



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 169 OF 2004

IN THE MATTER OF THE ESTATE OF JOEL MAITHYA KIKOSI (DECEASED)

MONICAH MUKULU KIILU.....1ST APPLICANT

ELIZABETH NTHENYA KIMEU.....2ND APPLICANT

AGNES MUTHIO MAITHYA.....3RD APPLICANT

REBECCA NGILE MUASA.....4TH APPLICANT

VERSUS

JOHN MWAKE MAITHYA.....1ST RESPONDENT

JOSEPH MUTHINI MAITHYA.....2ND RESPONDENT

AND

MUTUNGA KASOA.....INTENDED 3RD RESPONDENT

RULING

Introduction

1. This ruling is the subject of two applications. The first application is dated 20th November, 2013 (the 1st application), while the second application is dated 25th January, 2016 (the 2nd application). The 1st application is brought by the 1st to 3rd Applicants herein while the 2nd application is by the 4th Applicant herein. In the 1st application, the said applicants seek the following orders relevant to this ruling:

- 1. THAT the Honourable Court be pleased to order the Respondents to produce to the Court 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 such account.**
- 2. THAT the Honourable Court be pleased to order the Respondents to complete the administration of the estate in respect of all matters without any further delay and thereafter to produce to the Court full and accurate account of all the completed administration.**
- 3. That the Honourable Court be pleased to make a finding that the Respondents being the Administrators of the estate of the deceased, have committed an offence under the Law of Succession Act and therefore the Respondents be made liable and/or punished accordingly.**
- 4. That the costs of this application be provided for.**

2. In the 2nd application, the following orders are sought:

1. That **Mutungu Kasoa** be joined as a 3rd Respondent in this application.
2. That **Mutungu Kasoa** holder of a current account No. [Particulars withheld] with KCB Garden Branch, Nairobi in the name of **Iyangun Fish Farm** be ordered to render an account of his role in the sale and handling of the proceeds from the sale of **Donyosabuk/Komarock Block 1/14** and explain his intermeddling with the Estate of **Joel Maithya Kikosi**.
3. That the Respondents be ordered to render account of their dealings with the 9½ acres belonging to the applicant from the land parcel **Donyosabuk/Komarock Block 1/14** and the proceeds of the sale therefor.
4. That the Respondents be ordered to forthwith deposit with the court, or an interest earning account, a total sum of Kshs 6,652,000/= being the equivalent value of the Applicant's 9½ acres in **Donyosabuk/Komarock Block 1/14** less advance received.
5. That the Honourable Court be pleased to make any other or further orders as the ends of justice may demand.
6. That the costs of this application be awarded to the applicant.

