



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO.12 (O.S) OF 2003**

**ELIAS KAMAU KANGETHE & 4 OTHERS ..... PLAINTIFF**

**VERSUS**

**COMMISSIONER OF LANDS AND ANOTHER ..... DEFENDANT**

**RULING**

One **JOHN KANG'ETHE KAMAU** (hereinafter referred to as the Deceased) died on 13th July 1974. At the time of his death he owned the following properties-

- (i) *L.R. Location 1/KIRWARA/40*
- (ii) *L.R. LOCATION 1/KIRWARA/250*
- (iii) *L.R. LOCATION 1/MUKARARA/436*
- (iv) *L.R. LOCATION 1/MUKARARA/650*

The estate of the Deceased remains un administered as apparently no one has ever sought nor obtained a grant of representation.

I am informed that all the Applicants are the Deceased's children by his two wives. I am told that both wives are now also deceased. The applicants have now come to court by originating summons dated 7th January 2003 seeking an order that the Commissioner for Lands (the 1st Respondent) do issue various title deeds to the Applicants and also to one HERMAN KAMU in respect to various portions of the lands listed above and constituting the estate of the Deceased. The various beneficiaries of the estate of the Deceased appear to have agreed on how they will share the assets of the Deceased's estate, and there is no dispute in that regard.

The originating summons is said to be brought under rules 2 and 12 of Order 36 of the Civil Procedure Rules (the Rules) and also under Section 3A of the Civil Procedure Act, Cap.21. Rule 2 of order 36 aforesaid enables the persons named in rule 1 of the same order to apply for and obtain in like manner an order for the administration of the personal estate of a deceased person, or for the administration of the real estate of such deceased or the administration of a trust. The persons named rule 1 are the executors or administrators of a deceased person (which the Applicant are not), trustees under any deed or instrument (which they are not) and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid. The Applicants have claimed to be interested in the orders sought as heirs of the Deceased. They are thus on the face of it properly seized of necessary locus standi.

But the order sought goes way beyond mere administration of the real estate of their deceased father. The order, if granted, will have the effect of distributing the Deceased's real estate. Learned counsel for the Respondents, though not opposing the application in terms, has in effect submitted that the order sought would, if granted, be unlawful. In this regard he pointed out various provisions of the Law of Succession Act, Cap. 160. That Act constitutes the law of Kenya in respect of, and has universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after commencement of the Act, and to the administration of estates of those persons. This is unless otherwise expressly provided in the Act or any other written law. See subsection (1) of Section 2 of the Act. Under subsection (2) of the same Section the estates of persons dying before the commencement of the Act are

subject to the written laws and customs applying at the date of death, but nevertheless the administration of the estate must commence or proceed so far as possible in accordance with the Act. Cap.160 commenced on 1st July 1981 by Legal Notice No.93 of 1981. The deceased herein therefore died before the Act came into operation. This estate would have to be distributed in accordance with the written laws and customs applying at the date of his death. But the estate must be administered in accordance with the Act.

It is clear that the Applicants are trying to circumvent the process set out under the Law of Succession Act, Cap.160 in the administration and distribution of their deceased father's estate. The Deceased died in 1974. It therefore cannot be claimed that there has not been sufficient time in which to set in motion that process. True, an emergency may now have arisen in the form of one of the Applicant's illness necessitating urgent distribution of the estate. But wise people do make allowance in the unforeseeable, and act accordingly. There have been nearly 30 years in which to properly apply in the administration and distribution of the Deceased's estate. Such administration would have to be under the Law of Succession Act, Cap.160. Distribution would have to be under the written laws or customs then applicable, or as may be lawfully agreed. But the process has to be put under way under Cap.160 aforesaid. There is no short-circuiting it. There is no escaping it. There is no going round it.

In the event therefore I hold this application as misconceived, and certainly without merit. I would dismiss it with costs. I note that the Hon. Hayanga, Judge, in fact heard the application on 24th January, 2003. He delivered a considered ruling. He was of the view that the Applicants should move under the Law of Succession Act, Cap.160. But he did not dismiss or otherwise dispose of the application. Instead he referred the matter to the Hon. The Chief Justice who in turn directed that the matter be placed before me "for directions and orders as (I) may deem fit after hearing counsels for both sides". That is how I got to hear the matter all over again.

**DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF FEBRUARY , 2003.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS DAY OF FEBRUARY, 2003.**