



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.385 OF 1989

IN THE MATTER OF THE ESTATE OF JOEL KIMONGO WARURUNGA (DECEASED)

RULING

1. The application coming for consideration is the Notice of Motion dated 3rd July 2013. The application is brought under Section 1A, 1B, 3A of the Civil Procedure Act and section 47 rules 49, 72 and 73 of Probate and Administration Rules. The applicant seeks the following orders;

- i. That the property being L.R. No.36/3/36 Eastleigh Section 3 be sold and the net proceeds be distributed among the beneficiaries.
- ii. That the costs of this application be in the cause.

2. The application is grounded on the grounds that the property **L.R. No.36/3/36** Eastleigh Section 3 is the only remaining whereon a residential house asset of the estate is located. That the beneficiaries are unable to continue dealing in harmony with the now old and dilapidated building that has reached optimal level in generating rental income and the parties are engaged in ceaseless wrangles in managing the property and collection of rent that has created hostility and rift in the family; that to avoid dispute and in the interest of justice the same should be disposed of and the proceeds be shared among the beneficiaries.

3. That the executor in his affidavit confirmed the grant on 7th June 1984 and the executor who was his mother died on 31st January 1989. Subsequently to which they applied for granted on 8th June 1989 and confirmed on 14th September 1990 to the effect that the property known as No.36/3/36 Eastleigh Section 3 was to be shared in the house of Mercy Wanjiku Joel exclusively among the children and beneficiaries as follows; David Mwangi Kimongo, Susan Wangui Joel, Bernard Irungu (deceased), Maina Joel and Nyambura Joel.

4. That the said property is in an up market Eastleigh section 3 is partially occupied by tenants attracting an income of Kshs. 89,000/- some family members namely; Catherine Wahu, Danson Maina, Bernard Irungu and Josephat Mathu are residents therein and the amount of rent not paid by them is Kshs. 13,000/- which totals up to Kshs.102,000/-.That presently the rent is collected by Susan Wangui without any accountability and banked in her account with Barclays bank Account number 202445961. That Catherine Wahu Kimongo collects rent with effect from January 2012. That consorted efforts to resolve the issue of collection of rent has been unsuccessful and the same has created irreconcilable differences. That as at May 2012 the said property had been valued at Kshs. 28,000,000/-. He urges the court to order that the unaccounted for rent be deposited in court forthwith pending the determination of this application.

5. The application is opposed. Susan Wangui Joel in her replying affidavit dated 20th September 2013. She avers that the beneficiaries have never met to discuss the sale of the said property adding that the applicant's character smirks mischief and can only be construed as a ploy to defraud the beneficiaries as

he has been the one running the said property since 1990 until December 2011 when the beneficiaries voted him out due to mismanagement, lack of accountability and transparency and that it is the beneficiaries who agreed that she collects rent on behalf of the other beneficiaries. That she and Catherine have been diligent and have all rental payment and expenditure receipts, for scrutiny if need be. That in addition to paying the utilities of the said property they have been paying the hospital bills for Josephat Mathu who is mentally impaired and a son of the deceased. That the beneficiaries subsequently proposed Mr. Wangithi Jonnah Kimani Trading as Jowahih Associates, to collect and manage the suit property. That since the valuation of the same on 21st May 2012 they took up the property and have renovated the same from its dilapidated state which has enable it retain and attract new tenants. That the applicant during the year 1990 and 2011 when he managed the said property he refused to give account of the rent proceeds collected and sought the court to order the applicant to do so. That the caveat emptor advertised in the national daily was necessitated by the applicant's illegal attempt to sell of the suit property.

6. Subsequent to the said replying affidavit, Danson Maina Kimongo, Joel Muritu Kimongo and Catherine Wahu Kimongo filed replying affidavits dated 24th September 2013 seeking to be associated with the averments of Susan Wangui Joel.

7. The applicant filed his written submissions on 18th November 2014. The applicant gave a brief background culminating to this application. He submitted that the administrators of the will executed the will in terms of the deceased's wishes in regards to his two households. The third wife was appointed as the executor of the will and she had 5 children, Irungu Joel, Mwangi Joel, Wangui Joel, Maina Joel and Nyambura Joel. The trustees were divided into two equal shares with one going to the executor and her children and the other half going to the deceased's wife Mrs. Njeri who is now deceased.

8. That the deceased had bequeathed all his estate both real and personal whatsoever unto his trustee upon trust. That the deceased also owned plot no. 98 section III reference number 36 Eastleigh Nairobi. That via an indenture dated 26/3/1997 the administrators as personal representatives of the deceased conveyed onto the said beneficiaries the parcel in issue together with the buildings and improvement thereon as tenants in common unto and to their use in fee simple free from circumstances.

9. The respondents submitted that the suit property was bequeathed to David Mwangi Kimongo, Susan Joel, Bernard Irungu, Maina Joel and Nyambura Joel. That the administrators have managed the property since 1990 when the grant was confirmed. By 2011 the applicant had never paid to the beneficiaries with full account of the rent collected from the suit property but had utilized the same for his own purposes this predicated to the vote of no confidence against the applicant and management was taken over by the respondent in 2012. they relied on section 83 of the law of succession Act Cap 160 which provides, *"bestows the duty to produce 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 upon the administrators of the deceased's estate. This may be made upon the application by an interested party or by the court through its own motion."*

Further that Section 94 provides that *"when a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned"*. That before the application is allowed the applicant should be ordered to account to the beneficiaries for the rent collected from the suit property. They relied in the case of **Veronica Wangoi Kararaho –vs- Betty Wanini Kaharaho & Another [2011] eKLR**, where it was held that *"the beneficiaries ought to know the property for which any proceeds are put and whether the same are for the benefit of the estate.....such omission by the 1st respondent as the administrator representing the first house was a breach of trust bestowed upon her the beneficiaries and a reflection of the failure to properly and constantly account for the estates proceeds."*

10. That it is trite law that the administrators of the estate of the deceased are supposed to act jointly as they are inseparable and he has not shown any reasons why his co-administrator has not participated in these proceedings. That order 31 rule 2 of the Civil Procedure Rules provides that, ***"where there are***

*several trustees, executors or administrators; they shall all be made parties to a suit against one or more.” He relied on the case of **the estate of Kasalon Mwangi Kahero [2013] eKLR**, where it was held that the application herein was brought by the applicant alone rather than jointly with the co-administrator. This is not proper as the court committed the administration of the estate jointly to both of them. The two must always act together, as they ultimately will be required to account jointly of the administration of the estate.”*

11. That the applicant failed to give account of the management of the suit property when he was in charge and has refused to attend family meetings to sort out the matters arising. That the beneficiaries are dealing well with the management of the suit property and no complaints have been raised adding that the only issue arising is the applicant who is bent on arbitrarily selling the assets of deceased without the beneficiaries consent something they claim is actuated by malice. That the beneficiaries have made attempts to manage the suit property which shows that they are out to preserve the same from misuse by the applicant.

12. From the averments both parties the applicant and respondent have been in control of managing the asset in question. Both parties appear to distrust the other. The applicant seeks that the property to be sold as it has created hostility among the family members. The other parties have expressed reservations and state that they have no intention to sell the said property. The applicant also claims that the respondents are not giving accountability of the rental proceeds collected from the suit property. Section 83 of the Law of Succession Act Cap 160, tasks the legal representative to give 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. Section 83(h) further provides that the court or an interested party can request for 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.

13. In an instance where there is alleged impropriety with the deceased’s estate the court can order the parties administering the same to produce an account before court. In the instant case the applicant is said to have managed the suit property between 1990 and 2011 and was ousted from managing the same for failing to give account of rental proceeds he was collecting. I find that it is only fair that both the applicant and the respondents tender a proper accurate account of the rental proceeds collected from the suit property whilst they were in charge of the same so that the issue of accountability can be conclusively dealt with. This shall be done within 45 days from the date of this ruling. Parties shall thereafter take a mention date for direction on the same and the application filed by one Joel Irungu Maina seeing revocation of the grant. The applicant shall also file a current valuation report on the status of the premises and its value within the said 45 days.

14. On the applicant’s proposal of sale of the suit property the same is opposed by the respondents and they state that they wish to continue holding on to the same. Danson Maina Kimongo, Joel Muritu Kimongo and Catherine Wahu Kimongo in their replying dated 24th September 2013 joined issues with the respondent. From the foregoing it is clear that the other beneficiaries are not keen on disposing off the suit property instead they seek to maintain it and draw income from it as such I disallow the applicant’s prayer to sell the suit property. Costs in the cause. It is so ordered.

Dated, signed and delivered this **23rd** day of **October** 2015.

R. E. OUGO

JUDGE

In the presence of:-

For the Applicant For the Respondent

Ms. Charity Court Clerk

