



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 3403 OF 2005**  
**IN THE MATTER OF THE ESTATE OF DAVID KYULI KAINDI (DECEASED)**

**RULING**

1. On 31<sup>st</sup> July 2015, the court made the following orders:

*(a) that the executor of the will of the deceased made on 17<sup>th</sup> March 1987, who is also the personal representative of the deceased herein, is hereby directed to complete execution of the will in relation to the bequests and legacies made therein to the late Nthale Kyuli within ninety (90) days of the date of this ruling;*

*(b) that the executor/personal representative shall in the next thirty (30) days of the date of this ruling render a full and accurate account of his administration of the estate of the date of the deceased from the deceased's death to date, and especially as it relates to the legacies and bequests made in favour of the late Nthale Kyuli;*

*(c) that the matter shall be mentioned after 30 days to confirm compliance with (b) above, and after ninety (90) days to confirm compliance with (a) above;*

*(d) that in default of compliance with the orders in (a) and (b) above, the grant made to the executor on 12<sup>th</sup> April 2006 shall stand revoked; and*

*(e) that the executor shall bear the costs of the application.*

2. The matter was fixed for mention on 8<sup>th</sup> February 2016, ostensibly in accord with order (c) of the orders made by the court on 31<sup>st</sup> July 2015, to confirm compliance with the orders (a) and (b) thereof. On the said date, Mr. Uvyu for the executor, stated that the executor was encountering difficulties in distributing the estate and prayed for an additional forty-five (45) days. Ms. King'oo protested that no valid reasons were being given for the application for more time. Nevertheless, the court granted the parties some time by standing the matter over to 14<sup>th</sup> March 2016.

3. On 14<sup>th</sup> March 2016, Mr. Uvyu stated that the executor was having challenges as there were squatters in some of the properties, who were preventing subdivision of the property. Ms. King'oo on the other hand, submitted that the executor had taken no steps to comply with the court orders of 31<sup>st</sup> July 2015, and was instead blaming the beneficiaries for his failure to distribute the estate. She asserted that there were no squatters in occupation of any of the assets of the estate.

4. I have perused through the record, and noted that the executor did file papers in an effort to comply with the orders made on 31<sup>st</sup> July 2016. He filed a statement of account dated 27<sup>th</sup> August 2015. By this filing the executor complied with order (b) of the orders of 31<sup>st</sup> July 2015. The applicant filed an affidavit on 3<sup>rd</sup> February 2016, sworn on 2<sup>nd</sup> February 2016, in response to the statement, while the executor swore an affidavit on 10<sup>th</sup> March 2016, in response to the matters raised by the applicant in her affidavit.

5. In the statement, the executor gives the status of several assets. Regarding LR No. 209/136/13, he mentions the rental income derived from the property and how the said income is shared out. He states that Machakos/Town Block 1/69 had been sold in 2008 by the applicant's late husband. Regarding what he calls Syokimau Farm Limited (it is not clear whether the deceased's interest in the company was the shares in the company or a property owned by the company) the executor narrates what each of the sons was entitled to from the property, adding that some of the sons had sold off portions thereof, although the remaining property still attracted rental income. Regarding the plot situate at Nunga Market, he states that it has no title. He states that the title documents relating to Plot No. 104 Matuu were lastly in possession of the applicant's late husband. On the livestock, he states that the applicant's husband received a number of livestock in 2008. On the money in the bank, he says that according to the will the same ought to be distributed after twenty-three years, which is yet to expire. On Nzii Farm, he states that the process of subdivision was in the process, but laments that squatters were making life difficult for him, and he was thinking of seeking the assistance of the police to remove them.

6. I have carefully considered the statement of account given by the executor. It would appear that the executor made the statement purposely to account to the applicant, rather than accounting generally on his administration of the estate. To my mind the executor is acting in a defensive manner, seeking to respond defensively to the questions raised specifically by the applicant instead of doing duty of accounting for his management of the estate of the deceased. I made it clear in the ruling of 31<sup>st</sup> July 2015 that rendering of accounts is a statutory duty that any personal representative owes to the beneficiaries and to the court. An account should be rendered even without any order from the court or demand by the beneficiaries.

7. The role of personal representatives is clearly set out in the law, in the Law of Succession Act, Cap 160, Laws of Kenya. That role can be reduced into three (3) broad sub-roles. One, there is the duty to collect, get in and preserve the estate. The first duty is followed by the duty to pay the debts and liabilities of the estate. The last one is distribution of the estate. The personal representative is obliged to gather the estate together before he can think of settling debts and liabilities. The estate that is distributed is what remains after debts have been paid and liabilities settled.

