



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2280 OF 2011**

**IN THE MATTER OF THE ESTATE OF JAMES WAIGANJO**

**(DECEASED)**

**RULING**

1. The late James Waiganjo in respect of whose estate these proceedings relate died testate on the 27<sup>th</sup> April 2011 leaving behind a valid Will executed on 24<sup>th</sup> January 2006. On 2<sup>nd</sup> May 2012, Joseph Kuria Thamo, Francis Ng'ang'a Kanyera alias Francis Ng'ang'a Kamiri and Karugu Njenga alias Isaac Karugu Njenga petitioned the Court for a Grant of Probate of Written Will. The Estate was gazetted on 10<sup>th</sup> February 2012 and the said grant issued to the three (3) jointly on 19<sup>th</sup> March 2012.

2. Vide a Summons for Confirmation of grant dated 3<sup>rd</sup> May 2013, the Grant was confirmed on 24<sup>th</sup> January 2006 and the estate distributed as per the Written Will.

3. On 28<sup>th</sup> May 2019, the Court was moved for amendment of the Certificate for Confirmation of the Grant on grounds that one of the Executors one Karugu Njenga alias Isaac Karugu had died. Subsequently, the Certificate of Confirmation of Grant was amended on 29<sup>th</sup> July 2019 and the name of the deceased Co-Executor removed thus leaving the two surviving Executors as the only Executors.

4. The estate having remained undistributed fully to the rightful beneficiaries, three of the beneficiaries namely; James Waiganjo Ngatia a grandson to the Deceased, Elizabeth Wanjiru Ngatia and Hannah Nyokabi Waiganjo being daughters to the Deceased moved to this Court vide a Summons dated 30<sup>th</sup> June 2020 seeking several orders inter alia;

- (a) An order compelling the Executors to distribute the estate and transfer to the beneficiaries their rightful shares as per the Will within 30 days;**
- (b) Production in Court a full and accurate inventory of assets, liabilities of the entire estate upto the date of the account;**
- (c) Production in Court a full and accurate account of the affairs of Gitungo Family Investments Limited;**
- (d) That in default of the foregoing, the grant be revoked and Letters of Administration be issued to the applicants in respect of the undistributed estate of the deceased.**

5. The application is premised upon grounds stated on the face of it and an affidavit sworn by James Waiganjo Ngatia with authority from his co-Applicants claiming that, six years down the line since the grant was confirmed the beneficiaries among them the applicants are yet to receive their rightful share as bequeathed under the Will. That the bulk of the assets remaining undistributed are the Shares in Gitungo Family Investment Co. LTD which asset generates income. That the said income has remained undistributed by the Executors hence the need for accountability. That despite notice to the executors to complete administration of the Estate, the same has been either ignored or neglected.

6. In response, James Waiganjo Gitungo filed a replying affidavit sworn on 23<sup>rd</sup> July 2020 in which he denied allegations that the Respondents (Executors) have refused and or failed to execute fully the administration of the Estate. He averred that, he and his co-Executor have made every effort towards executing transfer of Shares from Gitungo Investment Company Limited to all beneficiaries but their efforts have been frustrated by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' failure to execute the necessary transfer documents despite several requests by the Executors. As proof of such effort, he attached some correspondences between them and the firm of Kabiru Advocates representing the Applicants (see Annexure "JKT-1" showing a letter dated 17<sup>th</sup> June 2020 together with Share Transfer Forms forwarded to Kabiru for his clients to sign).

