



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 21 OF 2016**

**IN THE MATTER OF THE ESTATE OF NJUE KAMUNDE ALIAS NJUE WA KAMUNDI  
(DECEASED)**

**AND**

**MARYSTELLA GAKII MUTEGI.....APPLICANT**

**VERSUS**

**MERCY KAGIGE KAMUNDE.....RESPONDENT**

**R U L I N G**

1. By Summons dated 4<sup>th</sup> March 2017, Mercy Kagige Kamundi, the applicant herein has moved this court for the following orders namely:-

**(i) That the application be certified urgent**

**(ii) Service be dispensed with in the first instance.**

**(iii) That this court be pleased to suspend forthwith the appointment of the respondent Marystella Gakii Mutegi as Co-administrator of the estate of the deceased herein until further orders of this court.**

**(iv) That the applicant, Mercy Kagige Kamundi, do serve as the sole administrator of the estate of the deceased until further order of this honourable court.**

**(v) That this honourable court be pleased to remove the respondent forthwith from the office of the administratrix of the estate of the deceased.**

**(vi) That this court be pleased to order that all the estate income including the rent yielded by L.R NO. KARINGANI/NDAGANI/8387 be paid forthwith into an estate account with Chuka Branch of the KCB Ltd.**

**(vii) That the Deputy Registrar of this honourable court do sign the account opening forms and mandate in respect of the said estate account at KCB Chuka Branch.**

**(viii) That the respondent be restrained by herself and/or agents and servants from interfering with the applicant's discharge of her duties, under Section 83 of the Law of Succession Act in relation to all the assets of the estate including L.R**

**KARINGANI/NDAGANI/8387.**

**(ix) That the respondents be restrained from the applicant's entry into L.R NO. KARINGANI/NDAGANI/8387.**

**(x) That the court be pleased to order the respondent to furnish estate account to the applicant and this honourable court from 27<sup>th</sup> June, 2012.**

**(xi) That honourable court be pleased to order the respondent to produce to this honourable court the bank statements in respect of all deceased's under mentioned bank accounts from 27<sup>th</sup> June 2012 to date.**

- a. Co-operative Bank Ltd Chuka Branch Account No *[particulars withheld]*
- b. Co-operative Bank Ltd Chuka Branch Account No. *[Particulars withheld]*
- c. Equity Bank A/C No. *[Particulars withheld]*
- d. Post Bank Cash Express
- e. Family Bank Account No. *[Particulars withheld]*

**(xii) That this honourable court be pleased to order that the applicant do receive from the estate Kshs40,000/- per month as her dependency/provision under Section 26 and 29 of the Law of Succession Act.**

**(xiii) That this honourable court be pleased to order the respondent to disclose to this honourable court the bank account receiving the rent from the 12 flats in L.R NO. KARINGANI/NDAGANI/8387 from 27<sup>th</sup> June 2012 to date.**

**(xiv) That the orders herein be enforced with the assistance of the officer commanding Chuka Police Station .**

2. The applicant in seeking the above reliefs has invoked the provisions of **Section 47** of the **Law of Succession Act** and has listed the following grounds as basis for her application.

- a) That the respondent disobeyed the order made on 12<sup>th</sup> March 2015 for about 2 years with the consequence that this estate had no lawful administratrixes.
- b) That the respondent has purported to solely administer the estate as she alone collects the rent from 12 flats in **L.R. NO. KARINGANI/NDAGANI/8387**.
- c) That the respondent has converted the rent received and is wasting the estate.
- d) That the respondent has refused to meet the applicant with a view to planning how to administer the estate and has refused to sign forms to facilitate opening of estate account and thereby creating a situation where the revenue of the estate is received by her and converted for her own use.
- e) That the respondent has breached fiduciary duties which forbid an administratrix from allowing a conflict to exist between her personal interests and those of the estate of which she is an administratrix.
- f) That this court has power to remove the respondent from office and replace with an applicant who will abide by the law.

