



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**SUCCESSION CAUSE NO. 2916 'A' OF 2005**  
**IN THE ESTATE OF CHRISTOM KINYUA WAINAINA – (DECEASED)**

**RULING**

1. The application dated 18<sup>th</sup> March 2011 seeks injunctive orders to restrain the respondent from putting up structures on Plot No. 781/Kangemi/Dagoretti. The applicant is one of the executors of the will of the deceased. She complains that the said development was done without recourse to her.

2. The respondent replied to the application through his affidavit sworn on 29<sup>th</sup> April 2011. He admits putting up structures, but explains that they were meant to replace previous ones that had been destroyed by a fire in 2010. These averments were supported by the co-executor of the applicant who swore an affidavit on 29<sup>th</sup> April 2011.

3. Both sides have filed written submissions to expound on their respective positions. The applicant's submissions were filed on 12<sup>th</sup> March 2013 while those by the respondents were filed on 19<sup>th</sup> September 2012.

4. The deceased died testate on 20<sup>th</sup> June 2005 leaving a valid will made on 24<sup>th</sup> July 2002. The said will did not appoint executors, but curiously a grant of probate was made on 19<sup>th</sup> December 2005 to Lucy Wanjiku Kinyua and Wainaina Kinyua Wainaina. This was no doubt an error for a grant of probate should only issue to a person named in the will of the deceased as an executor. Where a will does not name an executor the court ought to issue a grant of letters of administration with the will annexed to the persons who qualify under Sections 63, 64 and 65 of the Law of Succession Act.

5. The law on this is Section 53 of the Law of Succession Act, which states as follows:-

**“53. A court may –**

***a. Where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either –***

***i. Probate of the will to one or more of the executors named therein; or***

***ii. If there is no proving executor, letters of administration with the will annexed...”***

6. The grant of probate made on 11<sup>th</sup> December 2005 ought not have been made. The proper grant to make in the circumstances ought to be of letters of administration with the will annexed in terms of

**Section 53 (a) (ii)** of the Law of Succession Act. Lucy Wanjiku Kinyua and Wainaina Kinyua are not executors of the will of the deceased, as the deceased did not appoint them as such. They are administrators of the estate appointed by the court.

7. Be that as it may, **Section 79** of the Law of Succession Act vests the property of the deceased in the personal representatives, that is to say the executors named in the will of the deceased or the administrators of the estate appointed by the court. It is the personal representatives who should hold legal title to the property. They can sue or be sued over the said property, and can enter into and enforce contracts over the property on behalf of the estate. They therefore exercise the powers of the owner over the estate, and are subject to the same duties over the property as the deceased would have been subject to.

8. For avoidance of doubt, *Section 79* of the Law of Succession Act provides as follows:-

***“79. 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.”***

9. The vesting of property or title envisaged in **Section 79** of the Law of Succession Act does not constitute the personal representatives absolute owners of the property in question. The ownership of the estate property in such cases is restricted. The person representatives hold such property on behalf of the estate for the benefit of all who may be interested in it, may they be beneficiaries, heirs, survivors, dependants or creditors. The personal representatives stand in a fiduciary relationship to the property and the persons interested. They are therefore trustees, who are ultimately accountable to the persons interested in the property. They are bound to account for their stewardship of the property to any person who has an interest in the property.

10. Ownership brings with it control. The temporary, but restricted, ownership of estate property by the personal representatives gives them control over such property. Control that the beneficiaries or heirs or dependants are not entitled to and should not have over the property. The control exercisable by personal representatives over estate property is granted to them by the law and the same cannot be taken away from them unless by a court order. That is the combined effect of *Sections 79,80,81 and 82* of the Law of Succession Act.

11. Since control of estate assets is given to personal representatives; beneficiaries, heirs, survivors and dependants ought not do anything with respect to estate property without the consent of the personal representatives. The law does not vest any authority over estate property to persons who do not hold a grant of representation. Such persons have no powers and no duties over estate property. They must not do anything to the property – anything that is likely to alter its character, whether it is development, renovation, decoration, extension and the like. Such changes should only be undertaken by the personal representatives in exercise of their powers and duties as legal owners of the property. Non-grant-holders can effect such changes only with the express authority or consent of the personal representatives. Doing otherwise amounts to intermeddling with of the estate.

12. The position of a person who is interested in the estate but does not hold a grant is a tenuous one. Such persons - whether heirs, survivors, beneficiaries or dependants – are mere licencees so far as estate property is concerned. The licence is granted to them by the personal representatives. Licencees cannot exercise the powers of an owner. Their right to property is limited to utility or user, nothing more. They have no right to sublet or develop or renovate or redecorate the property, since such rights accrue only to the personal representatives.

13. This is the effect of **Section 45** of the Law of Succession Act, which deals with intermeddling. Intermeddling refers to acts done with respect to estate property by persons who have no authority in law

to handle estate property. The persons who may lawfully handle estate property are those mentioned in **Sections 45 and 46** of the Law of Succession Act – holders of grant of representation, police officers and administrative officers. Intermeddling with the assets is an offence under **Section 45(2)(b)** of the Law of Succession Act.

14. The legal position stated in the foregoing paragraphs is really a rule of convenience and common sense. Administration is usually committed to a small group of persons, ranging from one to four. Having more than four individuals running an estate can lead to confusion and chaos, making administration and accountability a difficult exercise. To smoothen the process of administration it is fair to clothe the administrators with power, authority and control over the assets, and to take away such power, control and authority from the rest of the persons interested in the property.

15. The respondent with respect to the instant application is not the holder of grant of representation over the estate of the deceased. He is a mere beneficiary named in the will of the deceased. He is therefore a licensee with respect to the property in question. He admits to have put up some structures on the property. He explains that he was merely replacing structures that were previously on the property but which had been destroyed by a fire. Whatever the case, the property in question still vested in the personal representatives, and therefore anything that needed to be done on the property ought to have been done with the consent and authority of the personal representatives. For doing anything without such authority amounts to intermeddling which ought to expose the person concerned to liability under **Section 45** of the Act. It would appear that the acts of the respondent were unauthorised, even though they might have been justified. They amounted to intermeddling.

16. In view of everything that I have said above, I am satisfied that there is merit in the application dated 18<sup>th</sup> March 2011. I am nevertheless concerned that the personal representatives of the deceased are not doing enough towards distributing the estate of the deceased. The terms of distribution are clearly documented in the deceased person's testamentary instrument. There can therefore be no excise on the part of the personal representatives in failing to bring the administration of the instant estate into completion.

17. The final orders that I make in this matter are as follows:-

- a. That the grant of probate of the will of the deceased dated 8<sup>th</sup> November 2006 made to Lucy Wanjiku Kinyua, James Wainaina and Wainaina Kinyua Wainaina is hereby revoked by the court on its own motion;
- b. That I hereby appoint Lucy Wanjiku Kinyua, James Wainaina Kinyua and Wainaina Kinyua Wainaina administrators of the estate of the deceased and a grant of letters of administration with the will annexed shall issue to them accordingly;
- c. That the grant of probate dated 8<sup>th</sup> November 2006 shall be returned to the court registry for cancellation;
- d. That the respondent is hereby restrained from putting up any further structures on Plot No. 781/Kangemi/Dagoretti pending the distribution of the estate or further orders of the court or the authority of the personal representatives of the deceased;
- e. That costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> DAY OF May 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Kinyua advocate for the applicant.**