



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1935 OF 2014

IN THE MATTER OF THE ESTATE OF BERNARD GICHURU KARUITHA (DECEASED)

NELLY WAMBUI GICHURU.....APPLICANT

VERSUS

GEORGE KAMAU GICHURU.....1ST RESPONDENT

JAMES MUNGAI GICHURU.....2ND RESPONDENT

NGUGI GITAU.....3RD RESPONDENT

RULING

1. There are three (3) applications for determination herein dated 18th April, 2019, 18th June, 2019 and 23rd September, 2019 respectively.
2. The application of 18th April, 2019 seeks that Rose Njoki Gichuru be appointed as co-administrator of the estate of Bernard Gichuru Karuitha the deceased herein in place of George Kamau Gichuru and James Mungai Gichuru to administer the estate of the deceased alongside Nelly Wambui Gichuru.
3. Rose Njoki swore an affidavit on 18th April, 2019 in support thereof, and deposed that the application is necessitated by the fact that the 1st and 3rd administrators have failed to cooperate with the rest of beneficiaries and one administrator and have completely refused to attend court in order to confirm the distribution of this estate. She asserted that to this end, the family of the deceased has unanimously agreed to have her appointed in place of the two (2) administrators to ensure that the grant is confirmed and the estate distributed in accordance with the law.
4. The application dated 18th June, 2019 was filed under certificate of urgency on 19th June, 2019. It was certified urgent by the duty Court and interim orders granted pending the hearing and determination of this cause. In it, the Applicant prays for orders that:
 1. The Respondents be restrained from interfering, selling, transferring, leasing, allocating, receiving or collecting rent in any way dealing with the property of the estate namely:
 - a. Ndumberi/Ndumberi/T.326;
 - b. Ndumberi/Ndumberi/T.327;
 - c. Ndumberi/Ndumberi/T.356;
 - d. Ruiru/Ruiru East Block 4/T.3103;
 - e. IR. 16675/44; LRN:7785/423;
 - f. Nairobi/Block 126/645 L.R. No. 0907-04828 (Member Share No. 125).
 - g. Maryland Farm/Njiru, Company Stocks; East African Breweries Limited Account No. 00365850 (14 shares as of 12/10/2007)
 2. The purported transfer of property title no. Nairobi/Block 126/645 LR.0907-04828 (Member Share No. 125) by the Respondents

to themselves be and is hereby cancelled.

3. The purported transfer of property IR.No.16675/44; LRN:7785/423 to one Ngugi Gitau be declared null and void and the same be cancelled.

4. The Respondents render a true account of the rent collected from the lease of IR.No.16675/44; LRN:7785/423 from January 2014 to May 2019.

5. The ELC proceedings No. 720 of 2019 in the Chief Magistrate's court concerning the property of the estate of the deceased be stayed pending the hearing and determination of this application and the succession cause.

6. The court file for High Court Succession Cause No. 2508 of 2014 at Nairobi said to be instituted by the Respondents secretly without involving the family be called for by this honourable court and the same be terminated.

5. The application is brought under **rule 44 and 73 of the Probate and Administration Rules**. It is premised on the ground that two (2) of the administrators namely George Kamau Gichuru and James Mungai Gichuru, the 1st and 2nd Respondents herein maintain that they, as sons of the deceased, are the only ones entitled to a share in the estate. Further that the Respondents secretly filed Succession Cause No. 2508 of 2014 where they fraudulently obtained a grant without involving their other siblings and have set upon selling the properties of the estate to unsuspecting third parties.

6. The application is supported by an affidavit sworn by the Applicant on 18th June, 2019 in which she deposes that she is a co-administrator of the deceased's estate. She asserts that the beneficiaries of the estate had agreed on a mode of distribution and they consequently filed summons for confirmation of grant. She states that the Respondents however refused to attend court in order to confirm the distribution of the deceased's estate in this cause. In her view, their refusal is founded on their belief that only the sons of the deceased are entitled to share in the estate of the deceased. To them, daughters should not inherit property from their father.