- g) That the applicant was appointed joint administratrix of the estate with the respondent on 13<sup>th</sup> March, 2015 but that the respondent has refused to administer the estate jointly and excluded her despite numerous oral and written demands.
- h) That the order referred to was made on the application of the members of the family of the applicant upon discovering the fact that the respondent obtained a grant in this cause and procured confirmation without disclosing all heirs of the deceased.
- i) That the respondent illegally treats the estate as personal property to be controlled by her alone.
- j) That on 12<sup>th</sup> March, 2015 this honourable court ordered inter alia that:-
- i) The respondent, Marystella Gakii and the applicant Mercy Kagige Kamunde be and are hereby appointed joint administratrixes of the estate in this cause and that all the deceased bank accounts and Safaricom shares were ordered frozen and/or stopped from being opened till the cause is fully determined.
- k) That as held in Petition No. 518 of 2013 (**Judicial Service Commission**) -vs- **The Speaker of the National Assembly**) all actions done by a person who disobeys court orders are illegal, null and void. Consequently since 12<sup>th</sup> March, 2015 the respondent has been committing offences created by **Section 47** of the Law of Succession Act.
- l) That the respondent administers the estate of the deceased partially or for her own benefit instead of administering it impartially for the benefit of all the beneficiaries and dependants.
- m) That after making oral demands that the respondent complies with the orders made herein on 12<sup>th</sup> March 2015 and receiving no responses, the Petitioner sent a demand letter to the respondent on 13<sup>th</sup> October, 2016 inviting her to attend a meeting to discuss the modalities of administering the estate jointly, the respondent failed to turn up for the meeting on 27<sup>th</sup> October, 2016 and has made no response to date.
- n) That the respondent has undermined the authority of this honourable court greatly through her arrogant behaviour towards the applicant.
- o) That the applicant who was being assisted financially by the deceased has not received any financial support from the estate of the deceased since his demise on 27<sup>th</sup> June 2012.
- p) That the longevity of the applicant's life is dependent on the availability of financial support from the estate of the deceased.
- q) That the applicant administers the estate in an opaque and illegal manner.
- r) That the respondent has refused to join the applicant in opening an estate account with KCB Chuka Branch.
- s) That the respondent has used the estate's funds to build a permanent house for her parents and to establish a boutique which she runs in Chuka Town.
- t) That is through intervention of this court that the deceased's estate shall be administered in accordance with the law.

3. The applicant has supported the above grounds through her affidavit. Sworn on 4<sup>th</sup> March, 2017. In that paragraph 74 of the affidavit the applicant has reiterated the above grounds which I will not reproduce here but will only touch on the additional important and relevant facts deposed in the said affidavit in support of this application.

