



**REPUBLIC OF KENYA**

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

**P&A CAUSE NO. 261 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPRUTO ARAP ARUSEI (DECEASED)**

**BETWEEN**

**EUNICE ARUSEI.....APPLICANT**

**VERSUS**

**BENJAMIN KIMOSBEI RUTTO.....1<sup>ST</sup> RESPONDENT**

**ANNE CHEPKOECH CHIRCHIR.....2<sup>ND</sup> RESPONDENT**

**BENARD KIBITOK RUTTO.....3<sup>RD</sup> RESPONDENT**

**SOSTEN KIMELI RUTTO.....4<sup>TH</sup> RESPONDENT**

**FRANCISCA JEPCHIRCHIR.....5<sup>TH</sup> RESPONDENT**

**SALLY CHEMUTAI ARUSEI.....6<sup>TH</sup> RESPONDENT**

**BASILISA JELAGAT.....7<sup>TH</sup> RESPONDENT**

**ALBERT KIPRONO RUTTO.....8<sup>TH</sup> RESPONDENT**

**ROSE JEPKORIR.....9<sup>TH</sup> RESPONDENT**

**LIMUS KIPRUTO RUTTO.....10<sup>TH</sup> RESPONDENT**

**GODFREY KIPLETING RUTTO.....11<sup>TH</sup> RESPONDENT**

**EVANS CHERUIYOT RUTTO.....12<sup>TH</sup> RESPONDENT**

**RULING**

By consent the parties in this matter entered the following order before *Justice C.W Githua* on 31<sup>st</sup> August, 2017.

1. That the applicant (*Eunice Arusei*) be in occupation and use of Nandi/Ngechek/441 and the respondents to use and remain in occupation of Nandi/Ngechek/630 and 635.
2. That the parties agree on the mode of distribution within 21 days, failure to which each party shall file proposed mode of distribution within the next 30 days.
3. That *Benjamin Kimosbei Rutto* be substituted as a co-administrator of the Estate in place of *Chepkemboi Arusei* who is deceased.
4. That the matter be mentioned on 15<sup>th</sup> May, 2017 for further orders on distribution.

The background of this matter is that there are two homes. The widow in the first house was *Mary Jepkemboi Arusei* and in the second home is *Eunice Arusei*. The first house has 12 children, seven of whom are men. The second house has 8 children, five of whom are men. The Administrators of the Estate of *Kipruto Arap Arusei* were the two widows. However *Mary Jepkemboi Arusei* passed on before the matter was settled. Paragraph 3 of the consent order had effect of substituting her with *Benjamin Kimosbei Rutto*, who is her son.

The second house have listed 5 assets of the deceased which includes Nandi/Ngechek/439 of which assets they have proposed they be shared equally between the two houses.

The Applicant/Respondents brought up the application dated 10<sup>th</sup> August, 2017 seeking for orders that:-

- (a) The petitioner/Respondent do produce to this Honorable court evidence that Nandi/Ngechek/439 is an asset due to the estate of the deceased.
- (b) The Petitioner/Respondent do produce to this Honorable court full and accurate inventory of the assets and liabilities of the deceased within her knowledge and not yet disclosed such as details of the bank accounts of the deceased and any other property.
- (c) The Petitioner/Respondent do produce to this Honorable court a full and accurate accounts of all dealings she had with third parties in relation to land parcel Nandi/Ngechek/441 up to and including the date of the account.

The said application is supported by the affidavit sworn by *Benjamin Kimosbei Rutto* on 10<sup>th</sup> day of August 2017. The said affidavit reveals that the second house had filed a mode of distribution alluding that Nandi/Ngechek/439 belonged to the deceased. The official search to the said land shows that the parcel belongs to one *Patrice Kipkemei Arap Chepkwony*. He further alleges that the petitioner had leased out part of Nandi/Ngechek/441 to third parties and prays for full inventory of all assets and liabilities of the deceased, including bank accounts which are within her knowledge.

