



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

SUCCESSION CAUSE NO. 39 OF 2016

IN THE MATTER OF THE ESTATE OF FRANCIS GITHII NGANGA (DECEASED)

JOHN NGANGA GITHII.....PETITIONER/APPLICANT

-VS-

PERIS NJOKI GITHII.....CROSS PETITIONER/RESPONDENT

RULING

1) The deceased, **Francis Githii Nganga** died intestate on 9th July 2015. He was survived by two widows, namely **Peris Njoki Githii** (first widow) and **Saweria Waruguru Githii** (second widow), and their ten children. The Petition for grant of Letters of Administration was filed on 11th May 2016 by **John Nganga Githii**, the deceased's son with the second widow. Contemporaneously filed with the Petition was a Summons expressed to be brought under Sections 45, 47 and 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules.

2) The Summons which is the subject of this ruling contains several prayers the substantive ones being prayers 3 to 6 which seek:-

“3. THAT all future rents collected from LR No. 1144/540 (Grant IR No. 33667 Naivasha CBD 1144/861 (Grant No. IR 37549), Industrial Area, LR No. 1144/918 (Grant No. IR 43791) Lake view Estate, Plot No. 323, Naivasha Town Block 1/40, Kihoto Estate, Naivasha Block 1/3 Kihoto Estate, Naivasha/Municipality Block 7/430 Kabati Estate and Loc 16/Ndakaini/413 in Ndakaini, be collected by an independent estate agent and be deposited in an Estate Account to be operated under the supervision of this Honourable Court.

4. THAT the Respondents be ordered to immediately give a detailed statement of account in respect of all the rents, and/or other financial income collected, generated and/or gained from the properties forming part of the estate of the deceased herein from the date of the demise of the deceased herein.

5. THAT this Honourable court be pleased to order PERIS NJOKI GITHII, to surrender to and furnish this Honourable court with all the Title Documents, for parcels of land and lob books of all the vehicles registered in the name of the deceased herein for safe custody pending the final hearing and hearing and determination of the petition herein.

6. THAT Bank accounts in the name of the deceased name at A/C [particulars withheld] Equity Bank Limited, Naivasha Branch, Barclays Bank (K) Limited A/C [particulars withheld] at Naivasha Branch in the name of Franco Philly Co. Limited, be freezed until the

final hearing and determination of the petition herein or until further orders of this court.”

3) The grounds on the face of the Summons which are further expanded in the affidavit of **John Githii Nganga** (Petitioner) as follows:

“(a) THAT the properties belonging to estate herein generate an income conservatively, estimated at Kshs 900,000/= per month which is collected and controlled by the first house (i.e. Respondents) to the exclusion of Applicant, his mother and sister, yet they are equally entitled to a share of the estate.

(b) THAT for some time, the Applicant, his mother and sister (Second House) and the first house have on several occasions attempted in vain to discuss the matter of preserving the estate herein, hence the need to have a court order that will restrain the Respondents not to waste and /or intermeddle with the assets of the estate herein.

(c) THAT as to now there is no administrator with the mandate to manage the estate herein for the benefit of all the persons who are legitimately entitled to share the same.

(d) THAT there is urgent need to have an independent estate agent with the mandate of collecting in the rent and other financial incomes generated by the properties of the estate herein who should be depositing the same in an estate account that shall be ran under the directions and supervision of this Honourable Court for the benefit of all the beneficiaries.”

4) In response to the Summons **Peris Njoki Githii** (first widow) filed an objection on 24/11/2016 and further, a Petition (Cross-Petition) on 1/12/2016 and also a Replying affidavit in opposition to the Petitioner’s Summons. The Applicant responded through a Further affidavit. As directed by the court, the parties filed skeleton arguments and made further oral submissions during the hearing of the Summons.

5) I will summarise the parties’ respective cases as presented through affidavits and annexures as well as submissions. The Petitioner’s case is that the Cross-Petitioner and her family have since the death of the deceased seized control of his estate exclusively enjoying profits therefrom, and were unwilling to approach the court for letters under the Law of Succession Act. He contends that a company founded in 2011 by the deceased and his family, namely, **Franco- Philly Company Limited** is being used illegally by the Cross-Petitioner, as a device to manage the estate of the deceased, without the requisite the grant of this court. This he asserts flouts Section 45 of the Law of Succession Act.

6) He is opposed to the prayer by the Cross-Petitioner for her appointment as an Administrator of the estate. He therefore urges that, pending the appointment of an administrator, all rents due from the properties listed in the Summons be collected by an independent estate agent and deposited into a designated account, under the court’s supervision.

7) Further, he seeks that the Cross-Petitioner furnishes an account of all income hitherto earned from the estate properties, and to surrender all title documents and log books relating to the estate of the deceased. And further that the deceased’s bank accounts and in the name of Franco-Philly Company Limited be frozen temporarily.

8) For her part, the Cross-Petitioner opposes that appointment of the Cross-Petitioner as an administrator. Her argument is that the matters raised in the Summons should await the substantive hearing in the respect of the Petitions. That being the person in whose hands the estate of the deceased was left, she had implied authority over the property and could not abdicate from that responsibility pending appointment of an administrator. Thus the Cross-Petitioner asserts that she has diligently presided over the assets and liabilities of the estate, in association with **Franco-Philly Company Limited** by collecting rents and discharged liabilities in respect of the estate.

