



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 177 OF 2000
IN THE MATTER OF THE ESTATE OF M’ IKIUGU M’ MWIRICHIA (DECEASED)

JOYCE NKATHA KIUGU.....PETITIONER

Versus

JUSTUS THIORA KIUGU.....1ST OBJECTOR

DAVID KUBANIA KIUGU.....2ND OBJECTOR

JULIUS KATHURIMA KIUGU.....3RD OBJECTOR

AYUB MWITI KIUGU.....4TH OBJECTOR

EDWARD MAITHETHIA KIUGU.....5TH OBJECTOR

STEVE MURETI KIUGU.....INTERESTED PARTY

RULING

Four different applications

[1] Before me are four different Applications filed on diverse dates by the parties herein. The first Application is dated 27th May 2016 and seeks *inter alia* for:

- (a) **An order be issued directing the National Land Commission to release a sum of Kshs 1,023,602 same being money due to the Applicant as the Administrator of the Estate of the deceased, pursuant to acquisition by the Government of part of L.R NOS NTIMA/IGOKI 3524 AND 2871.**

The said Application was however granted by this court on 28th July 2016.

[2] The 2nd Application is dated 23rd September 2016 and seeks the following orders:

- 1.spent
- 2spent

3. That an order be issued directed to Justus Thiora Kiugu to surrender the said sum of Ksh 1,010,000 to the applicant who is the administrator of the estate of the deceased.

4. That an order be issued for purposes of protecting the applicant who is the deceased's widow and the sole administrator of the deceased estate.

5. That costs be provided for.

The gist of this Application is that the Court of Appeal on 12th March 2015 ordered that all the deceased's estate should be registered in the Applicant's name. However, part of the rental income totaling to Kshs 1,010,000 has come into the hands of Justus Thiora Kiugu and he has deposited it into his Cooperative Bank Meru Branch A/C NO. [particulars withheld].

[3] The 3rd Application was filed by the 1st Objector and is dated 27th September 2016. In the application, the Objector prays for inter alia an order directing:-

(a) The Petitioner to file statements of accounts over the estate and specifically the compensation received in respect of Land Parcel NOS 2871 and 3524 from the National Land Commission; and

(b) That rents payable by tenants in plot No, Meru Municipality Block 11/210 be paid to the respective parties as the deceased had given them respective shops and not the Petitioner alone.

The gist of this Application is that the Objectors have been living at the mercy of the Petitioner and the Interested Party which is against the trust established.

Fourth application

[4] The fourth Application is by the Petitioner and is dated 15th December. It seeks for the following orders:

1.spent

2. That an order be issued compelling the 1st Objector /Respondent Justus Thiora Kiugu to surrender all the rental income that he received from ABC Bank and which cash had been frozen by the honourable court on 26/9/2016.

3. That an order be issued directing all the tenants in Meru Municipality Block II/210 to be paying rent directly to the Petitioner/Applicant.

4. That all the tenants in Meru Municipality Block II /210 be summoned to comply with order No. 3 above.

The core of this Application is *inter alia* that the Court of Appeal ordered all properties to be registered in the Petitioners name. Again, on 26th September 2016, the Honourable court froze the money released by ABC bank to the 1st Objector but the 1st Objector circumvented the aforesaid court order and pocketed the said estate money for his personal use.

Arguments

[5] The Petitioner and the Interested Party in opposition to the Objectors' Application dated 26th September 2016 contended *inter alia* that section 35 of the Law of Succession Act entitled a surviving spouse to have a life interest in the whole residue of the net intestate estate and as such sharing of compensation money cannot arise since that money was the entitlement of the spouse to the exclusion of

any other person and that since the Court of Appeal in Civil Appeal No. 30 of 2014, had ordered all the estate to be registered in the name of the Applicant, the Objectors had no legal standing to demand a share of the interest or the estate for the lifetime of the surviving spouse.

[6] On the other hand, the Objectors in opposition to the Application dated 15th December 2016, contended *inter alia* that it was clear from the judgment of the Court of Appeal that the Petitioner was to be registered as a trustee for herself and the deceased children in equal shares.

