



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**SUCCESSION CAUSE NO. 2685 OF 2011**

**IN THE MATTER OF ESTATE OF GEORGE GITHINJI KAMWAKI (DECEASED)**

**DAVID NDEGWA GITHINJI.....1<sup>ST</sup> APPLICANT**

**CHARLES MWANGI GITHINJI.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**REGINA WAMBUI GITHINJI.....RESPONDENT**

**R U L I N G**

1. In their Notice of Motion dated 25<sup>th</sup> January 2015 brought under **Section 26, 27, 28, 30** and **45** of the **Law of Succession Act Cap 160**, the Applicants David Ndegwa Githinji (1<sup>st</sup> Applicant) and Charles Mwangi Githinji (2<sup>nd</sup> Applicant) are seeking the following orders:

1. That the Honourable court do issue an order appointing an Independent Management Company to administer the estate of GEORGE GITHINJI KAMWAKI (Deceased), pending the issuance and confirmation of Grant to the Administrators.

2. That the Honourable court in the Interim period do make an order directing the Management Company to make reasonable provision for the upkeep of the Applicants herein.

3. That the honourable court do issue an order restraining the Respondent herein from taking over, transferring, selling, disposing off, excavating, quarrying stones and/or in any other way dealing with the property consisting of the undivided estate of GEORGE GITHINJI KAMWAKI (Deceased).

4. That an order do issue directing the Respondent herein m/s Regina Wambui Githinji to render a comprehensive account of the rental income collected from the rental premises from the date of death of the deceased, to date and;

5. That the costs of the Application be provided for.

2. The Applicants based their application on the grounds that the Applicants petitioned for the letters of Administration ad Colligenda bona of the estate of GEORGE GITHINJI KAMWAKI (Deceased) on the 6<sup>th</sup> of December 2011 under Succession Cause No. 2685 of 2011. The Respondent filed petition by way of cross application for grant of letters of Administration of the estate of GEORGE GITHINJI

KAMWAKI on the 5<sup>th</sup> of April 2012.

3. The issue of Administration is yet to be determined by the Court yet the Respondent has embarked on administering the estate in complete exclusion of the Applicants' household and that the vast estate is being wasted. This, it is said to be notwithstanding an injunction issued against the Respondent herein restraining them from wasting the undivided estate.

4. That the Applicant's mother who is the 1<sup>st</sup> widow of George Githinji Kamwaki is old and sickly and requires urgent monies to cater for her upkeep and medical treatment and the estate has several rental buildings which fetch approximately Kshs. 200,000/= in monthly income.

5. The Application was supported by the Affidavit of David Ndegwa Githinji dated 25<sup>th</sup> January 2015, in which the applicants aver that they are apprehensive that unless the court proceeds to grant Orders sought in their application, the entire estate of the deceased will be wasted away or looted by undeserving persons.

6. I have anxiously considered the grounds of application before me together with the Supporting Affidavit of David Ndegwa Githinji. Essentially, this application revolves around **section 45** of the **Law of Succession Act** which provides 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.”***

7. There is no specific definition of the term intermeddling provided in the Law of Succession Act. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, or any other written law or a grant of representation under the Act. In my understanding, the use of wide and general terms such as; ***“for any purpose”*** and ***‘or otherwise intermeddle with’*** in the Act encompasses the category of the offensive acts which would amount to interference and is not limited to taking possession and disposing of the property of the deceased.

8. Such acts would include taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the **Law of Succession Act**, or any other written law. The list goes on and is not exhaustive. Therefore, any act or acts which will dissipate, or diminish, or put at risk the free property of the deceased are acts of intermeddling in law.

9. The law has emphasized the need to protect the free property of the deceased, by providing for a very firm stance on intermeddling; and has further clothed the court with wide powers to punish for intermeddling and to issue any appropriate order(s), for the protection of the estate of a deceased against any person. Police officers and Administration officers too have powers to take steps towards protection of and prevention of intermeddling with the free property of a deceased.

10. It is complained that the Respondent has taken possession of the property of the deceased and collects

monies from rental buildings estimated to fetch approximately Kshs. 200,000/= in monthly income as stated in the Applicants' submissions. That the Respondent continues to deal with the estate of the deceased without due regard to the interests of other beneficiaries in the Estate.

11. The Respondent did not file any reply to the application, neither did she appear in court despite having been served as evinced by the Affidavit of Service dated 14<sup>th</sup> February 2017.

12. I note that the Applicants have not in their Notice of Motion, given any estimate and justification of the reasonable provision they wish to have from the estate of the deceased for their upkeep. From the submissions alone the Court is unable to determine the amount to be provided for the upkeep of the Applicants.

13. The first issue that must be addressed however is that of the administration of the estate of the deceased. Before administrators appointed to the estate the Respondent should not embark on administering the part of the property of the deceased that she has arrogated to herself in complete exclusion of the 1<sup>st</sup> House. The cause has been court since the year 2011 yet the parties make no effort towards the appointment of an administrator/s.

14. Under **Section 7 of Cap 168 Public Trustee Act** where the particular circumstances of any case appear to the court so to require, the court may, if it thinks fit for reasons recorded in its proceedings, of its own motion under the Law of Succession Act letters of administration to the Public Trustee notwithstanding that there are persons who, under that Act or any other written law, would in the ordinary course be legally entitled to administer the estate of the deceased person concerned in preference to the Public Trustee.

15. This application is therefore allowed with the following orders:

- a. The Public Trustee do administer the estate of GEORGE GITHINJI KAMWAKI (Deceased), for purposes of the issuance and confirmation of Grant.
- b. That the Respondent is hereby restrained from taking over, transferring, selling, disposing off, excavating, quarrying stones and/or in any other way dealing with the property consisting of the undivided estate of GEORGE GITHINJI KAMWAKI (Deceased).
- c. That the Respondent herein M/s Regina Wambui Githinji do render a comprehensive account of the rental income collected from the rental premises from the date of death of the deceased, to date.
- d. That in the interim the Public Trustee do assess the estate for purposes of making reasonable provision for the upkeep of both houses.

Cost to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>th</sup> DAY OF February 2017**

**L. A. ACHODE**

**JUDGE**