



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT CASE NO. 85 OF 2008**

**MOHAMMED AILA JIBO.....PLAINTIFF**

**VERSUS**

**AISHA RAMADHANI.....1<sup>ST</sup> DEFENDANT**

**HALIMA JATAWE.....2<sup>ND</sup> DEFENDANT**

**RULING**

The proceedings herein were initiated by way of a plaint. The interim application was anchored on the said plaint seeking interim reliefs. The interim application found its way before Gacheche J on 17<sup>th</sup> March, 2008 and the learned Judge granted the said interim relief along the following terms: -

**“Based on the claim that the respondents have not been appointed administrators of the estate of the late Jatan Nawe, I do for that reason grant an order in line with prayer 2 in the interim nature pending the hearing and determination of the application of 26<sup>th</sup> March, 2004. Notice to issue. In the meantime I also order that the applicant do deposit in court all rents for the subject premises for the period commencing January, 2008 till the determination of this matter.”**

These were subsequently confirmed pending the hearing and determination of the suit vide the ruling of Waweru J. delivered on the 4<sup>th</sup> day of February, 2009. It has the following salient features: -

- The learned Judge reviewed the proceedings of both sides.
- That the plaintiff who is the respondent was not a trespasser in the said premises because he had a lease which had some substantial time to run.
- The defendants did not have a full grant of representation to the estate of the deceased. All they had was a limited grant only for purposes of defending the suit and for this reason the defendants could not have had the authority to administer the estate of the deceased inclusive of termination of the lease and for that reason the plaintiff’s suit had a probability of success.
- The defendants as at that time did not have a full grant of representation to the deceased’s estate to entitle them to take control of the suit premises and for that reason it was important that the plaintiff be accorded protection in order to enjoy possession of the suit premises pending disposal of the suit.
- That the plaintiff having known that his landlady was deceased, and the defendants having not presented to him a full and proper grant of representation to the estate of the deceased entitling them to collect the rent on behalf of the estate of the deceased, he was entitled to seek the intervention of the

court. The fact of the defendants not having proper representation cannot be trifled by them on the representation that the plaintiff is a mere tenant because he might be called upon to account for that money in the near future.

- That the defendants will be entitled to this rent at any time, that they show a full and proper grant of representation of the estate or probate of the will of the deceased. On the basis of that reasoning, the learned Judge allowed prayers 3 and 4 of the chamber summons dated 14<sup>th</sup> day of March, 2008.

The prayers granted read as follows: -

**“3. A temporary injunction do issue restraining the defendants by themselves, their servants, agents or any one acting under them or under their authority or otherwise howsoever from harassing, intimidating, obstructing, or otherwise howsoever interfering with the plaintiff’s usage and enjoyment of LR 30/11/203 as long as the plaintiff pays all the rent due and owing over the same, until the plaintiff’s suit is heard and determined.**

**4. The plaintiff do deposit in court forthwith the rent of Kshs.80,000/= due on the property LR 36/11/03 forthwith.”**

Against the afore set out background information, the defendants have come to the seat of justice by way of a notice of motion dated the 18<sup>th</sup> day of August, 2011 and filed on the 24<sup>th</sup> day of August 2011. A total of 4 reliefs have been sought namely: -

- (1) That the honourable court be pleased to lift/discharge the injunction restraining the defendants from collecting or receiving rent from the plaintiff herein.**
- (2) That the sum of Kshs.1,760,000/= deposited in court by the plaintiff be released to the first defendant.**
- (3) That the plaintiff be ordered to pay the balance of all rent due to the estate within 14 days.**
- (4) That the costs of the application be provided for.**

The grounds in support are set in the body of the application, supporting affidavit and oral highlights in court and the major ones are as follows: -

- There is an injunction issued herein on the 6<sup>th</sup> day of February, 2009.
- The defendant has authority from the co-defendant to swear the supporting affidavit.
- That the plaintiff/respondent had sought the intervention of the court because there was no administrator of the estate of the deceased to whom rent could be paid.
- That by reason of failure to have a grant holder in place the court ordered rent to be deposited into court.
- That rent due to the estate of the deceased as at August 2011 was Kshs.3,520,000 out of which only Kshs.1,760,000.00 has been deposited in court leaving another balance of Kshs.1,760,000.00.
- That the first defendant has been appointed an administrator to the estate of the said deceased person and for this reason she is properly vested with the authority to receive the said rent from the court and further that the plaintiff be rerouted from paying rent into court and he be directed to be paying the same to the defendants.
- That it has come to the applicant’s notice that not all rent has been deposited with court and for this

reason the plaintiff/respondent is called upon to remit the undeposited rent to them.