DETERMINATION

Issues

[7] When the matter came up for hearing on 23rd January 2017, Mr. Kiautha for the Petitioner intimated to court that issues in all the three applications can be summarized as follows:

- 1. Who should collect rent from the estate?**
- 2. Court of Appeal decision be implemented**
- 3. Rent from the estate with effect from 12th March 2015 to date be accounted for by the Objectors.**

These issues were adopted by all the parties. Accordingly, the court settled the above to be the issues in controversy which I shall determine.

[8] Julius Thiora Kiugu argued the applications for himself and on behalf of all the other objectors. He made extensive submissions and emphasized that the major point of contention relates to rent arising from Meru Municipality/ Block II/210. He urged that his father, during his lifetime gave each beneficiary a distinct shop which he marked in the approved plan of the building thereon. And that each receives rent from the respective premises. The only problem is that his brother Steve has shielded all the others from accessing their mother- the Petitioner. Instead, Steve has been misleading their mother that they have been collecting rent from her shop- something that has made her annoyed with them. He also said that the rent subject of these proceedings was released to him by the order of judge Njoroge.

[9] The Objectors also made another argument that according to the judgment of the Court of Appeal the Petitioner was to be registered as a trustee for herself and the deceased in equal shares. But, Steve has prevented enforcement of the trust according to the said judgment. In the instant case it is indeed not in dispute that the Court of Appeal ordered all the estate of the deceased to be registered in the name of the Petitioner.

[10] The Petitioner and the Interested Party posit that the Court of Appeal had ordered all the estate to be registered in the name of the Petitioner. And Section 35 of the Law of Succession Act entitled a surviving spouse to have a life interest in the whole residue of the net intestate estate. As such sharing of compensation money cannot arise, for the money was the entitlement of the spouse to the exclusion of all others. Thus, the Objectors had no legal standing to demand a share of the estate for the lifetime of the surviving spouse. Therefore, all issues being raised by the Objectors were but introduction of extraneous matters in the face of a clear order by the Court of Appeal.

DETERMINATION

[11] I have carefully considered these applications, the averments and the above rival contentions by the parties. Doubtless, the Court of Appeal sitting in Nyeri on 12th March 2015 ordered *inter alia* that:-

...all the assets of the deceased stated here below and others residue to be registered in favour of his widow Joyce Nkatha Kiugu to hold in trust for herself and the deceased children in

equal shares.

By that pronouncement, three matters are in plain eye-sight of any diligent reader. The first one is that the distribution of this estate was concluded by the Court of Appeal. Any attempt to re-litigate distribution of the estate in this court is ill-advised and misplaced. Therefore, all arguments that the deceased had settled beneficiaries in distinct shops are extraneous matters which this court cannot take into account. The second matter is that a trust was created consisting in all the properties of the deceased for the benefit of the Petitioner and the children of the deceased. The third matter is; the Petitioner is the administrator of the estate and trustee of the estate and trust property herein. Therefore, in law the entire estate property is vested in her as an administrator and trustee thereof. These matters portend one thing; that the only person who has power of administration of the estate and trust property is the Petitioner. Accordingly, all rents should be collected by and be paid to the estate account held by the Petitioner. Any acts by any other person without the authority of a grant or written law violates the said legal norm and amounts to intermeddling with the estate- and may be dealt with under section 45 of the Law of Succession Act as a criminal offence and the intermeddler will 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. See section 45 below:

Protection

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.

[12] Coming back to the facts of this case, from the submissions by Justus Thiora, he and other beneficiaries have been receiving rents from some of the estate property. In fact, he admitted having received rents but which were deposited in a joint account with counsel. The funds were however released to the 1st Objector through an order of ELC in case number 81 of 2015; as it is now the subject of an appeal in the court of Appeal, the less I say about it the better. I will not say anything more about that appeal for now. But what is of importance is the admission that parties other than the administrator are receiving rent from the estate property. This is contrary to the distribution ordered by the Court of Appeal and the Law of Successions Act. I will make my final order on this later.