4. The applicant has deposed that upon the revocation of grant that had been issued inclusively to the respondent herein, a joint grant was issued to both the applicant and the respondent and in her view that meant that the estate henceforth should be administered jointly. The applicant has stated the respondent has however frustrated all efforts towards that end.
5. According to the applicant the respondent worked as a shop assistant in the deceased's shop in Chuka Town and never had wealth of her own. She has accused her of closing down a mini supermarket/wholesale shop called Merchant of Venice which the deceased was running and has not disclosed any statement of accounts in that business.
6. The applicant has further deposed that the respondent should have disclosed or accounted to her the money which were at the deceased's various accounts and that she had an obligation to account to the estate the stock in trade of the business known as Merchant of Venice and other monies held by the deceased at the time of his death. She has added that the respondent has not provided an inventory of the estate.
7. The applicant has also deposed that the respondent has refused to disclose a son of the deceased from his first marriage.
8. The applicant has added that the deceased used to assist her financially in various ways including meeting her medical expenses and that the respondent has refused to continue doing so and has even stopped going to see her yet she used to accompany the deceased virtually everyday to see her.
9. The applicant has claimed that the respondent has joined forces with some of her children who are opposed to her administration of her late husband's estate vide ***Chuka High Court Succession Cause No.354 of 2015*** and that she is desirous of making her life difficult.
10. The applicant has also claimed that the respondent apart from refusing to open joint estate account at KCB, she has also placed guards at property where 12 flats are situated to prevent the applicant's children from gaining access and that on one occasion she instructed guards to confiscate a camera that was used to take pictures of the property.
11. The applicant has asked this court in view of the above to direct the police to help her in her quest to administer the estate and have free access in compliance with **Sections 79 and 83 of Law of Succession Act**. The case of **WILLIS and OCHIENG ODHIAMBO -vs- KENYA TOURIST DEVELOPMENT CORPORATION** (No citation provided) has been cited to show that where two administrators are appointed they must act together.
12. The applicant prays that in view of the cited breached of law and order made by this court, the respondent should be removed as an administratrix of the estate in this cause. She has also sought for monthly maintenance and has cited the decision ***Mombasa High Court Succ. Cause No.145 of 1998 in Re-estate of Mohamed Saleh Sherman*** to support her claim.
13. In her written submissions done through learned counsel Kamau Kuria and Co. Advocates, the applicant accused the respondent for not fully accounting for the monies collected as rent from **L.R. KARINGANI/NDAGANI/8387**. It is submitted that the respondent has constructed a permanent house for her parents and opened a boutique shop in Chuka Town when her only source of income was her association with the deceased. This in the applicant's view is the basis to ask the respondent to account for monies she received before being removed as an administrator.
14. The applicant has further sought to amend her prayers to include the following orders namely:-

**11(b) That this honourable court be pleased to order the respondent to deposit into estate account opened as per the order of 13<sup>th</sup> March 2017 Kshs.3,745,510/- withdrawn from the account at Cooperative Bank Chuka Branch A/C NO. [particulars withheld] and not spent on completion of works of the apartments.**

**12(b) That this honourable court be pleased to order that the respondent do deposit into the estate account opened as per the order of 13<sup>th</sup> March,2017 Kshs.2,640,000/- the rent paid by tenants occupying L.R. No. KARINGANI/NDAGANI/8387 since August 2012.**

**13(b) That in the alternative to 13(a) this honourable court be pleased to order that L.R. NO. KARINGANI/NDAGANI/3334 be transferred to the applicant forthwith.**

15. The applicant has submitted that the respondent in her administration duties is subject to supervision by this court and that this court does exercise supervisory jurisdiction over administrators and executors as cited in **Halsbury Laws of England** which the applicant has relied in asking this court to rein over the respondent who in her view has converted Kshs.5 million to her own use. The applicant submits that where an administratrix or executor is dishonesty in her duties she should be removed and cited the decision in the matter of *estate of D.B Shah (deceased) Rakhi Bedi - vs- Ramesh B. Shah* ( no citation provided). The applicant has also contended that the respondent should be removed from office for purporting to develop immovable property forming the estate without sanction of this court because the property does not belong to her.

16. The applicant has justified monthly upkeep of the Kshs.40,000/- saying that the estate can support it and **Section 27** of the **Law of Succession Act** in her view gives power to this court to make such orders. The applicant contends that this court can also in exercise of power donated by that Section order that a specific part of the estate be sold or valued with a view to giving her the amount of valuation as an alternative to periodical payments and in this regard she has specifically asked for two plots valued at Kshs.500,000/-each or one valued at Kshs.3,500,000/-.

17. The applicant has made further submissions which this court considers premature at this stage and more specifically in relation to the prayers sought here. For the interest of judicial time the court will not delve into them at this stage.

18. This application is opposed by the respondent who filed a replying affidavit sworn on 9<sup>th</sup> March, 2017. She has also filed a Supplementary Affidavit sworn on 19<sup>th</sup> April 2017 and a further Supplementary Affidavit sworn on 6<sup>th</sup> June, 2017.

