



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**P&A CAUSE NO. 373 OF 2014**

**MARIA WANJIRU GATHI.....1<sup>ST</sup> APPLICANT**

**JOHNES MWANGI GATHII.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**PETER NJOROGE MWANGI.....RESPONDENT**

**RULING**

**[1]** Following the death of **Margaret Njeri Njuguna** on **28 November 2012**, a Petition for Grant of Letters of Administration Intestate in respect of her Estate was filed herein by her mother, **Maria Wanjiru Gathi** (the 1<sup>st</sup> Applicant) jointly with the deceased's brother and son to the 1<sup>st</sup> Applicant, **Johnes Mwangi Gathii**, who is also the 2<sup>nd</sup> Applicant herein. In the Affidavit in Support of the Petition, sworn jointly by the two Applicants, it was averred that the Deceased died intestate and was survived by the following:

- |                                  |         |
|----------------------------------|---------|
| <b>[a]</b> Maria Wanjiru Gathi   | Mother  |
| <b>[b]</b> Johnes Mwangi Gathii  | Brother |
| <b>[c]</b> James Wainaina Mwangi | Brother |
| <b>[d]</b> Mary Wairimu Kabuga   | Sister  |
| <b>[e]</b> Joseph Hinga          | Brother |
| <b>[f]</b> Samuel Kamau Mwangi   | Brother |

**[2]** The estimated value of the Deceased's Estate as at **30 September 2014** was put at **Kshs. 24,000,000/=**, comprising of the following assets:

- [a]** ELDORET MUNICIPALITY BLOCK 15/452
- [b]** ELDORET MUNICIPALITY BLOCK 21/3730
- [c]** ELDORET MUNICIPALITY BLOCK 11/50
- [d]** Funds in several bank accounts held at Standard Chartered Bank (K) Limited and Equity Bank (K) Limited
- [e]** Shares in Kenya Airways, Mumias Sugar Company Ltd, Nation Media Group, Safaricom Ltd, Eveready Ltd, KCB Bank Ltd and KenGen.

**[3]** Thereafter on the **6 November 2014**, the two Applicants filed an application under **Sections 45 and 47** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** and **Rule 73** of the Probate and Administration Rules, seeking the following orders:

- [a]** Spent

[b] That **Peter Njoroge Mwangi**, the Respondent in the application, be compelled to deposit in court within 30 days, the Title Deeds and Title documents and agreements over the Deceased's assets, namely Land Parcel No. ELDORET MUNICIPALITY BLOCK 15/452, Land Parcel No. ELDORET MUNICIPALITY BLOCK 21/3730, and the unregistered parcel of land number ELDORET MUNICIPALITY BLOCK 11/50 pending the hearing and determination of the application *inter partes* and thereafter pending the hearing and determination of the Petition.

[c] That the court be pleased to remove all entries registered after the demise of the deceased **Margaret Njeri Njuguna** in respect of Land Parcel No. ELDORET MUNICIPALITY BLOCK 15/452, Land Parcel No. ELDORET MUNICIPALITY BLOCK 21/3730, and that the same do revert to the Estate of the Deceased pending the hearing and determination of the Petition.

[d] An Order do issue inhibiting the registration of any charges, leases, transfers or other dealings over Land Parcel No. ELDORET MUNICIPALITY BLOCK 15/452, Land Parcel No. ELDORET MUNICIPALITY BLOCK 21/3730, and the unregistered parcel of land number ELDORET MUNICIPALITY BLOCK 11/50 pending the hearing and determination of this cause.

[e] An Order do issue preserving the Estate of the late **Margaret Njeri Njuguna** to include but not limited to Land Parcel No. ELDORET MUNICIPALITY BLOCK 15/452, Land Parcel No. ELDORET MUNICIPALITY BLOCK 21/3730, and the unregistered parcel of land number ELDORET MUNICIPALITY BLOCK 11/50, pending the hearing and determination of this application *inter partes* and thereafter pending the hearing and determination of this Petition.

[f] That an Order do issue prohibiting **Peter Njoroge Mwangi** from intermeddling, collecting rent, re-assigning tenants or in any way interfering with the Estate of the late **Margaret Njeri Njuguna** pending the hearing and determination of the application *inter partes* and thereafter pending the hearing and determination of this Cause.

[g] That the Court be pleased to appoint **Isaducum Enterprises** to collect rent from all the properties namely, Land Parcel No. ELDORET MUNICIPALITY BLOCK 15/452, Land Parcel No. ELDORET MUNICIPALITY BLOCK 21/3730, and the unregistered parcel of land number ELDORET MUNICIPALITY BLOCK 11/50, and deposit, less the administration expenses not exceeding 10% of the rent in a Joint Account of the Applicants or in court pending the hearing and determination of the application.

[h] That the costs of the application be paid by the Respondent.

[4] That application is the subject of this Ruling. It was premised on the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant on **6 November 2014**, wherein she deponed that, subsequent to the death of the Deceased, one of her sons, the Respondent herein, fraudulently transferred all the assets of the Deceased into his name and started collecting rent therefrom; and that when she asked him why he had done what he did, the Respondent produced a Will purporting to have been the Deceased's legatee. She noted that the alleged Will had not been attested by two witnesses, or at all. Accordingly, she feared that the Respondent may transfer all the assets and keep them away from their reach as Administrators of the Estate of the Deceased; hence the application.

