mr. Murango**, Learned Counsel for Imelda Karendi (“Imelda”) informed the court that the said consent had not been complied with by **Jane Kaimuri and Joyce Tirindi Kibanga (“the administrators”)**. In that they had not paid the balance of Kshs. 796,667/-.

3. **Ms. Matiri**, Learned Counsel for the administrators submitted that Imelda had previously failed to make certain payments relating to the estate which resulted in her clients deducting the aforesaid sum of Kshs.796,667/- from the amount payable to her.

4. The Court therefore directed that the parties do file their affidavit evidence and submissions. This ruling is in respect of the issue whether the administrators are entitled to withhold the said sum of Kshs796,667/- from Imelda or not.

5. Vide her affidavit of 20/05/2020, **Joyce Tirindi Kibanga** deponed that the administrators delayed in complying with the order of 09/3/2019 as a result of issues beyond their control. They had to borrow money from the bank. That they deducted Kshs.796,667/- from the agreed sum of Kshs.8,000,000/- because Imelda owed some beneficiaries a total sum of Kshs. 1,311,667/-.
6. It was contended that in the ruling of 26/03/2012 by Makau J, it was directed that the deceased's widow, **Josephine Igoki**, be paid Kshs. 15,000/- per month by Imelda from the rent collected until the grant was confirmed. However, Imelda did not pay this sum and the total sum due from 26/03/2012 to 20/04/2015, when the grant was confirmed, was Kshs.570,000/-. Each of the three daughters were thereafter to contribute Kshs.5,000/- to meet the said obligation. Imelda had not paid her share thereof.
7. That Imelda having failed to pay the said sum to date, she owes Kshs.305,000/-. In addition, she owed the administrators Kshs.140,000/- and Kshs.120,000/- respectively as rent arrears. In addition, she owed Kshs. 166,667/- being the proceeds due to the other beneficiaries for the sale of **Plot No. Nkando/Mariene/13**.
8. In her affidavit of on 6/07/2020, **Imelda** swore that the administrators had failed to abide by the timelines set in the consent order of 09/04/2019. They had also failed to pay a sum of Kshs.796,667/- from the total amount they were supposed to pay. She denied owing any monies as alleged by the administrators she contended that that assertion was an afterthought as the claim was in respect of sums dating way back in 2012 which were well within their knowledge before the consent order of 9/04/2019 was entered into.
9. She admitted to have been unable to comply with the order of 26/03/2012 regarding the upkeep of the widow of the deceased. This was because, she only began collecting rent in January 2013 and paid Kshs. 12,500/- for the widow's upkeep. However, since the latter lived with the 2nd respondent, who was taking care of her, it was agreed that the said Kshs. 15,000/- be paid to him which she religiously did.
10. After confirmation, when the responsibility shifted to the three daughters to each contribute Kshs. 5,000/-per month, the 1st administrator complained bitterly that the funds were ending up in the wrong hands. This prompted the 2nd respondent and his wife to voluntarily and single handedly take on the responsibility of taking care of the widow on their own and did not accept any further contribution from the daughters.
11. As for the proceeds for the sale of **PLOT NO. 13 MARIENE MARKET**, the same was being held in an escrow account in the name of her advocates pending the transfer of the plot to the purchasers.
12. **Lucy Mathee**, wife of **Leonard Muthee Kibanga**, the 2nd respondent swore an affidavit filed on 09/06/2020. In it, she supported the averments made by Imelda in respect of the claim for Kshs.15,000/- per month for the maintenance of the widow.
13. I have considered the affidavits and the submissions on record. The issue for determination is whether the administrators are entitled to withhold a sum of Kshs. 796,667/- from the sum of Kshs.8,000,000/- due to Imelda as her share in Meru Municipality/Block II/30 ("the said property").
14. In terms of the consent order of 09/04/2019, the 2 administrators were to pay Kshs.8,000,000/- to Imelda as her share in the said property. The order set out not only the total amount payable but also the manner of payment.
15. The administrators contended that they were entitled to withhold the sum of Kshs.796,667/-, made up of the following: -
- a) Kshs. 570,000/- due to the widow as ordered by the Court way back in 2012;
 - b) Kshs.166,667/- being the share of the other beneficiaries from the proceeds of the sale of **PLOT NO. 13 MARIENE MARKET**; and
 - c) Kshs.60,000/- rent arrears owed to the 2nd administrator.
16. From the evidence on record, it is clear that Imelda was unable to collect rent in 2012. The tenants seem to have already paid the previous landlord the rent for that entire year. Further, when she started to collect rent in 2013, it was agreed that the monies be paid to the 2nd respondent who was living with and taking care of the widow.
17. There was no evidence that the 2 administrators took care or maintained the widow as alleged. The widow who is alive did not file any affidavit to complain that Imelda had not complied with the Court order or that the administrators had maintained her.
18. The averments made on oath by Imelda and **Lucy Muthee** regarding the maintenance of the widow were neither denied under oath nor challenged. They therefore remained un rebutted. The administrators having failed to answer or challenge the said averments, the said averments remain a fact and the truth of the matter.
19. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 Others [2012] Eklr**, the court held: -
- "In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."***
20. To this Court's mind, the issue of non-maintenance of the widow was an afterthought. It was an issue that had not been raised for 8 years. Further, it was not raised when the consent order of 09/04/2019 was being recorded. It must not have been in the contemplation of the

