



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. SUCCESSION CAUSE NO. 2388 OF 1999
IN THE MATTER OF THE ESTATE OF MARGARET WANGUI
KINYANJUI – DECEASED

IN THE MATTER OF THE ESTATE OF MARGARET WANGUI

KINYANJUI – DECEASED

GITAU KINYANJUI GACHUI

ANNE WAIRIMU KINYANJUI PETITIONERS

R U L I N G

There were two petitions filed by different children of the deceased which were consolidated and John and Ann were appointed joint administrators by consent.

There were various interim consents recorded by the parties which culminated in the form of Agreed issues which is not dated but was produced before this court on 7th March, 2002 and was made an order of this court.

Even after the close of evidence and submissions, I was asked to hold the ruling as there could be chances of further consent but none was forthcoming.

According to the final consent this court has to decide only on two outstanding issues – namely:-

- (i) The Co-operative Bank of Kenya Loan
- (ii) Medical bills in the sum Kshs.600,000/=

The family consent that David (the third son of the deceased) be given duty of collecting rents, keep accounts and pay outstanding loans of the estate.

It can be noted that one of the sons of the deceased named Gitau Kinyanjui Gachui *alias* Jesse Gachui died on 8th January, 2000 by a fatal gun shot. Thus his estate now is the beneficiary of this estate. The said Gitau has filed many affidavits in interim proceedings previously filed in this cause.

David and John the other two sons in their petition of 14th October, 1999 have specified three liabilities.

- (1) Kshs.875,000/= Co-operative Bank (Co-op Branch).
- (2) Kshs.252,000/= Barclays Bank (Market Branch)
- (3) Kshs.500,000/= Assorted creditors.

Gitau and Ann (*the son and the daughter of the deceased*) in their petition have specified one liability which is Cooperative Bank Loan in the sum of Kshs.700,000/=.

I have advisedly specified the above liabilities for reasons that the loan for co-operative was alive in the mind of the applicants in both the petitions. They have also estimated the value of such liabilities which is less than Kshs.900,000/= in any case. None of the petition mentions liability on the hospital charges.

Keeping these observation aside, I go to the evidence adduced before me in respect of the two issues. David who was supposed to collect the rent, keep accounts and pay outstanding loan of the estate had produced a statement of accounts. According to him the deceased was unwell during most parts of the year 1997. He has specified the hospitalization of the deceased during months of May, June, July and September, 1997. She was discharged from the hospital on 1st December, 1997. According to him, because of her sickness and as the loan account was penalized to the tune of Kshs.207,000/=, without consulting the deceased all the three brothers decided to contribute Kshs.100,000/= per month in repayment of the loan from September 1997 upto 24th June, 1999. He said loan was taken by their mother for construction purposes and that it was for her use and benefit. He denied that the deceased gave Kshs.2,000,000/= to each of the three sons from the loan as advance and that they were repaying that advance. This he said on the face of the record which contains affidavits from his brothers John and late Gachuhi. The former has not uttered a word in any of his affidavits that he was a creditor of the estate and his late brother Gachuhi had specifically denied that any repayment of the Bank loan was made by any other person. It is pertinent to note that David agreed that while the deceased was in the hospital the rental income was collected by her agents as he has been doing after the death and agreed that there was no arrears of rent upto June, 2000. It cannot be totally taken as a coincidence that both the brothers i.e David and John started repaying themselves the alleged loan payment on 8th January, 2000, the day the third brother Gachuhi was shot dead. I shall refrain from making any further comments or observations which shall not be appropriate to the present cause. It is also to be noted that no attempt is made to repay the estate of the late brother in similar manner. As per evidence before me John was paid Kshs.1.7 million and David was paid Kshs.1,450,000/=. Thus the estate was withdrawn in the total sum of Kshs.3,150,000/=. But the question to be decided is whether both the brothers were creditors of the estate.

Over and above what I have stated hereinbefore the evidence on the issue of Co-operative loan can be summarized as under.

The deceased did apply for loan from the Co-operative Bank in her name. The purpose for the loan was mentioned as the construction of a building. She also secured the loan by charging one of her properties. But I have to decide whether she disbursed the loan amongst her three sons as alleged by the objectors or she used for her purposes. I must note one point out that no evidence is laid before me that the deceased used the loan for her own purposes. I can also note here as agreed by all concerned that the deceased had several properties which were earning rental income. It is also evident that the deceased was not a person of meagre means. That is evident from the details of the estate before me. Ann – one of the Administrators and a daughter of the deceased deponed before me that the deceased had disclosed to her that she had acquired a loan so that she could disburse the same equally amongst her sons. She stated that the deceased was approached by John for assistance as he did not have a clear title to pledge. During the cross-examination it came out in evidence that the disbursement was in the sum of Kshs.2,000,000/=. It is also evident that the repayment of the loan started during the life time of the deceased. However, both sides give different reasons for such repayments which were made during pendency of these proceedings. The objectors are saying that none of the other beneficiaries were consulted before disbursements. David's stand is he was authorized to pay the debts of the estate.