7. He further averred that they have managed to transfer several properties to the beneficiaries among them the Applicants. That what is remaining are the assets with the obstacles in place.
8. As proof of such transfer, he attached copies of title deeds reflecting some beneficiaries as the registered owners among them Hannah Nyokabi (3<sup>rd</sup> Applicant) L.R. Limuru/Bibirioni/1156 and Tigoni/Mabrouke Block 1/1845 (see Annexure “**JKT-2**”).
9. Regarding money in the deceased’s bank accounts, he stated that the same was duly distributed to and acknowledged by beneficiaries pursuant to a consent executed by all beneficiaries. He also attached a schedule of payment duly acknowledged by beneficiaries among them the Applicants (see Annexure “**JKT-3**”).
10. Similarly, he averred that, L.R. Kajiado/Ewaso-Kedong/395-340 and ½ of L.R. Dagoretti/Riruta/66 were by consent of all beneficiaries sold and proceeds shared out as per annexure “**JKT-4**”.
11. He went further to state that transfer of shares in Gitungo Company Limited has been executed to some beneficiaries who have executed transfer forms. As proof of such effort, he attached as “**JKT-5**” minutes and transfer forms duly executed in the names of some beneficiaries.
12. Commenting on Menengai Farmers Limited Shares, he averred that the same were touching on shares in Gitungo Family Investment Company Ltd which is not within their mandate as the same is within the powers of the Company Directors to which the Applicants have refused to be part of it.
13. He averred that they were more than ready and willing to windup the administration of the estate a fact demonstrated by the surrender of the Company Shares to the Stock Brokers to sell and then distribute to the beneficiaries their shares.
14. He prayed for time so that they will finish the process of administering the Estate. He claimed that the 2<sup>nd</sup> Applicant who has been receiving her benefits is using her son the 1<sup>st</sup> Applicant to embarrass them and engage in unnecessary fights. That the Applicants have not established any impropriety on their part or misuse of the estate assets.
15. In their rejoinder, James Waiganjo Ngatia swore a supplementary affidavit filed on 21<sup>st</sup> September 2020 denying the allegation that they have refused to sign the Share Transfer Forms. He further denied receiving any proceeds in respect of their rightful shares.
16. He further claimed that the purported sale of assets was made without consultation at a lesser value and sold jointly to the 1<sup>st</sup> Respondent and John Gitungo Waiganjo both Executors at Kshs. 10,000,000/- which amount was far below the market value.
17. As regards Gitungo Company shares, he stated that, there are only two Directors remaining as the others died hence no Company resolutions have been made to warrant execution of Company business.
18. He went further to state that no evidence had been adduced to show which properties have been sold, to who, and at what price and through which beneficiaries’ resolutions. He claimed that the recent form CR 12 obtained from the Companies’ Registry does not show any transfer of shares done to any of the beneficiaries.
19. At paragraph 16 of the affidavit, he averred that the instant application is limited to the affairs in Gitungo Company Limited and not the entire estate.
20. A further rejoinder was made through a supplementary affidavit sworn by Elizabeth Wanjiru Ngatia the second Applicant which seems not to be a complete copy but which largely claims that there has been no attempt to have her sign any Share Transfer Forms by the Respondents. She basically reiterated what the 1<sup>st</sup> Applicant stated almost word by word in his supplementary affidavit.
21. She however admitted receipt of some proceeds from her late father’s bank accounts. She denied ever been invited to attend any meeting of the Company as claimed by the Respondents.

#### **Applicant’s submissions**

22. Mr. Kabiru filed his submissions dated 11<sup>th</sup> August 2020 on behalf of the applicants. He narrowed down the issues for determination as follows;

- a) Whether there has been any unreasonable delay or failure by the Executors in executing the Will;**
- b) Whether there is need for a full and accurate account and or inventory of the assets, liabilities and distribution of the estates;**
- c) Whether there is need for a full account and accurate statement of affairs of Gitungo Family Investment Limited; and**
- d) Whether the grant should be revoked.**

23. Regarding the issue of delay in executing the Will, Mr. Kabiru submitted that the Shares in Gitungo Family Ltd have not been transferred to the beneficiaries as claimed by the Respondents. He referred to annexure “JWN1” being Form CR 12 of the Companies Registry which reflects that as at 10<sup>th</sup> June 2020 the Shares herein were still in the deceased’s name. He submitted that there was no proof of any meeting held by beneficiaries to approve sale of any property comprising the estate.

24. Counsel contended that none of the beneficiaries has received his/her share as claimed by the Respondents. According to him, there is sufficient ground to replace the Executors with the Applicants to complete the administration of the estate. In support of this argument, Counsel referred the Court to the holding in the case of; **In Re Estate of Onyango Ogutu alias Benedict Onyango (Deceased) (2018)Eklr** where the Court revoked a Grant and replaced the administrators with new ones on grounds that the Law of Succession does not envisage administration of the estate to go on for generations and that administration should be completed as soon as possible so that every survivor of the Estate gets his share and moves on with his life.