7. The Applicant avers that the 1st and 2nd Respondents instituted a Succession Cause No. 2508 of 2014 in the High Court at Nairobi without the knowledge of the other beneficiaries. A Grant of letters of Administration intestate of the deceased's net estate was consequently issued to the Respondents on 25th February, 2016. A copy of the grant is on record. She asserts that the Respondents have used the grant to cause the deceased's properties to be transferred into their names and have sold some of the properties as a result.

8. On 15th July, 2019 the 1st and 2nd Respondents filed a replying affidavit sworn jointly on 12th July, 2019 in opposition to the application dated 18th June, 2019. They asserted that the application is frivolous and an abuse of the court process. They stated that the Applicant has no case since the deceased's estate was distributed *inter vivos* in 2003. According to them, the properties listed under paragraph two (2) of the summons had been allocated to them and their sisters, including the Applicant herein, also received their shares of the deceased's estate *inter vivos*.

9. It is the Respondents' case that they applied and received from this court a Grant of letters of Administration to the deceased's estate in Succession Cause No. 2508 of 2014. They urged that it is therefore only fair and just that the cause be heard together with the instant one.

10. On 12th September, 2019 the Applicant filed a further supporting affidavit of even date in which she opposed the Respondents' claim that the deceased's estate was distributed *inter vivos* stating that if this were so there would have been evidence of transfer and ownership. She urged that the allegations contradict the Respondents actions of consenting to the issuance of a grant for the whole of the deceased's estate and obtaining a grant illegally in 2016.

11. According to the Applicant, the Respondents allegations that the deceased distributed property to his daughters *inter vivos* is meant to mislead this court. She contends that the properties listed by the Respondents belong to their respective owners and have never belonged to the deceased.

12. The Applicant accused the Respondents of collecting rent from Githongori Land Parcel IR No. 16675/44; LRN:7785/423 in spite of the existence of a court order of 18th June, 2019 barring them from collecting rent from any of the deceased's properties. This, she says, is even after she wrote to the tenants through her Advocates on record to remit rent payment to her account starting July 2019 since she is the only legal administrator of the estate. A copy of a letter dated 1st July, 2019 in this regard is on record. Instead, the Respondents, through their Advocates, wrote to the tenants by a letter dated 24th July, 2019 to disregard the Applicant's letter.

13. Consequently, the Applicant filed an application via summons dated 23rd September, 2019 and brought under **section 5(1) of the Judicature Act, section 45 and 73 of the Law of Succession Act, rule 49 and 73 of the Probate and Administration Rules, section 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap 21 Laws of Kenya) and Order 37 of the Civil Procedure Rules, 2010**.

14. The application seeks that the Respondents be held in contempt of the orders of this Honourable Court issued on 24th June, 2019 and arrest and committal orders be made against them and their servants or agents specifically one Mr. Ngugi Gitau. Further that an order do issue directing the OCS Runda Police Station to enforce the orders once issued.

15. The Applicant asserts that the orders were duly served upon the Respondents who despite having knowledge of the orders, continue to deal with the deceased's properties in blatant disregard of the orders. She alleged that the Respondents continue to collect rent from the property known as I.R. No. 16675/44; LRN 7785/423 Runda (Githongori) and have purportedly sold a portion of the property known as Nairobi/Block 126/645 L.R. 0907-04828 to unknown people.

16. In reply thereto, the 1st and 2nd Respondents jointly swore an affidavit on 4th October, 2019 in which they stated that the application dated 23rd September, 2019 lacks probative value and is an abuse of the court process. They asserted that being an application for contempt of court, it ought to have been served upon each party cited personally. That this the Applicant failed to do and nor were they served with a Notice of the Penal Sanctions. They urged that whereas the Applicant averred that the orders were served upon the Respondents' Counsel on record, no evidence was tendered in this regard.

17. The Respondents took issue with Ngugi Gitau being cited as the 3rd Respondent in the application stating that he is neither an heir nor a party to this Cause. In their view, the Applicant cannot therefore purport to join him in these proceedings without filing an appropriate application.

18. All three (3) applications were disposed of by way of written submissions. Learned Counsel Mr. Njanja filed written submissions dated 11th November on behalf of the Applicant in which he asked the court to allow all three (3) applications dated 18th April 2019, 18th June 2019 and 23rd September 2019. Counsel stated that there are three (3) issues for determination by this court with respect to the three (3) applications namely:

1. Whether the Respondents have intermeddled with the deceased's estate.
2. Whether the Respondents should be held in contempt of court.
3. Whether the court should substitute George Kamau Gichuru and James Mungai Gichuru with Rose Njoki Gichuru as co-administrator of the deceased's estate.