The Applicants' Case

3. The 1st Applicants averred that they are the sisters and beneficiaries of the estate of **Joel Maithya Kikosi**.
4. It was their case based on legal advice that the Respondents ought to have completed the administration of the estate within six (6) months from the date of the confirmation of the grant. Whereas the Court may allow a longer period for the completion of the administration of the estate, in this case it was contended that the Respondents have never applied for the said period and have no excuse whatsoever for failing to proceed to distribute to the rest of the rightful beneficiaries as per the confirmed grant and order of June, 2012. In particular the Respondents were accused of wilfully failing to distribute proceeds from the sale of **Nairobi/Block 118/1398** held in the joint account equally amongst the beneficiaries, thereby causing some beneficiaries loss and damage in terms of their entitlements thereof.
5. The said applicants averred that property known as **Donyosabuk/Komarock Block 1/14** had already been sold to a land buying company known as **Umoja Wendani Housing Co-operative Society Limited** and a copy of the certificate of official search was exhibited. In the applicants' opinion, the said parcel must have fetched a substantial amount of money bearing in mind its location and size of approximately 75 Acres. However the proceeds thereof have not been shared amongst the beneficiaries and they only learnt the matter through the said search. It was their case that it is only fair that the Administrators be compelled to disclose the actual amount of money received from the said transaction.
6. The said 1st Applicants contended that they only learned that **Mavoko Town/Block 12/138** had been sold yet the proceeds therefrom were not distributed amongst the beneficiaries.
7. The 1st Applicants were therefore apprehensive that the Respondents were distributing the estate selectively and in a manner maliciously calculated to cause loss and damage to certain beneficiaries.
8. Based on legal advice the said applicants averred that the Respondents' actions constitute an offence under the **Law of Succession Act**.
9. On her part the 4th applicant, the applicant in the 2nd application averred that she was the administrator of the estate of **Muasa Kikosi** who was a brother to **Joel Maithya Kikosi**, the deceased herein. According to the 4th applicant, her said husband and the deceased herein contributed in the acquisition of one share in **Komarock Ranching and Farmers Co. Ltd** which share was registered in the name of **Joel Maithya Kikosi** for himself and in trust for his said brother and their mother since it was a policy of the said company that persons owning shares jointly nominate only one person to be registered as owner on behalf of all others.
10. It was averred that a share was bought for ten heads of cattle and the said applicant's husband contributed one, **Joel Maithya** four and their mother five heads of cattle. However since they were equally entitled to their mother's share, the applicant believed based on her advocate's advice that her husband and his brother owned a share in the ratio of 1:4.
11. It was averred that the said Company subdivided its land and awarded two pieces for each share held, one measuring one hundred acres and another measuring two acres. Accordingly, the deceased herein on his own behalf and in trust for **Muasa Kikosi** got **Donyosabuk/Komarock Block 1/14** measuring one hundred acres and another plot measuring two acres. It was deposed that that sometime in May, 2012, upon learning that the Respondents had petitioned for letters of administration and were seeking confirmation of the grant without making any provision for her husband's 1/5th, the applicant filed a caveat and instructed her advocate to secure her interest.
12. Upon negotiations between the applicant and the Respondents, a consent was reached and filed in court but according to the applicant, the same was plucked from the Court file. By the said consent, the applicant averred that she was awarded 9½ acres from **Donyosabuk/Komarock Block 1/14** which the Respondents undertook to excise and transfer to her as a condition for her withdrawing the caveat she had filed in the cause. According to the applicant, in his replying affidavit sworn on 24th September, 2015 and filed in Court on 28th September, 2015, the 1st Respondent admitted the existence of the said consent.
13. It was averred that sometime in June 2013, the applicant and her son, **Kioko Muasa**, were summoned by the 2nd Respondent at his home in the presence of the 1st Respondent and one **Mutungu Kasoa** and the applicant was presented with some papers which she was required to

sign and was informed that upon doing so, she would be given Kshs 500,000/= which amount would enable her sort out her financial problems and would be deducted from the purchase price once an agreement was reached with the intended purchaser, the said **Mutungo Kasoa**. According to the applicant, since she was in need of treatment and her grandchildren's fees and due to their illiteracy, they signed the same upon the Respondents' word. However in 2014 when she confronted the 2nd Respondent on when the said 9½ acres would be transferred to her so that she could sell the same to the said **Mutungo Kasoa** or any other willing buyer, the 2nd Respondent informed her that they had sold the land and that the said Kshs 500,000/= she had received was what she deserved without disclosing the identity of the purchaser or the purchase price.

14. The 4th applicant insisted that at no time did she authorise the Respondents to sell her said 9½ acres in **Donyosabuk/Komarock Block 1/14** hence the Respondents' action was unlawful and an outright attempt to defraud her and other beneficiaries of her husband's estate. She however discovered that the land was sold to **Umoja Wendani Housing Co-operative Society Limited** and effectively transferred to it by the Respondents. According to her, her advocates informed her that upon inquiring, he was informed that the land was sold at Kshs 750,000/= per acre and that the total price was Kshs 52,500,000/=. Based on the foregoing, the applicant believed that she was entitled to Kshs 7,125,000/= which after deducting the said Kshs 500,000/= leaves a total sum of Kshs 6,625,000/= which she ought to be paid though it was sold without her authority. She disclosed that though she has been offered a price of Two Million per acre she can still with little effort get a better price.

15. It was her case based on her advocate's advice that from the sale agreement, the Respondents mischievously directed that the price be channelled through an account No. 1135231273 with Kenya Commercial Bank, Garden Branch, Nairobi held by **Mutungo Kasoa** in the name of Iyangun Fish Farm. Since the said person was a stranger to the agreement, the applicant believed that this action was intended to hide the truth from her a make it hard for her to trace the transaction.