25. Touching on the issue of rendering a full account and accurate inventory of the assets and liabilities, counsel contended that it is the duty of the Executors to give a full account of the assets received, how disposed of and if any proceeds paid to the beneficiaries, how much.

26. Learned counsel further submitted that the duty to give a full account is a statutory requirement under Section 83 of the Law of Succession. To fortify this contention, Counsel made reference to the holding in **In Re Estate of Julius Mimano (Deceased) (2019)eKLR** where the Court stated that there is an obligation imposed upon the administrator to render an account of all dealings with the assets and liabilities upto the point of the account.

27. As regards the Shares and assets being managed by Gitungo Family Company, Counsel submitted that it was necessary as the Executors had stepped into the shoes of the Deceased hence the need for accountability. To amplify this proposition, Counsel placed reliance in the case of **In Re Estate of Agwang Wasiro (Deceased) (2020)eKLR** where the Court stated that the effect of a grant is to vest the property of the estate of a dead person, by virtue of Section 79 of the Law of Succession Act, in the person the grant is made.

28. Submitting on revocation, Mr. Kabiru contended that the Applicants have failed to comply with the requirements under Section 76(d) (ii) and (iii) of the Law of Succession more specifically on the administrator’s inability to render an accurate account of the estate. To lay emphasis on this aspect, reliance was placed on the holding in the case of **In Re Estate of Aggrey Orieno Ambala (Deceased) (2011)eKLR**.

#### **Respondent’s submissions**

29. On her part, Ms. Muhuhu appearing for the Respondents filed her submissions dated 1<sup>st</sup> September 2020 reiterating the averments contained in the replying affidavit to the application in which the Respondents blamed the Applicants for refusing to execute necessary transfer forms for the shares in Gitungo Company. Counsel submitted that the Applicants had failed to controvert the fact that there were attempts made through their lawyer to sign the necessary forms but they refused.

30. Concerning the prayer to account for proceeds and shares in Gitungo Company in which the Deceased had 51% shareholding, she submitted that it is not within the mandate of the Executors but Company Directors. According to M/s Muhuhu, the Executor’s powers are limited to transfer of shares and not to account for Company affairs. In support of this proposition Counsel relied on the holding in the case of **Patrick Kibathi Kigwe and 2 Others –Vs- Charles Kigwe Gathecha (2015)eKLR** where the Court held that distribution of the estate of the Deceased is as per the Will of the Deceased and operations of the Company are as per the Companies Act, Memorandum and Articles of Association.

31. Touching on the delay to complete the administration of the estate, Counsel submitted that the estate is quite vast hence the delay. That the Applicant’s reluctance to co-operate is another factor that has delayed the complete administration of the estate.

32. M/s Muhuhu submitted that the Executors have transferred quite substantial part of the estate according to the Will of the Deceased and doing contrary to the wishes of the Deceased in the Will is going contrary to the law. To buttress this position, Counsel referred to the decision in the case of **Beatrice Nini –Vs- George M. Kagwe (2012)eKLR In the Estate of Margaret Wanjiku (Deceased)** in which the Court stated that the Court must at all times give effect to the wishes of the Deceased as emphasized in the Will.

33. Counsel submitted that disposing of properties jointly owned by the Deceased with 3<sup>rd</sup> parties have proved to be difficult to dispose especially where the joint owner is not ready to dispose. Commenting on the sale of Sokoni land (L.R. Dagoretti/Riruta/T.66) he stated that the same was sold and proceeds shared between the beneficiaries among them the Applicants. To that extent, Counsel submitted that there was no proof that the Respondents had failed to execute the grant to warrant revocation.

#### **Determination**

34. I have carefully considered the application herein, response thereto and rival submissions by both Counsel. Issues that arise for determination are;

- (a) **Whether the Respondents have failed or neglected to administer the estate fully;**
- (b) **Whether the Respondents should render a full account and an accurate inventory of the assets and liabilities of the estate including shares and affairs of Gitungo Family Company Limited.**
- (c) **Whether there is sufficient ground to revoke the Grant.**

35. Due to their connectivity, I will address the three issues together. There is no doubt that the grant herein was confirmed way back the year 2013 in November the 27<sup>th</sup>. According to the Applicants, the confirmed grant has been lying un-administered since then to date with a large portion of the estate remaining un-administered.