19. Mr. Njanja submitted that the beneficiaries of the deceased's estate had on 25th March, 2019 unanimously agreed to appoint Rose Njoki Gichuru to co-administer the estate alongside Nelly Wambui Gichuru, the Applicant herein to enable the conclusion of this Cause. That to this end, the court should appoint Rose Njoki as co-administrator of the estate in place of the 1st and 2nd Respondents.

20. Mr. Njanja contended that all the beneficiaries of the deceased's estate had agreed on a mode of distribution upon which a summons for confirmation of grant was filed. Counsel asserted that the 1st and 2nd Respondents have however failed to cooperate with the other beneficiaries and have refused to attend court for purposes of confirmation of the grant. Counsel attributes their refusal to their belief that only sons should inherit out of their father's property.

21. It was Mr. Njanja's submission that in order to deal with the estate to the exclusion of the deceased's daughters, the 1st and 2nd Respondent initiated a Succession Cause No. 2508 of 2014 and obtained a grant of representation of the deceased's estate therein. Counsel asserted that the grant is fraudulent having been obtained without the knowledge and consent of the other beneficiaries. That to this end, the court should call for the file in that succession cause.

22. Mr. Njanja submitted that the court ought to bar the 1st and 2nd Respondents from using the fraudulent grant to sell and transfer the properties of the deceased, failure to which the estate of the deceased will waste away to the detriment of the other beneficiaries. Counsel pointed out that since 2003, the Respondents have failed and neglected to pay land rates of the deceased's properties and the rates and penalties have accrued to Kshs. 948,278/- as at 20th September, 2019.

23. On the contempt of Court, Mr. Njanja stated that despite a court order barring the 1st and 2nd Respondents from dealing in any manner with the deceased's property, the Respondents continue to receive rent from I.R. No.16675/44; LRN:7785/423 Runda (Githongoro) which has over seventy (70) structures. Further that the Respondents have transferred Ngundu Farmers' Cooperative Share Certificate No. 125 belonging to the deceased and cause it to be registered in their names as NAIROBI/BLOCK 126/645 without the knowledge of any of the beneficiaries.

24. It was Mr. Njanja's submission that a court order is not a mere suggestion, an opinion or a point of view. That it is a directive that is issued after much thought and with circumspection. As such, it must be complied with. Counsel asserted that to see it any other way is to open the door to chaos and anarchy. It was his statement that the reason why courts punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice.

25. To buttress his point, Counsel referred to the decision in **Econet Wireless Ltd vs. Minister for Information & Communication of Kenya & Another [2005] eKLR** and that in **Teachers Service Commission vs. Kenya National Union of Teachers and 2 others Petition No. 23 of 2013 [2013] eKLR**.

26. Mr. Njanja asserted that the Respondents were personally served with the court order of 18th June, 2019 but that the Respondents refused service. Counsel contended that all the tenants in the deceased's properties, the Respondents' Advocates on record and the Chiefs in Githongoro and Westlands were served with the order. He urged that the Respondents, through their Advocates, wrote to the tenants asking them to disregard the court order and remit their rent payments as they had previously done. That the Respondents cannot therefore claim to not have known of the existence of the court order.

27. Learned Counsel Mr. Thuo filed written submissions dated 11th November, 2019 on behalf of the Respondent in which he stated that the matter herein has been handled in a pedestrian manner reasons for which the court ought to dismiss all three (3) submissions.

28. Mr. Thuo contended that the Applicant in this cause is the one who commenced these proceedings, and that the Respondents did not give their consent as purported in Form 37. Further that whereas the Applicant averred that George Kamau Gichuru is a grandson of the deceased, he is in fact the deceased's son.

29. Mr. Thuo admitted that the Respondents had filed a Succession Cause No. 2508 of 2014 but stated that the cause is still pending. Counsel urged that in light of the two (2) succession proceedings in relation to the estate of the deceased herein, it is prudent that the two (2) causes be consolidated and the parties give *viva voce* evidence in support of their arguments.

