



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 231 OF 2010

RE: ESTATE OF SAMUEL WAWERU MUGO (DECEASED)

MIRIAM NJOKI WAWERU.....1ST PETITIONER

PETER KINYANJUI WAWERU.....2ND PETITIONER

MARY WAMBUI GACHACHI.....3RD PETITIONER

VERSUS

ANNA WANJIRU MUREITHI.....1ST OBJECTOR

OBADIAH KARURU.....2ND OBJECTOR

DAVID GATHURU.....3RD OBJECTOR

JOHN WAWERU NJOGU.....4TH OBJECTOR

RULING

1. Samuel Mugo Waweru, hereafter *the deceased*, died on 22nd July 2009. He had three wives: Ruth Nyambura Waweru; Lucy Nduta Waweru; and, Mirriam Njoki Waweru. The first two are also deceased. He was survived by the third widow and twenty two children. The deceased left behind a number of landed properties, shares and monies in two commercial banks. The estate has not been distributed.
2. The petitioners have presented a notice of motion dated 20th September 2011 praying that the estate be preserved in the following manner: first, a prohibitory order restraining the 1st objector from collecting rent over premises known as Uasin Gishu/Kimumu/1364, 1365 and Eldoret Municipality/Block 16 (Kamukunji) 349; secondly, to compel the 1st objector to render a full and true account of all rents collected from the three properties from January and February 2010 respectively to date; thirdly, that she be ordered to refund those sums to the estate or to deposit them in court; and, lastly, that all rents be collected by Delta Multi Services Limited and deposited in a rent account in the joint names of the petitioners held at Family Bank. The petitioners also pray for costs.
3. The pith of the motion is that the three houses had mutually agreed that all rents be collected by Delta Multi Services Limited. The agent is only able to collect rent from a part of the estate. Secondly, the petitioners claim that the 1st objector has been intermeddling in the estate. The petitioners contend that unless the orders sought are granted the interests of the rightful heirs and beneficiaries will be greatly compromised. Those grounds are buttressed by a joint deposition of

- the three petitioners sworn on 20th September 2011.
4. The application is contested. There is a replying affidavit sworn by the 1st objector on 30th September 2011. She avers that she is a daughter of the deceased from the 1st house. She avers that before the deceased died he sold to her the two properties Uasin Gishu/Kimumu/1364 and 1365. She has exhibited a sale agreement and minutes dated 19th June 2010 to support her claim. She claims that she developed the properties.
 5. The 1st objector avers further that the deceased allocated the third property Eldoret Municipality/Block 16 (Kamukunji) 349 to the 1st house. In the meeting of 19th June 2010, it had been agreed that she utilizes the rent on some orphans and dependants and to repair the premises. She claimed that she used to collect rent from the premises long before the death of the deceased. She contends that in the circumstances she is justified to continue collecting rent from the three properties. She denied that there was an agreement that the rent be collected by the agents.
 6. In response, the petitioners have filed a supplementary affidavit sworn by their counsel of record. There are annexed minutes of a meeting held on 21st April 2001. The minutes were in the *Gikuyu* language. A certificate of translation is attached. It was a reconciliation meeting for the family of the deceased. I think the material part is in paragraph 4.0 where the deceased is alleged to have cancelled the sale of the two plots of land to the 1st petitioner.
 7. Both parties have filed detailed submissions. Those by the petitioners are dated 9th May 2014; those by the 1st objector 28th August 2014. On 13th July 2015 I heard learned counsel for the parties briefly. I have carefully considered the notice of motion, pleadings, depositions, documents and the rival submissions.
 8. It is common ground that the deceased died intestate. The objection proceedings in this matter are pending. The net intestate estate has not been distributed by the court. It would thus be inappropriate and highly prejudicial to make a final finding at this stage; at any rate on the basis of conflicting affidavit evidence.
 9. The deceased died way back on 22nd July 2009. The present motion was not presented to court until 20th September 2011; more that two years since the death of the deceased. the delay has not been explained at all. When delay is established, unless it is well explained, it is deemed to be *inexcusable*. See *Allen v Mc Alpine & Sons Ltd* [1968] 1 All ER 543, *Ivita v Kyumbu* [1984] KLR 441, *Unqa Limited v Magina Limited* [2014] eKLR, *Trishcon Construction Company Ltd v Landmark Holdings Ltd* Nairobi, High Court Civil Suit 179 of 2012 [2014] eKLR. I find there has been *undue* laches in presenting the motion.
 10. In order to make a meaningful determination of the present motion, the court would be called upon to determine the following matters; whether there was an *inter vivos* sale of the two properties Uasin Gishu/Kimumu/1364 and 1365 from the deceased to the 1st objector; whether the 1st objector developed the two properties; whether that contract of sale was rescinded by the deceased; whether the sale was completed or contravened the Land Control Act; whether the third property, Eldoret Municipality/Block 16 (Kamukunji) 349, was allocated by the deceased to the 1st house; whether the 1st objector is intermeddling in the estate; the tenor and import of the meetings of the family documented in the minutes; and, lastly whether there was an agreement on collection of the rents by an agent.
 11. All of those matters cannot be fairly determined on untested affidavit evidence. To make a finding on all those matters at this stage would embarrass the trial court. From the limited information before the court, it would appear that the deceased had sold the two properties to the 1st objector for the consideration of Kshs 25,000. A deposit of Kshs 20,000 was paid. It would also appear that when the balance was not forthcoming, the deceased changed his mind and demanded the market price of the two properties. In annexure 4a at paragraph 4.0 of the supplementary affidavit, the deceased was emphatic he had cancelled the sale. Even assuming the sale was subject to the Land Control Act, the deceased did not say whether he refunded the deposit. I did not hear the petitioners to contest strongly that the third property had been allocated by the deceased to the 1st house. The 1st objector comes from that house. There is then the claim by the 1st objector that she is the one who developed two of the properties.
 12. The circumstances under which a prohibitory order can only be granted are well settled. A litigant

must rise to the threshold laid in *Giella v Cassman Brown and Company Limited* [1973] E.A 358. I am afraid that this is not such one case. The 1st objector claims to have been collecting rent from the suit premises well before her father died. True, the properties are registered in the name of the deceased. true, the purported sale is under contest. But the balance of convenience is still in her favour. I thus decline to grant a prohibitory order as prayed. For the same reasons, I decline to order that the rents so far collected be refunded or that future rent be collected by delta Multi Services Limited.

13. From the replying affidavit, the 1st objector admits she has been collecting rent and not submitting it to the estate. All the contested properties are still in the name of the deceased. The net intestate estate has not been distributed. The objection proceedings are still pending. In order to avoid the ends of justice from being defeated, I am prepared to order that the estate be preserved to the extent that the *status quo* now obtaining shall be preserved. In addition, the 1st objector shall render a full and true account of the rents collected by filing a suitable report in court within the next ninety days. The parties shall endeavor to set down this cause for directions and hearing as soon as is practicable but in any event within the next ninety days.

14. For the avoidance of doubt, the final orders of the court are as follows-

- a. Prayers a), b), c), d) and e) of the notice of motion by the petitioners dated 20th September 2011 are devoid of merit and are hereby dismissed.
- b. The *status quo* obtaining in the estate as of *today's date* shall be preserved.
- c. The 1st objector shall render a full and true account of the rents collected over the three suit properties, Uasin Gishu/Kimumu/1364, 1365 and Eldoret Municipality/Block 16 (Kamukunji) 349, by filing in court a suitable report under her hand or that of a registered accountant in court within the next *ninety* days of *today's date*. Further reports shall be filed every *year* until the final determination of the objection proceedings or main petition.
- d. The parties shall endeavor to set down this cause for *directions* and, or *hearing* as soon as is practicable but in any event within the next *ninety* days of *today's date*.
- e. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 29th day of September 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:-

Mr. Kenei for Mr. Njuguna for the petitioners.

Mr. Momanyi for the objectors.

Mr. J. Kemboi, Court clerk.