36. This Court is being asked to replace the current Executors from administering the estate with the Applicants. One of the grounds stated is that there has been a delay in completing the administration of the estate. The other ground is that there has been little or no accountability on how the estate is being managed with great emphasis being attached to the mismanagement of the affairs in Gitungo Family Company Limited to which the Deceased had 51% shareholding.

37. The appointment of an Executor or administrator is the duty of the Court. The mandate conferred upon an administrator or Executor is that of a trustee and that the Executor's or administrator's duties ought to be executed diligently and faithfully as an agent representing the Court in overseeing expeditious and diligent administration of the estate.

38. Upon appointment as an Executor or administrator of an estate, the administrator/executor is expected by law to discharge responsibilities or duties a Deceased person would individually execute if he or she was alive. See **In Re Estate of Julius Mimano (Deceased) (supra)** where the Court stated that;

**“...The personal representative of a deceased person holds a unique position in law. The property of the dead person is vested in them by virtue of section 79 of the Law of Succession Act. The effect of section 79, read together with section 82 of the Act, is that the same puts the personal representative on the same footing with an owner of the property, in the sense that he exercises the powers that the legal owner of the property would have exercised were they alive, and suffered the same burden of duties and obligations over the property as the legal owner would have been were they to live.”**

39. However, there are certain statutory obligations imposed upon an Executor or administrator. Among the duties spelt out under Section 83 of the Law of Succession at paragraph (2) is that; ***“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 upto the date of the account.”*** Paragraph (e) goes further to provide that;

**“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.”**

40. In the case of **In Re Estate of Adam Haji Ali Talib (Deceased) (2019)eKLR** the Court faced with a similar scenario such as the one before me had this to say:-

**“Under Section 83(g) an administrator is obligated to complete the administration of the estate in respect of all matters within six months from the date of confirmation of the grant and to produce to the court a full and accurate account of the completed administration. There is no evidence that the Administrator completed the administration of the estate within the period specified by law. The Administrator has also not filed accounts 6 months from 14.7.17 when the Grant was issued or within 6 months from 27.4.98 the date of confirmation of the Grant. Section 83(e) and (g) have therefore not been complied with.”**

41. At paragraph 8 the court went further to state that;

**“The production of accounts is a key component of the administration process of a deceased person's estate. From the moment a grant is issued to a personal representative of a deceased person, the grant holder becomes responsible to the Court in the carrying out of the duties of administrator. Accounts are an accountability tool that will tell the Court whether the administrator has been faithful to the role entrusted to him or her. When an administrator fails to file accounts as required, questions as to the integrity of the process are bound to arise as in the present case.”**

42. In the instant case, there is no dispute that the Executors have not filed any statement of accounts or inventory as required under Section 83 within six months. This is a statutory obligation that is enforceable by the Court on its own motion or on application by any Interested Party. Since the Grant was confirmed, it is about six (6) years now.

43. Although at some point one of the Executors died, the delay of six (6) years before completing administration of the estate is not reasonable delay. I take cognizance of the fact that the Executors have tried to execute transfer of some of the assets yet others have not. For the sake of proper accountability, the Executors are duty bound to give a full account and accurate inventory of all the assets and liabilities taken over from the time of Confirmation of the Grant, their status, proceeds realized if any, sale and distribution of the same.

44. What the Applicants are asking is merely a formal statutory requirement which has not been done since confirmation of the grant. To that extent I am in agreement with the applicants that the Respondents have a duty and are hereby directed to give a full and accurate account and full inventory of all assets and liabilities relating to the estate from the date of Confirmation of the Grant upto the date of the account.

45. Having held as above, the remaining key issue for consideration is, whether the Executors are duty bound to account for the shares and affairs of Gitungo Company Ltd. It is trite law that a Company is a legal entity and separate from its Directors. **See Salomon v Salomon Co. Ltd(1897)AC22** where the court stated that a company is a separate legal entity separate from its Directors. The Deceased owned 51% shares in Gitungo Co. Ltd. There are other Directors involved.

