



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 308 OF 2009

IN THE MATTER OF THE ESTATE OF DANIEL MBURU NGETHE (DECEASED)

RULING

1. The deceased Daniel Mburu Ngethe died on 15th March 2008 at Kenyatta National Hospital. He was survived by the following beneficiaries:

- a) Gladwell Gathoni Mburu (widow)
- b) Elizabeth Wanjiku Mburu (daughter)
- c) Pauline Wangui Mburu (daughter)
- d) Edwin Mburu (grandson)
- e) Daniel Mburu (grandson)
- f) Willingstone Muchigi Mburu (grandson)
- g) Rose Gathoni Mburu (granddaughter)

2. The grant of probate of written will to the estate of the deceased was issued to James Samuel Kinyanjui on 15th June 2009 and confirmed on 6th July 2010. The Executor has so far distributed the estate of the deceased among the beneficiaries as per the certificate of confirmation schedule, except for the shares held by the deceased in various companies and money held with Kenya Commercial Bank –Kikuyu Branch, Account No. [...].

3. As per the certificate of confirmation of the grant, all dividends or other benefits in respect to all shares vested absolutely to the deceased's widow and upon her death, all the shares were to be registered in the names of his two daughters in equal shares absolutely. The bank balance with Kenya Commercial Bank – Kikuyu Branch, Account No. [...] also vested absolutely to deceased's widow. The deceased's widow died on 29th April 2012 hence the present application to compel the Executor to execute the documents enabling the transfer of shares and monies in the deceased's account to the beneficiaries.

4. Pauline Wambui Mburu, filed Summons dated 5th February 2016 which she later amended on 6th December 2016, seeking the following orders:

- a) The Executor be compelled to execute the necessary transmission and transfer documents in respect of the shares in the name of the deceased and to vest the same in the names of Pauline Wangui Mburu and Elizabeth Wanjiku Mburu equally or otherwise in accordance with the

certificate of confirmation of grant within seven days of service of the order, and in default the Deputy Registrar of this Honourable Court do execute all the necessary documents to that effect.

b) An order do issue compelling the manager and/or responsible officer at Kenya Commercial Bank Ltd Kikuyu Branch to furnish/provide copies of the last statement of the personal bank account held by the deceased prior to his demise on 15th March 2008 being A/C No. [...] as well a statement and/or documents showing or detailing the transfer and/or change of account from the personal account held by the deceased to the account opened in the name of the Estate of the deceased i.e Estate of the late Daniel Mburu Ng'ethe Kikuyu Branch, A/C No. [...].

c) The Executor be compelled to render an account of all the sums of money held in bank account of the deceased herein Kenya Commercial Bank Ltd Kikuyu Branch A/c No. [...] as at 15th March 2008 to date.

d) The Executor be compelled to refund the estate of the deceased any and all monies together with interest accruing thereon that are found to be missing from the bank account of the deceased and/or due to the estate of the deceased, or any monies that are unaccounted for, or any monies or funds that have been unlawfully or improperly withdrawn and/or utilised from the monies belonging to or due to the estate of the deceased.

e) The Executor be compelled to pay out all the monies held in the bank account of the deceased herein held at Kenya Commercial Bank Ltd, Estate of the late Daniel Mburu Ngethe, Kikuyu Branch, A/c No. [...], as well as any funds/monies found to be lawfully due to the account and/or estate of the late Daniel Mburu Ngethe to Pauline Wangui Mburu and Elizabeth Wanjiku Mburu equally within seven days of service of the order, and in default the Deputy Registrar of this Honourable Court do execute all the necessary documents to effect the same.

f) The Executor be compelled to pay out all the monies and/or dividends accrued from all the shares of the deceased since 29 April 2012 and to render a full and proper account of the same.

g) That the Executor do file in court within 30 days of service of the order a full and proper account of the deceased's account and estate dealings during his tenure as an officer of the honourable court in this matter.

h) The Executor herein, James Samuel Kinyanjui be compelled to personally bear the costs of this application and in any event no costs arising here from should be charged or levied against the estate of the deceased.

