



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Succession Cause No. 36 Of 2002

IN THE MATTER OF THE ESTATE OF EVANSON NGUTI KAMANDA (DECEASED)

PADDY KARANJA NGUTI APPLICANT

VERSUS

JACINTER WANJIRU NGUTI RESPONDENT

RULING

By Summons dated 9th December, 2013, brought under Section 45 of the Law of Succession Act and Rule 73 of the Probate and Administration (P&A) Rules, the Respondent, Jacinter Wanjiru who is also the administratrix of the deceased's estate pray for the following orders:-

(i) *That service of this application be dispensed with in the 1st instance.*

(ii) *That this Honourable Court be pleased to order that all rent proceeds from that property known as LINCOLN HOTEL (ELDORET MUNICIPALITY BLOCK 7/278) be deposited in the account of administratrix herein or in the alternative in a joint account of Limo R. K. & Co. Advocates and Gicheru & Co. Advocates pending distribution of the remaining assets of the estate.*

(iii) *That the administratrix be allowed to administer the estate without interference from anyone.*

(iv) *That one Sarah Wanjiru be stopped from interfering/wasting the estate and in particular that property known as Lincoln Hotel (Eldoret Municipality Block 7/278) pending the distribution of the remaining assets of the estate.*

(v) *Costs be on cause.*

The said application is premised on the following grounds:-

(a) *A co-administrator in this cause passed on and there is a pending application before court to substitute.*

(b) *The Applicant herein is the only appointed administratrix of the estate but she has been impeded from fully discharging her duties by third parties and strangers to the estate out to exploit the situation.*

(c) *The rent proceeds running into hundreds of thousands are being collected and wasted*

by one Sarah Wanjiru who is not under any obligation either to account or legally carry out any duty in the estate.

(d) The estate has suffered serious and massive losses because of the intermeddlers in the estate.

(e) The Will left by the deceased was that the Lincoln Hotel and Kaptagat Hotel be utilized to benefit whole of the beneficiaries.

(f) That attempts to dispose the hotel to cut down the losses was frustrated.

It is further supported by the affidavit of Jacinter Wanjiru Nguti sworn on 9th December, 2013.

The head under which this application is brought is **“to preserve and protect the estate.”**

The deceased had two wives. The first is deceased while the 2nd Esther Kaburu Nguti is alive.

The deceased distributed most of his properties by a Will. This Will was uncontested and therefore confirmed by the court. However, two properties were left undistributed. They are described by parties as prime properties as they are income generating. At the hearing of this application, they were named as Lincoln Hotel and Kaptagat Building.

Lincoln Hotel has lodges which are rented. Kaptagat building houses residential premises which are also rented.

Initially, there were two administrators of the estate both of whom were children from the 1st house, namely;

- Jacinter Wanjiru Nguti and
- Francis Karisho

The latter is now deceased leaving Jacinter as the only administrator of the estate. Apparently, the 2nd wife has never opposed the administration of the undistributed estate by Jacinter Wanjiru.

The greatest concern to the Applicant is the inclusion of Sarah Wanjiru in the administration of the estate. Sarah Wanjiru is the wife of the late Francis Karisho.

Incidentally, one of the children of the 1st wife of the deceased, Paddy Karanja Nguti, without the authority of the court has also been administering the estate. He collects rents from lodges of the Lincoln Hotel. This, according to Jacinter Wanjiru, has amounted to wasting of the estate. She states that Paddy Karanja has failed to account for the rents collected, pay pending bills and deposit the proceeds in a trust account. For this reason, she urges court to order him to stop any further management of the asset.

Sarah Wanjiru is represented by the law firm of Gicheru & Co. Advocates. Mr. Aseso submitted on her behalf. She has also filed a Replying Affidavit she swore on 27th May, 2014 which Mr. Aseso relied on in his submissions.

According to Mr. Aseso, Sarah Wanjiru is partly administering the estate by a consent order recorded in court on 18th December, 2013. He said that this consent order compromised the instant application. Those orders, he said, have not been set aside and/or reviewed.

By and large, Mr. Aseso stated that the Respondent (Applicant herein) cannot be trusted to administer the estate single handedly. He cited an instance in which she (Jacinter Wanjiru) attempted to sell Lincoln Hotel. The co-administrator learnt about it and placed a caution against

the title to the property. He said that the relationship between the co-administrators were never smooth-sailing. Conflicts were evident which prompted Francis Karisho to file the application dated 23rd January, 2012. For this reason, if Sarah Wanjiru is denied the right to administer the estate, then her deceased husband's interest would not be taken care of.

