



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Probate & Administration 20 of 2006

IN THE MATTER OF THE ESTATE OF MARGARET WANJIKU (DECEASED)

BEATRICE NINI.....APPLICANT

VERSUS

GEORGE M. KAGWE.....RESPONDENT

R U L I N G

1.The deceased herein, Margaret Wanjiku died on 25th February 2005 and by a Will dated 1st March 2006, she appointed her brother, George Mbugua Kagwe as her “*Trustee*” and she bequeathed all her estate “*real and personal to him*” and upon collecting the estate he was to carry out the following specific bequests;

- i) *To transfer House No.53 at Kariobangi South Estate to the deceased’s daughter, Beatrice Nini, absolutely.*
- ii) *To transfer Plot No.247 Mathare north to the deceased’s son, John Paul Kagwe, absolutely.*
- iii) *To transfer City Council House No.D11 to the deceased’s step-daughter, Catherine Wangari Muiru, absolutely.*

2. A grant of Probate of the Will was made to the said George Mbugua Kagwe on 16th March 2006 by Rawal, J. and on 1st December 2008, Beatrice Nini filed a Summons under **Rules 47** and **73** of the **Probate and Administration Rules** as well as **Sections 83** and **94** of the **Law of succession Act** seeking the following orders;

“1) That George M. Kagwe the executor of the will of the deceased be and is hereby ordered to give an account of all or any part of the monies generated and collected from the assets held in his possession and control within thirty (30) days.

2) A declaration do issue that the monies appropriated by George M. Kagwe be and is hereby apportioned and taken into consideration and be deemed as an advance to him from the estate of the deceased from his share to the estate of the deceased.

3) The Executor produces to the Court an accurate inventory of the assets [and] liabilities of the deceased and a full [and] accurate account of all dealings therewith.

4) The Executor to make full payment of rental collections made over the last two years to the Applicant who is the representative of John Kagwe Paul the proper legatee of Plot No.247 Mathare North, a fact known to law and to the Executor at all times.

5) The Executor be directed to assent, distribute and transfer the estate of the deceased in accordance with the Will to the will to the legatees, the applicant being a legatee as per the will of the deceased, and the Executor cease to deal with or exercise control of the Applicant's brother's bequest in any manner whatsoever. (sic)

6)The Court does give any further orders as it may deem fit and just to give.

7)The costs of the Application be provided for.”

2. It is her case that since his appointment as Executor of the Will, the Respondent has continued to collect and appropriate monies from the rents raised from the deceased's assets without regard to the interests of the beneficiaries and specifically, she has raised issue with regard to Plot No.47, Mathare North which was to be inherited by John Paul Kagwe (**who was said to have disappeared**) and it is her wish that the said asset be transferred to her until her said brother **“resurfaces.”** In the meantime, that any rents collected from the said property should be accounted for and transferred to her.

3. In his Replying Affidavit sworn on 20th April 2009, George Kagwe admitted that he had knowledge that John Paul Kagwe had disappeared in the year 2006 and there were allegations that he had been murdered. Further, that he was **“ready to give a full and accurate inventory of the assets and liabilities and an accurate account of all dealings including monies generated and collected from the assets held in my possession and more particularly John Paul Kagwe's Plot No.247 Mathare North”.**

4. It is his contention that the Applicant has no locus standi in relation to the asset belonging to John Paul Kagwe and she is certainly not entitled to the asset as she claimed. Further, that the Application is without merit and should be dismissed.

5. I have taken into account the submissions by Advocates for the parties and the first issue to address is that of accounts as is sought at Prayers 1 and 3 of the Application before me. Since the Respondent is not averse to complying with those orders, then I shall grant them as prayed but limited to Plot No.247 Mathare North.

6. Turning to Prayers 2 and 5 which are also related, in a Supplementary Affidavit sworn on 9th June 2009, the Applicant has deponed that she was entitled to the proceeds of rent from Plot No.247 Mathare but I am afraid that is not the position in Law. Nowhere has she protested that her interests in House No.53 at Kariobangi South Estate have been prejudiced in any way. Neither has she protested that her step-sister, Catherine Wangari Muiru has any complaints regarding House No.D.11. It is obvious that her complaints are limited to Plot No.247 Mathare North Estate.

7.What is the Law governing the situation where a beneficiary wishes to take over the functions and role of an Executor of an estate and who also holds the grant of probate of a Written Will?

8.Firstly, a personal representative or executor has certain powers set out under **Section 79** of the **Law of Succession Act** as read with **Section 82** of the same **Act**. Of importance is the fact that **“all the property of the deceased shall vest in him.”** Further, under **Section 82(c)**, he is obligated to **“assent, at any time after the confirmation of grant to the vesting of a specific legacy in the legatee thereof”**

9. In this case, the grant has not been confirmed and so none of the legatees can claim any part of the estate. Specifically, no legatee can purport to represent the interests of another because that is the business of the Executor, who is also obligated by **Section 83(e)** of the **Act** to produce to the Court a **“full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.”**

A legatee cannot also be lawfully entitled to take the place of the Executor whose obligations were imposed on him by the deceased. The Court must at all times give effect to the wishes of the deceased as expressed in her Will.

10. Secondly, there is no evidence that John Paul Kagwe is dead and until that presumption is lawfully made, it is the duty of the Respondent as Executor to protect his interests until such time as he demands it or such time as he is deemed unable to do so for whatever reason, in which case his personal representative will take his place.

11. Thirdly, the present Application is clearly premature, misguided and is without merit and is best dismissed save that I shall order the Respondent to give a full and accurate inventory of all assets and liabilities and an accurate account of all dealings including monies generated and collected from the assets of the deceased including but not limited to Plot No.247 Mathare North. He should do so within forty five (45) days of this order.

12. Let each party bear its own costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2012

20/1/2012

CORAM:

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mrs. Keya for Applicant

No appearance for Respondent

ORDER

Ruling duly read.

ISAAC LENAOLA

JUDGE