



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 23 OF 2018**

**IN THE MATTER OF THE ESTATE OF JOSEPH KILONZO MAINGI (DECEASED)**

**1. FLORENCE NDULU KAUNANGE**

**2. MARY MBULA KILONZO MAINGI**

**3. EUNICE MUTHOKI KILUVA ..... PETITIONERS**

**VERSUS**

**VICTORIA MUMO MAINGI ..... RESPONDENT**

**RULING**

1. By Summons dated 2<sup>nd</sup> May, 2018, the Petitioners herein seek the following orders:

**(1) Spent.**

**(2) That an order do issue compelling the respondent to give a true account of all income generated by the following assets of the deceased:**

**a) Machakos Town Block 11/530, 11/303 (developed commercial building).**

**b) Machakos Kiandani 2207/2313/2162/2723/2201 since the demise of the deceased on 15<sup>th</sup> June, 2016 and how the same has been expended.**

**(3) That the Court to appoint the 1<sup>st</sup> Petitioner in collaboration with the Respondent to oversee, manage the aforesaid assets jointly and apportion equal or equitable share to all petitioners out of the proceeds for the purpose of school fees and upkeep for the beneficiaries pending the confirmation of the grant herein.**

**(4) That costs be in the cause.**

2. According to the Petitioners, the deceased died intestate married to three wives, the Petitioners herein. At the time of his death the deceased was survived by 16 dependants including the Petitioners. According to them, some of the said dependants whose particulars were disclosed are in school and in need of school fees.

3. It was the Petitioners' case that the deceased, prior to his demise, used to collect rent from all his landed properties and pay for all his dependants in their various institutions. However, the dependants were now facing hardship as there was no transparency on the amount collected hence the dependants risk getting out of school unless the Court makes provision to facilitate the proper management of the rents collected and apportionment to the beneficiaries. They were further apprehensive that the deceased's estate would be subjected to waste and loss.

4. It was disclosed that the estate of the deceased comprises of commercial building within Machakos Town and include:

**i) St Valentine Girls School with an estimated rental income of Kshs 100,000.00 per month situated in Machakos Kiandani 2201, 2202, 2207, 2162 and 2723.**

**ii) Commercial buildings in Machakos Town Block 11/530, 11/303 with an estimated income of Kshs 500,000.0 per month.**

5. According to the Petitioners, the said properties are currently managed by the Respondent who is a sister to the deceased solely who has only been giving handouts to the Petitioners hence there is a need for the proceeds to be accosted for and apportioned equally or equitably amongst the 3 houses of the deceased so as to cater for the needs of each house and to avoid hardships to the minors.

6. The Petitioners further proposed for the purposes of management on behalf of the deceased, **Florence Ndulu Kaunange**, the eldest wife of the deceased do represent and manage the deceased's properties jointly with the Respondent until further orders of the Court for accountability purposes.

7. It was submitted in behalf of the Petitioners relied on section 45 of the **Law of Succession Act** and asserted that there are clear reasons why the succession court should make orders for accounts. According to them the Court under section 83(c) of the said Act on its own motion may require a personal representative of the estate of the deceased to produce before the Court an account of the estate.

8. In this case it was submitted that the applicants are interested in the estate of the deceased by virtue of their marriage to the deceased. It was their case that they have moved the Court for a grant of letters of administration to the deceased's estate which estate is co-owned by the Respondent who is currently the sole manager of the same. According to the Petitioners, the respondent has committed a criminal offence under section 45 of the Act known as intermeddling by dealing with property belonging to the deceased as she wishes by causing two of the petitioners to open a bank account to which some of the tenants who are known to herself deposit a paltry sum of what the deceased's estate is entitled to.

9. It was therefore submitted that in the circumstances, under section 83(e) of the Act the Respondent ought to give an account for what she has intermeddled with or applied from the estate illegally.

10. In response to the application, the Respondent in a replying affidavit sworn on 11<sup>th</sup> June, 2018 deposed that the said properties do not belong to the deceased save for a small share being beneficiary in the estate of the estate of **Joel Maingi Mbithi**, his deceased father.

11. According to the Respondent, the said properties have been registered between the deceased and the Respondent in trust for other beneficiaries under Succession Cause No. 326 of 1999, Estate of **Joel Maingi Mbithi**, their deceased father.

