



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2123 OF 2007**

**IN THE MATTER OF THE ESTATE OF CWG**

**MNG..... APPLICANT**

**VERSUS**

**CWG .....RESPONDENT**

**RULING**

1. The matter before this court is the summons dated 24<sup>th</sup> May 2016 brought under section 83 (e) of the Law of Succession Act Cap 160 and Rule 59 of the Probate and Administration Rules. The applicant, Martin Ndegwa Gichigi seeks orders that;

**i. Pending the hearing and determination of this application, a freezing order be placed directly at Kenya Commercial Bank of Kenya, Moi Avenue Branch, Account Number [particulars withheld] in the name of Martin Ndegwa Gichigi and Caroline Wanjiku Gichigi to prevent any further withdrawals.**

**ii. Pending the hearing and determination of this application a freezing order be placed directed at Old Mutual MMF inflow Account number [particulars withheld] Custody service No. [.....] Entity No. [.....] of the rent received on behalf of the estate properties from the time of the deceased death to date.**

**iii. The respondent of the above named estate of CWG be compelled to give a full and accurate account of the rent received on behalf of the estate properties from the time of the deceased death to date.**

**iv. Kenya Commercial Bank be compelled to provide to the applicant or their duly appointed agent up to date certified statements for their Kenya Commercial Bank account, Moi Avenue Branch Account number [particulars withheld] in the name of Martin Ndegwa Gichigi and the respondent.**

**v. Old Mutual be compelled to provide the applicant or their duly appointed agent a full statement of account from the date of account opening to date for MMF inflow account number [particulars withheld] Custody Service Number [.....] Entity Number [.....].**

**vi. Cost of the application be provided for.**

2. The applicant filed a supporting affidavit on 24<sup>th</sup> May 2016 stating that the respondent and he are co-

administrators and that he left direct administration of the estate to the respondent as she was within the jurisdiction since he was a resident of the United States of America. He states that before the death of the deceased, she had instructed Chambrin Agencies to collect rent on her behalf. He goes on and states that he together with his co-administrator had agreed that all rent collected would be channeled towards the payment of school fees for the deceased son and grandson and that the surplus would be deposited in their joint account held at Kenya Commercial Bank account number [particulars withheld]. He further states that the respondent had falsified some information and had instructed Chambrin Agencies to deposit all the rent collected into an Old Mutual Account held in her name. That the amount received from May 2010 to February 2016 amounts to 13, 574,641 and from the records received from the collecting Agency, the respondent has been receiving 100,000 every month from December 2006 to April 2010, totaling to 4,100,000. He further states that he has been unable to get clear statements from Kenya Commercial Bank since he resides out of the country and that his co-administrator has refused to furnish him with the statements. He thus prays for freezing orders over the funds currently held in the old mutual Account and Kenya Commercial Bank account and that both entities provide a full and conclusive statement of accounts.

3. The respondent filed a replying affidavit on 10<sup>th</sup> April 2016. In her affidavit, she states that's that she together with the applicant are administrators to the estate of the deceased. She confirms that the deceased had indeed instructed Chambrin Agencies to collect rent on her behalf and that after her death, she together with the applicant agreed that all the rent collected would be channeled towards paying school fees for the deceased son and grandson. She states that she together with the applicant were not in the jurisdiction for some months after the death of the deceased, hence the applicant appointed his wife and his uncle to manage the estate in their absence. She goes on and states that on her return to the country she took over the administration of the estate and decided to open an Old Mutual account into which rental income would be deposited then transferred to the KCB account, a decision that she states her co-administrator knew of and consented to.

4. I have considered the applicant's application, his supporting affidavit, the respondents replying and all affidavits filed before this court and conclude that the following are the issues for determination;

**i. Whether the respondent should be compelled to give a full statement of the accounts of rent received.**

**ii. Whether the respondent, KCB and Old Mutual can be compelled to issue out full and accurate statements of the estates funds.**

**iii. Whether a freezing order can be placed directly to the KCB bank account and the Old Mutual Inflow account.**

5. In determining the first issue it's important to consider the duties imposed on an administrator by the Law of Succession Act. Section 83 of the Act provides that;

*(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*

*(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*

The applicant seeks to have the respondent furnish him with complete and accurate statements of account of all dealing with the estate properties and income. He states that he is unable to acquire financial statements from both financial institutions as he is not within the jurisdiction and that the old mutual account is in the name of the respondent only. W.M. Musyoka J in the estate of Thiong'o Nginyayu Muthiora (deceased) [2013] eKLR stated,"

*I will emphasis that personal representatives are for all practical purposes trustees. They hold property for the benefit of others. The property vested in them by virtue of Section 79 does not belong to them. It does not vest absolutely. They hold such property in trust for creditors, heirs, beneficiaries and dependents. They stand in a fiduciary position with respect to the estate to the creditors, heirs, beneficiaries and dependents. As such they are obligated to account to the court and to the creditors, heirs, beneficiaries and dependents for their handling of such estate property.”*

I concur with the findings of the learned Judge and hold that the respondent ought to furnish the applicant with all statements of accounts. I therefore grant prayers 4.

6. With regard to prayers 2, 3, 5 and 6 it is important to note that a freezing order is not an interim injunction and as such its conditions differ from those required under the **Giella .vs. Cassman Brown**. The threshold for granting a freezing order has been set out in Goode on Commercial Law, 4<sup>th</sup> Edition. The conditions are;

- a. That the claimant has a good arguable case based on a pre-existing cause of action.
- b. The claim is one which the court has jurisdiction.
- c. The defendant appears to have assets in the jurisdiction.
- d. There is a risk that the defendant will dissipate the assets.
- e. There is a balance of convenience in granting the order.

The courts have established that an arguable case is one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success. The applicant seeks a freezing order on accounts held at KCB and Old Mutual. The orders are pegged on the refusal of the respondent to furnish accounts and a fear of mismanagement of the deceased estate. The respondent has refused to furnish statements of account to her co-administrator and has not adduced evidence to rebut the presumptions that have been created on her misappropriation of funds. I therefore grant prayers **2, 3, 4, 5 and 6** as prayed. The matter will mention within 30 days from the date of this ruling for further directions on the orders freezing their accounts. The respondent Kenya Commercial Bank and Old Mutual shall provide statements as sought within **21 days** from the date they are served with the court order. Costs shall be in the cause. It is so ordered.

Dated, signed and delivered this **16<sup>th</sup>** day of **May 2017**

**R. E. OUGO**

**JUDGE**

In the presence of:-

**Miss Kiama For the Applicants**

**Miss Asekenye h/b for Mr. Olalo for the 1<sup>st</sup> Respondent**

**M/s Charity**

**Court Clerk**