



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAKURU
CIVIL DIVISION
SUCCESSION CAUSE 539 OF 2001

IN THE MATTER OF THE ESTATE OF SIMON NDUNGU NJOROGE (DECEASED)

ESTHER WANGARI KINGORI.....INTERESTED PARTY/APPLICANT

VERSUS

1. ELIAS NJOROGE NDUNGU

2. JAMES KAMAU NDUNGU.....ADMINISTRATORS/RESPONDENTS

RULING

The applicant filed an application by way of Chamber Summons under **Rules 49 and 73** of the **Probate and Administration Rules**. She prayed for a reasonable provision to be made for herself and her two minor children for their maintenance including food, clothing and school fees pending the hearing and determination of the issue of distribution of the deceased's estate. She prayed for leave to withdraw a sum of Kshs.300,000/- or such other sum as the court would order, from the estate's bank accounts. She further prayed that the two respondents be ordered to provide to her and to the court a proper, complete and accurate inventory and account of the deceased's estate in strict terms of the court order issued on 24th May, 2004 as she alleged that the inventory and accounts that were filed in court by the respondents dated 28th May, 2004 was improper and inadequate.

The applicant and the respondents are the joint administrators of the deceased's estate. The respondents were the sole administrators of the said estate until 22nd October, 2004 when a consent order was recorded to include the applicant as a joint administrator. The applicant lamented that the respondents had not been able to make progress towards distribution of the estate because they had failed to provide a proper, full and accurate account and inventory of their administration of the deceased's estate from the date of his demise upto the time she was joined as an administrator.

The applicant stated that she urgently required a reasonable amount of money for the upkeep and education of herself and three minor children who were dependants of the deceased prior to his death. She said that she was unable to pay school fees for the children and they had been sent away from school in the middle of the last school term and had since remained out of school due to lack of school fees. She stated that she required about Kshs.100,000/- to cater for the children's school fees and other school

necessities for the whole year including clearing the fees arrears for the last term. She also required a further Kshs.200,000/- for the general upkeep of herself and the children and also to refurbish her business which she had been running in Elburgon town but which had since closed down owing to lack of stock. She said the business closed down because she was using the little money generated therefrom to meet the daily subsistence needs for herself and the children and she was therefore unable to replenish the stock.

The applicant had been allowed by this court to withdraw from the estate's account a sum of **Kshs.150,000/-** in August 2004 but she stated that the same was quickly used up in paying up loans, household and medical bills and school fees arrears which had accumulated. Although the applicant was allowed to collect rent from some houses in Elburgon town, the same amounted to **Kshs.6,000/-** only per month, if paid in full but she stated that she had problems with some of the tenants who were defaulting in payments. The applicant's counsel submitted that the deceased's estate was worth over **Kshs.100 million** and the respondents were controlling most of it.

The respondents opposed the said application and filed a replying affidavit through Elias Njoroge Ndungu, the first respondent. They said that between 3rd May and 30th July, 2004 the applicant had been allowed to withdraw a total of **Kshs.250,000/-** from the estate account for her own maintenance and that of her children and had already taken a fair share of her entitlement from the estate but had not accounted for it. They further stated that the amount required for school fees of the applicant's children was no more than **Kshs.35,000/-** per year and therefore her application for **Kshs.300,000/-** was ridiculously exaggerated and baseless. The respondents also deposed that other two children of the deceased whom they were educating were also in urgent need of school fees and indeed one of them who was in a University in Russia was at the verge of deportation unless he paid some unspecified arrears of fees. The total university fees per year was **\$4,140**.

With regard to the issue of inventory of the estate's assets and accounts, the respondents stated that they had filed the same on 31st May, 2004 in compliance with this court's orders of 24th May, 2004 and that it was the applicant who had refused to remit her accounts. The respondents submitted that there were 11 beneficiaries of the deceased's estate and the applicant could not be allowed to continue to withdraw money from the estate account before distribution of the same as that was going to deplete the cash in the estate account. They further submitted that if the applicant was allowed to withdraw any money, the respondents should also be availed some money as well to cater for school and university fees of the other two children of the deceased.

