



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 784 OF 1990**

**IN THE MATTER OF THE ESTATE OF MWAURA GITACHU (DECEASED)**

**HEZEKIAH NJUGUNA MWAURA.....APPLICANT**

**VERSUS**

**DR. JOSHUA GITACHU MWAURA.....1<sup>ST</sup> RESPONDENT**

**HENRY GITACHU MWAURA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The deceased MWAURA GITACHU died testate on 17th October 1989. In his will he appointed his three sons (the respondents and the applicant) as joint executors. The grant of probate was issued to the executors on 2nd December 1990 and later confirmed on 17th October 1997.

2. The applicant filed this application dated 22nd April 2013 on his own behalf and on behalf of the members of the house of their mother ESTHER THITHI MWAURA. He sought that the court orders the respondents to produce a full and accurate inventory of the assets and liabilities of the deceased, as well as a full and accurate account of all dealings therewith; that the respondents be ordered to complete the administration of the estate without any further delay and to produce to court full and accurate account of all completed administration; that the respondents be found to have committed an offence under **Cap 160** and be made liable; and, in the alternative, the court be pleased to revoke the grant of probate made to the respondents and to appoint other suitable persons in their place to proceed with the administration of the estate.

3. It was the applicant's case that subsequent to the confirmation of the grant the respondents failed to complete the administration within the requisite period. Further, that they failed to proceed diligently with the administration of the deceased's estate as well as wilfully/negligently subjecting assets forming part of the estate of the deceased to loss and damage. The application was supported

by his affidavit in which he averred that the respondents ought to have finalised the administration of the estate within 6 months, but have failed to do so and neither had they applied for extension of period within which to complete administration. Further, that the respondents had failed to diligently distribute the deceased's estate as per his will and were distributing the estate selectively in a manner calculated to cause loss and damage as well as completely disinheriting the members of his mother's house.

4. The respondents both swore affidavits in reply in which they denied allegations put forth by the applicant as concerns failure to complete administration of the estate as well as failing to administer the estate diligently. It was their case that the delay in completion of the administration of the estate had been caused by numerous applications filed in the matter by the applicant and his siblings. Further that, as executors, they had done everything within their power to distribute the estate but their efforts had have been frustrated by the applicant and his siblings for their own selfish reasons. They stated that they had distributed the estate as per the deceased's will except for land parcel as L.R No.Loc1/Mugumo-ini/338 which had a caution placed on it by the applicant thus making it impossible to transfer the same or to share it amongst the beneficiaries. They prayed that the application be dismissed with costs as it lacked merit.

5. The application was canvassed by way of written submissions which I have duly considered. **Section 83** of the **Law of Succession Act (Cap 160)** lists duties of personal representatives. They include the requirement that the personal representatives do account to court and to the beneficiaries of their conduct of the affairs of the estate. The other duties are as follows:-

“(a).....

(b) .....

(c).....

(d) .....

e) **within six months from the date of the grant, to produce to the court 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;**

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.”**

6. In the case of **In the matter of the Estate of John Ngugi Kimani (Deceased) Nairobi High Court Succession Cause No. 1830 of 1999**, the court stated that the administrators are under a duty to account to beneficiaries with regard to their administration of the estate of the deceased. The grant herein was confirmed on 17th October 1997 and to date, no accounts relating to the estate have been filed in this court. It is for this reason that I allow prayer one and order the respondents to produce full and accurate inventory of the assets and liabilities of the deceased, as well as a full and accurate account of all dealings with the estate of the deceased. The same should be filed in court within 30 days from the date hereof.

7. As concerns the prayer for completion of the administration, it is only when the full account that

has been ordered has been made that a better picture will emerge as regards the extent to which the administration has been done.

8. As concerns alleged offences committed by the respondents under **section 95(a) & (b)** of the **Act**, it trite that the section imposes a burden on the party alleging the commission of those offences to prove *mens rea*, hence the use of the prefixes "wilfully" and "knowingly". Before the provisions under **section 95(b)** can be invoked, it must be shown that the court had made an order on its own motion or on application of any person interested in the estate for the filing of the accounts and that the order has been disobeyed. As such, invoking **section 95** without compliance with **section 83** would be premature (**In The Matter of the Estate of Husseinbhai Karimbhai Anjarwalla, Mombasa High Court P&A No. 118 of 1989**). It is for this reason that the prayer to find that the respondents have committed an offence as administrators fails. The court also finds that no reason has been given to revoke the grant issued to the respondents.

**DATED at NAIROBI this 15<sup>th</sup> day of May 2015**

**A.O. MUCHELULE**

**JUDGE**

**DELIVERED at NAIROBI this 20<sup>th</sup> day of May, 2015**

**L. ACHODE**

**JUDGE**