16. It was the 4th applicant's case that at the time of filing the caveat, she was not aware that the deceased **Joel Maithya Kikosi** had also been given the other 2 acre parcel of land hence the reason she did not ask for 1/5 share in those assets. She disclosed that there is a further two acres which the Company is planning to allocate to each share since both parcels have not been transferred and she prayed that she be given 1/5 interests in each of the two parcels.

17. The 4th applicant disclosed that the 1st Respondent informed her that there were attempts by the 2nd and 3rd Respondents to persuade him to sign a backdated agreement purporting that the 3rd Respondent had purchased **Donyosabuk/Komarock Block 1/14** from the administrators before the sale to **Umoja Wendani Housing Co-operative Society**. However, the sale agreement between **Umoja Wendani Housing Co-operative Society** and the Administrators did not mention the 3rd Respondent as having any interest in the property and the 3rd Respondent indeed paid the beneficiaries a total of Kshs 16,000,000/= in July, 2013 Six months after the first deposit was paid by which time he had received a total of Kshs 32,500,000/= out of Kshs 52,500,000/=. To the applicant this mean that the 3rd Respondent could not have validly purchased that land without making any payment hence any purported agreement is an attempt by the 3rd Respondent and one or both the Administrators to defraud the beneficiaries of a fair value of the land, and is therefore a nullity.

18. It was therefore the 4th applicant's case that her application ought to be allowed.

1st Respondent's Case

19. The application received support from an unlikely quarter, the 1st Respondent herein, **John Mwake Maithya** who took issue with the decision of the 2nd Respondent to join him in the latter's replying affidavit without consulting him.

20. The 1st Respondent disclosed that he was aware that the land in Komarock was to be sold and the proceeds disclosed to all beneficiaries and all parties be called to witness and agree amicably on the mode of sharing so as to avoid the costly legal tussle. He averred that he knew the purchasers to be Umoja Wendani Co-operative Society though he was not called to witness the transaction which was done behind his back by his co-administrator, the 2nd Respondent hence the sale is void.

21. According to the 1st Respondent, when his father was alive, the 2nd Respondent had solicited a buyer **Ms Kibe** and negotiated an unworthy price of Kshs 1.3 m which was cancelled by the first administrator, **Daniel Mutua Maithya**. He averred that since September, 2013 he had been demanding for the documents of sale from their agent, **Mutungo Kasoa**, to no avail. It was his case that the 2nd Respondent has been causing court adjournments whenever the matter comes up with the aim of delaying justice.

22. Regarding **Mwala/Manyani parcel No. 96-Block D**, the 1st Respondent averred that the 2nd Respondent intends to change the parcels allocated to him and their late sister with an intention to lock out the said sister's siblings who have been sent packing with a view to disinheriting them.

23. The 1st Respondent therefore urged the Court to proceed and find the 2nd Respondent as being un-co-operative and/or unreasonable and meet the costs of these proceedings since the 1st respondent's attempts to settle the matter out of court were thwarted by the 2nd Respondent on the excuse of his busy schedule. The 1st Respondent urged the Court to consider the will of their father registered in court in 2004 coupled with the family gathering deliberation of 2012 in recognising the complainants as the *bona fide* beneficiaries to the estate without further delay and to further compel the 2nd Respondent to co-operate s as to expeditiously finalise the administration of the estate.

24. The 1st Respondent urged the Court to allow the beneficiaries to employ the services of a Registered Land Valuer for **Donyosabuk/Komarock Block 1/14** to determine the prevailing market price with a view to the buyer being compelled to pay a reasonable price for the same. According to the 1st Respondent, the said parcel was sold but the details thereof remain known to the broker, **Mutungo Kasoa** and the 2nd Respondent.