[13] But I find the argument by the Petitioner and the Interested Party that, the spouse's life-interest in the whole residue of the net intestate estate means no sharing whatsoever of any compensation money or income from the estate to be quite intriguing. They urged that the money was the entitlement of the spouse to the exclusion of all others, thus, the Objectors had no legal standing to demand a share of the estate during the lifetime of the surviving spouse. I will examine the law on these propositions. Under section 35(2) of the Law of Succession Act, the surviving spouse has the power of appointment of all or any part of the capital of the net intestate by way of gift taking immediate effect among the surviving child or children of the deceased. Power of appointment or award means power to dispose of the capital of the intestate estate for the spouse's benefit or of the children of the deceased. Any child may also apply for appointment of his share of the capital of the net intestate estate where the child considers that the

power of appointment under section 35(2) of the Law of Succession Act has been unreasonably exercised or withheld. Therefore, it is not the law that under section 35 of the Law of Succession Act, compensation money or capital or income of the estate is the surviving spouse's exclusive entitlement.

[14] The evidence before the court is that the Interested Party received a sum of Kshs. 1,023,602 from National Land Commission which was transferred on 8.9.2016 to his account No [particulars withheld] in Bank of Africa, Meru Branch. The indication I have is that the interested party squandered these monies. Of significance is that these funds were as a result of compulsory acquisition of two of the immovable property of the deceased and which were subject of confirmed grant as per the order of the Court of Appeal. They appear in clause (f) and (g) of the order of the Court of Appeal. The said acquisition is in exercise of the power of dominant domain of the state; it was not a sale under section 37 of the Law of Succession Act for purposes of maintenance of the spouse. It was also not an appointment or award for the sole benefit of the spouse or any particular beneficiary under section 35 of the Law of Succession Act. Accordingly, the proceeds from the National Land Commission should be held and shared by the Administrator in accordance with the confirmed grant. With above analysis, I am ready to determine the three issues herein in seriatim.

THE UPSHOT

Who should collect rent from the estate?

[15] In light of the law, and the confirmed grant, only the administrator of the estate should collect the rent or income from the estate property. But, the rent should be applied for the benefit of the spouse and all the children of the deceased in equal shares. Accordingly, I direct that all rents from the estate properties shall be collected by the administrator into the estate account in her name for her benefit and that of the beneficiaries in equal shares. This leads me to the other issue.

Rent from the estate with effect from 12th March 2015 to date to be accounted for by the Objectors

[16] I find and hold that the Objectors have been receiving rent from the estate property in contravention of the law and the grant herein. They have no right whatsoever to administer the estate of the deceased; the administrator has sole power to do so except it must be in accordance with the grant. Accordingly, as intermeddlers, the Objectors are answerable to the rightful administrator, to the extent of the assets with which they have intermeddled after deducting any payments made in the due course of administration. I, therefore, order the Objectors, within 30 days to file a full and accurate account of all the rents received by each one of them from 12th March 2015 to the date of this order. They will also file a full and accurate inventory of all the estate property each has been receiving rent from within the next 30 days of today. And, after accounts have been filed, they will pay, within 30 days thereof the money due from them to the estate account standing in the name of the administrator. As a necessary order, I direct that all the tenants in Meru Municipality Block II/210 shall from now henceforth pay rent directly to the estate account in the name of the administrator.

Of compensation by NLC

[17] I find that the interested party received a sum of Kshs. 1,023,602 from National Land Commission which was transferred on 8.9.2016 to his account No [particulars withheld] in Bank of Africa, Meru Branch. This was contrary to the law and the grant herein. He shall also pay over the said amount to the account of the estate standing in the name of the administrator within 60 days from today. The said sum of money shall be distributed in accordance with the grant herein, i.e. equally amongst the petitioner and all the children of the deceased.

Court of Appeal decision be implemented

[18] Consequently, this estate shall be administered in accordance with the grant herein as was confirmed by the Court of Appeal. As a consequence, all the applications herein are deemed to be determined to the extent stated in the orders above. But specifically;

1. The Petitioners Applications dated 23rd September 2016 and 15th December 2016 is allowed;
and
2. The Objectors Application dated 27th September 2016 is dismissed in its entirety.
3. Each party to bear its own costs.

Dated, signed and delivered in open court at Meru this 21st day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Mwirigi advocate for interested party

Mr. Mutegi for petitioner

Objector - present

.....

F. GIKONYO

JUDGE