parties at the time they entered the subject. Consent order. In this regard, the Court cannot vary the terms of the said order at the instance of one party. Since the alleged non-payment was in the knowledge of the parties, they must have taken into consideration of that fact when they were recording the consent of 09/04/2019.

21. As regards the claim for rent arrears in the sum of Kshs.60,000/-, allegedly owed to the 2nd administrator, that is a misconceived claim. The interest of Imelda in the said property was to cease upon receipt of the entire sum of Kshs.8,000,000/-. She has not received the said sum. There is no way she can be punished for insisting on her rights.

22. The last claim is for Kshs.166,667/- , being proceeds owed to the other beneficiaries from the sale of **Plot No. NKANDO/MARIENE/13**. The evidence on record shows that the sale of that property has not been completed yet. The proceeds thereof are being held in an escrow account awaiting the administrators to complete the transaction. That claim is also without any basis.

23. On the other hand, Imelda made a claim that there was a miscalculation of the interest in **Meru Municipality Block II/30**. That since the property was valued at KShs. 52,000,000/-, her share should have been KShs. 8,666,667/- and not Kshs. 8,000,000/- as stated in the consent order. That the 2 administrators should pay her the balance of KShs.796,667/- together with the understated sum of KShs.666,667/-.

24. A simple answer to the claim is that, the order of 09/04/2019 was by the consent of the parties. It was not a miscalculation by the Court. The Court cannot now purport to vary the terms of that consent at the instance of one party. I think the loss should lie where it has fallen. Accordingly, that claim is declined.

25. Accordingly, the respective claims by the parties are hereby dismissed. Due to the effect of Covid-19, and for the reason that Imelda continues to enjoy the entire rent accruing from the said property, I make the following orders: -

- a) **The amount of KShs. 796,667/-, being the balance of KShs.8,000,000/- be paid to Imelda by the administrators (or the administrator who has not completed her share thereof) within 90 days from the date hereof.**
- b) **Failure to comply with (a) above, the amount shall begin to accrue interest at court rate from the date of default until payment thereof and execution in respect thereof to issue.**
- c) **Imelda shall relinquish collection of rent from the said property upon payment of the amount in (a), or after 90 days from the date of this ruling, whichever is earlier.**
- d) **There shall be no order as to costs.**

DATED and **DELIVERED** at Meru this 24th day of September 2020.

A. MABEYA

JUDGE