



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 765 OF 1994

IN THE MATTER OF THE ESTATE OF CAREY KIHAGI MURIUKI (DECEASED)

KIHAGI MATHENGE MURIUKIAPPLICANT

VERSUS

PATRICIA MARGARET MURIUKI

THOMAS KIHAGI MURIUKI

PAUL MWANGI KARIUKIRESPONDENTS

RULING

INTRODUCTION

The deceased, Carey Kihagi Muriuki, died on 29th November 1993. The Respondents, Ms Patricia Margaret Muriuki, Thomas Kihagi Muriuki and Paul Mwangi Kariuki, are the family of the deceased. Ms Patricia Margaret Muriuki and Thomas Kihagi Muriuki filed for letters of administration of the deceased's estate in **HCC P&A in 765 of 1994**.

Ms Immaculate Ngukuwanyaga and Kihagi Mathenge Kariuki and Lucina Mithayo Wangare are also members of the family of the deceased. They filed for letters of administration in **HCC P&A 976 of 1994**.

The Court consolidated both matters to the present case file. On 3rd March 2000, Githinji J (as he then was) found that Kihagi Mathenge Muriuki was a dependent of the deceased. Koome J (as she then was) dealt with assessment of the property of the deceased's estate and, by the Ruling of 24th July 2005, apportioned the same between the members of the deceased's family by Ms Patricia Margaret Muriuki, and also included Kihagi Mathenge Muriuki. On 16th July 2010, Kimaru J also gave a Ruling on the apportionment of the house(s) on Langata property, land parcel L.R. No. 7834, and the amendment of the acreage of the land.

PLEADINGS

The Applicant, Kihagi Mathenge Muriuki, filed the application of 15th May 2014 on 22nd May 2014 seeking the following orders:

- a. The administrators of the estate of the deceased give and render accounts in respect of all income

received in respect of:

- i. L.R. No. 7834 I.R. No. 8601 from 5th August 2005 to date (5 acres); and
- ii. Mwiyo/Labura/Blocks 11/48, 11/51, 11/52, 11/53

(30 acres).

The Applicant deposed that the distribution of the deceased's estate was in line with the Ruling of Koome J of 5th August 2005. Since then, the administrators had full control of the properties. The Applicant sold his interest in part of the house erected on L.R. No. 7834 I.R. No. 8601 to the administrators in 2013. However, he has not been granted access to the five (5) acres that he is entitled to. He demands the proceeds of rent payments of the two (2) properties.

The Respondent through Counsel Ms. Phyllis Ngaruiya filed a Replying affidavit on 23rd July 2014. The deponent confirmed that the distribution of the deceased's estate has been as per Justice Koome's Ruling.

The Applicant applied for review of the Ruling of Koome J before Kimaru J, and on 27th July 2010 a Ruling was delivered to the effect that the Applicant elects to have the wooden structure and reduced parcel of land or to forfeit and be bought out of the structure and he obtains the rightful share. The deponent further said that after the Ruling of Kimaru J, the Applicant intimated to the Respondents the intention to appeal as exhibited by the correspondence **PNN1** attached to the affidavit. The matter abated and caused delay.

Subsequently, the Applicant's interest in the wooden structure was bought by the administrators in 2013 upon its valuation of Ksh. 1.5 million as evidenced by attached correspondence **PNN 2 & 3** between the lawyers of the parties. The process also took quite some time until finally the issue of the house(s) was resolved between the parties.

With regard to the accrued rent payments of the house that belonged to the Applicant, the house remained vacant from the date of the Ruling of Koome J as the administrators did not know what the applicant wanted with it. Therefore, it was not leased out and has not been leased out even after it was bought from the Applicant in 2013. The deponent also attached the previous tenant's lease that expired on 30th November 2005 to demonstrate the house was left vacant as at that date.

With regard to Mweiga property, Mwiyo/Labura/Blocks 11/48, 11/51, 11/52, 11/53, the property was the subject of litigation in **HCC 79 of 2009** and the Attorney General put a restriction on the suit property. It was in 2014 that the restriction was lifted as shown by correspondence **PNN 5** attached to this affidavit by the petitioner.

The deponent stated that the 1st administrator/respondent has been ill. The 2nd administrator lived in UK and relocated back recently, and he is not conversant with the goings on in the administration of the deceased's estate. He left his mother the power of attorney. All these factors have cumulatively delayed the subdivision of the two (2) properties.

ORAL SUBMISSIONS

Ms Githae for the Applicant informed the Court that there has not been any accountability of accounts regarding the suit properties mentioned above. The applicant stated that the administrators were duty bound to ensure the deceased's estate was not wasted and ought to have let the house(s) for rent. As per the typed proceedings, the 1st Petitioner informed the Court that one of the Karen houses was rented at Ksh. 35,000/- and the other at Ksh. 40,000/- per month. The Ragos Valuers & Estate agents Limited Report of 12th February 2013 showed the house **Wing A** let out at undisclosed rent and **Wing B** is vacant.

