



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Miscellaneous Civil Cause 154 of 2012**

**IN THE MATTER OF THE ESTATE OF GASPER WALELE MWANGUWA (DECEASED)**

**KATHARINA WAMBUGHA WALELE.....PETITIONER**

**VERSUS**

**1. FOCUS MWANGUWA WALELE  
2. JULIUS MNDWARIGHA WALELE**

**3. JOHN IGACHO WALELE.....RESPONDENTS**

**RULING**

By way of this Notice of Motion brought under certificate of urgency, the applicant sought a whole raft of orders as follows:

**“2. THAT this Honourable court be pleased to issue preservatory orders to preserve the estate of the deceased pending hearing and determination of this application.**

**3. THAT this Honourable court be pleased to order that Focus Mwanguwa Walele, John Igacho Walele and Julius Mndwarigha Walele be ordered to produce audit account of the proceeds of the estate and rent collected.**

**4. THAT this Honourable court be pleased to order that the respondents should disclose all the dealings that they have been doing in the deceased’s office at King’orani Plot Number XII/272 since the demise of the deceased.**

**5. THAT this Honourable court be pleased to issue an order be [sic] restraining the respondents from interfering with the records in the said office at King’orani plot number XII/272 and surrender the same to the applicant.**

**6. THAT this Honourable court be pleased to order that Kenya Commercial Bank produce a list of all the assets held by them on behalf of the deceased for purposes of obtaining letters of administration for the estate of the deceased Gasper Walele Mwanguwa.**

**7. THAT this Honourable court do order that the proceeds of the estate of the deceased be deposited in the applicant’s account No. 113302078 at Kenya Commercial Bank Kilindini branch pending the hearing and determination of this application.**

**8. THAT this Honourable court be pleased to order any other order [sic] that the court may deem fit to grant.**

**9. THAT the costs be in the cause.”**

The application was opposed by the respondents and the 1<sup>st</sup> respondent **FOCUS MWANGUWA WALELE** filed a replying affidavit sworn on 3<sup>rd</sup> September, 2012.

The background of this application revolves around the estate of one **GASPER WALELE MWANGUWA** (hereinafter referred to as '*the deceased*') who passed away in Mombasa on 20<sup>th</sup> February, 2012. The applicant **KATHARINA MWANGUWA WALELE** is the widow of the deceased whilst the three respondents **FOCUS MWANGUWA WALALE**, **JULIUS MNDWARIGHA WALELE** and **JOHN IGACHO WALELE** are all sons of the deceased. The undisputed facts are that the deceased got married to the applicant way back on 24<sup>th</sup> May, 1957 at Bura Catholic Church as evidenced by the annexed copy of a marriage certificate serial No. 1604. The couple bore eight (8) children together (which children included the three respondents). In addition the deceased sired two (2) other children out of wedlock both of whom were taken into the home and raised as part of the family.

Following the death of the deceased the respondents produced a copy of a will purportedly written by the deceased in which the deceased appointed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as well as his daughter **VERONICA WALELE** as executors. Various provisions with relation to distribution of the estate were contained in that will. On her part the applicant challenges both the validity and content of the alleged will. She also asserts that no adequate provision has been made to herself as the deceased widow and his daughters. This led to the applicant filing this present notice of motion seeking orders as stated above. It is worth noting at this point that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did on 28<sup>th</sup> August, 2012 file a petition in the Mombasa High Court vide Succession Cause No. 355/2012, seeking Grant of letters of Administration to the estate of the deceased. That petition remains pending to date. In addition the court did grant interim orders on 9<sup>th</sup> October, 2012 restraining the respondents from disposing of the estate properties.

The application was by consent of both parties argued by way of written submissions. The applicant in this matter seems to be raising three main issues:

- (1) The validity of the will held by the respondents.
- (2) The failure by the deceased to make adequate compensation for herself as the widow and their daughters and
- (3) Concern that the estate of the deceased is being wasted and/or mismanaged by the respondents.

At the outset I wish to state that the proper procedure the applicant ought to have used would have been to file an objection to the petition for Grant made by the respondents in Succession Cause No. 355/2012. However, failure to follow this procedure does not mean that the court will not consider her concerns. This is in line with Article 159(2) (d) of the Constitution of Kenya which requires that a court administer justice without undue regard to technicalities. Regardless of form or procedure a court is mandated to examine the situation presented to it and to take all necessary steps to consolidate and preserve the estate of the deceased.

With regard to the applicant's claim that the purported Will may not be valid, the court would have to take oral evidence from both parties in order to make a determination one way or another. Similarly the applicant's prayer that adequate provision was not made to her under the will can only properly be determined after a substantive hearing where evidence is taken.

I note that the respondents filed their petition seeking grant on 28<sup>th</sup> August, 2012. To date no orders have been made for notice to issue in the official Kenya Gazette. That being the case, I do hereby direct that in the interest of expeditious disposal of justice and to prevent a multiplicity of suits, the two suits

Succession Cause 355/2012 and this Misc. 154/2012 be and are hereby consolidated. The parent file will be Succession Cause 355/2012. Both matters having been filed before the High Court in Mombasa, it would be in the interests of convenience to have the two files consolidated.

The applicant made prayers seeking orders directed at Kenya Commercial Bank to provide a list of the deceased's assets. Only an executor/representative of the estate of the deceased would have proper *locus* to seek such orders. As of now, the applicant does not hold letters of administration in respect of the estate of the deceased this court cannot grant the orders prayed. Similarly, the applicant's prayer to have the proceeds of the estate deposited into her personal bank account must fail for the same reason.

Finally, the applicant prayed for orders that the respondents do furnish a full inventory of the assets and liabilities of the deceased as well as a full account of their dealings thereto to date. Section 83(h) of the Law of Succession Act empowers a court to require a personal representative to produce to the court, if required by the court either of its own motion or on the application of any interested party in the estate a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith upto the date of the account. The respondents have not yet been granted letters of administration with respect to the estate of the deceased. However, they have apparently moved in, taken over the deceased business and are now collecting rents from the properties owned by the deceased without court sanction. In the absence of any duly appointed administrator there is a real likelihood of wastage and/or mismanagement of this estate before administrators are appointed. As such I do hereby invoke the court's powers under section 83(h) and direct that the administrators do provide a full and accurate inventory of all the deceased's assets and liabilities and in addition that they do provide to this court a full and accurate account of all the respondents' dealings with the deceased's business and/or properties from the time of his death to date. Such inventory and account to be filed in court within twenty (20) days of today's date.

On her part the applicant having made clear her intention through the filing of this Misc. Application is hereby directed if she wishes to pursue these objections to file an objection in line with Rule 15 Law of Succession (Probate and Administration) Rules. Such objection also to be filed within twenty (20) days of today's date.

No order on costs.

**Dated and delivered in Mombasa this 28<sup>th</sup> day of March, 2013.**

**M. ODERO**

**JUDGE**

In the presence of:

Ms. Mbuluka for Applicant

Mr. Mutiso for Respondents

Court Clerk Mutisya