30. With respect to the application for contempt of court, Mr. Thuo submitted that the application is frivolous, vexatious and an abuse of Court process. Counsel asserted that an application for contempt of court is a serious one which cannot be prosecuted casually principally because it has the ultimate effect of curtailing the freedom of a litigant.

31. Mr. Thuo asserted that whereas the Applicant contended that the Respondents had been served with the court orders personally and through their advocates on record, there is no evidence of such service. Counsel further stated that Ngugi Gitau, cited as the 3rd Respondent in the application for contempt of court has never been enjoined in these proceedings.

32. From the record, it is not in doubt that there are two (2) causes in relation to the deceased's estate: Succession Cause 1935 of 2014, which is the instant cause, and Succession Cause No. 2508 of 2014.

33. Whereas the Respondents allude to not having known of the existence of this cause and that they did not sign the consent to the summons for confirmation of grant, the record tells a different story.

34. On record is a Petition for Letters of Administration Intestate of the estate of the deceased herein filed on 18th July, 2014. The Petition was brought by three parties: James Mungai Gichuru, Nelly Wambui Gichuru and George Kamau Gichuru. All three (3) parties are children of the deceased as demonstrated in their joint affidavit sworn on 14th July, 2014 in support of the summons. Consequently, on 1st December, 2014 a Grant was issued to the three parties, as administrators of the deceased's estate. The Respondents' claim that this cause was instituted solely by the Applicant therefore has no basis.

35. I note that there is also on record another Grant of Letters of Administration Intestate issued to the Respondents, George Kamau Gichuru and James Mungai Gichuru in Succession Cause No. 2508 of 2014 excluding the Applicant in relation to the deceased's estate.

36. On the issue of contempt, I am guided by the decision in **Re Bramblevale (1970) 1 Ch. 128** where Lord Denning stated as follows concerning contempt of Court:

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt.”

37. Back at home the Court of Appeal in **Civil Appeal No. 95 of 1998 Mwangi H.C. Wangondu vs Nairobi City Commission**, stated that the threshold of proof required in contempt of Court is higher than applicable in normal civil cases, and one can only be committed to civil jail, or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

38. There is no doubt that there are interim orders granted by this court on 19th June, 2019, there is however no affidavit of service on record to demonstrate that the Respondents were aware of the existence of the court orders. This is especially so with regard to the 3rd Respondent who is neither a party to these proceedings nor a beneficiary of the deceased's estate. In my view, the Applicant has not demonstrated beyond reasonable doubt that the Respondents were aware of the existence of the court orders. As such, I cannot hold the Respondents in contempt as prayed.

39. With regard to Succession Cause No. 2508 of 2014, I find that this cause has no life since it was obtained during the existence of Succession Cause 1935 of 2014 and was not brought to the knowledge of the deceased's beneficiaries. It is therefore up to the parties herein to move the court appropriately concerning the Grant issued in Succession Cause No. 2508 of 2014. The manner in which the 1st and 2nd Respondent moved to file a second cause when they were administrators in this matter and without notice to the other beneficiaries does not bode well for the estate. For this reason, the court removes them from being administrators in this cause. In their place, I hereby appoint Rose Njoki Gichuru as co-administrator of the deceased's estate.

40. To ensure that the estate of the deceased is not wasted pending the determination of this cause and confirmation of grant, an order of injunction is hereby issued restraining the 1st and 2nd Respondents, either through themselves or their agents, from selling, transferring, leasing, allocating, receiving rent or otherwise dealing with the property of the estate namely:

a. Ndumberi/Ndumberi/T.326;

b. Ndumberi/Ndumberi/T.327;

c. Ndumberi/Ndumberi/T.356;

d. Ruiru/Ruiru East Block 4/T.3103;

e. IR. 16675/44; LRN:7785/423;

f. Nairobi/Block 126/645 L.R. No. 0907-04828 (Member Share No. 125).

g. Maryland Farm/Njiru, Company Stocks; East African Breweries Limited Account No. 00365850 (14 shares as of 12/10/2007)

41. The rent proceeds shall be deposited in a joint account to be opened in the joint names of the Counsels on record pending further orders of this court.

It is so ordered.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF DECEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the Respondents.