Finally, Mr. Aseso stated that the wording of the orders of 18th December, 2013 was not temporary in nature and so this application is totally spent.

In rejoinder, Mr. Limo for Jacinter Wanjiru stated that, if the said orders of 18th December, 2013 were final, then the instant application would not have been allocated a hearing date. He denied that the orders were final since none of the parties appended their signatures to it. So no party is bound by the orders.

He stated that Sarah Wanjiru is not an administratrix to the estate and cannot therefore purport to act as such. He submitted that under Sections 94 and 95 of the Law of Succession Act, and administrator of an estate can be put to task to account for the estate. In this case, Sarah Wanjiru would waste the estate as she has no legal obligation to account.

He submitted that Jacinter Wanjiru has done her duties of administering the estate faithfully. That she must continue with the said duties as no changes pursuant to Section 76 of the Law of Succession Act (hereafter the Act) have been made.

Learned counsel, Mr. Chemwok is on record for Paddy Karanja. He entered appearance on 26th May, 2014 when the respective parties were required to give account of the proceeds of the rents they have collected.

Mr. Chemwok seemed to concur with Mr. Limo for Jacinter Wanjiru that the estate should only be managed by the legal administratrix, Jacinter Wanjiru. He termed Sarah Wanjiru as a stranger in the administration of the estate. He promised to advise his client in this respect and ensure that he gives account of any rents he had collected from Lincoln Hotel.

Mr. Chemwok was however not present during the hearing of this application. But Mr. Limo informed the court that he was not opposed to the application. He also told the court that Paddy Karanja had handed over the keys of the hotel to Jacinter Wanjiru and further that, Paddy Karanja was now agreeable that Jacinter Wanjiru should solely administer the estate.

Having considered the respective submissions, I take the following view of the application.

On 18th December, 2013, court (Hon. Justice Ochieng) ordered as follows:-

“(1) Orders are granted as set out above.

“(2) The application dated 9th December, 2013 is fixed for hearing on 12th May, 2014.”

On this date, Mr. Limo advocate was in attendance for the administrator and Mr. Ngeno for the Respondent.

Mr. Limo addressed the court as follows:-

“The Respondent needs time to respond to the application. We have no objection, but we wish to secure the estate.”

Then Mr. Ng'eno responded;

“We have agreed to seek an early date for the application. In the meantime, the rents

will be deposited in a joint account in the names of R. K. Limo and Gicheru & Company Advocates. Sarah Wanjiru will collect the rent from Lincoln Hotel and Jacinter Wanjiru will collect rent from Kaptagat House. Each of them will then deposit the rents in the joint account.

The persons collecting the rents will also maintain accounts which must be made available to the other parties every month.”

Mr. Limo then said;

“That is correct.”

The above proceedings are in very clear terms and do not make a contradiction of what the parties intended be done pending the hearing of the instant application.

The court did not record the orders in the form of a consent. They were recorded in terms of an agreement meant to safeguard the interests of the various parties before the instant application is heard and determined.

In the interlude period, it has now emerged, that those orders were not strictly adhered to. Allegations and counter-allegations of mismanagement of the rents is the music in court. For instance, none of the parties did the accounting on time. On 12th May, 2014 myriads of excuses were raised as to why this could not be done. More perplexing is that, even a party who had not been appointed to collect the rents, Paddy Karanja, appointed himself to do so. And so, according to Sarah Wanjiru, it was difficult for her to account. Paddy Karanja could not give any reason why he elected himself to collect rents from Lincoln Hotel.

But on the part of Jacinter Wanjiru, she submitted, she had done her part faithfully. So far, her accounting has not been challenged by other parties.

What I am trying to say is that, at no time was the order of 18th December, 2013 meant to be final. It was also not a consent order. Therefore, the positions obtaining in both cases of **SAMSONS MUNIKAH PRACTISING AS MUNIKAH & CO. ADVOCATES -VS- WEDUBE ESTATE LIMITED (2007) E KLR** and cited as **NAIROBI COURT OF APPEAL NO. 126 OF 2005 SAMSONS MUNIKAH PRACTISING AS MUNIKAH & CO. ADVOCATES -VS- WEDUBE ESTATES LIMITED (2007) e KLR**, and **INVESCO ASSURANCE COMPANY LIMITED -VS- CHARLES KABURU (2007) e KLR** also cited as **MERU HIGH COURT CIVIL APPEAL NO. 14 OF 2007 INVESCO ASSURANCE COMPANY LIMITED -VS- CHARLES KABURU (2007) e KLR** do not apply in the instant case.

