



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
SUCCESSION CAUSE NO: 2255 OF 2010
IN THE ESTATE OF NDIBA THANDE– (DECEASED)

RULING

The application dated 12th July, 2012 essentially seeks an account of estate property that is granting in case, which is not being collected by the administrator, but is going to a third party.

The deceased died on 28th December, 2009. Representation to his estate was sought by his widow, Esther Wambui Ndiba, and was granted to her on 19th April, 2011. She has brought this application under **Sections 45, 47, 49** and **83** of the Law of Succession Act, in her capacity as administrator of the estate.

Her case is that the deceased died possessed of only one asset. L.R No. Dagoretti/Kangemi/25. There are rental houses standing on this property. During the deceased's lifetime the deceased collected rent, from the tenants who occupied said rental houses, through an agent called Mwihoko Holdings, who were based at Westlands, Nairobi. It transpired that after the deceased death Kamau Ndiba, who has filed an application for the revocation of the grant made to the administrator herein, instructed Mwihoko Holdings not to release the remaining income to the administrator. He is said to have instructed the agent to release the income only to himself. The administrator appointed other agents, Promast Enterprises Limited, but the respondent to this application, Kamau Ndiba, threatened the tenants with eviction if they paid their rents to Promast Enterprises Limited. The Respondent continues to collect rent from the premises and to spent the money on himself without accounting to the administrator. The administrator avers that this amounts to intermeddling.

The application was served on the respondent. He has replied to it through his affidavit sworn on 21st September, 2012. His position is that it was him who instructed Mwihoko Holdings Limited to correct rent, and this was after the deceased, before his demise, mandated him to manage the rental houses. He has upgraded the houses and installed electricity. He and his brother, called Mbugua, have also built some of the rental houses, and have been paying rates on the land without assistance from the administrator. He goes on to assert that he collects rents from the portion of the property belonging to his side of the family. He argues that the deceased had put a boundary on Dagoretti/Kangemi/25, so that each house had its own portion, and therefore the administrator is not justified in claiming rent collected from their portion of the property. He utilises the money so collected to pay electricity bills, for maintenance of the property and to pay school fees for his siblings.

There is only one administrator of the estate of Ndiba Thande, in otherwords there is only one personal representative of the said Ndiba Thande, deceased. That personal representation is called Esther Wambui Ndiba. The property of the estate, or put differently, the property that Ndiba Thande died possessed of, vests in the said personal representative, Esther Wambui Ndiba. This vesting of the deceased's property in her makes her the legal owner of the said property. She has stepped into the shoes of the deceased so far as this property is concerned and she represents the deceased in all respects, again, so far as the

property is concerned. The law on this is **section 79** of the Law of Succession Act which I will set out herein in verbatim for the avoidance of doubt. It provides;-

“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”.

The effect of **Section 79** of the Law of Succession Act is to clothe the administrator of the estate of the deceased with all the rights that the deceased had over his property, and similarly impose upon the administration all the duties that the deceased had over his property. It is on the basis of **section 79** that the administrator can sue or be sued on behalf of the estate, can enter into contract with third parties with respect to estate property, and can enforce causes of actions for an on behalf of the estate or the deceased. It is for that reason that the administrator is the personal representative of the deceased. He can practically do anything that the deceased would have legally done were he alive.

When Esther Wambui Ndiba was appointed on 19th April, 2011 as the administrator and personal representative of the deceased, property Dagoretti/Kangemi/25 vested in her by virtue of **Section 79**, of the Law of Succession Act. She thereby assumed all the right that the deceased had over the property. She is the one who should sue or be sued over the said property. She is the one who should enforce any cause of action, such as trespass, with respect to the said property. She is the one who should contract with third parties with respect to the property. This means that she should be the one letting out the property and collecting rents. She has also, by virtue of **Section 79** of the Law of Succession Act, assumed all the duties of the deceased with relation to the said property. She should be the one paying all outgoing with respect to the property.