I also have before me the evidence of Mrs. Gachuhi the widow of the deceased son who readily conceded that her late husband received a loan of Kshs.2,000,000/= from the deceased which was to be repaid to her. It is also on evidence that a total sum of Kshs.6,569,500/= was paid by the three sons and that John paid Kshs.1,313,500/= + Kshs.939,000/=. David paid Kshs.1,328,000 + Kshs.889,500/= and late Gachuhi paid Kshs.1,128,500/= + Kshs.971,000/=. David tried to show that John had various title deeds on his own name to refute the deposition of Ann, but going into the details of those titles during cross-examination nothing substantial emerged.

Looking into totality of the evidence before me, (as specified hereinbefore) I am inclined to accept the version of the Petitioners/Objectors that the loan was obtained by the deceased for the purposes of her three sons. I am not satisfied by the averments made by the Respondents that the deceased was very hard up during the period and her three sons came to her succor without informing her even after her discharge from the hospital. On the other hand no potent facts are laid down to aver that the deceased did not have adequate income to pay back the loan. I cannot and do not surmise this without anything to substantiate that. I also note that after her death her estate has quite adequately repaid the liabilities and David could without any problem pay quite substantial sums for all the expenses not to mention the repayments to the family members. I cannot assume with those evidence before me that during her life time she was unable to pay her liabilities. A cursory glance at Ex. I which is a statement of account would, in my humble view, bear me out. I am further fortified in my observations by the details of the liabilities listed on the petitions filed for letters of administration.

In short I find that the contention that the entire sum of the loan was used for the construction is not justifiable and not sufficiently proved. After the death the Bank loans were repaid from the estate collection. It was only David who gave evidence before this Court and his deposition as to the sons being creditors is not supported by the averments made by John in his affidavits before the Court. In any event, they did not disclose their claims in the family meeting during which David was entrusted with the collections and repayments on behalf of the estate. The repayments only to the two of the sons also do not augur well with the case of the Respondents.

The upshot of all the above is that I find that the repayments made in the sum of Kshs.3,150,000/= to John and David was improper and has to be refunded to the estate.

The issue of the loan for the hospital charges in the sum of Kshs.600,000/= is, in my view, simpler. The evidence that David received Kshs.200,000/= cash from John and an uncle and contributed the similar sum cannot be supported from evidence. Firstly the amount which was shown to be due to the Aga Khan Hospital on the day of discharge of the deceased was around Kshs.570,000/=. It is true that the total charges were not that much but I am not told how and when the loan of exact sum of Kshs.800,000/= each was paid by the three persons who were repaid. John and David were sons of the deceased and the third person was her brother. The loan amount was not disclosed at the family meeting and the evidence produced do not support the contention. It is not possible that the only two sons out of all the children had advanced the loan. The method of repayment to the hospital also does not support the version by the Respondents. It is inconceivable that the family members of the deceased would have given the loan without knowledge of the other close members of the family. There is no reason to believe that any one would lie for this small sum in comparison to the extent of the estate. I thus find that David exceeded his obligations when he repaid those sums without the knowledge or consent of the other beneficiaries and without any basis.

I am urged to ask David to repay the above sums to the estate. I shall however refrain from so doing considering that the benefactors of such repayments are the beneficiaries of the estate except one Mr. Steve Kahugu. I shall considering all the circumstances before me make following directions and orders.

(A) John Kinyanjui shall refund to the estate the following sums:-

1. Kshs.1,700,000 in respect of refund of Co-op loan.
2. Kshs.200,000/= in respect of the hospital charges.

B. David Waweru shall refund to the estate the following

sums:-

1. Ksh.1,450,000/= in respect of Co-op. loan
2. Kshs.200,000/= in respect of hospital charges.

I shall also direct David to ask Mr. Steve Kahugu to refund Kshs.200,000/= to the estate. If Mr. Kahugu has any claim on the estate, (which is not produced before this court) he has legal remedy to recover the same.

I shall not ask them to pay any interest on the said sums simply because firstly it is a family matter and secondly the three sons have paid back to the estate a total sum of Kshs.6,569,500/= which exceeds the amount they all received from their deceased mother. After the refund the said sum shall be distributed equally between the beneficiaries of the estate.

The parties have agreed to various other issues and that is the reason I shall order that each parties shall bear their own costs. I also note that the counsel's charges have been paid by the estate as per the consent filed.

Dated and delivered at Nairobi this 21st day of January, 2003.

K. H. RAWAL

J U D G E.