8. It is important to note that the collection of the estate entails several things. It involves ascertaining and identifying the assets that belong to the estate. This would include collecting debts and perfecting imperfect titles. Ideally, one cannot move to distribution of the estate before they have ascertained and collected the estate, for what should be distributed is what has been ascertained and collected. It may involve suing debtors and enforcing causes of action that accrue in favour of the estate, like taking out proceedings against debtors and tortfeasors, to recover debts and damages. The other two duties should follow only after that. This would mean that where the first duty is not discharged satisfactorily the personal representative would encounter difficulties discharging the other two duties. I would repeat that debts are paid out of what has been collected, and distribution is of what is available after payment of debts and settlement of liabilities.

9. The obligation to render accounts would require the personal representative to approach the matter with the three broad duties in mind. The nature of the account to be rendered should depend on when the account is sought to be rendered. Where it is sought before confirmation of grant, the account should cover collection and preservation of the estate and payment of debts and settlement of liabilities of the estate. The personal representative must give an account of the assets and liabilities that he has ascertained, and the assets that he has collected, gotten in, recovered or gathered and the titles that he has perfected, and the steps taken to preserve the estate. He should also state the debts and liabilities that he has paid or settled before moving the court for confirmation of the grant, and if he has not yet settled the debts, state how he proposes to have them settled. The account at this stage should also state the assets

that generate income, stating how much has been collected and how it has been utilized. Where the account is being rendered after confirmation of grant, and where no previous account had been given, the personal representative is obliged to cover what I have stated above, and in addition indicate whether he has distributed any of the assets set out in the will or in the certificate of confirmation of grant, in case of intestacy. If not, he must state what he has done, or is in the process of doing, in the effort to complete the distribution.

10. The statement given herein by the executor does not give an account as to whether the executor ever ascertained the assets and liabilities of the estate, or what he did to collect the estate, and what assets he collected or gathered or got in. The statement indicates that some assets do not even titles, which is demonstrative of the fact that the executor did not discharge his duty of collecting or gathering the estate. It was his duty to perfect such titles before applying for distribution of the estate. The perfection of the title should not be an exercise to be undertaken after confirmation of the grant.

11. On LR No. 209/136/13, the executor does not give an account of the steps that he has taken to have the property distributed as directed on 31<sup>st</sup> July 2015. Neither does he explain the difficulties that he could be facing in the process. Although he alleges that Machakos/Town Block 1/69 was sold in 2008 by the applicant's husband prior to his death, he has not provided proof of the alleged sale, and, more crucially, he has not indicated the steps that he took as executor and personal representative of the deceased to secure the interest of the estate with respect to recovering the value of the estate from the estate of the applicant's late husband. On the Syokimau farm, he does not state why the property has not been distributed, and he has not indicated the steps that he has taken as executor to secure the property. There is no explanation as to what he did to prevent the sale of portions of the property by some of the sons of the deceased, and what he did to recover the sale proceeds from them. He states that the plot at Nunga Market has no title, without indicating what he has done as executor to secure a title for the property. It was his responsibility as personal representative to perfect the title to that property before presenting the untitled property for distribution. The title documents relating Plot No. 104 Matuu are said to have lastly been in the possession of the applicant's late husband, but the personal representative does not state what he has done to have the said documents restored to him to facilitate distribution. He asserts that the applicant ought to know where the documents are, however, that is not helpful, for the duty to manage the estate falls on the executor and not the applicant. Regarding the money in the bank, the executor does not disclose the amount in the various accounts set out in the will of the deceased. The beneficiaries are entitled to that information. On Nzii Farm, he pleads frustration with the occupation of the land by squatters, without indicating what he has done to protect the property.

12. The property of a dead person vests in his personal representatives, by virtue of section 79 of the Law of Succession Act. For avoidance of doubt the said provision states as follows –

*‘The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.’*

13. The effect of section 79 is that the property of the estate is vested in the executor so that he exercises such power over the property as the deceased himself would have done. The executor, or administrator as the case may be, is, for all practical purposes, the legal owner, though temporarily and subject to certain restrictions, of the said property. He has the power to sell it, to mortgage or charge it, to lease or rent it out, to sue and be sued over it, in precisely the same manner that the owner would have done.

