



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

SUCCESSION CAUSE NO. 344 OF 2001

IN THE MATTER OF THE ESTATE OF STEPHEN KIUNGA M'MWITARI (Deceased)

TERESIA KAJUJU KIUNGA

ELIZABETH KINARIO KIUNGA

EVANGELINE MWENDWA KIUNGA

ANNE KAURIA KIUNGA

FLORENCE KADHIGA KIUNGA

DORIS KARIMI KIUNGA

FIDELIS MAKENA KIUNGA.....APPLICANTS

VERSUS

ABEL KITHARA

ROSEMIRIA/ROSEMARY KARIUNI KIUNGA.....RESPONDENTS

RULING

1. The Applicants moved this Court by an Originating Summons dated 3.11.16 seeking inter alia that the Respondents do render a true and just account of the estate of their father Stephen Kiunga M'Mwitari (deceased) with effect from 26.7.99. The deceased died on 28.7.99. Following consensus within the family, the Respondents who are respectively brother and mother of the Applicants obtained a limited grant of letters of administration *ad colligenda bona* on 24.1.02 (the Grant). Under the Grant the Respondents were to collect, get in and receive the estate and operate the deceased's account in Kenya Commercial Bank, Meru Branch and do such things as may be necessary for the preservation of the estate and until further representation be granted. The Respondents were to do this in accordance with the law and render a true and just account. In a ruling of 28.9.18 the Court directed the Respondents to, within 60 days of the date of the ruling, 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 from 24.1.02 up to the date of the account.

2. Subsequently, the 1st Respondent did, on 4.12.18, file accounts by way of an affidavit he swore on 30.11.18 in which he indicated that the estate of the deceased as at the time of his demise had the following assets:

- a) Abothuguchi/U-Kaongo/1939
- b) Abothuguchi/Igane/44
- c) Abothuguchi/Gaitu/1522
- d) Abogeta/U-Kaongo/181

e) House without land on Plot 211/2. Mishomoroni, Msa

f) Account No. 181227870, Kenya Commercial Bank, Meru Branch.

3. The 1st Respondent stated that following a family agreement the house without land on Plot 211/2 was sold for Kshs. 1,900,000/= and the proceeds were divided as follows:

- i) Abel Kathara Kshs. 300,000/=
- ii) Outstanding ground rent Kshs. 107,000/=
- iii) Agents commission Kshs. 380,000/=
- iv) Teresia Kajuju Kiunga Kshs. 50,000/=
- v) Elizabeth Kinaro Kiunga Kshs. 50,000/=
- vi) Evangeline Mwendwa Kiunga Kshs. 50,000/=
- vii) Anne Kauria Kiunga Kshs. 50,000/=
- viii) Florence Kadhiga Kiunga Kshs. 50,000/=
- ix) Doris Karimi Kiunga Kshs. 50,000/=
- x) Fidelis Makena Kiunga Kshs. 50,000/=
- xi) Construction of mother's house Kshs. 300,000/=
- xii) House for Abel Kathara Kshs. 230,000/=

4. From the bank account of the deceased, he withdrew Kshs. 200,000/= for the education of Florence Kadhiga Kiunga. He also used the funds to educate his daughter at Machakos Teachers Training College and his son at Keeru Secondary School. The account still has funds remaining. He was unable to produce receipts as the moneys were paid directly to the institutions. He also acted in good faith. He further stated that if he benefitted more than the other beneficiaries then this should be regularized at distribution. The estate is still intact save for the house without land which was sold. The 2nd Respondent in her affidavit sworn on 30.11.18 adopted the averments in the affidavit of the 1st Respondent. She too stated that if she has benefitted more than the other beneficiaries then this should be regularized at distribution.

5. The Applicants in an affidavit sworn on 23.4.19 by Florence Kadhiga Kiunga confirmed the assets of the estate listed by the 1st Respondent. She however denied that the family agreed to dispose of any of the deceased's properties. They contend that the 1st Respondent, the only son of the deceased sold the property in Mishomoroni and leased out other plots without consulting the other beneficiaries. The Applicants deny that the 1st Respondent gave them any money as alleged and if he did so he ought to have supporting documents to confirm the same. The 1st Respondent used moneys from their father's estate to the exclusion of other beneficiaries. The accounts produced by the 1st Respondent are not legally satisfactory. The Applicants further alleged that during the pendency of this application, the 1st Respondent cut a lot of trees on Plot No. Agothuchi/Igane/44 and sold timber the proceeds of which he used alone. They deny that the 1st Respondent did anything in good faith and that any time they tried to discuss the estate he became insanely violent and threatened the Applicants with physical violence. He has wasted the estate of the deceased and unlawfully enriched himself with the same. He even chased their elder sister Teresia away from their homestead who now has no fixed abode. The Respondent owes the estate the sum of Kshs. 2,100,000/= which he should be ordered to refund. Further he should disclose the proceeds of lease of the estate's farms to third parties and the amount he received from selling charcoal and timber.

