



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 158 OF 2005**

**IN THE MATTER OF THE ESTATE OF THE LATE DICKSON KIIHIKA KIMANI (DECEASED)**

**RULING**

1. This ruling is in respect of the application dated 14/9/2018. The prayers sought are;

**1. THAT all the 4 co-administrators of the estate of DICKSON KIIHIKA KIMANI (deceased) namely MARGARET WAMBUI KIIHIKA, ALICE MUKUHI KIIHIKA, MARY WANGARI KIIHIKA and MIRIAM WARAU KIIHIKA be substituted with co-administrators, namely FLORENCE NDUTA KIIHIKA, ANTHONY GICHIA KIIHIKA and JUDY MUTHONI KIIHIKA and that the grant issued on the 13<sup>th</sup> October 2009 be rectified/amended accordingly.**

**2. THAT this honourable court be at liberty to issue such other further orders as it shall deem just to grant in respect of the estate of DICKSON KIIHIKA KIMANI (deceased).**

2. The application is premised on 8 grounds namely;

1. **THAT** all the administrators have failed to proceed diligently with the administration of the estate.

2. **THAT** MARGARET WAMBUI KIIHIKA is 89 years old, senile and sickly and so cannot administer the estate effectively and the beneficiaries propose that she be substituted with her daughter, FLORENCE NDUTA KIIHIKA.

3. **THAT** ALICE MUKUHI KIIHIKA is 76 years old and infirm and in the circumstances is not able and available to practically co-administer the estate and she wishes to be replaced by her son, ANTHONY GICHIA KIIHIKA, as co-administrator.

4. **THAT** MARY WANGARI KIIHIKA is ailing and also refuses to co-operate with the other co-administrators and the beneficiaries propose that she be substituted with JUDY MUTHONI KIIHIKA.

5. **THAT** MIRIAM WARAU KIIHIKA has inter meddled with the estate by disposing of property without authority and it is only just that she ceases being an administrator.

6. **THAT** the applicants/proposed administrators are at all times available and able to practically co-administer the said estate.

7. **THAT** the estate herein has not been gathered.

8. **THAT** the applicants/proposed administrators are all beneficiaries of the estate of the late DICKSON KIIHIKA KIMANI.

3. The application is supported by the affidavit of Anthony Gichia Kihika. Annexed thereto are a copy of the grant, minutes of family meetings, an affidavit by Alice Mukuhi Kihika (an administrator) and a copy of a land sale agreement.

4. Mary Wangari Kihika opposes the application and in a replying affidavit avers that the allegations of senility and mental infirmity are medical conclusions that require evidence and none is provided. Mary avers that she is in good health and always ready to co-operate.

5. Mary proceeds to absolve the administrators from blame over delay in the matter citing the various applications that the court has had to dispose of.

6. Margaret Wambui Kihika, the 1<sup>st</sup> administrator, denies that she has neglected or failed to proceed diligently with the administration of the estate. She stated that she has acted diligently and even testified in court.

7. She states that Florence Nduta Kihika is her daughter and in unsuitable to administer the estate. She had claimed to be a landlord in a lease that Margaret opposed and this led to a suit being **BPRT Case Number 51 of 2017**.

8. In rejoinder, Anthony Gichia Kihika depones that he does not need medical evidence to know that Margaret Wambui Kihika is sickly and senile since it is quite easy to do so by merely observing her.

9. On the alleged criminal charges against him, Anthony states that the same are trumped up charges.

10. The 1<sup>st</sup> administrator filed written submissions.

11. The applicants and the 1<sup>st</sup> administrator filed written submissions. The 3<sup>rd</sup> and 4<sup>th</sup> administrators submitted orally through counsel on record.

12. For the envisaged substitution of the existing administrators with other persons, which essentially would involve the revocation of the grant made to the administrators and issuance thereof of another grant in the names of the proposed administrators, sufficient grounds have to be laid to show that the existing administrators were unable or have refused to carry out their mandate and thus the grant has become inoperative through subsequent circumstances. See **Section 76 (e) of the Law of Succession Act**.

13. The person who alleges proves. **Section 107 of the Evidence Act** provides;

**“Section 107**

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

14. In our instant case, the applicants have raised serious allegations against the administrators.

15. Margaret Wambui Kihika is said to be sickly and senile and so cannot effectively administer the estate.

16. Alice Mukuhi Kihika is said to be old and infirm and therefore not able and available to practically co-administer the estate and wishes to be replaced by her son.

17. Mary Wangari Kihika is said to be ailing and also refuses to co-operate with the other co-administrators.

18. Miriam Warau Kihika is accused of intermeddling with the estate by disposing of property without authority.

19. Issues of health, notably senility and illness are matters of scientific proof. Mere allegations cannot suffice. No iota of evidence is brought forth to prove senility or illness on the part of any of the administrator. The casual approach by the applicants in regard to this issue is astonishing. Anthony Gichia cannot possibly be expected to make findings on issues health and senility. He has not laid any claim to any credentials in medicine. In that field, therefore, he is an ordinary man in the street.

20. Administrator Alice Mukuhi Kihika is said to have sworn an affidavit marked “AGK 5” annexed to the affidavit of Anthony Gichia Kihika in which she states she is 76 years old and she can no longer perform duties of an administrator.

21. Why it is the applicants raising the issue on her behalf is not clear. It is within her rights to cease being an administrator. She, however, ought to make a formal application before court in which case her powers and duties will vest on the other administrators or alternatively vest in her replacement with consent of all the parties.

22. As regards intermeddling, the burden of proof too lies on the applicants. No sufficient evidence of intermeddling is shown.

23. On the material before court, I am persuaded that acceding to the prayers sought herein will lead to further convolution of the issues before court. No evidence has been tendered to prove inability of the current administrators to perform their duties. The application has no merit.

24. I proceed to dismiss the application dated. This being a family matter, I order that each party bears its own costs.

**Dated and Delivered at Nakuru this 24<sup>th</sup> day of January, 2019.**

**A. K. NDUNG'U**

**JUDGE**