



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.146 OF 2017

IN THE MATTER OF THE ESTATE OF NAHASHON KIRAGU MBUTHIA (DECEASED)

A N D

ANN WAIRIMU GACHERU.....2ND PETITIONER/APPLICANT

V E R S U S

MARY WANGUI KIRAGU.....1ST PETITIONER/RESPONDENT

R U L I N G

The application for determination is the one dated 2/10/2017, brought by the 3rd petitioner/applicant Anne Wairimu Gacheru. She seeks the following orders:

(a) That this Hon. Court be pleased to order the 1st petitioner/respondent to pay school fees for the beneficiaries of the Estate as follows:

1. NW Kshs.18,000/=

2. SM Kshs.12,000/=

(b) That the court do summon the 1st petitioner/respondent to provide a full and accurate account of the rent collected from L.R.No.Nyandarua Gilgil/219, Plot 20 Gathundo Township; L.R. Nyandarua/Upper Gilgil 1038; L.R. Nyandarua/Olkalou South/553 Plot 30 Olkalou Town and L.R.No.Nyandarua/Ndemi 3688 for the period between December, 2015 to-date;

(c) That this court be pleased to order the opening of a joint account in the names of the applicant and 1st respondent in a bank of their choice where all rent proceeds from aforementioned plots will be deposited;

(d) That this court be pleased to issue orders of injunction against the 1st respondent from further dealing and/or intermeddling with above listed properties, pending the hearing and determination of the summons.

The application is supported by two affidavits, dated 2/10/2017 and a further one dated 26/1/2018. The applicant was represented by Ms. Wangeci Advocates.

The application was opposed and the 1st petitioner/respondent swore an affidavit dated 23/10/2017 and a further affidavit dated 8/11/2017. The respondent was represented by Mr. Waiganjo Advocate.

The applicant deponed that she is a widow of the deceased and that Jane Wanjiru was the 1st wife of the deceased and she has four children including the 1st petitioner/respondent; that she has three children who are all minors; that she is also an administrator of the deceased's estate together with Mary Wangui, the Respondent while the 2nd administrator SM passed away in 2017; that her children SM and NW are in school and the deceased had been paying their school fees as well as taking care of their upkeep; that the respondent has been exclusively collecting rent from the business premises without accounting for it and that the applicant is only given between Kshs.21,000/= to Kshs.24,000/= per month for fees and upkeep yet it had been agreed that each house gets Kshs.50,000/=; that efforts to have the respondent to render account have been fruitless; that is why she wants this court to order that the respondent do render accounts of all rents collected from December, 2015 to-date. The applicant also averred that the respondent has cut trees on L.R. Nyandarua/Upper Gilgil/219 and 1038 without her consent and therefore an order of injunction should issue to stop her from intermeddling with the properties.

In opposing the application, the respondent deponed that she is indeed one of the administrators together with the applicant; that the rents from the estate are collected by an agent who was engaged by the deceased prior to his death and the applicant should get records from the said agent on how much is collected which is her duty as an administrator. The respondent exhibited the records obtained from the agent; that the applicant receives Kshs.24,000/= depending on the sums collected, which she was required to use on school fees but she diverts the said money to her own use and has not rendered account on how she has been using it; that the first wife had been sick and bed ridden even before the demise of the deceased; that she also has school going children who require fees; that the applicant's intention in seeking a joint account is to cripple the first house because the 1st wife is not able to engage in any meaningful job and that the ailing 1st wife relies on rent for her medication and she cannot be waiting for an application to be made to court to enable her to purchase medicines. The respondent further contends that the application is baseless as there is no proof that the respondent has cut trees or that the applicant has borrowed money from any institution.

I have given due consideration to the summons and the rival submissions of counsel. There is no doubt that the applicant is one of the administrators to the estate of the deceased representing the 2nd house while the respondent represents the 1st house.

The first prayer is for payment of school fees for the applicant's minor children. The deceased died on 28/12/2015. The applicant has never made any application for payment of school fees since and the question is how has the fees been paid from 2015. I do agree with the respondent that there is no evidence exhibited by the applicant that the said fees is due or owing or that the said children are in school. The applicant should have exhibited an invoice and fee structure from the school as proof that the children attend the said schools and may be an accompanying letter to show that fee was still unpaid. For this proposition I am supported by the decision in *E.J. v KJB & another Succ.224/2012* where J. Musinga stated:

“However, any school fees must be subject to production of a fees structure from the respective schools and colleges that children are in. This court will not therefore accept a mere letter indicating the school fees arrears.”