46. The Executors are only concerned with the transfer of Shares to the beneficiaries and not to go deeply into the operations of the Company which has its Articles and Memorandum of Association which governs its operations. I am totally in agreement with the holding in **Patrick Kibathi Kigwe & 2 Others –Vs- Charles Gathecha (supra)** where the Court stated;

**“Whereas, there are legitimate concerns as to the conduct of the executors who are also Directors of Kisambi Investments over the property of the Company; these concerns are best addressed by the Protestor as a shareholder of the Company. At this stage it is the duty of the Court to facilitate transfer of shares of the deceased to beneficiaries and distribution of the deceased’s estate according to the will.”**

47. It is admitted that the Shares in Gitungo Family Company have not been transferred to beneficiaries. The Executors are accusing the Applicants of the delay while the Applicants are apportioning the blame on the respondents.

48. Other than attaching minutes showing that beneficiaries had agreed to share the Shares in Gitungo Company Ltd, there was no evidence from the Companies Registry confirming that any beneficiary has received his/her share(s).

49. Whereas this Court will not interfere with the Company operations which is the preserve of the Directors, it has a duty to facilitate transfer of shares to the beneficiaries to enable them have legal power to participate in the affairs or management of the Company including making important Company resolutions.

50. All I can read from both sides is bad blood and misunderstanding. The Executors must as an obligation execute immediate transfer of the Shares and any other properties entitled to the beneficiaries. For those reasons, I will not make any directions affecting the management and operations of the Company other than to direct immediate transfer of the Shares to beneficiaries.

51. Concerning revocation of the grant, Section 76 of Law of Succession is clear. A Grant can be revoked on grounds of fraud, concealment of material information or facts to the case, defective proceedings in substance, untrue allegation of a fact essential in point of law, failure to apply for confirmation of the grant, failure to proceed diligently to administer the estate or failure to produce in Court within the prescribed period such inventory or account of administration as required under Section 83(e) and (g) or grant has become in operational.

52. In the case of **Jesse Karaya Gatimu –Vs- Mary Wanjiku Gathenji (2014)eKLR** the Court held thus;

**“The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.”**

53. The Applicants are relying on grounds under Section 83(e) and (g) to seek revocation of the Grant. Revocation of a Grant is within the discretion of the Court which should be exercised cautiously to avoid further delay in the administration of the Estate. The Court has to weigh the size of the estate, factors of the delay and their justification.

54. The delay here although not fully justified, has been mitigated by the death of one of the Executors, vastness of the Estate, uncooperative joint owners of the properties with the Deceased and beneficiaries’ mistrust against each other. Since a sizeable part of the estate has been transferred to the respective beneficiaries, appointing new Executors will complicate and further delay the process.

55. Revocation proceedings should not be used to settle scores amongst beneficiaries and the Court must never fall into that trap. In so doing, the Court must be guided by the best interest of the estate and the ends of justice. See **Joyce Ngima Njeru and another –Vs- Ann Wambeti Njeru (2012)eKLR** where the Court held:-

**“... the central core of the ingredients required to be established under section 76 of the L.S.A. is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the Grant or in active use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merit.”**

56. Since I have already noted that there were factors contributing to the delay in completing the administration of the estate, and in exercise of my discretion, I do not find revocation of the grant reasonable in the circumstances of this case. Justice will demand that we respect the wishes of the Deceased in the appointment of the Executors in place save that they must operate within the time lines provided by law.

57. For the above reasons stated, I do not find sufficient ground to revoke the Grant. Having held that the Executors must file a full statement of accounts and inventory of the assets and liabilities, the application herein partially succeeds and partially fails with orders that;

**(a) The Respondents/Executors be and are hereby ordered to within sixty (60) days prepare and file a full account and inventory of the assets and liabilities of the estate since Confirmation of the Grant upto the date of the accounts.**

**(b) That within the same period, the Respondents/Executors shall sign necessary transfer documents or instruments to facilitate transfer of individual beneficiaries’ shares to their names.**

**(c) That both parties and all beneficiaries shall submit to the process of executing necessary documents to effect transfer of their Shares into their names.**

**(d) That in default of the above orders, the Court shall be at liberty to appoint fresh Executors for purposes of completing the administration of the un-administered part of the Estate.**

(e) This being a family matter costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIS 23<sup>RD</sup> DAY OF DECEMBER, 2020.

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J. N. ONYIEGO

JUDGE