



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KITALE**

**Succession Cause 233 of 2006**

**PETER K. KEMEI & 2 OTHERS.....PETITIONERS/APPLICANTS**

**VERSUS**

**SALLY MUIGEI.....RESPONDENT**

**RULING**

The application before me is for the review of orders which had been issued earlier, in this very suit. The orders sought are as follows;

“ (a) ***THAT***, this Honourable Court be pleased to vary the order authorizing the four representative to run Ogilgei Bar and Restaurant and instead order that the premises be leased out to a third party at a monthly rent of Kshs.46, 500/= till determination of P&A NO.51 of 2007.

(b) ***THAT***, accounts be taken to determine the total income earned

from Ogilgei Bar & Restaurant and the other rental properties of the deceased between 30<sup>th</sup> March 2007 to-date.

(c) ***THAT***, the rental income from both Ogilgei Bar & Restaurant and from other properties be deposited at National Bank of Kenya Ltd, in the joint account held in the name of the Applicants and thereafter be shared equally amongst the four houses.

(d) ***Costs of this application be borne by the Respondent. “***

It is the applicants' case that the respondent, Sally Muigei, and her two sons, Oliver Kibet and Moses Kipchirchir, had taken over the keys for all the lodging rooms, as from 4/5/2007. They are said to have done so violently, and without due regard to the consent orders issued in this case.

In the event, the respondent is accused of collecting rental income for the said lodging rooms, and keeping the funds to herself.

It is also said by the applicants that the respondent had refused to co-operate in the procurement of a liquor licence for running the Bar and Restaurant business. She is said to have refused to obtain a

Personal Identification Number (PIN) from the Kenya Revenue Authority, so as to facilitate the release of the licence.

Meanwhile, as the respondent collects money without accounting for it, the applicants say that the electricity and catering levy bills remained unsettled.

In her replying affidavit the respondent says that she was only running the 16 lodging rooms, which have an average occupancy rate of 5 rooms per day. Each of the rooms is rented out at Kshs.150/=, and the respondent says that she is able to account for the money she had collected.

As regards the bar, the respondent insists that the same has been in the hands of the 3<sup>rd</sup> widow and her sons.

The respondent, who is the 4<sup>th</sup> widow, denied the allegation that her sons broke into the bar counter and took away the keys to the lodging rooms. Instead, she accuses the applicants and members of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> houses of having taken over the running of the bar and the lodgings, to the exclusion of the respondent.

The respondent categorically denied having refused to procure her PIN Certificate. Her explanation was that she did not even know that there had been an application for a liquor licence, as she had been completely excluded from the day to day running of the bar.

In effect, the respondent lays the blame squarely at the applicants' feet, for not facilitating the actualization of the consent orders.

According to the respondent, she was always ready to comply with the orders of the court, but the applicants did not wish to co-operate with her. As an example of the alleged lack of co-operative, the respondent pointed out that the joint account at National Bank of Kenya, Kitale Branch, was opened discreetly by the applicants, without informing or involving the respondent. She says that she only became aware of the existence of that account when the applicants served with affidavit in support of the present application.

As part of her answer to the application, the respondent exhibited a copy of an electricity bill issued by The Kenya Power & Lighting Co., Ltd., on 28/10/2007. She said that the bill was still outstanding, and that the other 3 houses expected her to settle it.

Finally, the respondent pointed out that each of the other 3 houses were settled on substantially bigger portions of land, compared to her. Therefore, as the said other 3 houses were not giving an account of the proceeds from their respective portions, the respondent reads nothing but discrimination against her.

By virtue of the provisions of Rule 63 (1) of the Probate Rules, Order 44 of the Civil Procedure Rules is application to probate and administration causes. Therefore, pursuant to the provisions of Order 44 rule 1 (1), an applicant for review should demonstrate that he had discovered a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the Decree or order was passed or made. Alternatively, the applicant would need to demonstrate that there was some mistake or error apparent on the face of the record, or that there was some other sufficient reason to warrant review.

In my understanding, the applicants did not attempt to fulfill the requirements set out in Order 44 rule 1 (10) of the Civil Procedure Rules. Instead, they appeared to be complaining that the respondent had failed to honour, or had breached the terms of the earlier orders of the court.

Ordinarily, if one or more parties to a case had deliberately flouted the terms of a court order, in the manner suggested by the applicants herein, or in any other manner, the court ought to be invited to cite him for contempt, and to punish him appropriately.

Secondly, the matters complained of are said to have occurred subsequent to the orders in question, therefore they could not have been things which the applicants could have known at the time the orders were made.

Thirdly, the applicants have not demonstrated that there was any error or mistake apparent on the face of the record.

When the respondent asserted that the applicants had failed to demonstrate any fraud or misrepresentation, the applicant's answer was that when the respondent had received money on behalf of the estate, and then kept the same to himself, that constituted fraud.

The court is unable to agree with that broad statement, as to what constitutes fraud. I say so first because if a party wishes to allege fraud on the part of any other party, he must begin by making a precise assertion of fraud. Thereafter, he must set out the particulars of any such alleged fraud.

It is thus not sufficient for the applicants to submit that the respondent was guilty of some fraud, by implication.

In any event, the failure to give an account is not, by itself, evidence of fraud.

But the court cannot even assume that the respondent had failed to give an account, as she has expressly stated, on oath, that she was ready and willing to account for all the money she had received as rentals.

As the respondent did point out, the consent order dated 29/3/2007 only mentioned the running of the bar and restaurant businesses, at Ogilgei. In other words, there was no mention of the lodging rooms. Therefore, I fail to understand why the respondent is being accused of breaching an order that was not issued by the court.

However, all the parties should always bear in mind the fact that even though they should be engaged in an ongoing civil case, that does not give them the authority to carry out actions which may constitute criminal offences.

In the event that anybody commits any offence of a criminal nature, the issue ought to be investigated by the police, who should thereafter take appropriate action, regardless of the fact that there was also an ongoing civil case. The reason for so saying is well spelt out in section 193A of the Criminal Procedure Code, which provides as follows;

***“ Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings. “***

Meanwhile, the 1<sup>st</sup> petitioner/applicant, Peter K. Kemei, has said that the running of the bar was taken over by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> houses, whilst the respondent was to run the restaurant at a nominal rent of Kshs.4, 000/=. By that statement, the applicants confirmed that the reality on the ground was not reflective of the terms of the consent order.

If the consent order were complied with, the bar and restaurant were to be run by four representatives, each representing their own mother's houses.

As the parties have, in real terms, already varied the terms of the consent order, I hold the considered view that it is not appropriate for the applicants to complain about one alleged variation.

In any event, the applicants did not provide the court with sufficient material to satisfy the court that the proposed rent of Kshs.46, 500/= was reasonable in the circumstances of this case. I therefore decline to give an order which may not be capable of being enforced.

As regards the taking of accounts, all the beneficiaries of the estate who may be handling any property of the late Paul Kibuson Kimuige is reminded that they are accountable to the court and also to all the other beneficiaries. This court need not make a specific order in that regard, as the law is clear enough.

The upshot of the foregoing is that the application dated 25<sup>th</sup> September 2007 is unsuccessful. It is thus dismissed with costs.

However, the parties to this cause are directed to take the necessary steps, with a view to having the matter heard and determined expeditiously. I believe that it is only the speedy resolution to the entire cause that would ensure that justice is done to all the parties.

It is so ordered.

Dated and Delivered at Kitale, this 21<sup>st</sup> day of January, 2008.

**FRED A. OCHIENG**

JUDGE