So far, there is no evidence to support the claim for payment of the school fees.

The applicant admitted that Kshs.24,000/= is remitted to her by the respondent from rents received from the estate.

It is the applicant's contention that she is supposed to receive Kshs.50,000/= which the other house receives. The respondent in her affidavit has tried to explain in detail why only the above sum of Kshs.24,000/= is paid to the applicant.

For example, the respondent has deponed that two tenants have been paid a total of Kshs.38,000/= as costs for suits they had filed against the estate; that the estate has incurred costs of wear and tear of the houses (repair) and payment of statutory dues like rates.

In any event, it does not follow that the two houses would benefit equally from the estate because of various factors, maybe the first house may have contributed to the estate, or one house may have more needs than the other. Even though the applicant alleges that they had agreed that she gets Kshs.50,000/=, she did not avail any such evidence to the court.

As pointed out above, the applicant is one of the administrators of the deceased's estate. The duties of an administrator are set out under Section 83 of the Act. Section 83(e) provides as follows:

“83(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.”

In *Njeri Njau & others v Muigai Ntota (2012)(e)KLR*, J. Lenaola said:

“I am clear in my mind that the duty to render an inventory and accounts is not one that a personal representative can wish away casually as the respondent has done.”

J. Musyoka had occasion to consider the section in *Estate of Thiongo Nginyanju Muthiora Succession Cause No.2131/2011* where he said:

“I will emphasize that personal representatives are for all practical purposes trustees. They hold property for the benefit of others. The property vested in them by virtue of Section 79 does not belong to them. It does not vest absolutely. They hold such property in trust for creditors, heirs, beneficiaries and dependants. They stand in a fiduciary position with respect to the estate, to the creditors, heirs, beneficiaries and dependants. As such, they are obligated to account to the court and to the creditors, heirs, beneficiaries and dependants for their handling of such estate property.”

From the above authorities, it is clear that being an administrator of this estate, the applicant had the duty and power to demand for the accounts from the estate agent. She cannot sit back and let the work be done for her by the respondent which she should be doing herself. She is equally liable to produce the accounts and cannot lay blame on the respondent alone. The court cannot therefore grant the said prayer against the respondent calling for accounts.

The prayer for opening of a joint account is premised on the notion that the applicant is entitled to the same amount of rent and proceeds from rent as the first house, a notion which I have found to be misplaced. Besides, it is not in dispute that the 1st wife mother to the respondent is bed ridden, a fact that the applicant has not denied. The question is whether the applicant will cooperate in running of the account so that the sick lady gets medication when it is required. The joint account may not be a good idea now that the parties do not seem to be in harmony.

The applicant also contends that the respondent is intermeddling with the estate by cutting trees. As correctly pointed out by the respondent, there is no evidence to support that allegation – no photographs or report to the chief or police or agricultural officer has been availed.

The applicant also prays that an injunction do issue to restrain the 1st petitioner from dealing with or intermeddling with L.R. Nyandarua/Upper Gilgil/219 & 1038, Plot 20 Gathundia Township; Nyandarua Olkalou South/533, Plot 30 Olkalou Town and LR Nyandarua/Ndemi/3688. This prayer in essence seeks to bar the respondent from carrying out her duties as the personal representative of the deceased's estate under Section 79 & 83 of the Act.

In effect, the court would be removing the respondent from her duty as legal representative of the deceased's estate.

The applicant has not placed before this court sufficient material to enable it make an order for removal of the 1st petitioner as the administrator of the deceased's estate.

In the instant case, grant was issued to the administrators on 30/5/2016. Since then, it has not been confirmed. No satisfactory reason has been given why the respondent should be removed from being an administrator through an order of injunction.

Having considered this application, I find that there is not sufficient material placed before this court to grant the prayers sought. The grant is pending confirmation and it is my view that the parties should go ahead and have it confirmed and distribution be done once and for all. The application is dismissed with costs to the respondent.

Dated, Signed and Delivered at NYAHURURU this 29th day of March, 2019.

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Wangeci holding brief for Mr. Waichungo for applicant

Mr. Nderitu holding brief for Ms. Mukira for applicant