From Kimaru J's Ruling, the issue of the two (2) houses in Karen/Langata and the acreage of the land were determined. The Karen/Langata property acreage was corrected from 10.8 to 10.08 acres. The

Applicant was given the first option to buy the house. The house has been bought by the administrators. What is remaining is an account for rent.

The 2nd issue is with regard to subdivision of the land parcel of Karen/Langata L.R. No. 7834 I.R. No. 8601. The Applicant stated that he is entitled to half the land, and the pleadings and indicate that this refers to five (5) acres of the land.

As the subdivision process is underway, the Respondent claims that under City Council Bylaws, some land is to be excised to make allowance for a road. The Applicant is reluctant to this proposal and demands the whole of the five (5) acres awarded by Koome J in the Ruling of 24th July, 2005. The subdivision is overtaken by the current developments in the Law.

Ms Ngaruiya informed the Court that it is true the objector/Applicant was to obtain rent from the premises for his education and upkeep. The house had two (2) quarters and the petitioners lived there at the time. After the Ruling of Koome J, the portion for the Applicant was left vacant. It was not clear whether he would live here or rent the premises.

The subdivision of the land properties in question has been addressed. For the Karen/Langata property, both the Applicant and Respondent have filed proposed subdivision plans in 2014. The subdivision is pending the consent and approval of all beneficiaries. The other property in Mweiga has been the subject of litigation and was released to the administrator in 2014. The deponent relied on the content of the Replying affidavit of 23rd July, 2014.

ISSUES

The pleadings and oral submissions in this case disclose the following issues for determination:

1. Accounts in respect of all income/rent received in respect of:
 - i. L.R. No. 7834 I.R. No. 8601 from 5th August 2005 to date (5Acres);
 - ii. Mwiwogo/Labura/Blocks 11/48, 11/51, 11/52, 11/53 (30 acres)
2. Access by Applicant to protect his interest in the suit properties.
3. Subdivision of the suit properties among the beneficiaries of the deceased's estate.

APPLICABLE LAW

The **Law of Succession Act Cap 160** regulates the administration of the deceased's estate. The Applicant was declared a dependent of the deceased and obtained a share of the deceased's estate as provided for by **Section 28 & 29** of the Act. **Section 28** of the **Law of Succession Act Cap 160** sets out what the Court should take into account in distributing the estate of the deceased to dependents:

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to?

- a. ***the nature and amount of the deceased's property;***
- b. ***any past, present or future capital or income from any source of the dependant;***
- c. ***the existing and future means and needs of the dependant;***
- d. ***whether the deceased had made any advancement or other gift to the dependant during his lifetime;***
- e. ***the conduct of the dependant in relation to the deceased;***
- f. ***the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;***
- g. ***the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.***

Section 29 of the **Law of Succession Act Cap 160** defines the dependents to the deceased's estate to include the nuclear and extended family of the deceased:

For the purposes of this Part, "dependant" means?

- a. *the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
- b. *such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*
- c. *where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

EVALUATION

The issue is one of the rent payments made towards the house(s) on property L.R. No. 7834 I.R. No. 8601. The order by Koome J was to the effect that the Applicant has a share of the home and the rent would cater for his education and expenses. The record makes clear that this did not happen. The Respondent stated that after the Court Ruling of 2005, **Wing B** of the home remained vacant so that the Applicant would decide what to do with it; live there, rent it out or sell it. The Respondent attached a letter to terminate lease and have the house vacant. The same has not been challenged by the Applicant nor has any evidence been adduced that the lease was not terminated.

The other aspect is that during the Court proceedings the Petitioner informed the Court then that the two (2) houses were rented at 35,000/- and 40,000/- a month. Accordingly, the same should be accounted for.

On perusal of the Court record, the Petitioner testified before the Court on 6th July 2005 and stated as follows:

"It is not possible for me to visit the farm in my present condition. I am confined to a wheelchair. There is a wooden house in Karen it is rented; it is a 1 shaped house; one gets Ksh. 35,000/- and the other Ksh.40,000/-. The deceased had another house in Gigiri which brings an income of Ksh.100,000/-. Both places have to be maintained."

At the time the houses were rented the Court had not delivered the Ruling that gave the Applicant Kihagi Mathenge Muriuki a share of the home to collect rent for his education and expenses. Later on, after the Ruling, the lease terminated in November 2005 as per the annexure to the Replying affidavit. This indicates that at the time of testifying rent was payable. After the Ruling, rent was payable up to November 2005 when the house was vacated.