Interestingly again, the said order of 18th December, 2013 was extracted and is annexed to the Replying Affidavit of Sarah Wanjiru. It bears no wordings that it was recorded by consent. I am therefore at a loss how counsel for Sarah Wanjiru arrived at the conclusion that the order was issued by consent.

The only prayer, as at this point which has been overtaken by events is prayer (ii), since the joint account as agreed has already been opened. It is in this joint account that parties were required to deposit the rents collected.

Under Section 79 of the Act, ***“the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”***.

Section 81 on the other hand, safeguards the interests of the beneficiaries and the estate in the event of the death of one of the executors or administrators. It provides as follows:-

“81. Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with with.”

It therefore follows that, unless such other person is appointed to replace the deceased executor or administrator, only the surviving executor or administrator shall have the powers to administer the estate.

As rightly submitted by learned counsel Mr. Limo, only an executor or administrator can be called to account for duties accorded to him/her by personal representation.

Both sections 94 and 95 read as follows:-

“94. 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.

95. (1) Any personal representative who, as regards the estate in respect of which representation has been granted to him-

(a) wilfully or recklessly neglects to get in any asset forming part of the estate, misapplies any such asset, or subjects any such asset to loss or damage; or

(b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of section 83; or

(c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or

(d) knowing or having reason to believe that the estate will prove to be insolvent, continues to administer it without petitioning for administration thereof in bankruptcy, shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.

(2) Any personal representative who, as regards the estate in respect of which representation has been granted to him if at any time there is a continuing trust and he is the sole surviving administrator, wilfully fails to apply to the court within three months in accordance with section 75A for the appointment of further administrators shall be guilty of an offence and shall be liable to a fine not exceeding five thousand shillings.”

For the above reasons, both Paddy Karanja and Sarah Wanjiru have no locus standi to collect any rents from the two assets.

The scenario obtaining as at now is that, there are too many centres of rent collection. This has led to the mismanagement of, and intermeddling with, the estate. For proper administration of the estate, and for purposes of curtailing any further intermeddling with the estate, the law must be followed to the letter. This will ensure that the surviving administratrix is accountable to all beneficiaries. And in the event she misapplies any of the assets, the law will take its course. Court must bring to a halt the current trend of greed where some beneficiaries want to grab the juicy portions of the estate before its distribution.

Perhaps, I would not do justice in this ruling if I did not address the issue of occupation of the assets by both Sarah Wanjiru and Paddy Karanja.

Sarah Wanjiru is occupying one of the two-bedroomed houses in the Kaptagat building. Paddy on the other hand, by his own admission occupies three (3) rooms at Lincoln Hotel.

These parties were also separately bequeathed other properties by the Will. But instead of settling in those other properties, they opted to occupy the undistributed assets.

It is my view that these are issues that will be taken into account during the distribution of the assets. So for now, I do not wish to disturb that status quo.

Finally, it is the view of this court that, to bring to a halt to this long protracted dispute, the two assets must be distributed as soon as possible. So then, the orders I give remain in force until the distribution of the said Lincoln Hotel and the Kaptagat Building.

In the result, I allow the application in the following terms:-

1. That only the legally appointed administratrix Jacinter Wanjiru Nguti shall henceforth collect all the rents both from Kaptagat Building and Lincoln Hotel.

2. That the said Jacinter Wanjiru Nguti shall be depositing all the collected rents into the joint account already opened in the joint names of R. K. Limo & Company Advocates and Gicheru & Company Advocates.

3. That Jacinter Wanjiru shall, on a monthly basis give an account of all the deposited rents to the other beneficiaries through their appointed advocates.

4. That both Sarah Wanjiru and Paddy Karanja are hereby restrained from further collecting rents from Lincoln Hotel. In this respect counsel for Jacinter Wanjiru shall write a letter to the respective tenants and serve them with this order.

5. Sarah Wanjiru will continue to occupy one of the two-bedroomed houses at Kaptagat Building. Likewise, Paddy Karanja shall also, in the meantime, continue to occupy only three (3) rooms at Lincoln Hotel.

6. Parties shall fix this cause for distribution of the estate as soon as is practically possible, subject to availability of a date in the court diary.

7. Each party shall bear its own costs of this application.

It is so ordered.

DATED and DELIVERED at ELDORET this 29th day of May, 2014.

G. W. NGENYE - MACHAIRA

JUDGE

In the presence of:-

Mr. Kibii holding brief for Limo for Jacinter Wanjiru Nguti

Mr. Aseso for Sarah Wanjiru

Mr. Chemwok for Paddy Karanja