I have carefully considered the application before this court and I wish first to address the issue of the inventory of the deceased's assets and statement of account. Prayer number 3 in the applicant's application dated 23rd April, 2004 was as follows:-

“THAT the respondents do produce to the court for approval or otherwise a complete and accurate inventory of all the deceased's assets as at the time of his death, a full account of the administration of the deceased's estate so far (including all bank statements and bank fixed deposit certificates since the deceased's death), and full account of the estate that remains unadministered”.

On 24th May, 2004 the aforesaid prayer was granted by consent and the inventory and accounts were to be filed within seven days from the date of recording the consent in terms of the aforesaid prayer.

I have perused the inventory of the deceased's assets and the accounts that the respondents filed on 31st May, 2004 and it is evident that they are incomplete and do not comply with the order that the court issued by consent. Given the extent of the deceased's estate, I think it was not possible for the respondents to fully comply with the order within the short period of time of seven days that the parties set by themselves. The deceased died on 19th October, 2001 and had a fairly large estate which included about twenty parcels of land, about 10 accounts in several banks, four running businesses which initially were operated by the deceased but were transferred to other persons either immediately before or immediately after the death of the deceased and about six motor vehicles.

As per the court order of 24th May, 2004, the respondents were required to produce for the court's approval or otherwise a complete and accurate inventory of the deceased's assets at the time of his death. Such an inventory must of necessity show the correct market value of each of the deceased's assets because that inventory will greatly assist the court in distributing the estate amongst the beneficiaries. It does not help the court to merely list down the assets without stating the net monetary value of each. The respondents did not show the value of any of the parcels of land which they listed down in the inventory that they filed in court. For some of the parcels of land, the respondents did not indicate their registration numbers and in others, for example **NAKURU SAN MARCO/4** they indicated that the title had not been transferred to the deceased and that there was **Kshs.105,000/-** owed to Kenya Seed Co. Ltd and other unstated amounts owed to the Lands Office and to Nakuru Municipality. How did they know that? Was there any documentary proof of the alleged debts attaching to the said property? What was the net value of the property after payment of all the debts that attached to the same? These are some of the questions that arise with regard to the accuracy of the said inventory.

The respondents did not show any statement of accounts in respect of the three petro stations and posho mill that were operated or owned by the deceased either by himself or jointly with the respondents before the demise of the deceased. Whether the accounts for the said businesses were in credit or in debit, their complete accounts as at the time of the deceased's demise must be provided. There should also be evidence to show the exact dates when the respondents and Joseph Karimi were given the contracts to operate the petro stations at Rongai, Molo and Kisumu by Caltex Oil Kenya Ltd as was stated by the respondents.

With regard to the motor vehicles, the value of those that had not been disposed of was not indicated and as for those that were said to have been sold, no evidence was shown as to when they were sold, what the actual selling price for each was and how the sale proceeds were utilised. The information provided by the respondents regarding the transactions involving the various bank accounts was also totally unsatisfactory. They ought to have prepared or caused to be prepared for them a proper and accurate statement of accounts for the period between 19th October 2001 and 22nd October, 2004 when the applicant became a co-administrator of the estate.

The complete and accurate inventory and accounts is not just for the benefit of the applicant alone but is also necessary for the fair distribution of the estate amongst all the beneficiaries. The respondents may be lacking in the necessary professional expertise to prepare such detailed statement of inventory of the estate and accounts but that cannot be an acceptable excuse for not complying with an express court order. The law allows engagement of experts to assist in any necessary aspect of management and/or distribution of an estate and in my view, such a step has to be taken in this matter if fair and equitable distribution of the estate will be achieved. Towards that end, the parties herein should agree on a reputable firm of auditors who would be engaged to prepare a complete and accurate inventory of all the deceased's assets and also prepare an appropriate statement of accounts of the estate from the time the deceased passed away upto date. The firm of auditors will be paid their reasonable fees from the estate's account but the fees ought to be agreed upon in advance. The parties will be expected to avail all the necessary information and/or documents to the firm as would enable it to carry out the given task. The appointed firm will also be at liberty to obtain any necessary information and/or documents from any institution. The firm will then file its report within sixty (60) days from the date of its appointment or within such other period as may be agreed upon by the parties or granted by the court.

