



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 932 OF 1989

**IN THE MATTER OF THE ESTATE OF KARIITHI KINUTHIA alias KARIITHI MWANGI
KINUTHIA (DECEASED)**

RULING

1. The deceased died testate on 31st October 1988 at Nairobi leaving a valid written will. In the said will the deceased had nominated Peter Mburu Gathinjaga and Stephen Mwangi Gichori as his executors of the said will. Subsequently the executors applied for grant of probate of written on 1st November 1989 and were later issued with certificate of confirmation of grant on 19th July 1991.
2. On 1st April 2012 Salim Gishohi Kariithi a son to the deceased made an application seeking court orders to compel the executors to complete administration of the deceased's estate and seek that they give full and accurate account of the deceased's estate. He stated that one of the executor Stephen Mwangi Gichori had since passed away and the surviving executor Peter Mburu Gathinjaga. He avers that **L.R. No. 209/2716** and **209/783/17** known as **Thuru Thuru/Waranga** House and **L.R. 209/697/33** known as Three New Eden Hotel have not been transferred to the beneficiaries. That the executor continues to receive rent from plot No. 209/2716 and **209/783/17** and has refused to give account of rent received and money paid to the beneficiaries. That he has acted together with Gichohi Kariithi and Anne Njeri in intent to defraud the estate by opening an account with Gichohi where rent is deposited yet it is not clear how the money is paid out. Further he entered consent in HCCC 819 of 2001 allowing rent to be paid in the said account and allowing them to withdraw money unconditionally. That since the confirmation of probate some of the beneficiaries have died Wachira Kariithi and Maina Kariithi while Wanjiku Kariithi is very old at 85 years. That it is in the best interest of the entire estate if the same is wound up and accounts of the entire estate be rendered.
3. The application was opposed and Peter Mburu Gathinjaga filed a replying affidavit dated 18th June 2014. He pointed out that the applicants only concern relates to 3 properties and not the entire estate adding that he is the only one discontent with execution of the deceased's will. He avers that the estate of the deceased has been distributed to the beneficiaries according to the will adding that the deceased had an undivided share in interest in property **L.R. No. 209/2716** and **209/783/17** known as **Waranga/Thuru Thuru House** registered in the names of Gerald Wachira Macharia and Kariithi Kinuthia with each owning half undivided share of the same. He added that the deceased held ½ share of the said property in trust for himself and 8 other partners as per the partnership deed dated 16th June 1976 and named the eight partners as Late Francis Gachago, Late Francis Nduguti Muteme, Late Abeid Salim, Mohammed Aradai, Nyaga Watuku/ Mohammed Mohaa, Charles Mwangi Maina, Kariithi Mwangi Kinuthia and Peter Mburu Gathinja that therefore the deceased's share of the same is only 1/8 which share he bequeathed his second widow and her sons Gichohi wa Mukami alias Gichohi Kariithi as per clause 3(vii) of the will. He also pointed out that the applicant was not a beneficiary of the said property adding that from 1976

the partners appointed Gimco limited as their own manger to collect and distribute rent amounts as evidenced by the Court order in HCC 619 of 2005. That Anne Njeri Knott and Gichohi Kariithi are representatives of other partners Jerald Wachira Macharia and Kariithi Mwangi respectively. Further that the property L.R. 209/697/33 also known as Three New Eden Hotel was is registered in the names of Karam Ahmed, Albeid Salim and the deceased and the same was held in trust for other 5 partners namely Francis Ndunguti, Mwangi Ndugire, Kariuki Gacharo, Nyaga Watuku, Samuel Mwangi Amos and Kariithi Kinuthia by virtue of partnership deed dated 8th September 1971. He denies receiving any rent from **Waranga/Thuruthuru House**. He added that the three properties are leaseholds which term has expired and that their application for extension of term is pending in Lands office and therefore no transfer can be effected. He avers that he has duly carried out his role as an executor of the deceased's will and urged the court to find no merit with the application and dismiss the same with costs.