19. The respondent has denied the allegations made that she has refused to co-operate with the applicant as a co-administratrix. She has deposed that she declined to attend a family meeting organized due to reasons of hostility from her in-laws and other reasons she has given vide her letter dated 20<sup>th</sup> October, 2016. The respondent has deposed that she asked the applicant to involve their respective Advocates in organizing for a meeting and exchanging of documents and that she is still awaiting for a response from the applicant through her Advocate.

20. The respondent has also denied declining to open an estate account deposing that she only came to learn about the issue when this application was filed. She has further denied the issue of applicant's claim on dependency on the estate herein, contending that the applicant was well provided in the estate of her late husband the late Eliud Kamunde M'Mwirabua vide **Chuka High Court Succession Cause No. 354 of 2015**. It is alleged that the applicant has other eight children all employed who should be able to help the applicant and that it cannot be correct to state that the applicant only depended on one child (deceased herein). She has further denied building a permanent house for her parents or any knowledge concerning a mini supermarket/wholesale shop left behind by the deceased.

21. The respondent has listed the assets left behind by the deceased and deposed that the deceased person passed on before the development of **KARINGANI/NDAGANI/8387** though she adds that she had plans with the deceased to carry out the development prior to his demise. She has produced a letter of approval for development by Nema dated 24<sup>th</sup> April, 2012 and argued that the construction could not have been completed by 27<sup>th</sup> June 2012 when the deceased died.

22. The respondent has further deposed that she utilized funds in deceased's bank accounts as well as

gratuity to develop **L.R. KARINGANI/NDAGANI/8387** and justified the action stating that she was the administratrix of the estate and was fulfilling the wishes of her late husband. She has further deposed that the rental houses generates about Kshs.50,000/- per month which she needs for her upkeep and that of her child as she has no other sources of income.

23. The respondent has also denied knowledge of dependant by the name Eliud Murithi Njue and has challenged the applicant to provide proof that the said child is a child and a dependant of the deceased stating that with prove she is ready and willing to cater for him.

24. In her Supplementary Affidavit sworn on 19<sup>th</sup> April, 2017 the respondent has given details of how some of the monies from the estate was utilized and how the property known as **KARINGANI/NDAGANI/8387** is managed. She has claimed that she borrowed a loan of Kshs.350,000/- to facilitate completion of the development of the said property and that part of the proceeds from rent i.e Kshs.25,000/- go towards servicing that loan every month. In her view the request by the applicant to be paid Kshs 70,000/- monthly from the estate is not tenable because the estate cannot afford in view of other needs inclusive of her needs as well as needs of the child.

25. In her further Supplementary Affidavit sworn on 6<sup>th</sup> June 2017, the respondent has denied any wrong doing on her part in the administration of the estate of the deceased herein and has revealed that she has filed a statement of account in respect to the estate and how the income from the estate has been spent. She has further added that the only development on **KARINGANI/NDAGANI/8387** at the time the deceased passed on were five iron sheets temporary structures which were connected with electricity and which acted as a store for the building materials and a house for the watchman and a caretaker.

26. This court has considered this application, and the written submissions made and the authorities cited. I have also considered the response made by the respondent. This court from onset observes that this application was not really necessary if the administratrixes co-existed peaceful with mutual respect for each other. In My view the apparent bad blood between the applicant and the respondent though not unexpected given the circumstances has had undesired effect of protracting this cause and causing unnecessary delays. Having said that what is before this court is in an application with a number of prayers but the main one being kicking out the respondent from the administration of the estate. In my view the other prayers in the application particularly prayers 1, 2, 6, 7, 9, 10, 11 and 12 have substantially been spent and/or been addressed by the order made by this court on 13<sup>th</sup> March 2017. The same also applies to prayers 11 (b) and 12(b) as amended. I will therefore mainly delve on prayers 3, 4, 5, 8, 13, 14 and 15 in the application. I find no basis for going back to what this court has already dealt with and issued orders accordingly.