5. In her affidavits in support of the summons dated 5th February 2016 and 6th December 2016, Pauline Wangui Mburu avers, in summary as follows; that the Executor has failed to effect transfer or transmission of the shares to the beneficiaries as he ought to do despite numerous requests and reminders. She stated that after reaching out to the Executor, she went ahead to initiate the process and in consultation with her sons and the estate lawyers, they identified a stock brokerage firm to commence and facilitate the necessary procedures require to transmit the shares to the beneficiaries. They signed the necessary documentation and sent them to the Executor for his signature but the Executor refused to sign them. She also stated that dividends from the shares have continuously been sent to the deceased's bank account and accused the Executor of unlawfully withdrawing money from the deceased's account for his personal use and benefit without accounting for the same. She therefore demanded for a full and proper account of the deceased's account. She attached copies letters written to various institutions holding the deceased's shares.

6. The application is opposed by the Executor, James Samuel Kinyanjui. He filed an affidavit dated 5th May 2016. His case is that he was appointed the Executor of the deceased's Will by a grant issued by this court and pursuant thereto he has transferred all the properties listed in the Will to the beneficiaries save for the shares held by the deceased which required to be utilised initially by applying the proceeds for upkeep of the widow, and on her demise, to be shared equally to the 2 children of the deceased. He stated

that he has and is willing to execute all relevant transfer of share documents in favour of the beneficiaries provided that the shares and a full inventory of the shares held is given to him for purposes of transfer. He indicated that he has not been availed the full inventory of the shares held by the deceased's grandson to enable him effect the necessary transmission as required by law, and that the failing to transfer the shares has arisen from the failure by the applicant's son to produce all the share certificates handed over to him, failure to give an account of the shares sold, and how such sale was done without his involvement, and that there has not been a satisfactory explanation as to the whereabouts of the missing shares. He filed the account as dealt with and arising out of the dividends deposited at the deceased's bank account held at KCB Kikuyu Branch A/c [...]. Elizabeth Wanjiku Mburu, the applicant's sister also swore an affidavit dated 7th April 2016 in opposition to the application in which she confirmed that the Executor has handled the matter of her father's estate exemplarily well and that her sister was merely being impatient.

7. In response to the affidavits sworn in opposition of the application by the Executor and Elizabeth Wanjiku Mburu, the applicant's son, Willingstone Muchigi Mburu reiterated in an affidavit dated 9th May 2016 what was deponed by his mother Pauline Wangui Mburu and added the following; that he does not have the original share certificates as he availed all the share certificates in his custody to Mugambi Mungania & Company Advocates who continue to have custody and possession of all the share certificates he previously held. That Mugambi Mungania & Company Advocates conducted an independent search to ascertain and verify the full inventory of shares belonging to the estate of the deceased and the search revealed that the deceased had far more shares than what was in the Executor's schedule. It is on the basis of the results of the independent search that they asked for the equal distribution of the shares, and not according to the Executor's schedule which does not accurately demonstrate the total number of shares held by the deceased. That he is aware that the Executor has yet again instructed the firm of Mugambi Mungania & Company Advocates to conduct yet another search to ascertain and verify the status of the shares that belong to the estate of the deceased. That the advocates did so and the Executor has a full and current inventory of the shares.

8. At the hearing of the applicant's counsel reiterated what is deponed in the applicant's affidavits. The applicant's counsel stressed that the applicant has come to court because the Executor has failed to transfer the shares and an attempt to reconcile the parties has failed hence the application. The respondent argued that the only item for determination are items 5, 6, 7 and 8 of the confirmed grant. That the applicant needs to file for a grant in the estate of Gladwell Mburu and cannot pursue in this matter. That the Executor has produced account in respect of the accounts. That the process of transmission of the share is on-going. That if the applicants are dissatisfied they should move to court for the removal of the Executor even though he has done what he should do. That the court can only make an order of refund to the estate of the widow. The respondent sought a dismissal for application. In response the advocate of Elizabeth Mburu a beneficiary submitted that what the applicant is seeking is an expedited process of the deceased's estate. That Elizabeth has confidence in the Executor who has distributed a larger part of the estate. That the delay of execution is understandable due to the death of the widow. That the application is premature as all documents were availed after they came to court and any order made will interfere with the process going on.

