



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**SUCCESSION CAUSE NO. 145 of 2013**

**IN THE MATTER OF THE ESTATE OF ENYASIO GACHIE KARANJA (DECEASED)**

**DAVID WAITHAKA GACHIE CHARLES WANARUA GACHIE.....APPLICANTS**

**VERUS**

**EVAN WMBUGU GACHIE.....RESPONDENT**

**RULING**

1. The deceased herein died intestate on 26<sup>th</sup> May, 2012. A grant of letters of administration intestate was issued to Evan Wambugu Gachie and Charles Wanarua Gachie on 11<sup>th</sup> February, 2014 and then confirmed on 9<sup>th</sup> September, 2014. According to the confirmed grant, the estate was to be shared out equally.

2. Subsequently, by a Chamber Summons dated 19<sup>th</sup> December, 2019, Charles Wanarua Gachie and Godfrey Gichuki Gachie both siblings sought an order substituting or replacing one Evan Wambugu Gachie whom they accused of being uncooperative and reluctant to complete the administration of the estate. When the said application was mentioned before Justice Thande for directions on 28<sup>th</sup> September, 2020, the court advised the applicants to file an application for revocation of the grant.

3. Unfortunately the said directive was not complied with. Instead, the applicants once again moved the court through a Chamber Summons dated 30<sup>th</sup> November, 2020 filed under certificate of urgency on 1<sup>st</sup> December, 2021 seeking orders as hereunder;

***a. That this application be certified as urgent and service be dispensed with in the first instance.***

***b. That this honourable court be pleased to remove Evan Wambugu Gachie as a co-administrator and replace him with Godfrey Gichuki Gachie and David Waitthaka Gachie***

***c. That this honourable court be pleased to order the respondent to deposit Kshs 14,000,000 being the balance of funds received from Base Titanium Ltd for the sale and purchase of Kwale/Michingirini/521.***

***d. That pending the hearing and determination of this application a freezing order be placed directly to Equity Bank (Kenya) Ltd Digo Road Branch, Account Number 028xxxxxxx in the name of Evan Wambugu Gachie to prevent any further withdrawals.***

***e. That pending the hearing and determination of his application freezing order be placed directly at KCB Bank Kenya Ltd, Mvita Branch, and Account Number 11xxxxxxx in the name of Evan Wambugu Gachie to prevent any further withdrawals.***

***f. That the respondent be ordered to give an accurate and proper account of the estate properties.***

4. The application is premised on grounds stated on the face of it and averments contained in the affidavit in support of the application. Basically, the applicants among them one Charles Wanarua Gachie one of the administrators currently are seeking removal of Evan Wambugu as an administrator on grounds that he has been evasive and intentionally refused to cooperate with his co-administrator to distribute the estate.

5. It was further averred that sometime 2021, heirs of the estate herein were approached by Base Titanium Ltd who were keen on acquiring L.R Kwale /Michingirini/521 one of the estate properties.

6. That after negotiations, it was agreed that the above parcel of land would be sold at a consideration of kshs15,000,000. A compensation

agreement having been entered by all beneficiaries, a deposit of 1,000,000 was made through the respondent who shared the same to all beneficiaries.

7. They further averred that a general transfer was done to Titanium on 20th April, 2021 and the parcel of land in question effectively changed hand in favour of the beneficiaries. That in return, a balance of kshs 14,000,000 was deposited in the respondent's account pending distribution to beneficiaries as per the certificate of confirmation.

8. They claimed that despite receipt of the said amount, the respondent has refused and or failed to distribute the proceeds to beneficiaries hence the prayer for an order to compel him to distribute the said amount to beneficiaries and a freezing order to prevent the money from being transferred.

9. In support of the application, a sale agreement, transfer and a letter from Base Titanium Company transaction of kshs 14 million to the respondent's KCB account were attached as evidence.

10. Despite service of the application and hearing notice on the respondent, he did not file any response. The application is therefore unopposed. However, failure to file a response does not automatically mean that the application must automatically succeed. See Supreme Court holding in **Gideon Sitelu Konchellah Vs Julius Lekakeny Ole Sunkuli and 2 others (2018) e KLR** where the court held that the fact that an application is not opposed is no guarantee that it must succeed.

11. In the instant application, the applicants are asking three substantive prayers. Firstly, an order substituting Evan Wambugu as an administrator with David Waithaka Gachie. This prayer was contained in the earlier application dated 29<sup>th</sup> December, 2019 in respect of which the court directed and advised the applicants to file an application for revocation. Instead of complying with that direction, a similar prayer was made in this application. This is purely an abuse of the court process. In the circumstances that prayer cannot issue. Parties to effect J Thande's advice.

12. The second prayer is for freezing the account where the sale proceeds were deposited and therefore held. That prayer was to await determination of the application.

13. The application having not been opposed, I am satisfied and convinced from the evidence attached herein that the property in question was sold and sale proceeds deposited in the respondent's account. Since the respondent has failed to respond to the application herein, I am satisfied that there is good reason to preserve the funds in the respondents' account until he fully gives full statement of accounts on how he has spent or intends to spend the said amount.

14. The 3rd prayer is for the court to order the respondent to distribute the sale proceeds. This order shall only apply after the respondent has given an account in so far as the subject sale proceeds is concern.

15. Accordingly, the application is allowed in the following terms;

***a. That a freezing order restraining any transaction or dealings in respect of KCB Bank of Kenya Mvita Branch A/C No 11xxxxxxx and Equity Bank Digo Road Branch A/C No. 028xxxxxxx held in the name of Evan Wambugu Gachie be and is hereby issued pending further orders of the court.***

***b. That the respondent do within 30 days file statements of accounts showing how he has spent or intends to spend a sum of 14 million being proceeds received from Base Titanium on his own behalf and that of the beneficiaries.***

***c. Mention on 11<sup>th</sup> March, 2022 to confirm compliance and further directions.***

**Dated, signed and delivered virtually at Mombasa this 15<sup>th</sup> day of February 2022**

**J. N. ONYIEGO**

**JUDGE**