The Applicant challenged this assertion by referring to Ragos Valuers Valuation Report which showed that **Wing A** was rented but **Wing B** was left vacant. On this basis, the Applicant claims rent proceeds. There is no evidence to confirm the tenancy, who the tenant is and the payment thereof.

This Court finds that there is a valid Court order which was neither set aside nor amended vide the Ruling of Koome J. This Court also finds that the order that the Applicant rents and uses the proceeds for his needs was not complied with. The house was left vacant but there is no evidence that the Applicant was informed of the same and granted access to the premises.

The Applicant is entitled to rent for one (1) house for four (4) months from the month of the Court's Ruling as to the Applicant's entitlement to the month the lease lapsed.

The rest of the period will be determined based on proof that the Applicant's part of the house was rented. At the moment, and in light of the evidence before this Court, it is not possible to confirm whether the other house was rented or not, and if so for how much.

Although the Applicant claimed the Valuers found that **Wing A** was rented, no details were provided of the tenancy or the tenant disclosed. There is unresolved dispute as to which Wing of the Karen house belonged to whom, and whether the administrators were obliged to rent out the Applicant's Wing and remit rent or he was to do so himself. There is scant evidence at this stage to enable the Court to conclusively determine the matter once and for all.

The second issue concerns access by the Applicant to the suit property so as to determine his interest in the relevant land parcels. The Ruling of Koome J on the distribution of the deceased's estate was clear on each party's interest. It is ten (10) years since that order was issued but the parties have not completed the subdivision due to various reasons explained hereinabove. The letters annexed to the Applicant's application confirm there has been lack of access to the property by the Applicant impeded by the administrators. This Court allows, going forward, Counsel for the administrators and the Applicant to jointly discuss/advise their respective clients to amicably allow the Applicant access with reasonable notice to the administrators or the suit properties.

The last issue concerns subdivision of the suit properties. The administrators have explained in the Replying Affidavit that the wife of the deceased is ill and the son recently relocated to Kenya from the United Kingdom. For now the 1st administrator is excused due to her illness. This Court mandates Thomas Kihagi Muriuki (administrator) and Kihagi Mathenge Muriuki (Applicant) to agree on implementation of the Ruling of Koome J of 24th July 2005 on the subdivision of the suit properties. The Administrator will engage a qualified surveyor to place proposed subdivision plans of the suit properties. The Applicant is at liberty to also file the proposed subdivision plan of the suit properties. Each party may raise any objections or ensuing challenges to the distribution of the deceased's estate. The same will be addressed by submissions to the Court by respective Counsel.

FINAL ORDERS

Therefore, this Court finds as follows:

- a. The issue of accrued rents of the properties is not determinable from the evidence on record at this stage. The Applicant claims the house in Karen/Langata was rented. The Court record confirms was the position before the Court Ruling in July 2005 declaring his interest. The rent was paid up to November, 2005 when the lease was terminated. So the administrators will account for rent paid to the Applicant's share of the house for the 4 months before the lease lapsed and be paid.
- b. The rent accrued from 2005 to 2013 when the Applicant sold his share to the administrators is debatable. The Applicant claimed the house was rented; no details were provided to enable the Court to make an informed decision. The Respondent stated the Wing that consists of the Applicant's interest remained vacant. It is one's word against the other and he who alleges must prove. Hence, the Court cannot make any orders unless further evidence is adduced by parties.
- c. The Property in Mweiga was subject of litigation and had restriction which was vacated in 2014. There is no evidence adduced to confirm the contrary; that it was rented out and proceeds were made to the administrators. In the absence of cogent evidence, the Court is unable to make the relevant orders. Secondly the Court Ruling of Koome J was to the effect the Applicant obtains 30 acres of the said property and there was no mention or reference to rent payable.
- d. The Administrators will allow the applicant access to the suit properties to determine his interest but with reasonable notice to the administrators of the estate.
- e. The subdivision of the suit properties be undertaken by the administrators appointing a qualified surveyor and in the presence of all beneficiaries to prepare the proposed subdivision of the suit properties.
- f. The Applicant is also entitled to file a proposed subdivision plan on the suit properties.
- g. The Issue of Road Reserve be resolved upon production of legal documents from now Nairobi County on the requirements and presentation to all parties and the Court.
- h. Then the surveyor shall factor in the required portions from the suit property in Karen/Langata to be hived off equally from both portions of the suit properties belonging to the administrators and the applicant.
- i. The respective Counsel to facilitate compliance of these orders and ma address the Court on any

challenges in effecting the subdivision within 90 days from today after filing of rival subdivision proposals.

- j. Each party is at liberty to apply
- k. Each party to bear its own costs

DATED AT NAIROBI THIS 10TH DAY OF APRIL 2015

M. MUIGAI

JUDGE

Read in the absence of the Parties/Counsel