4. Gichohi Kariithi, a son to the deceased in his affidavit dated 18th June 2014 reaffirmed the respondent averments in regards to L.R. No. 207/2716 and 209/783/17. He deponed that the father's $\frac{1}{2}$ share of the same was bequeathed to his mother, his brothers and himself while the family of the late Gerald Wachira Maina who is represented by Anne Njeri holds the other undivided $\frac{1}{2}$ adding that Salim Gichihi is not a beneficiary of the same. In regards to L.R. 209/697/33 also known as three Aden hotel is a partnership property with his father holding $\frac{1}{3}$ undivided share while the late Albeid Salim and Karama Ahmed hold the remaining $\frac{2}{3}$. He added that the father's share was bequeathed to his step mother and her sons as under clause 3(x) of the said will. He avers that the executor has distributed the deceased's estate as per the will adding that the executor cannot effect transfer of partner's interest in 209/2716, 209/783/17 and 209/697/33 as the leases have expired and the application for extension are pending before the Lands office.
5. Mohammed Moha in his affidavit dated 9th July 2014 deponed that he had given Salim Gishohi Kariithi his power of attorney to act on his behalf in regards to their father's estate. He added that as per clause 3(ix) of the deceased's will he had been bequeathed part of share in **Waranga/Thuruthuru** and it was his wish that the same be transferred to him and his name to appear in the title to reflect his interest. That it was negligent of the executor to claims that the leases have expired but he does not inform them on the steps to take and sought to adduced letters from as far back as 2004 where the executor was calling for meetings to discuss extension of leases to **Waranga/Thuruthuru** adding that he and others too were dissatisfied with how the estate was being administered.
6. Parties filed written submissions. The applicant in his submissions referred the court to section 83 of the Law of Succession Act. He gave a brief background of the deceased succession cause to the current application adding that since the grant was confirmed on 19th July 1991 it is almost over 23 years and the executor has failed to complete to complete administration as provided for under the law. He has failed to transfer the properties to the rightful beneficiaries and also has refused to produce in court a full accurate account of completed administration as required under the law. It was added that the executor has exhibited a casual, negligent, lax attitude and failure in administering the deceased's estate by his admission that the lease for the said property had expired. He added that he had obtained commitment from the respondent and other partners to give detailed account of the affairs of that building. He further referred the court to section 76 of the success act that provides for consequences of an administrator who fails to act diligently.
7. The respondent in his submissions he stated that under the deceased will the applicant has only been bequeathed 20% of the deceased's partnership properties where his name is alias Solomon Gichohi. He stated that the estate had been distributed as follows;
 - i. Title No. Loc. 14/Kagumoini/676 - Wanjiku Kariithi and Lincoln Munene (Clause 3(i) of the deceased's will.
 - ii. Title No. Ngong/Ngong/2001 to beneficiary, Gichohi Kariithi (Clause 3 (ii) of the will)
 - iii. Title No. Eighteen (18) Kagumoini Trading Center – Wanjiku Kariithi (clause 3 (iv) of the will)

- iv. Plot No. five (5) Kagumoini Trading Center – Julius Githuku Kariithi (clause 4(v) of the will)
- v. Plot No. 305/2 Ngong Township- Mohammed Mohaa (clause 3(vi))
- vi. Interest in L.R. Nos. 209/2719 and 209/783/17b (part 3(vi) of the will)
- vii. Further interest in L.R. 209/2716 and 209/783/17- Wachira wa Mukami, Julius Githuku wa Mukami, Dedan Gikonyo wa Mukami, John Irungu wa Mukami and Lincoln Munene wa Mukami in unequal shares.
- viii. Share in B.A.T. to Dedan Gikonyo Clause 3(viii)
- ix. Shares and interest in Muranga house (plot 138/41) Varma Road- John Irungu, Dedan Gikonyo and Mukami Kariithi (their mother) clause 3(ix) of the will)
- x. Interest in L.R. 209/697 Three New Aden to the partners in the partnership deed
- xi. Cash in current account – to the wives Wanjiku Kariithi in equal shares

(Clause 3(xi) of the will)