With regard to the prayer by the applicant for leave to withdraw a sum of Kshs.300,000/- from the estate accounts for her benefit and that of her children, the applicant has shown that her two children, Daisy and Marion Ndungu are in need of school fees as well as Pauline Mukami, her niece who was living with the applicant and the deceased prior to his demise. The applicant is currently collecting rent from a residential house in Elburgon and the said rent is no more than Kshs.6,000/- per month. The applicant also stated that currently she was not engaged in any income generating venture and that was not disputed. Although the applicant stated that the aforesaid children had been out of school since the middle of the first term of the year due to default in payment of school fees, the present application was not filed until 10th May, 2005. I would have expected such an application to have been filed almost immediately after the children were sent away from school. This is perhaps the reason that caused the

respondents to dispute that the children were currently out of school for lack of school fees. All the same, I am of the view that the applicant has made out a case for provision of some interim financial relief from the estate accounts pending the distribution of the estate for her upkeep and that of the said children. I would, however, agree with the respondents' counsel that the applicant should not expect the court to order any payment to her so as to meet her personal financial obligations like repayment of the loan which she obtained from Equity Bank Ltd. Where the court has to intervene to order some interim disbursement of an estate's funds pending distribution of the estate amongst the beneficiaries, it will only do so to meet some basic necessities of a beneficiary or to alleviate excessive suffering of such a person but not otherwise. Having taken all the relevant issues into consideration, I order that the applicant be allowed to withdraw a sum of **Kshs.150,000/-** from account number **0152094479700** in the name of **NDUNG'U PETROLEUM CO. LTD** at Standard Chartered Bank (K) Ltd, Nakuru Branch.

The respondents also deposed in their affidavit that other two children of the deceased; Harun Gathungu Ndungu and Jane Muthoni were also in need of funds for their education. Harun Ndung'u was said to be in a University in Russia and his annual fees was **\$4,140**, the equivalent of **Kshs.331,200/-** and Jane Muthoni was at Naivasha Girl Secondary School where the annual fees was **Kshs.56,000/-**. The respondents' counsel urged the court to allow the respondents to withdraw the aforesaid sums for educational purposes of the said dependants. This application was resisted by the applicant's counsel who argued that the respondents were financially well off as they were controlling a substantial portion of the deceased's estate and in any event, they had not made any such application prior to the filing of the applicant's application. She submitted that it was improper for the respondents to oppose the applicant's application and at the same time seek similar orders to the ones that the applicant was praying for. However, in my view, there was nothing wrong with the averments made by the first respondent regarding provision of the said funds to the named dependants. After all, the education of his siblings should have been and I believe was the responsibility of the deceased in his life time. It is for the court to consider whether such a plea is merited and I do not see anything that ought to preclude the said beneficiaries from getting some interim provision as well. Consequently, I also make a similar order that the respondents be allowed to withdraw from the said account a sum of **Kshs.150,000/-**. Of that sum, **Kshs.30,000/-** should be paid to Naivasha Girls Secondary School and the balance of **Kshs.120,000/-** should be applied towards university fees for Harun Ndungu.

In the event that the said account does not have sufficient funds to cater for the total sum of **Kshs.300,000/-** which has been ordered to be paid out, the parties shall be at liberty to seek court's approval to draw out such funds from any other estate account that shall be having adequate funds. The sums herein ordered to be paid out to the respective parties shall be considered as part of their respective shares at the time of distribution of the deceased's estate.

It is hoped that the parties will co-operate with such auditing firm as will be appointed so that the exercise of preparing the inventory of the estate and the accounts as ordered is finalised as soon as possible to pave the way for the full distribution of the estate. The respective advocates' costs for this application shall be paid out of the estate accounts.

DATED, SIGNED & DELIVERED at Nakuru this 6th day of July, 2005

D. MUSINGA

JUDGE

6/7/2005