



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**SUCCESSION CAUSE NO. 711 OF 2008**

**IN THE MATTER OF ESTATE OF ELIJAH MBUGUA WAHINYA (DECEASED)**

**RUTH KAIRINGO MBUGUA**

**MARY WANGUI GITHOITHO**

**MARGARETNDUTAWAHINYA..... ADMINISTRATORS/ APPLICANTS**

**AND**

**OLIVER NJIHIA THANDI..... RESPONDENT**

**RULING**

The notice of motion dated 12th July, 2013 seeks to compel the respondent to hand over title No. IR 139605 created pursuant to a transfer registered on IR 15683/23 for purposes of distribution of the estate of the deceased. The application is supported by the affidavit of one of the administrators of the estate of the deceased (Mary Wangui Githoitho) and is premised on the grounds that the grant issued in respect of the deceased estate has already been confirmed; that it is not possible to distribute the estate of the deceased because respondent has refused to release the title herein thus making distribution of the estate impossible.

In the affidavit sworn in support of the motion, the applicants have deposed that in 1988, respondent had sued the deceased (vide Nakuru HCCC No.2 of 1988); that on 16.9.2005 the presiding judge, D. Musinga J., (as he then was) decreed that the suit property L.R NO. 9265/2 grant No. L.R 15683 measuring 280 acres be divided into two equal parts. Unfortunately, the deceased herein died before the order of the court had been fully implemented. Following the death of the deceased in 2007, the applicants filed the Succession cause herein and obtained a grant of letters of administration which was later on, got confirmed.

The applicants contend that upon the demise of the deceased, the respondent continued with the process of subdivision and processing of titles to the suit property without involving them. After they got letters of administration, the applicants wrote to the Commissioner of Lands requesting him not to release the title deed belonging to the deceased to the respondent.

Contrary to their request, the Commissioner released the deceased title to the respondent who has refused and/ or neglected to release the title to them. The respondent is said to have refused to release the title unless he is paid Kshs.948,400/=being costs he incurred in subdivision and registration of the title.

The applicants have deposed that they visited the respondent's advocate's office and confirmed

that the title to the suit property is indeed in the name of the deceased. Further that the respondent's advocate gave them a copy of the title deed but declined to release the original document explaining that they had to part with Kshs.948,400/= before he could release it to them.

Explaining that the respondent is out to frustrate their administration of the estate of the deceased, the applicants have deposed that they are ready and willing to pay any reasonable costs incurred by the respondent on condition that the respondent produces the necessary receipts.

The application is opposed through the respondent's replying affidavit sworn on 15th October, 2013. In that affidavit the respondent has deposed that he is a stranger to the estate of the deceased; that he has been wrongly enjoined in the proceedings and that following the judgment and decree in Nakuru HCCC NO. 2 of 1988 the deceased refused to cooperate in the sub-division and registration of the suit property. Consequently, he spent Kshs.1,896,800/= to effect the sub-division. Further that he informed the applicants that the title to the property was ready and could be collected from his advocates upon payment of Kshs.948,400/= being half the cost he incurred in subdivision of the property.

Regarding the applicants' contention that he has refused to account for the costs, it is argued that the dispute concerning the costs he incurred in obtaining the title cannot be determined in the current cause but through a different suit.

When the application came up for hearing, the parties agreed to dispose of the application by way of written submissions.

Although, counsel for both sides informed the court that they had filed submissions, at the time of writing this ruling, the only submissions in the court file are those of the applicant.

In the submissions filed on behalf of the applicants' it is reiterated that the respondent did not involve the applicants in the subdivision of the suit property and that the applicants are ready and willing to pay the respondent such expenses as he may prove to have incurred in obtaining the title.

Contending that the amount allegedly incurred by the respondent is inordinately high, the applicants have put the respondent's entitlement at Kshs.283,400f= . That notwithstanding, the applicants have expressed their willingness to pay any other costs that the respondent may prove to have incurred in procuring the title.

I have read and considered the rival arguments herein. The sole questions for determination is whether applicants have made up a case for issuance of the orders sought.

It is not in dispute that the respondent, through his advocate, is holding the title which is the subject matter of the application herein. It is also not in dispute that the respondent has refused to hand over the title unless he is paid Kshs. 948,400/= being the costs he allegedly incurred in procuring the title.

It is the applicants' case that, even though willing to pay the respondents' costs, no proper account has been given of the amount he claims. The applicants argue that they have done their calculations on what, in their view, is the respondent's entitlement, being Kshs.283,400/=.

However, they are willing to pay any additional money, upon prove.

On his part, the respondent contends that the dispute concerning the amount he incurred in registering the suit property cannot be settled under the current cause but through another suit for that purpose.

Although the respondent has a genuine interest in holding the title herein sought, in resolving the dispute herein, I take note of the fact that the respondent's action, even though justified, is in contravention of the provisions of Section 45( 1) of the Law of Succession Act (LSA) which makes it illegal, for whatever purpose, to intermeddle with any free property of a deceased person.

The section provides:-

**"45. ( 1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall:-**

**a) be guilty of an offence and liable to a fine not exceeding ten thousand year or to both such fine and imprisonment; and**

**b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**"

The term ("free property" as used in the Law of Succession Act is defined under section 3 thereof as follows:-

**"the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."**

It is not in dispute that the property which is the subject matter of the current application formed part of the free property of the deceased. Although the respondent claims that the deceased's refused to cooperate with him to get the judgment and decree of the court herein implemented, he has not annexed any evidence in support of that fact. Be that as it may, by dint of the provisions of Section 45(2)(b) the respondent having donated to himself power to administer the deceased's estate, is answerable to the applicants concerning the said administration of the estate. That section of the law only allows the respondent to deduct any payments made in the due course of administration.

As pointed out above, the applicants have not refused to pay the respondent the costs he incurred in registering the title herein. All what they seek is an account, which the respondent has adamantly refused to tender.

In my view, the refusal by the respondent to release the title herein which is required to complete the administration of the deceased's estate is in violation of the provisions of Section 45 of Law of Succession Act aforementioned.

Section 47 of the Law of Succession Act gives this court power to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as it may deem expedient.

Having found the conduct of the respondent to be in breach of the provisions of Section 45 of the LSA Act and taking note of the provisions of subsection (2) thereof which recognizes the right of a person found to have intermeddled with a deceased person's estate to recover the costs incurred during the course of administration and further taking note of the applicants' submissions, I allow the application on condition that the applicants will forthwith pay to the respondent Kshs.283,400/=, being the admitted costs of the respondent at least within 14 days hereof. I also direct the applicant's to file in court an undertaking for payment, subject to proof of any additional costs that the respondent might have incurred in obtaining the title herein.

**Dated, Signed and Delivered at Nakuru this 25th day of July, 2014.**

**H.A. OMONDI**

**JUDGE**