27. The applicant contends that the respondent has acted contrary to the law in carrying out her duties as the administratrix and feels that on account of that, she should be suspended and leave her as the sole administratrix of the estate of the deceased who is her late son. The powers and duties of a personal representative (s) or administratrix/administrator is well spelt under the provisions of **Sections 82 and 83 of Law of Succession Act**. It is also true that a personal representative is in a fiduciary position in regard to the estate of a deceased person. As a trustee she/he is expected to all times act in the best interest of the estate. Where conflict of interest arises or where it is shown that an administrator has acted contrary to the cited sections of the law (read Sections 82 ad 83), I agree with the applicant that **Section 47 Law of Succession Act and Rule 73 Probate and Administration Rules** can be invoked to remove or suspend him/her. I have gone through the relevant volume of *Halsbury's Law of England 4th edition page 750 to 756* and do agree that the same principles do apply here by virtue of **Section 3 (b) of the Judicature Act**. I also agree that personal representatives are subject to supervision of this court and this court will not shy away from making any orders that may be expedient and necessary for the ends of justice and to prevent abuse of powers conferred to them under **Sections 53 and 79 of the Law of Succession Act**.

28. The respondent herein is the widow of the deceased herein and daughter in law to the applicant. She was appointed joint-administratrix of the estate of the deceased herein together with her mother in law, the applicant herein on 10<sup>th</sup> December, 2014. This was after her earlier grant confirmed on 13<sup>th</sup> December, 2013 was revoked or annulled vide the same ruling which was delivered in Meru High Court

before this matter was transferred to this court for determination. The applicant for the reasons aforementioned wants this court to remove the widow from administration of the estate of her late husband. In my view such a measure is drastic because in law she as the surviving spouse ranks higher than the applicant by virtue of the provision of **Section 66 of Law of Succession Act** and **Rule 7(1) (e) III** of Probate and Administration Rules. The basis for removal of a widow from administration of estate of her late husband be well grounded and founded.

29. The applicant has stated that the respondent breached her fiduciary duties as an administratrix and that she has allowed her personal interest to conflict with the interest of the estate herein. However no evidence has been laid before me to prove this claim. The respondent deposed that she went out of her way to borrow a loan to finish development on L.R. **KARINGANI/NDAGANI/8387**.

Although this is an issue of fact to be further interrogated more at the hearing to establish it, I do find that such an action cannot be seen to conflict with the interest of the estate. Infact the interests are in tandem as the action goes to add value to the estate.

30. It is obvious from this application and the response made that the main bone of contention in the squabbles between the administratrixes herein is that the property known as **KARINGANI/NDAGANI/8387**. This is perhaps owing to the fact that it is one of the valuable asset in the estate with a rental income. That perhaps explains the thrust with which the applicant has asked this court even at this interlocutory stage to transfer the property to her forthwith. That prayer in my view is not only untenable but premature at this stage. I also find that the need of financial and moral support raised by the applicant in this application cannot be used as a basis to remove the respondent as the administratrix of the estate of her late husband.

31. The respondent has raised a legitimate question of dependency by the applicant in view of her prayer to be given Kshs.40,000/- per month. I do find that it would be premature at this stage to determine the question of dependency pursuant to **Section 26 of the Law of Succession** because the issue will be canvassed, and determined later when this court will be dealing with summons dated 27<sup>th</sup> May, 2016 and dated 9<sup>th</sup> March 2017. It is at that stage, in my considered view, that the question of dependency of the applicant and one Eliud Murithi Njue can be substantively canvassed and interrogated.

32. This court has been urged by the applicant to invoke the provisions of **Section 27 of Law of Succession Act** in making provision of Kshs.40,000/- from the estate to the applicant but I find that making orders under that section at this stage is unmerited and untenable because the question of dependency by the applicant is contested and unresolved. I also find that under the provision of **Section 29 of Law of Succession Act** the applicant is obligated to establish and prove her degree of dependency on the deceased prior to his death. Dependency in her respect unlike the position of the respondent is not automatically assumed. In her position, the applicant lacks legal basis to ask to be provided with a specified amount we like she has done and certainly she cannot ask that certain assets comprising the estate be sold for her benefit or be transmitted to her at this stage. That prayer as I have observed is not tenable in law. If the said property is to be sold or transferred to her at this stage what will be distributed at the end at the determination of this cause?. This court finds that prayer 13(b) in this application is not only bad in law and incompetent but the same is deficient of merit.