- Reliance has been placed on an order issued by Gacheche J on the 4<sup>th</sup> day of August, 2011 along the following orders: -

- (1) That the objection cause be and is hereby dismissed as well as their cross-petition.**
- (2) That Aisha be and is hereby appointed as administrator of the estate of the late Jatan Nawe and further order that she files in court a list of assets and liabilities of the estate within the next twenty one days.**
- (3) That the estate be distributed in accordance with Sharia law and in line with the requirement that “the daughter gets half, the son’s daughter a sixth, making two thirds and what remains go to the sister (Report by Al Bukhari) Bulugh Al – Maram, PS 334) and it shall be as follows: -**
  - **Asha Ramadhan – ½ (a half of the estate)**
  - **Jatane Nawe 1/6 (a sixth of the estate)**
  - **Kanja Nawe Fatuma Nawe and Halima Nawe to share 1/3 of the estate being the residue of the estate.**
- (4) That Asha who becomes the administrator of the estate do cater for the education and upkeep of Jatan Farooq until she attains the age of majority.**
- (5) That the sums so expended shall be debited from Jatan’s said share of the estate.**
- (6) That each party do bear its own costs.**

That by reason of the above set out matters the applicant has earned the relief sought and he should be granted the same.

The plaintiff/respondent was served and he has filed a replying affidavit deposed by one Mohamed Aila Jibo on the 19<sup>th</sup> day of September, 2011 and filed on the 5<sup>th</sup> day of October, 2011. The salient features of the same inclusive of the counsel’s oral highlights are as follows: -

- Vide paragraph 5 that the plea for the release of the deposited rent does not hold because that appointment is subject of an appeal.
- That the objector in the succession proceedings have filed an application for stay of execution of the grant of representation issued to the first defendant.
- Vide paragraph 7 that by reason of what has been stated in paragraph 5 and 6 above, it is premature to release the said funds to the first defendant and the plaintiff/respondent believes that the move by the first defendant is calculated to defeat the stay of execution in the succession proceedings.
- Vide paragraph 8 that the first defendant is seeking the discharge of an injunctive relief and yet they have been wanting to evict the plaintiff/respondent from the premises.
- Vide paragraph 9, 10, 11, 12 that him plaintiff/respondent was issued with a notice to carry out repairs or face demolition or shut down the business and since there was no administrator to undertake the said repairs, the plaintiff/respondent undertook the repairs. It is therefore not true that he has not remitted the amount claimed not to have been remitted.
- Vide paragraph 15, that the threatened, unjustified eviction which informed the court to grant the

injunctive relief will no doubt be effected once the injunctive relief is lifted.

There is also reliance on annexures namely notice of appeal in P&A Cause Number 1679 of 2007 an application for stay of execution in the P&A. Judgment in the P&A Cause No.1679 of 2007, memorandum of appeal against the judgment in the P&A Cause, photographs demonstrating renovations carried out by the plaintiff/respondent on the suit premises, Bill of quantities for the repair and costs.

This court has given due consideration to the rival deponements as well as the rival oral highlights. The court proceeds to make the following common grounds observations on the same: -