25. While conceding that **Agnes Muthio** who is listed as the 3rd Applicant died more than 10 years before, the 1st Respondent averred that her share remained with the 2nd Respondent and should he have not distributed her share to her children, then this Court should compel the 2nd Respondent to do so

26. The 1st Respondent therefore joined the applicants in seeking for accounts expeditiously.

2nd Respondent's Case

27. The application was opposed by the 2nd Respondent, **Joseph Mwake Maithya**, who is one of the administrators of the estate of **Joel Maithya Kikosi** (Deceased). According to the 2nd Respondent, the 1st applicant who swore the affidavit in support of the instant applicant has deliberately led to the Court by asserting that she has the authority of the 3rd applicant to swear the affidavit on her behalf when the 3rd applicant died over 10 years ago hence is wrong joined in the present application and her name ought to be struck off the record.

28. It was deposed that the Respondents took over the administration of the estate hardly over a year before following the revocation of a previous grant to **Daniel Maithya** who after seven years as administrator had not made the slightest effort to administer the estate. According to the 2nd Respondent, when they obtained confirmed grant they embarked on a serious effort to trace the assets of the estate as the actual physical location of some of immovable assets were unknown to the previous administrator or any member of the family, a fact well known to the 1st applicant.

29. It was therefore the 2nd Respondent's position that the delay in concluding the process of distributing the estate was largely caused by the previous administrator who declined to surrender title deed for land parcel **Mwala/Manyani/96** to facilitate subdivision and transfer to the beneficiaries. Regarding parcel no. **Nairobi/Block 118/1398** it was averred that the same was invaded by illegal occupiers who settled thereon some of whom have developed permanent houses during the tenure of the previous administrator who did not even know the physical location of the land. However the 2nd Respondent has initiated the process of removing the said occupiers from the land with the assistance of Komarock Farmers Ranching Co-operative Society Limited. Accordingly, the said parcel is not yet available for distribution.

30. It was the 2nd Respondent's position that the assets, liabilities and list of beneficiaries is clearly given in the Certificate of Confirmation and therefore the 1st applicant's demands for the same is unreasonable. It was averred that the 1st applicant is a proxy of the previous administrator who is out to frustrate and discredit the current administrators in an effort to trace, recover and finally distribute the assets of the estate, a duty he miserably failed to fulfil before being removed.

31. The 2nd Respondent therefore contended that the instant application is premature and that they need to be accorded time and cooperation necessary to complete the task of administration. The 2nd Respondent confirmed that they are ready to render a full and accurate account of their dealings with the estate which they are committed to administering faithfully, honestly and equitably but demanding such accounts before the process has been concluded is unreasonable. The 2nd Respondent however averred, based on legal advice, that their failure to apply for extension of the period allowed for completion of administration is, though regrettable, curable and that their advocates will move in earnest to do so.

32. With regard to the 4th Applicant's application, the 2nd Respondent averred that the subject property was part and parcel of the estate of **Joel Maithya Kikosi** whose estate, he together with the 1st Respondent were the administrators and that they were the registered owners of the said property having inherited the same from the said deceased.

33. According to the 2nd Respondent, the 4th Applicant is neither a beneficiary nor a dependant of the deceased hence has no legal basis in filing the said application. The 2nd Respondent denied that there was a consent between the Respondents and the 4th Applicant and erred that the said allegation was unfounded. Similarly the allegation that the said property was undervalued at the time of the sale was unfounded in the absence of a valuation report.

34. According to the 2nd Respondent the 4th Applicant's claim to 9.5 acres from land parcel no. **Donyosabuk/Komarock Block 1/14** by virtue of her being the administrator of the estate of **Muasa Kikosi** is misleading as the estate of **Muasa Kikosi** and that of **Joel Maithya Kikosi** are two different legal entities and no connection has been established between them.

35. The 2nd Respondent reiterated that land parcel known as **Donyosabuk/Komarock Block 1/14**, solely belonged to their late father **Joel Maithya Kikosi** and none of it belonged to **Muasa Kikosi** as insinuated by the 4th Applicant and he attached a letter from **Komarock Housing Co-operative Society Ltd** confirming the position. In his view the 4th Applicant has not tendered any evidence before this Court proving that her late husband contributed towards the purchase thereof. He therefore prayed that the 4th Applicant's application be dismissed with costs.