33. It is true that court orders must be obeyed by everyone for the dignity and authority of the court to be maintained. The applicant has accused the respondent for acts of disobedience but the right remedy in my view does not lie in this application. The applicant needed to have filed contempt proceedings against the respondent if it is true that she disobeyed any court order. The standard of prove applicable in such proceedings is different from the standard of prove applicable to such proceedings such as this. I find that the applicant's allegations in regard to disobedience particularly in respect to opening a joint estate account has been denied and this court finds that it is difficult in this application to make any finding because it is the applicant's word against the respondents. For purposes of clarity and for the interest of justice this court hopes that orders made on 13<sup>th</sup> March, 2017 in regard to opening a joint estate account has been complied with. If not for whatever reason(s) I direct both counsels in this cause to facilitate the same forthwith and all rents collected from **KARINGANI/NDAGANI/8387** be deposited there. If any of

the counsels or parties is reluctant to execute the requisite forms to facilitate the account opening, I direct the Deputy Registrar of this court to sign the forms.

34. This court made the orders in respect to allowing the applicant limited access to **L.R.KARINGANI/NDAGANI/8387** with a view to preventing the normal operations of that property and that access was only for purposes of carrying out valuation which I believe was done. I do not find basis to allow intermeddlers including the brothers of the deceased to visit the estate because doing so would encourage intermeddling and further squabbles which I find would not be in the interest of justice. I also do not find basis to involve the police in this cause at this stage.

35. The applicant has asked for restraining orders in terms of prayer 8 and 9 of the application but I find that no basis has been laid before me to issue such orders. The claims that the applicant's sons were confronted by guards or agents guarding **L.R KARINGANI/NDAGANI/8387** does not merit restraining orders because as I have observed above, the brothers of the deceased has nothing to do with the administration of estate herein. Their acts does amount to intermeddling with properties belonging to a deceased person which is contrary to the law. (**Section 45** of Law of Succession Act.) Those acts are frown upon by the (law and I cannot allow it. The applicant has not proved that she has been hampered by the respondent in her duties as a co-administratrix. It also does not mean that you are entitled to an estate by virtue of being an administrator or administratrix for that matter. Administration of an estate is not synonymous with dependency or entitlement to a share of the estate.

36. The long and short of this is that the summons dated 4<sup>th</sup> March 2017 save for prayer 6, 7, and 11, is disallowed for lack of merit. I direct that if no joint estate account has not been opened, the same be opened forthwith as prayed under prayer 6 of the application. I also reiterate the orders I issued earlier on 13<sup>th</sup> March, 2017. I note from the record that statements of accounts have been filed by both parties but if any party feels that there are other statements still out there the same be pointed out. I also direct the applicant to file her statement of account on how she utilized the funds she received including Kshs.383,615 from Sacco shares because that comprises part of estate as per the provisions of **Section 3 (1) of the Law of Succession Act**. I further direct the parties in this cause to move with speed and take directions on both the summons for confirmation of grant dated 8<sup>th</sup> March, 2017 and summons dated 27<sup>th</sup> May, 2016 with a view to bringing this matter to an end.

**Dated and delivered at Chuka this 23<sup>rd</sup> day of January 2018.**

**R.K. LIMO**

**JUDGE**

**23/1/2018**

Ruling signed, dated and delivered in open court in the presence of Dr. Kamau Kuria for the applicant and Kijaru holding brief for Kaaria for the respondent.

**R.K. LIMO**

**JUDGE**

**23/1/2018**