- (1) The main proceedings herein are still pending and what was disposed off by Waweru J was an interlocutory application in respect of which certain orders were made which the current application seeks to have discharged and or varied.
- (2) It is correctly deponed and submitted by the plaintiff/respondent that the injunctive relief was granted on twofold. Firstly to restrain the defendants from evicting, the plaintiff/respondent from the suit premises firstly because he had a lease for a specified period, which was still running on the 2<sup>nd</sup> part, was to restrain the defendants from collecting rent due to the deceased's estate because they did not have a grant of representation to the estate of the deceased hence the court's direction that rent be deposited into court.
- (3) It is correctly submitted by the plaintiff/respondent that both defendants were restrained.
- (4) It is correctly submitted by the plaintiff/respondent that the application has been presented on behalf of both defendants and yet only one of them has been granted a grant of representation to the estate of the deceased.
- (5) It is correctly submitted by the defendant/applicant that since the first defendant has a grant of representation she should receive the funds deposited in court.
- (6) It is correctly submitted by the plaintiff/respondent that the rent deposited in court is supposed to be received for the benefit of the estate of the deceased person.
- (7) It is evident from the orders of Gacheche J. in the P& A file that the beneficiaries of the estate of the deceased person are more than one. Besides the first defendant, there are other beneficiaries, inclusive of a minor.
- (8) It is evidently clear from the record that the first defendant is the one who petitioned for a petition of a grant of representation in Nairobi HCCC P&A No.1679 of 2007 which was objected to by four objectors. It is on record that the objection was dismissed, grant of representation issued and the estate distributed.
- (9) It is also clear from the record that there is a move to challenge the decision of Gacheche J and a notice of appeal to that effect has been filed. There is also demonstration that indeed an application for stay of execution of Gacheche J's, orders has also been filed, factors which cannot be ignored. What cannot also be ignored is the fact that no stay order has been granted yet to stop the 1<sup>st</sup> defendant/applicant from seeking what is being sought.
- (10) This court cannot ignore the fact that it has been brought to its notice that the funds sought to be released are a deceased person's estate funds and by reason of the revelation that distribution has already been ordered by Gacheche J, and that this distribution involves other beneficiaries other than the 1<sup>st</sup> defendant among them a minor, the court cannot ignore to seek guidance from the law of succession Act prescriptions. Those sampled are: -
  - (i) Section 45(1) which provides that: -

**“Section 45(1) except so far as expressly authorized by this Act or by any other written law or by a grant of representation under this Act, no person shall for any purpose or take possession or dispute a grant or otherwise intermediate with any of a deceased person---.”** Applying this free property to the rival arguments herein, it is clear that this is one of the reasons as to why Waweru J declined to allow the defendants herein to evict the plaintiff from the suit business and to order and direct that the monthly rental income be deposited in court.

(ii) Section 41 of the Law of Succession Act. It reads: -

**“Section 41 – where reference is made in this Act to the net intestate estate or the residue thereof devolving upon a child or children, the property comprised therein shall be held in trust in equal shares in the case of more than one child for all or any of the children of the intestate---.”**

This court’s construction of this provision is that the command is mandatory signified by the use of the word **“shall”** that the property devolving on to a minor child be held in a trust. It is to be noted that Gacheche J did not make provision for this in the distribution order.

(iii) Section 79 of the Law of Succession Act. It reads: -

**“Section 79. 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 a personal representative.”**

When construed and applied to the scenario herein, it is clear that rent subject of the application for release of the same was so held for the benefit of the estate. It means that the 1<sup>st</sup> defendant who is a personal representative can only receive it as such personal representative and not in his personal capacity irrespective of the fact that the court has adjudged her of the half owner of the deceased’s estate. It has to be received on behalf of the estate first and then processed through the succession cause for the benefit of the beneficiaries who have been so identified and their respective shares identified.

(iv) Section 82 of the Law of Succession Act reads in part.

**“Section 82 personal representatives shall subject only to any limitation imposed by their grant have the following powers: -**

**(a)To enforce by suit or otherwise all causes of action which by virtue of the law survive the deceased on account of his death for his estate**

**(b)---**

**(c)To assent at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof.**

**(d)To appropriate at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereon at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of continuing trust as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and with the assistance of a duly qualified valuer where necessary, the value of the respective assets and liabilities of the estate and to make any transfer which may be requisite for giving effect to the appropriation---“**

Construction and application of this provision to the facts herein is that considering the fact that confirmation has been effected, the personal representative has authority to enforce by way of suit or otherwise debts accrued to the estate. Any withheld or shortfall of rent payable to the estate falls into such category. They also have power to give effect to the distribution ordered by the court.