[5] The Respondent, in his Replying Affidavit filed herein on **2 December 2014**, denied that he fraudulently transferred all the assets of the Deceased into his name. According to him the Deceased, in her Will, transferred to him all her parcels of land voluntarily because of her love for him and the care she received from him when she was sick. He asserted that he lawfully acquired the properties, and hence, invited the Applicants to commission an investigation for verification purposes. He added that the orders sought by the Applicants are not tenable, as to grant the same would amount to determining the matter summarily without giving the parties a hearing. He thus urged that since the three pieces of land are already in his name, it would be in the interests of justice to maintain that status quo pending hearing and determination of the Petition.

[6] On the **31 July 2015** when the parties appeared before the Court for directions in connection with the application, it was proposed that the County Land Registrar, Uasin Gishu County, be required to avail the records pertaining to the subject parcels to ascertain whether indeed the transfers were made by the Deceased during her lifetime. Accordingly an Order was made in the following terms:

**"The Land Registrar shall produce to the Court the transfers lodged by the deceased before he died over Parcel Eldoret Municipality Block 15 (Huruma)/452 and Eldoret Municipality Block 21 (Kingongo)/3730, Eldoret Municipality Block 11/50. The transfers or a report thereof shall be presented to the Court on 26<sup>th</sup> October 2015. Both Counsels shall follow up the matter. The above date shall be a mention and for further directions. Interim orders extended."**

[7] A perusal of the court record does show that it took a while for the Report of the Land Registrar to be filed. The Report, which was filed herein on **19 December 2016**, shows that:

[a] Land Parcel No. **ELDORET MUNICIPALITY BLOCK 15(Huruma)/452** was first opened on **13 May 2003** and was transferred to the Deceased on **27 March 2012**; and a Title Deed issued. It was transferred to the Respondent, **Peter Njoroge Mwangi**, on **27 August 2013** and a Title Deed issued on the same date. The Report further shows that on **26 January 2015** a Restriction was placed against the Title on account of family dispute.

[b] Land Parcel No. **ELDORET MUNICIPALITY BLOCK 21 (Kingongo)/3730** was opened on **5 July 2006** and a Title Deed issued on **8 May 2008**. The property was transferred to the Respondent, **Peter Njoroge Mwangi** on **12 March 2014** and a Title Deed issued to him. A Restriction was placed against the Title on **26 January 2015** for the same reason.

[c] With regard to Parcel No. **ELDORET MUNICIPALITY BLOCK 11/50**, the Report shows that it was first registered on **18 November 2011** in the name of **Thuku Ng'ang'a** and a Certificate of Lease issued; and that on **29 September 2014**, a Caution was placed by the 1<sup>st</sup> Applicant, **Maria Wanjiru Gathi**, **Johnes Mwangi Gathii** (the 2<sup>nd</sup> Applicant) and **Joseph Hinga Gathii**, all

claiming a joint interest as beneficiaries of the late **Margaret Njeri Njuguna**.

[8] In the premises, it is manifest that the majority of the orders sought by the Applicant seek to reverse the aforementioned situation, and are therefore akin to mandatory injunction; yet it is now trite that such are orders which can only be granted in very clear cases in view of their drastic nature. In the persuasive authority of **Shepherd Homes Ltd vs. Shadahu [1971] 1 Ch34** for instance, it was observed that:

"... in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation."

[9] The same position was enunciated in **Locabail International Finance Ltd vs. Agroexport and Others [1986] 1 All ER 901** thus:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction."

[10] The foregoing English decisions have found approval in local cases such as the Court of Appeal case of **Kenya Breweries Ltd & 2 Others vs. Washington Okeyo [2002] eKLR** in which the Court of Appeal held that:

"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England, 4<sup>th</sup> Edition paragraph 948 which reads: ' A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application.'"

[11] Nevertheless, there is no gainsaying that the Court does have the power, pursuant to **Rule 73** of the **Probate and Administration Rules** to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court. The 1<sup>st</sup> Applicant has deposed to the fact that the transfers were done, not before the demise of the deceased, but afterwards; a fact further confirmed by the Report of the County Land Registrar, Uasin Gishu. Whether the Deceased had bequeathed the properties to the Respondent or not, it was imperative that, after the death of the Deceased, sanction of the Court be sought and obtained before any transfer could be effect. It is for this reason that **Section 45** of the **Law of Succession Act** provides that:

"Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."

[12] In the premises, with a view of preventing any further dissipation of the Estate of the Deceased, I would grant the orders prayed for in paragraph (d) of the application dated **6 November 2014** to the effect that an Order of Inhibition do issue, inhibiting the registration of any charges, transfers or other dealings over each of the assets comprising the Estate of the Deceased, **Margaret Njeri Njuguna**, and in particular land Parcel Numbers **ELDORET MUNICIPALITY BLOCK 15/452, ELDORET MUNICIPALITY BLOCK 21/3730 and ELDORET MUNICIPALITY BLOCK 11/50**; as well as the funds in the specified bank accounts held at **Standard Chartered Bank (K) Limited** and **Equity Bank (K) Limited** and Shares in **Kenya Airways, Mumias Sugar Company Ltd, Nation Media Group, Safaricom Ltd, Eveready Ltd, KCB Bank Ltd and KenGen**, pending the hearing and determination of the Petition herein. It is further ordered that each party shall bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> DAY OF JULY 2018

OLGA SEWE

JUDGE