Intended 3rd Respondent's Case

36. In his response to the application by the 4th Applicant, the intended 3rd Respondent averred that though this matter touches on the estate of **Joel Maithya Kikosi**, the 4th applicant is neither a dependant nor beneficiary of the said estate. He therefore did not understand the legal standing and/or basis for the 4th applicant's application.

37. According to the intended 3rd Respondent, all the dealings he had with regard to the said estate specifically the sale of **Donyosabuk/Komarock Block 1/14** was through the administrators of the estate hence his accountability if any should be done by the

administrators of the estate. Further if any accountability is required the same ought to be sought by the beneficiaries of the instant estate and not the 4th Applicant.

38. The intended 3rd Respondent averred that as the suit property was part and parcel of the estate of **Joel Maithya Kikosi** and not the 4th applicant's herein, pursuant to the confirmation of grant in favour of the 1st and 2nd Respondents, a title deed in respect of the said property was issued in their favour and he dealt with the said property through the 1st and 2nd Respondents in their capacities as the registered and absolute owners of the same and that he did not at any one point interact with the 4th Applicant in regard thereof.

39. The intended 3rd Respondent averred that the 4th Applicant did not establish any connection between herself and the estate of **Joel Maithya Kikosi** thus lacks locus standi to prosecute the said application and the application ought to be dismissed with costs.

Determination

40. I have considered the issues raised in these two application. I wish to deal with the 4th Applicant's application dated 25th January, 2016 first.

41. It is clear that the 4th Applicant is not claiming that she is a beneficiary or dependant of the estate of **Joel Maithya Kikosi**. Her claim is based on the fact that her late husband, **Muasa Kikosi**, the deceased herein, **Joel Maithya Kikosi** and their late mother contributed towards the shares in land parcel no. **Donyosabuk/Komarock Block 1/14**. She is therefore claiming the share that the estate of **Muasa Kikosi** is entitled to which in her view measures 9.5 acres which she claims she was defrauded by the Respondents and the intended 3rd Respondent. According to her the 2nd Respondent acknowledged this fact and that an agreement was reached between her and the Respondents that she was entitled to that portion of the land. She was however not paid the full purchase thereof which ought to have been Kshs 7,125,000/= which after deducting the said Kshs 500,000/= she received leaves a total sum of Kshs 6,625,000/=. She therefore seeks that once the intended 3rd Respondent is joined to these proceedings, he should be ordered to render an account of his role in the same and handling of the proceeds from the sale of **Donyosabuk/Komarock Block 1/14** and explain his intermeddling with the Estate of **Joel Maithya Kikosi** and that further the Respondents be ordered to render account of their dealings with the 9½ acres belonging to her from the land parcel **Donyosabuk/Komarock Block 1/14** and the proceeds of the sale therefor.

42. Section 83 of the *Law of Succession Act* provides a hereunder:

Personal representatives shall have the following duties—

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) 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;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) 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;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

43. In this case, it is clear that the intended 3rd Respondent is not an administrator of the estate of **Joel Maithya Kikosi**, whose estate is the subject of these proceedings. He is therefore not under obligation to render an account pursuant to section 83 aforesaid. It is however alleged that he has intermeddled with the said estate. It is trite law that the interests of deceased persons cannot be tampered with unless a properly appointed legal representative has been handed over the management of their estates. Section 45(1) of the *Law of Succession Act* states that:

(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.

44. 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.”

45. However, for the purposes of rendering an account arising from an alleged intermeddling, section 45(2)(b) of the Act states that the intermeddler *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 4th Applicant is neither the rightful executor nor administrator of the estate of **Joel Maithya Kikosi**. Consequently, I cannot order the intended 3rd Respondent to account to her in respect of his dealings with the estate of **Joel Maithya Kikosi**.

46. Had the intended 3rd Respondent been a personal representative of the estate of **Joel Maithya Kikosi**, may be the 4th Applicant would have been entitled to invoke section 83(i) of the **Law of Succession Act** to compel him to produce to the court a full and accurate account of the completed administration as long as she was able to prove that she was a party interested in the estate. That however does not seem to be the case here.