(v) Section 83. It reads in part: -

**“Section 83 personal representatives shall have the following duties---**

**(a)---**

**(b)To get in all the free property of the deceased including debts accruing to him and moneys payable to his personal representatives by reason of his death.**

**(c)----**

**(d)-----**

**(e)----**

**(f) Subject to section 55, to distribute or to retain in trust (as the case may be required) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom according to the respective beneficial interests therein under the will or intestacy as the case may be.**

**(g)-----**

**(h)-----**

**(i) -----.”**

When construed and applied to the facts herein, it is clear that by virtue of these provisions the first defendant as a personal representative is duly bound to call in and protect the property belonging to the estate of the deceased to hold in trust any property required to be held for the benefit of the minor, to distribute the estate of the deceased to the beneficiaries upon confirmation and lastly render accounts.

For the reasons given in the assessment the court proceeds to make the following final orders in the disposal of the application dated 18<sup>th</sup> day of August, 2011 and filed on 24<sup>th</sup> day of August, 2011: -

(1) Prayer 1 is allowed with a variation as hereunder: -

(a)The injunctive relief granted by Waweru J on the 6<sup>th</sup> day of February 2009 restraining the defendants by themselves, their servants, agents or anyone acting under them or under their authority, or otherwise howsoever from harassing, intimidating, obstructing or otherwise howsoever interfering with the plaintiff’s usage and enjoyment of L.R 36/11/203 as long as the plaintiff pays all the rent due and owing over the same until the suit is heard and determined still stands and is declared not to be affected by the application under review.

(b)The allowing of prayer 1 of this application will not operate in favour of the 2<sup>nd</sup> defendant as the 2<sup>nd</sup> defendant was not appointed as a personal representative or administrator of the estate of the deceased and for this reason he/she cannot receive rent on behalf of the estate of the deceased.

(c)The injunctive relief barring the first defendant from receiving rent from the plaintiff herein is lifted conditionally. The condition being that the said first defendant does not receive the said funds in her personal capacity but as the personal representative of the estate of the deceased.

(2) Prayer 2 is also allowed but conditionally with the condition being that since the rent was deposited in court for the reason that the first defendant did not have a grant of representation to the estate of the deceased and by reason of this, it is obvious that the said rent was to be received for the benefit of the deceased and considering that the estate has been distributed it is only proper that the said funds be

availed to the 1<sup>st</sup> defendant through an estate account. The 1<sup>st</sup> defendant is therefore required to forthwith furnish to court particulars of an estate account with a sound financial institution if one already exists, or alternatively if one does not exist then one such account is to be furnished to court to enable the court make an order releasing the said funds into the said account.

(ii) After the said funds have been so deposited in the estate account then the same to be dealt with in the manner provided for under the Law of Succession Act within the P & A Cause proceedings as per the distribution by Gacheche J inclusive of the issue of creation of a trust on behalf of the minor beneficiary.

(3) Prayer 3 is declined on account of the plaintiff/respondent's allegations, in the replying affidavit that the funds withheld were used to improve the property for the benefit of the estate a matter not denied by the first defendant or defendants. For this reason the first defendant is at liberty to amend the counterclaim and counterclaim for this figure specifically and then await trial on the same, or alternatively if no good defence is put forward in respect of the same, seek summary judgment for its recovery. In the 3<sup>rd</sup> alternative now that the 1<sup>st</sup> defendant has been vested with authority under Sections 79, 82 and 83 of the Law of Succession Act she is at liberty to initiate procedures under the relevant law governing the relationships of landlord and tenant for its recovery. In the 4<sup>th</sup> alternative to process the hearing speedily and have those issues dealt with at the main trial under *mesne* profits.

(4) With regard to costs considering that Waweru J. in his orders of 6<sup>th</sup> February, 2009 ruled that the plaintiff/respondent had a genuine complaint on the one hand, and considering that it was not the fault of the plaintiff/respondent that the first defendant did not have a grant of representation to the estate of the deceased then necessitating the initiation of these proceedings it is only proper that the 1<sup>st</sup> defendant/applicant do pay the costs of this application to the plaintiff/respondent.

(5) There will be liberty to apply.

**Dated, read and delivered at Nairobi this 21<sup>st</sup> day of October, 2011**

**R.N. NAMBUYE  
JUDGE**