



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1783 OF 2013**

**IN THE MATTER OF THE ESTATE OF THE LATE NELSON NDARA KOIBITA**

**NANCY WAIRIMU NDARA .....PETITIONER**

**-VERSU-**

**EDITH WANJIRU MAGONDU.....1<sup>ST</sup> OBJECTOR**

**CYNTHIA KOIBITA.....2<sup>ND</sup> OBJECTOR**

**RULING**

1. The application up for determination is a summons dated 25<sup>th</sup> June 2014, taken out under Section 45 of the Law of Succession Act, Cap 160, and Rule 49 of the Probate and Administration Rules.
2. The orders sought in the application are that the court do enforce its orders made on 3<sup>rd</sup> February 2014, that an account be jointly opened by the objectors, Edith Wanjiru Magondu and Cynthia Koibita, and the Deputy Registrar of the High Court of Kenya, Family Division, in a reputable banking institution for the collection of rental monies of the estate, that Kiambaa/Karura/T199, Nairobi/Block 82/1251, 82/1569 (Tena Estate) and Nairobi/Block 82/2395 be deemed to be estate properties and that all rental income collected from these assets be deposited in the joint account pending the administration and distribution of the estate, and such other order or orders that this court will consider appropriate.
3. The facts upon which the application is predicated are set out in the affidavit of Mary Njeri Kamwenwa, the first objector/applicant, sworn on 25<sup>th</sup> June 2014. The objector states that on 3<sup>rd</sup> February 2014, this court ordered that a special account to receive the rental income accruing to the estate be opened in the names of the advocates on record in the matter so that rent can be deposited therein pending further orders of the court. The applicants' case is that the said order has not been complied with due to the non-cooperation of the petitioner's advocate, Messrs. Onchuru Oyieko & Company, Advocates.
4. In opposition to the application, Nancy Wairimu Ndara, filed in a replying affidavit, sworn on 14<sup>th</sup> July 2014. She avers that the deceased had only one legally married spouse, being herself, their union was solemnized on 2<sup>nd</sup> February 2005 at the Registrar of Marriages pursuant to the Marriage Act (Cap 150) and therefore there exists no other widow as alleged by Mary Njeri

Kamwenwa and Cynthia Koibita. She avers that their union was blessed with two issues who have at all times been adequately provided for and are also heirs to the deceased's estate.

5. Further, it is her averment that the deceased was in no way polygamous and was in fact a bachelor at the time of the solemnization of their union as indicated on the marriage certificate. She asserts that she need not render or produce any account for any income on any of the estate properties to any party whosoever. It is her averment that her advocates being Messrs. Onchuru Oyieko & Co Advocates did in fact convene a meeting at their Chambers on 7<sup>th</sup> March, 2014 at 3.00 a.m. which was attended by representatives from the firm of Achillah T.O. & Co. Advocates on record for the 1<sup>st</sup> Objector but there was no attendance from the firm of Gatundu & Co. Advocates who were at the time on record for the 2<sup>nd</sup> Objector to discuss on the modalities of opening a special account, in adherence to the court's orders.
6. She states that a joint account should not be opened by the objectors Edith Wanjiru Magundu, Cynthia Koibita and the Deputy Registrar of the High Court, Family Division, for holding rental monies of the estate in any banking Institution whatsoever as this would amount to a travesty of justice on her part.
7. The application was disposed of by way of written submissions.
8. I have carefully considered the application, the affidavits on records and the written submissions. The main issue for determination is whether the Applicant has made a case for the orders sought.
9. The application is taken out under Section 45 of the Law of Succession Act, Cap 160. The said section offers protection to the property that makes up the estate of a dead person, and provides 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 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.*
10. The record reflects that on 18<sup>th</sup> December 2013, the 1<sup>st</sup> objector herein filed a summons dated 18<sup>th</sup> December 2013 where she sought among other orders, for an order that the court do direct that all the rental income from the estate of the deceased, more specifically from No. Kiambaa/Karura/T199, L.R. No. Nairobi/Block 82/1251, L.R. No. 82/1569 and L.R. No. Nairobi/Block 82/2395 be paid into an estate account to be opened and operated by the parties pending the administration and distribution of the estate.
11. On the basis of the said application the court made an order on 3<sup>rd</sup> February 2014 directing that “a special account to receive the rents shall be opened by the three (3) advocates so that the rents may be deposited therein pending further orders of this court.”
12. The applicant contends that that order has not been complied with for the respondent and her counsel have not facilitated the opening of the subject account despite the said court order.
13. I note from the papers filed in the matter by the respondent that she is aware of the said order and appears to evince an intention not to comply with the same for she asserts to be the only widow of the deceased and therefore the only beneficiary of the estate. She asserts further that she is not bound to account to any one, and that there is no justification for the opening of a special account.

14. The affidavit by the respondent was sworn on 14<sup>th</sup> July 2014 and it is expressed to be drawn by her lawyers, Messrs. Onchuru Oyieko & Associates, Advocates. When Kimaru J made the order of 3<sup>rd</sup> February 2014, Mr. Oyieko for the respondent was present in court. I am surprised that the firm of Messrs. Onchuru Oyieko & Associates, Advocates can cause to be drawn, sworn and filed in court an affidavit which plainly contradicts the very clear order of Kimaru J of 3<sup>rd</sup> February 2014. The said order has not been vacated nor varied. It is still in force and waiting for compliance.
15. Parties cannot choose which orders to obey and which ones to disregard. If they are unhappy with some order the only option open to them is to appeal against it or seek its review. Disobedience or disregard of the order is not an option.
16. The language of the affidavit of 3<sup>rd</sup> February 2014 is defiant. The respondent is clearly saying that although she is aware of the order she is not prepared to comply with it for the reasons that she has advanced in the affidavit.
17. To my mind, the order made on 3<sup>rd</sup> February 2014 must be complied with fully. I am not prepared to make any other order that would override that of 3<sup>rd</sup> February 2014. I will not proceed as if Kimaru J did not make the order of 3<sup>rd</sup> February 2014. Court orders are not made in vain. Kimaru J was not trifling when he made the said order. It was not an order in vain. It was not an order that was made with an intention that it be disregarded. Failure to comply with a court order attracts consequences. If the respondent and her counsel are not prepared to comply with the said order, then they ought to be ready to face the consequences of their choice to disregard the said order.
18. Failure to comply with court orders undermines the court process and exposes it to contempt and disrepute. It chips away at the whole concept of the rule of law and administration of justice. This is something that a court of competent jurisdiction ought not countenance.
19. To facilitate compliance with the order of 3<sup>rd</sup> February 2014, I do hereby give the advocates for the three parties fourteen (14) from the date of this ruling to open the bank account envisaged in the order of 3<sup>rd</sup> February 2014. Default by any of the parties shall attract penal consequences. The matter shall be mentioned after fourteen (14) days for compliance.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> DAY OF April 2015.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mrs. Ng'ang'a advocate for the applicant.**

**In the presence of Mr. Achilla advocate for the 1<sup>st</sup> objector.**