12. According to the Respondent, the deceased herein, **Joseph Kilonzo Maingi** and herself were appointed the administrators of their late father's estate and their other five sisters agreed that the properties be registered in their joint names to hold in trust for other beneficiaries pending distribution. Unfortunately, the deceased herein died before they could share the said properties.

13. It was disclosed that following the death of the deceased herein, the **Joel Maingi Mbithi's** daughters agreed with the deceased brother's widows that since the deceased herein had school going children, a joint bank account be opened so that the rents collected from the rental houses be banked therein by the tenants and deposit slips be handed over to the Respondent as roof of payment to assist in the payment of fees. Accordingly, the deceased's widows herein opened a bank account with Kenya Commercial Bank A/C No. [Particulars Withheld] in the names of the Petitioners. However all the other beneficiaries of the Estate of **Joel Maingi Mbithi** decided not to get a share until the deceased's children get education. The Respondent was therefore surprised that the Petitioners herein wanted her to account for monies held by them in their joint bank account yet the Petitioners are aware that they are getting more than what they are supposed to get solely on humanitarian grounds out of the love they have for their children's children.

14. The Respondent in fact averred that it is the Petitioners who should account for the monies deposited by the tenants in the said account.

15. According to the Respondent, her other sisters who are beneficiaries are **Josephine, Lydia, Mutuku, Janet Ngayai Muasya, Rose Kanyiva Ngao Muinde Nancy Mumbua** and **Rodah Mumbi Maingi**. She averred that she has also been paying plot land rates and repairs on her own yet the Petitioners despite getting money from the rental houses have refused to pay school fees for the deceased's children despite the sacrifice by herself and her sisters from their own resources.

16. The Respondent therefore averred that this application was brought in bad faith

17. In her submissions, the Respondent reiterated the contents of the replying affidavit and urged the Court to dismiss the application with costs.

#### **Determination**

18. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.

19. The application is expressed to be brought under sections 45, 47, 49 and 76(a)(b) and (c) of the **Law of Succession Act**. Sections 45 and 47 provide as follows:

#### ***45. No intermeddling with property of deceased person***

***(1) 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.***

***(2) Any person who contravenes the provisions of this section shall—***

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.*

#### **47. Jurisdiction of High Court**

*The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.*

20. Section 49 provide for territorial jurisdiction of the Magistrates while section 76 of the Act provides for the powers for revocation or annulment of grants.

21. I associate myself with the opinion of **Musyoka, J** in **Veronica Njoki Wakagoto (Deceased) [2013] eKLR** that:

**“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”**

22. The provision that deals with accounts as rightly submitted by the Petitioners is section 83(e) the Act which sets out as one of the duties of personal representatives as follows:

***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.***

23. In their submissions the Petitioners have disclosed that they have moved the Court for a grant of letters of administration to the deceased’s estate, the deceased here being their late husband, **Joseph Kilonzo Maingi**. There is no averment that the Respondent herein is a legal representative in respect of the estate of **Joseph Kilonzo Maingi**. It follows that the Petitioners cannot move the Court pursuant to section 83(e) aforesaid to compel her to render an account in respect of the estate of **Joseph Kilonzo Maingi** which she is not administering. In any case a grant is yet to be issued in respect of this estate in order to bring it within the ambit of the said section. As regards the Respondent’s liability to account arising from the alleged intermeddling, section 45(2)(b) of the Act states that she *would be answerable to the rightful executor or administrator, to the extent of the assets with which she has intermeddled after deducting any payments made in the due course of administration.* In this case, the Petitioners are not yet the rightful executors or administrators of the estate of **Joseph Kilonzo Maingi**.

24. However in their submissions although the Petitioners relied on section 83(e) of the Act, what was reproduced was in fact section 83(h) of the Act which provides that the legal representatives are liable:

***to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, 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.***

25. However as stated hereinabove, the Respondent is not the legal representative of the estate of **Joseph Kilonzo Maingi** hence cannot be compelled under the said provision.

26. As regards the estate of her father which the Respondent admits she is administering, the Petitioners could move the Court in their capacities as interested parties for account. However such an application would have to be made within the Cause in which the Estate of **Joel Maingi Mbithi** is being administered and not in this Cause.

27. In the premises this application is misconceived and is hereby struck out but with no order as to costs.

28. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 24<sup>th</sup> day of September, 2018.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**