



IN THE MATTER OF THE ESTATE OF BONIFACE MWAURA WATURU (DECEASED)

JOSEPH MUNGAI MWAURA APPLICANT

VERSUS

ERICK WATURU MWAURA 1ST RESPONDENT

VICTORIA WAMBUI MWAURA 2ND RESPONDENT

SCHOLAR NYAKIO MWAURA 3RD RESPONDENT

MERCY WANJIRU MWAURA 4TH RESPONDENT

RULING

The application before the Court is brought by way of a Summons dated 30th May, 2011 and taken out under **Rules 49 and 73** of the **Law of Succession Act**. The Applicant thereby seeks the following orders –

1. ... (*spent*).
2. *That the Court be pleased to order that the estate of the deceased BONIFACE MWAURA WATURU be preserved and that the Respondents by themselves, their agents, assigns or any persons claiming under them be restrained from interfering in any manner with the properties of any nature consisting part of the estate of the deceased BONIFACE MWAURA WATURU pending the hearing and determination of the application herein.*
3. *That the proceeds of all income earning assets in the estate of the deceased BONIFACE WATURU MWAURA to wit;*

(a) *LOC. 4/NGARARIA/1128*

(b) PLOT NO. 5964/2-284, 5964/2-74, 5964/2-281 and 5964/2-282 with GITHURAI TINGANGA CO. LIMITED.

(c) ¼ acre plot at KASARANI L.R. 8788/6 with Mukinye Enterprises Limited.

(d) Approximately 500 shares with Kenya Airways Company Limited. Be deposited in a joint interest earning account held by both Advocates for the Applicant and Respondents herein or as may be directed by the Court.

4. That the Court be pleased to give directions as to how the matter herein shall proceed to its logical conclusion.

5. That costs of this application be provided for.

The application is supported by the annexed affidavit sworn by John

Mungai Mwaura on 30th May, 2011 and is premised on the following grounds –

(a) That the Applicant herein is related to the deceased herein by virtue of being his son and has placed a caveat in this matter.

(b) That the Respondents herein have moved to commence succession proceedings without consultations with other members of the family and have left out other family members.

(c) That the Respondents are in possession of most of the assets comprising the deceased's estate and the Applicant is therefore apprehensive that they may dispose of the same to the detriment of the Applicant and his siblings.

(d) That unless the Respondents herein are restrained from interfering/intermeddling with the deceased's estate the Applicant is likely to suffer irreparable loss and harm.

(e) That unless the estate of the deceased is preserved the Respondents are likely to dispose of the same.

The application is opposed by the replying affidavit sworn by Joseph

Mungai Mwaura, the Applicant, on 17th January, 2012. At the hearing of the application, Mrs. Mwangi appeared for the Applicant and argued that upon the demise of the deceased, his sons had been collecting rents and using the money. She submitted that the estate should be preserved for distribution by the Court and that the rents collected should also be preserved. After the death, the Applicants approached the Respondents but the latter were not cooperative. The Applicants therefore placed a caveat so that the Respondents may not do anything behind the Applicants' backs. The beneficiaries all admit to be the children of the deceased.

Opposing the application, Mr. Kiptoo for the Respondents relied on the replying affidavit and told the Court that the Respondents were not opposed to preservation of the estate. They are also not opposed to prayer No.2 pending the hearing and determination of this matter. It is only prayer 3 which is controversial and which they are opposing. He conceded that it was true that the Applicants and the Respondents were all children of the deceased. Jane Mwaura was divorced in 1974 and she went away with her children. It was only in 2001 that the Applicant attempted to contact the deceased whereas the Respondents with their mother have lived with the deceased all along till the deceased passed on. The mother of the Respondents also passed away so that, as we speak, they are orphans. From 2009, they have been managing and expanding the estate. He submitted that they have never disposed of or wasted the estate. If an order were made for depositing of the money in Court or elsewhere, it would disrupt their lives. The Respondents have never ignored to include the Applicant as a beneficiary of the estate. Nor have they ever had any problem treating the Applicant as a beneficiary. Counsel invited the Court not to

grant the prayers sought as these would cripple the Respondents' lifestyle. One of them is in the university whereas others are in college. It is not true that all the properties are in the name of the deceased since some of them were developed by the Respondents' mother. He concluded by stating that the Respondents do not oppose preservation of interest and that the caveat will protect the interests of the Applicant.

In a short reply, Mrs. Mwangi said that the only way of preserving an income generating asset was by directing the application of income and that an income generating asset should be preserved and the income generated should be preserved.

From the submissions of both Counsel and especially that of Mr. Kiptoo, I note that the only issue to be sorted out is whether the proceeds of all income earning assets in the estate of the deceased, BONIFACE WATURU MWAURA, should be deposited in a joint interest earning account held by the parties' Advocates or as may be directed by the Court. After considering this point, I note that the Respondents have been collecting and using the money from the estate of the deceased. This cannot continue forever because at some point, sooner than later, this estate will have to be distributed so that each beneficiary can get his/her rightful share. Until that distribution is effected, it would obviously dislocate the Respondents' lifestyles if an order were to issue redirecting that the funds collected from the estate be deposited in an account held by both Advocates for the Applicant and Respondents. If there is goodwill among the parties, and since they concede that they are all children of the deceased, they should be able to get together as brothers and sisters and agree on a percentage which they can all share among themselves pending the distribution of the estate. I would encourage action along that line because to deny the Respondents the use of that money suddenly at this stage could do them a lot of harm. Meanwhile, it will also assist matters if the Succession Cause were to be speeded up and finalized soonest.

In sum, I grant order 2 as prayed but decline to grant order 3 at this stage. Parties to bear their respective costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 3rd day of May, 2012.

L. NJAGI
JUDGE