It would appear from the affidavit of the Respondent that since the demise of the deceased, the Respondent has been carrying himself out as if he is owner of Dagoretti/Kangemi/25 or at least the administrator of the estate of the deceased with respect to Dagoretti/Kangemi/25. He has been appointing agents to collect rent, installing electricity, constructing on Dagoretti/Kangemi/25 and paying rates. The property in question does not belong to him, but to the deceased. He has no legal rights to deal with the property as he has been doing since the same does not vest in him at all. He has no legal rights over the property and conversely no duties attach to him at all.

Section 79 of the Law of Succession Act should be read with **Section 45** of the same. **Section 79** vests the property of the estate on the personal representative, and therefore clothes the personal representative or administrator with authority over the property. **Section 45 (1)** provides that a person who does not hold a grant of representation should not take possession or dispose of any free property of dead person. The provision states:-

“Except so far as authorized by this Act.. 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”.

Quite clearly, a holder of a grant of representation has authority to handle the property of dead person, but not so a person without such grant. A person who handles estate property without authority is an intermeddler.

There is a wealth of case law on what amounts to intermeddling. In **John Kasyoki Kieti – vs- Tabitha Nzivulu Kieti & Another** in Machakos **High Court Civil Case No. 95 of 2001** it was held that doing anything affecting the estate of a deceased person amounts to intermeddling. On the facts of that case it was said that commencing a suit on behalf of the estate before obtaining a grant of representation as intermeddling with the estate. **In in Gitau and two others -vs- Wandai and five others** (1989) KLR 231/ it was held that entering into an agreement to sell estate property before getting a grant or without such a grant is intermeddling.

It is fallacious for a spouse or child to imagine that they cannot be guilty of intermeddling when they handle property belonging to their dead spouse or parent without a grant of representation. Intermeddling can be committed by any person so long as the handler has no grant of representation.

The Law treats intermeddling as a grievous wrong; so much so that the same is criminalised. It is an offence under **Section 45 (2)** of the Law of Succession Act. An intermeddler upon conviction is liable to a fine or imprisonment or both.

As mentioned earlier, the respondent, Kamau Ndiba, does not hold a grant of representation over the estate of Ndiba Thande. Yet without the grant he has been taking possession and generally handling estate property. By his own words he has appointed agents to manage estate property, he has upgraded houses belonging to the estate, installed electricity and constructed houses on estate land. These acts fall foul of **Section 45(1)** of the Law of Succession Act. They are acts of intermeddling with the estate of the deceased as the respondent has no authority to do the acts without holding a grant of representation. He is therefore an intermeddler. These are criminal acts under **Section 45(1)** of the Law of Succession Act. It means that the respondent has been engaging in criminal activity, and is liable to prosecution.

Under **Section 45(2)** of the Law of Succession Act, an intermeddler is answerable to the rightful administrator to the extent with which he has intermeddled with the estate. I have already found that the respondent has intermeddled with estate property, by virtue of **Section 45(2)** he has become answerable to the rightful administrator,

Esther Wambui Ndiba.

Having taken into account all the facts and circumstances of this case, I will make the following orders:-

1. That the respondent, Kamau Ndiba, is hereby ordered to render an account within 30 days hereof of all the rental income so far received by him in respect of the premises on Dagoretti/Kangemi/25 from the date of the deceased's death to the date of the account.
2. That the administrator is hereby directed to open an estate account with a reputable bank within 30 days of date hereof into which rental income derived from the premises standing on Dagoretti/Kangemi/25 shall be paid into.
3. That no payments shall be paid out of the said account without leave of the court.
4. That the funds held in the said account shall be utilized only for estate purposes, especially for the education and general maintenance of family members.
5. That this matter shall be mentioned after 30 days for compliance purposes.

DATED, SIGNED and DELIVERED at NAIROBI this 12th DAY OF July, 2013.

W. M. MUSYOKA

JUDGE