



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
SUCCESSION CAUSE NO. 458 OF 2003

EMMA WAGIKUYU.....1<sup>ST</sup> APPLICANT

ELIJAH MUCHAI.....2<sup>ND</sup> APPLICANT

VERSUS

JOHN MUCHAI MUNIU.....2<sup>ND</sup> RESPONDENT

RULING

1. The Summons dated 16<sup>th</sup> November 2010 is premised on the provisions of **Section 45(1)** and **55** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**. The Applicants, Emma Wagikuyu and Elijah Muchai seek Orders that the rent payable by tenants residing in the house situated on plot No.Block II/654 Thika Municipality should be deposited in Court pending the determination of this Cause.

2. From the grounds and the Affidavit in support of the Application the complaint made is that on 23<sup>rd</sup> June 2004, parties entered into a partial consent on distribution of the estate herein but two properties were left for distribution upon the parties being heard. The properties were money held in the deceased's account **No.3812588** at an unnamed bank and the house aforesaid.

That before the hearing could be finalized the Respondent intermeddled with the money in the account and also received rent amounting to Kshs.1.6. million without rendering a full account thereof.

3. It is the Applicant's case that since the hearing may not be concluded quickly, the interests of justice would demand that the rental proceeds be held by Court until the determination of the Cause.

4. In a Replying Affidavit sworn on 30<sup>th</sup> May 2011, the Respondent has deponed that he has indeed been collecting Kshs.12,000/- a month as rent for the house in Thika but he has used the money to pay for legal costs arising from Thika CMCC No.1279/1995, HCCA No.27/1991 (Nairobi) and Thika CMCC No.271/1999.

5. He has also deponed that he has the right to collect and use the rent because the deceased bequeathed the house to him by Will and so no other party has any claim to the property and should the Court find otherwise, then he will render an account for the monies used and take into account the money he has expended in the Court cases above.

6. Having heard the Advocates for the parties, my mind is very clear that there is need to grant the orders sought for the following reasons;

7. First, the Respondent's answer to the Application is very presumptuous; that he is entitled to the house

and rent thereof because by an oral Will the deceased bequeathed it to him and so for ten (10) years he has enjoyed the rent. It is presumptuous because that is a matter that is as yet undetermined and is quite alive before this Court and no party can claim to have a superior interest than the other, at this stage.

8. Second, the Respondent has casually argued that it matters not that he has rendered no account to date but he will do so later and with the rider that if it is so required of him, he will render accounts taking into account what he has spent. Again, that position is untenable in Law because from the record, he was appointed an Administrator of the estate on 31<sup>st</sup> July 2003 and by dint of **Section 83(e)** of the **Law of Succession Act**, he was obligated to provide 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 with regard to the estate, within six (6) months of the issuance of the grant. The Respondent has failed to do so and he cannot now be heard to say that he will only do so if the house is not transmitted to him.

9. Third, when a party decides that although the inheritance of a property is contested he should proceed nonetheless to deal with it as if the decision of the Court may not ultimately matter because he is certain that he is entitled to the property; collects rent therefrom and uses it without a care in the world, then **Section 45** of the **Law of Succession Act** can properly be invoked to stop him from further intermeddling with the estate generally, and the property in particular.

10. I should conclude by stating that it is completely unclear to me what the suits the Respondent has referred to have to do with the estate and why it is he that is paying legal fees unless he is doing so as Administrator. If so, he is entitled to bring evidence to this Court and if need be, monies can be released to him from the monies available to pay those fees and I shall therefore make the following orders;

***1) Let all rents due from the house on Block I 1654 Thika Municipality be deposited in Court from 1<sup>st</sup> February 2012.***

***2) The Respondent shall render a true and accurate account of all monies he has received in respect of that property up to the 31<sup>st</sup> January 2012. The account shall also include all expenditures he may have made with regard thereto.***

***3) The Respondent upon complying with (2) above is at liberty to apply for funds to pay for any outstanding legal fees in respect of Thika CMCC No.1279/1995, HCCA N0.27/1991 (Nairobi) and Thika CMCC No271/1999 only upon proof that those suits have a direct connection and bearing to the estate herein.***

***4) This matter has been pending since 2003 and is part-heard and therefore parties should appear before the Presiding Judge of the Family and Probate Division to take dates for conclusion of the Cause.***

***5) Each party will bear its own costs and the Application dated 16<sup>th</sup> November 2010 is determined in the above terms.***

11. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2012.**

**17/2/2012**

**CORAM**

**BEFORE LENAOLA – JUDGE**

**MIRON – COURT CLERK**

**MR. SUMBA FOR APPLICANT**

**MR. GACHERU FOR CO-PETITIONER/RESPONDENT**

**MR. KURAUKA FOR PETITIONER/RESPONDENT**

**ORDER**  
**RULING DULY DELIVERED.**

ISAAC LENAOLA

**JUDGE**

**FURTHER ORDER**

MENTION BEFORE G.B.M. KARIUKI J. FOR DIRECTIONS ON 6/3/2012

ISAAC LENAOLA

**JUDGE**

**MR. GACHERU**  
**I SEEK LEAVE TO APPEAL.**

ISAAC LENAOLA

**JUDGE**

**ORDER**

**LEAVE TO APPEAL IS GRANTED.**

ISAAC LENAOLA

**JUDGE**

**17/2/2012**