9. Having considered all the affidavits and submissions I find as follows; **Section 83 of the law of Succession** which deals with duties of personal representatives, grants beneficiaries the right to an account from the personal representative who is obligated to account to the beneficiaries in his administration of the estate. The section provides as follows:-

83(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.

10. From the above provisions, it is clear that administration of an estate should be completed within 6 months from the date of confirmation of grant unless a longer period is allowed by the court, and that the administrator should file in court a full and accurate account of the completed administration. The deceased herein died in 2008. The grant was issued on 15th June 2009 and confirmed on 6th July 2010. The Executor has distributed part of the estate as per the confirmed grant, but has not administered the estate with regards to all the shares, all dividends or other benefits in respect to all shares, and with regards to the monies in the deceased's account and the estate account. The confirmed grant is clear that all the shares initially vested absolutely to the deceased's widow but upon her death, they were to be registered in the names of the applicant and her sister in equal shares absolutely. Same to the bank balance with Kenya Commercial Bank –Kikuyu Branch, Account No. [...]. The deceased's widow died on 29th April 2012. Five years have since passed and the shares and the monies in the estate account are yet to be passed on to the beneficiaries. There has been delay. The Executor has blamed the delay on the applicant's son Willingstone Muchigi Mburu whom he accused of failing to avail the original share certificates to enable him transfer the shares to the beneficiaries. Willingstone has on the other hand maintained that he availed all the share certificates in his custody to Mugambi Mungania & Company Advocates, a fact that has not been disputed by the said advocates. It also emerged that the said Advocates in fact went ahead and conducted an independent search to ascertain and verify the full inventory of shares belonging to the estate of the deceased, which search revealed that the deceased had far more shares than what was in the Executor's schedule. In order to have the deceased estate fully administered I make the following orders;

i. The firm of Mugambi Mungania & Company Advocates to avail to the court all the original share certificates in their possession, the full inventory of the shares belonging to the estate of the deceased as established by their independent search, together with all the supporting documentation thereof. The same should be filed in court within 30 days from the date hereof. Once the actual number is established, the Executor shall immediately commence the process of dividing the shares equally between Pauline Wangui Mburu and Elizabeth Wanjiku Mburu and registering them in their favour.

ii. On the issue of the Executor's obligation to account for the estate of the deceased, I note the court's finding in **THE ESTATE OF WAINAINA WAITITU (DECEASED) [2015] EKLR** that **"Section 79 of the Law of Succession Act vests the property of the deceased in the administrators. That constitutes them legal owners of the property, yet they hold such property not for themselves, but as trustees for all those others interested in it, be they heirs or creditors. They therefore stand in a fiduciary position with regard to the property and in relation to the beneficiaries. As trustees they are accountable to the persons who are ultimately entitled to the assets upon distribution. The applicants, as heirs, are within their rights to call for an account from the administrators"**.

iii. Similarly, the applicant herein has a right to call upon the Executor to account for all the estate monies. It is not enough for the Executor to file the account documents. He ought to explain in details and to the satisfaction of the court and of the beneficiaries where the monies deposited in the estate account originated from, when they were withdrawn from the account and for what use they were applied to. This has not been done.

iv. I therefore order the Executor to file in court a detailed statement of the personal bank account held by the deceased prior to his demise on 15th March 2008 (A/C No. [...]), a statement or documents showing or detailing the transfer and change of account from the personal account held by the deceased to the account opened in the name of the Estate of the deceased (Estate of the late Daniel Mburu Ng'ethe Kikuyu Branch, A/C No. [...]), and, a detailed statement account of all the sums of money held in the name of the Estate of the deceased from the day it was opened to date. The same should be filed in court within 30 days from the date hereof. The court will make other orders as may be necessary once the above details are produced in court. Costs be in the cause it is so ordered.

Dated signed and delivered this **31st** Day of **August 2017**

R. E. OUGO

JUDGE

In the presence of:

Miss Soweto For the Applicant

Executor Absent

Beneficiary Absent

Ms. Charity Court Clerk