6. The purpose of a grants *ad colligenda bona* is clearly stipulated in Rule 36 of the Probate and Administration Rules which provides as follows:-

(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.

7. The Grant issued to the Respondents was solely for the purpose of collecting, getting in and receiving the estate of the deceased and doing such acts as may be necessary for the preservation of the estate and until a further grant was made. The intention of such a grant is to preserve and protect an estate at the risk of the wastage pending the issuance of a full grant.

8. With the Grant issued to the Respondents however, funds were withdrawn from the deceased's bank account and the property in Mishomoroni sold. From the 1st Respondent's affidavit, it would appear that he solely took control of and dealt with the estate of the deceased as he pleased and without the involvement of the 2nd Respondent, his co-administrator or other beneficiaries. His affidavit indicates that he was the greatest beneficiary of the proceeds of sale of the property in Mishomoroni. He also admitted that he used the proceeds of the deceased's bank account to educate his own children. The 1st Respondent has then told the Court that he is unable to produce receipts for any of the payments he made out of the estate of the deceased.

9. Section 79 of the Act provides that an administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative. The Grant issued to the Respondents put them in the place of the deceased for all purposes of the Grant and they had a duty to deal with his estate as representatives of the deceased but subject to the limitations imposed by the Grant. The Respondents and in particular the 1st Respondent however did what was not permitted by the Grant or by law. The 1st Respondent's acts are therefore illegal.

10. It must be noted upon issuance of the Grant, the Respondents undertook ***faithfully to administer such estate according to law (limited as aforesaid) and until further representation be granted and render a true and just account thereof whenever required by law so to do.*** Regrettably the Respondents' dealings with the estate as stated in their affidavits were all contrary to law and to the powers granted to them by the Grant. The Respondents have without a doubt breached the trust bestowed upon them by the other beneficiaries and by this Court when it issued the Grant to them.

11. Section 76(d) of the Law of Succession Act provides:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either –

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

12. The Respondents have held the limited Grant for a period of over 17 years since 24.1.02. They have failed to apply for a full grant and to proceed diligently with the administration of the estate of the deceased. They have also failed to produce to Court a full and accurate account of all dealings with the estate of the deceased from 24.1.02. Their conduct as administrators of the estate of the deceased falls way short of what is required of them. They have not acted in the best interests of the estate and of the other beneficiaries. The view of this Court then is that to allow the Respondents to remain as administrators of the estate of the deceased is untenable. Courts are by law required to protect estates of deceased persons from misuse and wastage and that is why the power to revoke grant can be exercised *suo moto* under Section 76 of the Act.

13. The Grant clearly set out the role of the Respondents which was to were to collect and get in and receive the estate and operate the deceased's account in KCB and do such things as may be necessary for the preservation of the same and until further representation be granted. Any deviation from what is stipulated in the Grant will invite punishment. Section 95 of the Law of Succession Act provides:

(1) Any personal representative who, as regards the estate in respect of which representation has been granted to him—

(a) wilfully or recklessly neglects to get in any asset forming part of the estate, misapplies any such asset, or subjects any such asset to loss or damage; or

(b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of section 83; or

(c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or

(d) knowing or having reason to believe that the estate will prove to be insolvent, continues to administer it without petitioning for administration thereof in bankruptcy, shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.

14. As stated above, the 1st Respondent of his own admission wilfully or recklessly neglected to get in and preserve the assets forming part of the estate. On the contrary, he sold the property in Mishomoroni and misapplied the proceeds thereof together with the proceeds of the deceased's bank account. Further, he wilfully failed to produce to the Court accurate accounts as is required by law. The Court therefore finds that the 1st Respondent as administrator has committed an offence under Section 95 of the Law of Succession Act.

15. In the result, and in exercise of the inherent powers of this Court to make such orders as may be necessary for the ends of justice, I make the following orders:

- a) **Abel Kiathara and Rosemiria/Rosemary Kariuni Kiunga shall within 21 days of the date hereof deposit in this Court all title and other documents relating to the estate of the deceased.**

- b) **The limited grant *ad colligenda bona* issued to Abel Kiathara and Rosemiria/Rosemary Kariuni Kiunga 24.1.02 is hereby revoked.**

- c) **A petition for a grant of representation shall be filed within 21 days by any other beneficiaries of the estate other than Abel Kiathara and Rosemiria/Rosemary Kariuni Kiunga.**

- d) **The Deputy Registrar is directed to furnish the Director of Public Prosecutions with a certified copy of this ruling with a view to initiating criminal proceedings against Abel Kiathara pursuant to section 95 of the Law of Succession Act.**

- e) **Mention on 24.6.19 to confirm compliance and for further directions.**

DATED, SIGNED and DELIVERED in MOMBASA this 31st day of May 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Applicants

..... for the Respondents

..... Court Assistant