9) According to the Cross-Petitioner all members of the family were directors of the said company. That

it was formed by the deceased with the object that it would manage his estate. In her view therefore, the Applicant as a co-director should move the company to provide accounts under the relevant law. The Cross-Petitioner states that the company survives its directors, in this case the deceased, and that an order to freeze its bank accounts will have no effect as third parties have no access thereto.

10) There is no dispute that the deceased was a relatively wealthy man at the time of his death on 9th July, 2015. The schedules of his properties and liabilities as listed in both Petitions leave no doubt in that regard. Further, it is not in dispute that the Cross-Petitioner in conjunction with the company known as **Franco-Philly Company Limited** assumed the management of the estate after the death.

11) The chief question to be answered is whether the Cross-Petitioner and/or **Franco-Philly Company Limited** were clothed with the necessary authority to administer the estate of the deceased as they admittedly have hitherto done.

12) Section 45 of the Law of Succession Act states:-

“(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.”

13) First of all, the company known as **Franco-Philly Company Limited** was and is a separate entity from its directors, including the deceased who held the highest number of shares individually. That is basic company law that requires no authority. Secondly, I cannot find anything in the Articles and Memorandum of Association of **Franco-Philly Company Limited** filed herein, authorizing it specifically to manage the estate of the deceased. The objects of the company are diverse and generalized.

14) Besides, the deceased as a director/shareholder would only have been entitled to dividends and other benefits arising from the business of the company, not from his estate as such. Ditto his estate after his death. Thus in my view, whatever may have been the intentions of the deceased in the formation of the company and despite the inclusion of his family as directors this has no effect on the administration of his estate.

15) **Franco-Philly Company Limited** has no authority therefore to purport to administer or manage the estate of the deceased. Indeed Section 56 (2) of the Law of Succession Act prohibits the grant of Letters of Administration with or without will annexed, to **“a body corporate other than the public trustee or a trust corporation.”** The admission that **Franco-Philly Company Limited** is currently engaged in the administration of the estate of the deceased, with the direct knowledge and approval of the Cross-Petitioner amounts to an admission to intermeddling in the estate of the deceased.

16) The Cross-Petitioner’s evident candour regarding her impugned dealings with the estate cannot sanctify her admitted intermeddling. There is no explanation given for her inordinate delay in approaching the court for the grant of Letters of Administration in respect of the estate. Whether this arose from ignorance of the law or misconception as to the status of **Franco-Philly Company Limited** and/or herself vis-à-vis the estate matters not. It seems that the Cross-Petitioner was only prompted to file her Petition by the current proceedings

17) I consider it mischievous and cynical that she has suggested that the status quo be allowed to stand, for the obvious reason that it suits her. The estate of the deceased would be dissipated to the detriment of beneficiaries including herself, if the court were to perpetuate a void in its administration. Submissions by the Cross-Petitioner that the matters raised in this application are premature are therefore not serious, except perhaps with regard to appointment of an administrator.

18) In light of the foregoing, I will grant prayer 3 of the Summons. In this regard, I direct that the each party furnishes to the court at least two names of their preferred estate agent and their profiles by 9th April, 2017 if they are unable to agree among themselves. Specific directions as to the signatories to the estate account intended in Prayer 3 can only be given upon the identification and appointment of the estate agent and will therefore be deferred.

19) With regard to prayer 4 and 5, I direct that the Cross-Petitioner does file in court within 30 days, a full schedule of the estate title documents and log books in her possession. Equally, she will render professional accounts in respect of all rents and profits received by her and or Franco-Philly Company Limited as her agent since 9th July, 2015, in respect of the estate of the deceased.

20) I also grant prayer 6 in terms that the bank accounts in the name of deceased namely, Equity Bank Naivasha Branch Account number [particulars withheld] be frozen until further orders of this court. While the Barclays Bank account said to be in the name of **Franco-Philly Company Limited**, namely, Barclays Bank Naivasha Account Number [particulars withheld] belongs to a separate entity, on the admissions of the Cross-Petitioner, it might be holding monies collected by **Franco-Philly Company Limited** in respect of the deceased's estate. I therefore order that no withdrawals be made therefrom until further orders of this court.

21) Finally, I have noted that, possibly due to the pendency of the instant Summons, no gazettelement of the cause has been done. I direct that notwithstanding the objections by the parties herein, the Deputy Registrar of this court does expedite the gazettelement of the two Petitions herein. The same are to be gazetted side by side. This will give notice and opportunity to other beneficially entitled persons who may desire to participate in the proceedings, and therefore facilitate the quick resolution of the matter.

22) Each party will bear its costs of the Summons herein, and also the requisite fees and costs of such gazettelement. This matter is stood over for further directions on outstanding matters on 9th April, 2017.

Delivered and signed at Naivasha this **24th** day of **March, 2017**.

In the presence of:-

N/A for Petitioner/Applicant

Mr. G.M. Njuguna holding brief for Wanjiru Theuri for
Cross-Petitioner/Respondent

Court Assistant – Quinter Ogutu

C. MEOLI

JUDGE