47. A person who believes that a proposed confirmation of grant ought not to be allowed is required by rule 40(6) of the **Probate and Administration Rules** to file an affidavit of protest in the said Cause setting out the grounds of objection. In this case, the 4th Applicant averred that upon learning that the Respondents were seeking confirmation of the grant without making any provision for her husband's share she filed a caveat and instructed an advocate to secure her interest. Thereafter negotiations were entered into that led to a consent being reached that she was to be awarded 9.5 acres from land parcel **Donyosabuk/Komarock Block 1/14**. The 4th Applicant's allegations were supported by an affidavit sworn by the 1st Respondent on 24th September, 2015.

48. While the 4th Applicant may well have a valid case against the estate of **Joel Maithya Kikosi** if properly advised, her case for an account against the intended 3rd Respondent does not lie in these proceedings. In **Re Katumo & Another [2003] 2 EA 509**, it was held that:

“Although the High Court has power vested in it by section 47 of the Act to hear and determine all manner of applications that jurisdiction has to be exercised within the provisions of the Act and where there is no provision covering a particular aspect of the dispute there is no jurisdiction.”

49. Her case against the estate seems to be based on fraud committed between the Respondents and the intended 3rd Respondent. As was held in **Koinange & 13 Others vs. Koinange [1986] KLR 23**:

“Allegations of fraud must be strictly proved, although that standard of proof may be so heavy as to require proof beyond reasonable doubt. Something more than a balance of probabilities if required. A higher standard of proof is required to establish such a finding, appropriate to the gravity of the offence concerned.”

50. Issues of fraud against third parties do not ordinarily fall within the ambit of succession proceedings. This was the position of **Nyamu, J** (as he then was) in **Stephen Waithaka Gatumbi vs. Frumence Kariuki Murui Nairobi HCCC No. 1757 of 2001** where he held that issues of fraud and forgery cannot in law be raised in a succession cause.

51. In the foregoing premises the 4th Applicant's application is unmerited.

52. As regards the application by the 1st, 2nd and 3rd Applicants, it is conceded that the 3rd Applicant died before the application was made. Accordingly the application in so far as it is expressed to be brought by the 3rd Applicant is misconceived. Consequently, the 3rd Applicant's name is struck out.

53. With respect to the application by the 1st and 2nd Applicants dated 20th November, 2013, section 83 of the **Law of Succession Act** provides that the duties of personal representatives include the production to the court of a full and accurate account of the completed administration within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts. The grant in respect of the estate herein was confirmed on 22nd January, 2007. On his part the 2nd Respondent, the only person who opposed the application, lamented that the Respondents took over the administration of the estate hardly over a year before following the revocation of a previous grant to **Daniel Maithya** who after seven

years as administrator had not made the slightest effort to administer the estate. According to him, when they obtained confirmed grant they embarked on a serious effort to trace the assets of the estate as the actual physical location of some of immovable assets were unknown to the previous administrator or any member of the family, a fact well known to the 1st applicant. This was the position as at 10th February, 2014 when the 2nd Respondent swore his affidavit. That was more than 4 years ago. He does not seem to have taken any step since then to comply with the law.

54. The duties of personal representatives were succinctly set out by the Court of Appeal in Stephens & 6 Others vs. Stephens & Another [1987] KLR 125 where **Apaloo, JA** (as he then was) himself as hereunder:

“As a trustee, the 1st respondent incurred the responsibility of honest, efficient and high-minded dealing with regard to the trust estate, which a court of equity demands of all trustees. He also incurred an obligation to account to the beneficiaries of his dealings with the property. Indeed, the duty to account is the main vehicle by which a court of equity enforces the trustee’s fiduciary duty...As a personal representative of the deceased, the 1st respondent owed a duty to pay all the debts of the intestate and thereafter, distribute the rest of the estate to his co-beneficiaries. It is common ground that the 1st respondent did not render an account of his administration to the widow or his brothers and sisters. What he did instead was to convey the plot in dispute, which he owned jointly with the widow and seven other beneficiaries, to himself and the second respondent. The curious result of this was that the widow and the natural children of the deceased were deprived of their only patrimony...Therefore it is plain that the 1st respondent in converting the trust property into his own and that of the 2nd respondent, he was guilty of a breach of trust. That equitable “wrong” is a mixed bag of many deviations and which consists of both commissions and omissions. A trustee is liable for a breach of trust if he fails to do what his duty as a trustee requires or if he does what as a trustee he is not entitled to do...On the facts, the 1st respondent did not only fail to do his duty of accounting to the beneficiaries and yielding up to them such part of the estate as they may be beneficially entitled to, but he wrongly converted the only substantial property in the estate to his own name and that of a confederate. In these circumstances judgement in favour of the appellants for the relief they prayed for was a matter of course and they were entitled *ex debito justitiae* to the reliefs they sought on the plaint.”

