



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

SUCCESSION CAUSE NO 245 OF 2013

IN THE MATTER OF THE ESTATE OF NDEGWA WAKABA (DECEASED)

LUCY NYAGUTHII.....3RD ADMINISTRATOR/APPLICANT

VERSUS

WAKABA NDEGWA.....1ST ADMINISTRATOR/RESPONDENT

PETER MWAURA NDEGWA.....2ND ADMINISTRATOR/RESPONDENT

RULING

The matter before this Court concerns the contested administration of the estate of the late Ndegwa Wakaba, hereafter “the deceased”, who died intestate on 17th May 2005 as evidenced in the certified copy of the deceased’s Certificate of Death on the Court’s record. On 7th February 2005, Wakaba Ndegwa (“the 1st Administrator/Respondent”), Lucy Nyaguthii (“the 3rd Administrator/Applicant”) and Peter Mwaura Ndegwa (“the 2nd Administrator”) in their capacities as the deceased’s children, petitioned the Court for a grant of letters of administration intestate of the estate of the deceased. There was no objection to the making of the said grant and the same was made to the Respondents by this Court on 6th August 2013 on the basis that the Respondents had already obtained the consent of the every person having an equal or prior right to grant representation the only beneficiaries of the deceased. The deceased was survived by six (6) children namely:

- i. Wakaba Ndegwa – son
- ii. Lilian Ngendo Gathigi – daughter
- iii. Lucy Nyaguthii – daughter
- iv. Peter Mwaura Ndegwa – son
- v. Lucy Wanjiku Mwaura – daughter
- vi. Alice Wambui Ndegwa – daughter

The schedule of the deceased’s property as per the petition of 7th February 2013 consists of a parcel of land Title Number Dagoretti/Riruta/779 (hereafter the “suit property”) measuring 0.73 acres that is

registered jointly in the names of the deceased and that of the 1st Administrator/Respondent. The suit property is developed with rental houses built on it, and it is estimated to be worth Kshs. 21,000,000.

On 17th July 2014, the 3rd Administrator/Applicant filed a summons made under the provisions of **Section 45** of the **Law of Succession Act Cap 160** and **Rule 9** of the **Probate & Administration Rules** seeking orders from this Court that the 1st Administrator/Respondent and 2nd Administrator/Respondent: i) stop collecting rent from the suit property and developing or otherwise alienating that property; ii) transfer the rent proceeds from the suit property to an agent appointed by both parties or to an interest-earning bank account; iii) account for the rental income they have collected since 17th May 2005 upon the final hearing and determination of the matter; and iv) further that the OCS Kawangware Police Station be ordered to supervise the enforcement of the above orders.

The 2nd Administrator/Respondent, having been duly authorized to act on behalf of the 1st Administrator/Respondent, Lilian Ngendo Gathigi, Lucy Wanjiku Mwaura and Alice Wambui Ndegwa, filed a replying affidavit with a view to challenging the summons of the 3rd Administrator/Applicant. In it the following salient points were put forth: i) the suit property is registered in the joint names of the deceased and the co-administrator; ii) in 1974 the Respondents mutually agreed with the deceased to demarcate the suit property for the construction of buildings which was continuously developed over a period of 44 years; iii) the suit property was the subject of an ownership dispute in **HC Civil Suit No. 2978 of 1981** between the 1st Administrator/Respondent and the deceased, and the result of the adjudication was that the suit property belongs to the deceased and the Respondents jointly and severally; iv) it is not true that there are 127 rental units on the property, nor has any evidence been adduced in court to support that contention; v) upon the demise of the deceased, the 3rd Administrator/Applicant was invited by the Respondents to occupy two (2) houses that belonged to the deceased while the other siblings got two (2) houses each which constituted the remainder of the deceased's share in the suit property; vi) the delay in filing a summons for confirmation of grant was caused by the 1st Respondent's illness and the Applicant's failure to cooperate in the distribution of the estate, and not due to the Respondents intentional refusal or neglect.

The 3rd Administrator/Applicant sought to rebut the above statements by way of a further affidavit filed on 6th October 2014. She denied that there was ever an agreement between the Respondents and the deceased to have the former build houses on the suit property. She also denied ever being invited to occupy two house which belonged to the deceased or being invited to family meetings to discuss the distribution of the estate; on the contrary, she maintained that she has been treated with hostility by family members keen to disinherit her. In addition, she made the case that it was only fair and in the interest of justice to have the houses in the suit property physically enumerated in order to determine the beneficial interest of all beneficiaries of the deceased's estate.

Subsequently the Respondents filed a Replying Affidavit on 28th October 2014. The central thrust of this application was that since there had been a ruling from the High Court in **HC Civil Suit No. 2978 of 1981** that affirmed the joint ownership of the suit property between the deceased and the Respondents and an amended decree of 11th January 1995 that Court distinguished between the ownership of the land and the buildings thereon which remain unchallenged, the suit property belongs to the deceased, the 1st Respondent and the 2nd Respondent. The number of housing units on the suit property is revealed as 101 including both permanent and semi-permanent houses/units. Of these 101 houses/units the Respondents outline that the share entitled to the deceased, the 1st Respondent and the 2nd Respondent is as follows:

- i. The deceased's share: a) Two (2) permanent stone residential houses which were apportioned by the deceased to Lilian Ngendo Gathigi and the 1st Respondent during the lifetime of the deceased; b) Eight (8) wooden rooms which were apportioned by the deceased equally to Lucy Nyaguthii, Peter Mwaura Ndegwa, Alice Wambui and Lucy Wanjiku.
- ii. The 1st Respondent's share: a) Two (2) permanent stone residential houses of two (2) bedrooms

each; b) Semi-permanent structures comprising 10 mabati rooms, 9 wooden rooms and 27 mabati shops.

iii. The 2nd Respondent's share: a) Three (3) permanent stone residential houses of two (2) bedrooms each; b) Four (4) permanent stone residential houses of one (1) bedroom each; c) Five (5) permanent stone residential houses (single rooms); d) Two (2) shops which are permanent room structures; e) semi-permanent structures comprising of twelve (12) wooden single rooms and seventeen (17) mabati single rooms.

The contents of the Respondents' Replying Affidavit are opposed by the Applicant in her further affidavit of 3rd November 2014. In particular, the assertion that the 3rd Respondent has proprietary interest in the suit property, the number of house units on the suit property, the contention that the deceased had gifted part of the estate to any of his children during his lifetime, the statement that the deceased did not have any income capable of enabling him to develop the property alone. The Applicant also challenged the statement by the Respondents that they had built 71 house units since the demise of the deceased from which they have been collecting rent as illegal since it was conduct without the benefit of a grant of letters of representation. Thus, the Applicant considered such conduct to amount to unjust enrichment and intermeddling with the estate of the deceased.

ISSUES

The pleadings and submissions presented by the parties make clear that the key issues which this Court is called upon to determine in this case are the following:

- i. Whether the Respondents have been intermeddling with the property of the deceased;
- ii. Whether the deceased gifted any part of the estate to the Respondents during his lifetime;
- iii. If the answer to (i) is in the affirmative, whether the Court should issue conservatory orders to preserve the estate;
- iv. Whether the Applicant is entitled to an equitable share of the deceased's estate.

THE LAW

The applicable law that is relevant to determine this matter is to be found in the provisions of **Sections 45, 42, & 38** of the **Law of Succession Act Cap 160**.

Section 45 of the **Law of Succession Act Cap 160** proscribes intermeddling with the property of a deceased person, and it provides:

(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.

In the present case, the 3rd Administrator/Applicant has made the case that the Respondents have been

dealing with the suit property, part of which constitutes the estate of the deceased, without first having obtained a grant of letters of administration. She specified that from 17th May 2005 when the deceased died till 2013 the Respondents have continued to collect rental income from the houses that are built on the suit property. The Respondents unwittingly admitted to this conduct by claiming that they were allocated certain portions of the suit property by the deceased during his life time or that they had proprietary interest over the same. Save for the 1st Respondent who is registered as a joint owner of the suit property together with the deceased and who thus has a proprietary claim, the 2nd Respondents and the other children of the deceased on whose behalf he acts have no proprietary claim over the suit property. Hence, their admission that they have been collecting rental income from the suit property for which no accounts have been produced amounts to intermeddling. On this basis, this Court is of the view that there are grounds on which conservatory can issue in order to conserve and protect the estate from further alienation.

Besides the 1st Respondent who is registered as a joint owner of the suit property together with the deceased, the other children of the deceased base their claim over certain portions of the suit property by stating that they were gifted the said portions. But there is no independent means by which to verify that that the said portions were gifted by the deceased to his children. The evidence adduced to support this claim is insufficient and cannot be relied by this Court as a basis on which to uphold the contention that the deceased apportioned any part of the suit estate prior to his demise. Even if the claim that the deceased allegedly apportioned to his children part of the suit property is to be accepted, which it is not, that benefit must be taken into account when the estate is finally subdivided among the beneficiaries. Indeed, **Section 42** of the **Law of Succession Act Cap 160** provides:

Where –

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

However, the evidence from the minutes of the family meeting on 20th October 2014 whose main agenda was distribution of the estate of the deceased, shows that the 1st and 2nd Respondents are to each receive 30% of the deceased's estate. This can in no way be fair and equitable, nor can it serve the ends of justice in any conceivable way. Having already benefited from the alleged gifts, it is difficult to justify why they should benefit twice and in far greater proportion to the other children. The provisions of our law are clear that where the deceased leaves his children but no surviving spouse, the estate should be equally divided among the children. More specifically, **Section 38** of the **Law of Succession Act Cap 160** provides:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

FINAL ORDERS

Upon a careful evaluation of the facts that have been made clear in the rival submissions of both parties in this case, this Court hereby orders as follows:

- a. The 1st and 2nd Respondents are found liable for intermeddling with the estate of the deceased.
- b. The estate of the deceased is hereby preserved and all dealings, financial or otherwise, with the estate of the deceased are ordered to stop in order to comply with the provisions of **Section 45** of the **Law of Succession Act Cap 160**.

c. The 1st and 2nd Respondents are hereby ordered to henceforth comply with the statutory duties of an Administrator in **Section 83 of the Law of Succession Act Cap 160**, and in particular the duty to apply for a confirmation of grant.

d. The Administrators shall open a joint interest earning account to which all the proceeds from the rental income derived from the suit property will be deposited.

SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2015

M. MUIGAI

JUDGE

In the presence of:

Gatheri H/B for Musungu for the Petitioner

Munga for the Respondent