- xii. Cash in Savings Account at Barclays of Kenya Limited River Road Branch Nairobi –John Irungu and Lincoln Munene and their mother, Mukami Kariithi (clause 3(xii) of the will)
- xiii. Remainder to wives Wanjiku and Mukami in equal shares (Clause 3(xiii))
- xiv. Motor vehicle - Gichohi son of Mukami (Clause 3(xiii) of the will)

8. He added that L.R. 209/2716 and 209/783/17 were held in trust for himself and the other partners. He submitted that the deceased held 1/2 undivided share in trust for 8 partners as listed in his replying affidavit. That Nyaga Watuku sold his 1/2 undivided in L.R. 209/2716 and 209/783/16 to the deceased. It was his submissions that Gimco Limited have regularly released money to Mohamed Mohaa directly up to the month of November 2014 and bequeathed his second widow and her sons the remaining adding that the beneficiaries participated through approved partners only. He submitted that the applicant did not have any interest in the said property. That L.R. 209/697/33 Three Aden hotel deceased held 1/2 rental income received from the property is shared among the beneficiaries and partners. The 1/3 share was distributed to the applicant's brother Mohammed Moha and Deceased partners representatives that the High Court in Nairobi HCCC 619 of 2005 Gimco Limited were appointed by Partnership and the estate of the late Jerald Wachira Macharia adding that the ones who have been managing the properties should be called to give account on the same. That Gimco limited took over management of the properties from the beneficiaries, partners and Agents in 2007. It was further submitted that the applicant has failed to demonstrate that the respondent has refused to distribute any of the deceased's assets, how the other beneficiaries are prejudiced or any wrong doing on the executors part. He urged the court to dismiss the application with costs.

Determination

9. It is not in dispute that the issues raised in the applicant's application touch on two properties **L.R. No. 209/2716** and **209/783/17** known as **Thuru Thuru/Waranga House** and **L.R. 209/697/33** known as Three New Eden Hotel. It is also not in dispute that the deceased held 1/2 share in plots 209/2716 and 209/785/17 as clearly stated in clause 3 (vii). From the same it is clear that other people other than the beneficiaries in this case have interest in the said properties. The respondent in his defence claims to have distributed the other properties as provided for in the will apart from the aforementioned properties. The applicant on his part has not refuted the respondent's claims that the other properties belonging to the deceased had not been distributed. The issue seems to revolve around the two properties. The respondent in his defence also claims that the reason for not transferring the said interest to the beneficiaries is because the lease of the same have since expired and he is waiting on the extension of the same. The respondent has not adduced any evidence to show that the said leases for the properties are expired or even that he has made any steps to apply for the extension of the same. As the executor of the deceased's will he should have exercised due diligence in management of the deceased estate as provided for under Section 83 of the Law of Succession Act (Cap 160). Section 83(g) of Cap 160 provides that, "*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.”

10. The respondent has only confirmed distribution of the deceased via averments in his replying affidavit which were unsupported by any documentary evidence to confirm the same. The applicant has been nominated by a power of attorney by Mohamed Moha to act on his behalf and therefore he has a right to ensure that the estate is properly wound up and account on the same given to the beneficiaries. I find that no prejudice shall be caused to the respondents. I therefore find that it is in the interest of justice and make the following orders;

- i. The respondent should within 45 days of this ruling compile a comprehensive list of the properties distributed so far and an acknowledgment of the same by the concerned beneficiaries.
- ii. The respondent to liaise with Gimco Limited who is said to be managing the properties in issue, obtain the relevant statements and records and convene a meeting with the concerned beneficiaries and a representative from the said Gimco Company to scrutinize the same with a representative from the said company to clarify any issues that may arise the same should be done within 30 days of this ruling.
- iii. The executor will also tender documentary evidence of the expired leases and said application that has been lodged for extension of the said leases.
- iv. The executor is further ordered to upon clarification of the above to render a true account of the estate of the deceased to facilitate the conclusion of this matter.
- v. Parties shall take a mention date at the close of the 45 days to confirm compliance and obtain further directions from the court.

It is so ordered.

Dated, signed and delivered this **24th** day of **April** 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Applicant**

.....**For the Respondent**

.....**Court Clerk**