55. On his part, **Masime, JA** stated that:

“An administrator of the estate of a deceased pursuant to a grant of letters of administration issued by the High Court is a trustee and stands in a fiduciary relationship to those who are beneficially interested in the estate. His duties as such trustee continue until he distributes the estate when his undertakings to the court are discharged. In the circumstances under section 20(1)(b) of the Limitation of Actions Act Laws of Kenya it cannot be argued that that time runs out against the beneficiaries commencing with the death of the deceased...On the facts of this case, the cause of action arose for the appellants against the respondents when the respondent as administrator of the estate of the deceased committed a breach of his trustee position by secretly conveying the trust property to himself and the 2nd respondent to the exclusion of the appellants who were also beneficially interested. There was no acquiescence by the appellants in that breach and no laches can be alleged as they took steps to lodge a caveat against the title as soon as they learnt of the breach.”

56. It was therefore held by the High Court of Uganda sitting in Kampala in Paulo Kavuma vs. Moses Sekajja & Another Kampala HCCS No. 473 of 1995 that:

“...the Succession Act provides that an administrator should within six months from the grant of Letters of Administration or within such further time as the court which granted the letters may from time to time appoint, exhibit in that court an inventory containing a full and true estimate of all the property in his possession, and all the credits, and also all the debts owing by any person to which the administrator is entitled and also within one year from the date of the grant or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands, and the manner in which they have been applied or disposed of...The said provisions of the law are mandatory and the administrator is required to exhibit an inventory containing the property in his possession all credits and debts to the estate in court. In the instant case it is clear from the court record and from the evidence of the plaintiff’s witnesses that no such inventory has ever been filed in court since the administrators were granted Letters of Administration, up to the time of filing this suit, more than 2½ years after the grant. There is also no evidence that the period was extended by Court. None of the provisions of section 280(1) have ever been complied with by the administrators. This breach of clear provisions of the law would amount to just cause under Section 233(2)(e) of the Act on the ground that the grant has become useless and inoperative through circumstances and the administrators have wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of the Succession Act. The grant is accordingly revoked and the defendants ordered within one month from the date of judgement to exhibit an account of the estate, showing the assets, which have come to their hands, and the manner in which they have been applied or disposed of...Section 332 of the Act provides that when an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damages, he is liable to make good the loss or damage so occasioned. Under the cited section the defendants would be liable to make good the loss or damage they may have occasioned to the estate but without a proper account of what properties came into the hands of the defendants and what happened to them it would be difficult to assess the loss occasioned to the estate and since the witnesses themselves testified that their main interest in this case was to save the house from being sold and having found no evidence on which to base the award of general damages, accordingly none awarded.”

57. In this case as the Administrators are guilty of dereliction of their statutory duty, I hereby direct the Respondents to within 30 days from the date of this ruling render an account of the estate, showing the assets which have come to their hands, and the manner in which they have been applied or disposed of, including their values and the amount at which they were disposed and the particulars of the persons to which they were disposed of as well as those assets which remain undisposed of and the manner in which they intend to dispose of the same.

58. In summary, while the application by the 1st and 2nd Applicants succeeds as aforesaid, the application by the 4th Applicant’s application

is disallowed.

59. As regards costs, though the parties were directed to furnish the Court with soft copies of the relevant pleadings and submissions, none of the parties complied therewith. Section 1A(3) of the **Civil Procedure Act** provides that:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

60. One of the overriding objectives of the **Civil Procedure Act** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, each party will bear own costs of these applications.

61. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 23rd day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey