



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO.671 OF 2005**

**IN THE MATTER OF THE ESTATE OF KENNETH CAINAN ORLALE (DECEASED)**

**WANJIRU AKINYI ORLALE.....APPLICANT**

**VERSUS**

**ROSE GATHONI MASAO ORLALE.....RESPONDENT**

**RULING**

Wanjiru Akinyi Orலை, the Applicant herein (she is also a co-administrator of the estate of the deceased) has made an application pursuant to the provisions of **Rule 49** and **73** of the **Probate and Administration Rules** and **Sections 83** and **94** of the **Law of Succession Act** seeking orders from this court to compel Rose Gathoni Masao Orலை, the Respondent herein (and who is also an administrator of the estate of the deceased) to provide a full account of all the rental income generated and collected from LR. No. Nairobi/Block 82/134 (hereinafter referred to as the suit property) within thirty (30) days of such an order being issued. She further prayed that the Respondent be compelled to refund the portion of the money due to co-administrator and other beneficiaries within the said thirty (30) days. The application is supported by the annexed affidavit of the Applicant and the grounds stated on the face of the application.

The application is opposed. The Respondent filed a replying affidavit denying that the Applicant is entitled to such account being rendered. She explained that she was only a beneficiary of 50% of the rental income from the suit property while the rest is being collected by Lydia Muthoni Orலை, the former wife of the deceased and the mother of the Applicant. She further deposed that the only way the dispute involving the distribution of the suit property can be resolved is by the disposal of the same and distributing the proceeds therefrom to the beneficiaries. She swore a further affidavit where she annexed accounts of the 50% portion that she has managed since January 2003 until December 2012. She urged the court to disallow the application.

During the hearing of the application, this court heard oral rival submission made by Mr. Etole for the Applicant and by Miss Nyamwata for the Respondent. Mr. Etole submitted that the Respondent had not accounted for the rental income that she has received from suit property. He asked the court to compel the Respondent to account for the same. He further asked the court to order the Respondent to refund the portion of the rent due to the Applicant and other beneficiaries. He submitted that in the further affidavit sworn by the Respondent, she had admitted holding the sum of Kshs.1.8 million. In his view, this sum should be shared equally between the Applicant and the Respondent. Mr. Etole proposed that all the future rental incomes from the suit property should be shared equally between the Applicant and the

Respondent.

Miss Nyamwata for the Respondent opposed the application. She submitted that the portion of the suit property was allocated to the Respondent by the court (P.N. Waki J – as he then was) in **HCCC. No.1314 of 2002**. The Respondent annexed a copy of the Ruling delivered on 27<sup>th</sup> September 2002 in her replying affidavit. She further submitted that the Respondent was a beneficiary of only 50% of the rental incomes received in respect of the suit property. The other 50% was being collected by the family of the Applicant. She was of the view that if the court were to compel her to render accounts for the 50% that she receives, then likewise the family of the Applicant should be compelled to render accounts for the remainder of the rental income that they are currently receiving from the suit property. She submitted that the dispute between the Applicant and the Respondent can only be resolved by the suit property being sold and the proceeds therefrom being distributed among the beneficiaries of the estate of the deceased.

This court has carefully considered the facts of this case. The deceased was married to one Lydia Muthoni Orlale. They were blessed with four (4) children. Among her children is the Applicant. During their marriage, they acquired a property known as Nairobi Block 82/82 or House No.134 (the suit property). The suit property was registered in the joint names. The marriage between the deceased and the said Lydia Muthoni Orlale was dissolved in **Divorce Cause No.35 of 1999**. Decree nisi was issued on 6<sup>th</sup> November 2000. It was made absolute on 26<sup>th</sup> January 2001. A matrimonial property case had been filed in court. It involved the deceased and his said former wife. The case was registered as **HCCC No. 649 of 1995 (O.S)**. On 26<sup>th</sup> January 1999 a consent was entered whose effect was to recognize the entitlement of Lydia Muthoni Orlale of the 50% share in the suit property. The deceased offered to purchase the 50% share of Lydia Muthoni Orlale. However, the deceased died before he could purchase the same.

Meanwhile, the deceased continued residing on the suit property with his other wife Rose Gathoni Masao Orlale (the Respondent herein). The couple was blessed with one child. After the death of the deceased, Lydia Muthoni Orlale sought to evict the Respondent from the suit property. The Respondent filed suit against the said Lydia Muthoni Orlale. That suit is **HCCC No. 1314 of 2002**. In a Ruling delivered on 27<sup>th</sup> September 2002, Waki J (as he then was) made the following orders:

- “1) That the Respondent is hereby restrained by herself, or through her agents, servants, employees or assigns from harassing, intimidating dispossessing or evicting the applicant from the main house situated on LR No. Nairobi/block 82/82 (House No.134) Donholm Estate.***
- 2) In similar terms the Respondent is restrained from evicting or dispossessing Mr. & Mrs. Enos Orlale, the parents of the deceased, from the one room occupied by them and from evicting or interfering with two other rooms rented out to tenants in the same premises.***
- 3) The respondent shall be at liberty to take possession of and manage or otherwise deal with the remaining rented premises comprising roughly 50% of the property.***
- 4) The said orders shall remain in force until the hearing of this case or further orders of this Court.***
- 5) Costs in the cause.”***

The Respondent is therefore correct when she states that she was allowed by the court to collect 50% of the rent from the suit premises. The court however noted that the dispute between the Respondent and Lydia Muthoni Orlale was essentially a succession dispute which ought to have ideally been canvassed and determined in the family court. It is worth of note that the above case is yet to be heard and determined on its merit. The court is of the view that the matter in dispute between the Applicant and the Respondent is the determination of the respective shares due to the beneficiaries. The court will also have

to determine how the said shares shall be realized from the suit property to each beneficiary. The present dispute on the collection and distribution of the rental income is just but a symptom of this unresolved issue. This court has reached the conclusion that the issue in dispute should be canvassed on its merits so that all the underlying tensions can dissipate.

In the premises therefore, this court will disallow the application. The parties are ordered to list the case for distribution of the properties that comprise the estate of the deceased to the beneficiaries. There is no dispute as to who the beneficiaries of the estate of the deceased are. The Applicant is ordered to file an application for confirmation of grant within fourteen (14) days of today's date. In the affidavit in support of the application, she will put forward her proposal on how the properties that comprises the estate of the deceased shall be distributed. She shall serve the application within the same period to the Respondent. The Respondent shall be at liberty to file an affidavit of protest to the proposed distribution if so wishes. Thereafter the parties shall list the matter before this court for appropriate directions. There shall be no orders as to costs.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2014**

**L. KIMARU**

**JUDGE**