14. Section 79 must, of necessity, be read together with section 82(a) (b) (c) of the Act. The powers vested in personal representatives, by section 82, stem from the fact that the estate of the deceased is vested in the personal representatives. Section 82(a)(b)(c) states that -

*‘Personal Representatives shall, subject only to any limitation imposed by their grant, have the following powers-*

*(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the*

*deceased or arise out of his death for his estate;*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*

*Provided that –*

*(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and*

*(ii) no immovable property shall be sold before confirmation of the grant;*

*(c) To assent, at the any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof ...'*

15. Then there is section 45 of the Law of Succession Act, which prohibits intermeddling and creates an offence against it. The relevant portions of that provision state that –

*'(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 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 ... or to a term of imprisonment ... or to both such fine and imprisonment ...'*

16. I cite these provisions to address the helplessness displayed by the executor in his statement of account. He expresses frustration that some of the assets of the deceased do not have title documents, that some have been sold off by his brothers, and intruders have invaded some of the lands. The executor has been vested with the property of the deceased. That vesting alone gives him the same rights and powers over the property as the deceased had, as aforesaid. Additional powers are granted to the executor under section 82 of the Act.

17. For the properties without title documents, what the deceased would have done were he alive, would be to take steps to obtain title documents. That then is what the executor is expected to do. He is the only one expected to act in that behalf for it is in him, and in him alone, that the estate has been vested. Regarding the alleged sale of some of the assets by his brothers, there is section 82(2) (ii) of the Act. The assets alleged to have been sold were immovable, and no such sales should have taken place before confirmation of the grant. In any event, such sales could only be through the executor, for it is only in him that the property was vested, and it is only he who can therefore pass a valid title. Transfer of title in the immovable property that was allegedly sold cannot be effected otherwise than through the executor, which would then mean that the alleged sales do not in any way prevent the executor from completing administration of the estate since the said transactions amount to mere expressions of intent by the beneficiaries to dispose of the interest once the property is transferred to their names, for they cannot at this stage transfer the title in the assets to the purchasers.

18. Regarding invasion of property by intruders, the legal owner of the property would have taken steps to stop the invasion. He would have gone to the police to secure protection in cases where the invasion amounted to criminal trespass, or sued them in a civil court for trespass. The civil court would no order consider granting injunctive relief once it is established that the property vested in the executor and that the interlopers were trespassers. If the trespassers had taken possession, the owner would be expected to obtain court orders in a proper cause for their eviction. The same case would apply to the brothers of the executor who allegedly sold estate property. The estate did not vest in them. They could not legitimately dispose of it before the grant was confirmed and the property vested in them. That would then mean that the person to whom the estate vested could take steps to nip such sales in the bud, just as the owner of the

property would have done. The activities of the invaders or squatters and of the sons who sold estate property fall afoul of section 45 of the Law of Succession Act. The executor could have acted under that provision to protect and preserve the estate.

19. Clearly, the executor had all the powers and wherewithal to take adequate steps to secure the property of the estate against both outsiders and insiders. The law was on his side, but he chose to do nothing, and he now, instead, passes the blame to others. The duty to act, one way or the other, rested with him, not on those he now blames. It would appear to me that the executor did not quite appreciate the burdens of the office that the testator appointed him to.

20. I agree with the applicant that the statement by the executor does not amount to an account at all. The executor has not given an account of the steps he has taken, if any, towards the distribution of the estate. His grant was confirmed in 2011, yet five (5) years down the line he has not discharged his duty of completing administration of the estate by distributing it to the beneficiaries as per the will of the deceased. The law envisages, at section 83(g) of the Law of Succession Act, that a personal representative distributes the estate he is in charge of within six (6) months of the confirmation of the grant that they hold.

21. The order of 31<sup>st</sup> July 2015 had given the executor ninety (90) days to complete administration. The duration given expired in November 2015 and by that date the executor had not complied with the order. I had ordered that in default of compliance with the orders of 31<sup>st</sup> July 2015, the grant of probate would stand revoked. It is my finding that the executor is in default of the said orders. Consequently, I am moved to make the following orders:-

**(a) That I hereby declare that the grant of probate made to the executor on 12<sup>th</sup> April 2006 is revoked;**

**(b) That the survivors of the deceased shall agree on the persons to be appointed administrators of the estate of the deceased to complete administration thereof in accordance with the will of the deceased made on 17<sup>th</sup> March 1987, as per the certificate of confirmation of grant dated 14<sup>th</sup> February 2011; and**

**(c) That the matter shall be mentioned thirty (30) days hereafter for appointment of the administrators.**

**DATED, SIGNED and DELIVERED at NAIROBI this 9<sup>TH</sup> DAY OF DECEMBER, 2016.**

**W. MUSYOKA**

**JUDGE**