The Applicant/Respondent, in her response alleges that the application lacks merit, is an abuse of court's time and ought be dismissed. The first respondent is a co-administrator of the estate and cannot feign ignorance on issues which are part of his responsibility. Rendering an inventory is a joint responsibility of the administrators.

Land parcel Nandi/Ngechek/441 was purchased by the deceased from its registered owner, *Patrice Kipkemei Arap Chepkwony*, but the deceased passed away before its transfer which is a fact which has never been disputed by the seller.

She further avers that she is in occupation and use of Nandi/Ngechek/441 as was ordered by court on 13<sup>th</sup> March, 2017 and she has not leased any of the Estate Assets to anyone. The Respondents are in occupation and use of parcel No. Nandi/Ngechek/439 as part of the deceased's estate and wish it excluded from the deceased's estate to end up solely benefiting from it.

The application, is prematurely filed as the administrators are required by law to render a just and true account of the Estate at the tail end of the administration process, says the Applicant/Respondent.

In determining the issue before this court, I have considered that under *Section 83(h) of the Law of Succession Act*, the court even on its own motion may require a personal representative of the estate of a deceased person to produce to the court an account of the estate. The Section provides:-

**“....to produce to the court, if required by the court, either on its own motion or on the application by any interested party in the estate, a full inventory of the assets and liabilities of the deceased and full and accurate account of all dealings herewith up to the date of the account”.**

I wish to acknowledge the holding in the succession cause No. 3403 of 2005 in the Estate of *David Kiguli Kaindi*. The court observed that the most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the Estate. The property of the deceased does not vest in them. They have no power over it; neither do they have obligations with respect to it. When aggrieved by the manner the Estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.

The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependants, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries, as they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.

While the foregoing is the legal position on the issue before this court, the same must be weighed in understanding that in law he who alleges must prove and the call to account must have basis and be founded on some grounds.

The ground that land parcel Nandi/Ngechek/439 does not belong to the deceased and is not part of the Estate, as the search shows it belongs to one *Patrice Kipkemei Arap Chepkwony*, has been explained by the respondent. She does not have its ownership documents but alleges the deceased bought it, but before it was transferred he passed on. The applicants are in its occupation and wishes it be excluded to be the sole beneficiaries. The seller does not challenge the position. As rightly put by the respondents, since their proposal is that it be shared equally between the two houses, if it turns out that it does not belong to the estate they have nothing to lose. Its ownership does not affect their

entitled share of the assets in which ownership is not in doubt. Actually, in my own view, if they strongly feel it is not part of the estate, and are not entitled to it, should release the respondents to claim it and disclaim the effects of the said process in terms of costs.

The claim that the applicant/Respondent has leased part of Nandi/Ngechek/441 has been denied by the Applicant/Respondent who is in its possession and use as per the court order of 31<sup>st</sup> August, 2017. The Respondents/Applicants did not avail evidence about the alleged lease. No lease documents were availed, names of those who have leased, area leased and for how long and much. Theirs is just a general allegation. The court cannot order for accounts of that which does not exist. The same applies to alleged bank accounts. No evidence was adduced that the deceased held an account or accounts, and in which banks. There is no evidence that the account if any have cash or some cash have been drawn from them. The court cannot grant orders for accounting of imaginary assets and dealings. As said earlier, basis for doing so must be founded by the applicant.

The first Applicant/Respondent is a co-administrator. He is in a position to find details on the allegations he made in the application. His failure to do so raises strong possibility that the allegations are fake or imaginary. It can be a tactic to delay the move to distribution of which was the next move the court had set its eyes on before the application was raised.

The bottom line is that the application lacks merit and is dismissed with cost to the respondents. Cost be in the cause

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 30<sup>th</sup> day of October, 2018.**

In the presence of:-

(1) C.F Otieno for Respondent/Applicant

(2) Mr. Mwelem- Court clerk