



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO 20 OF 2020

IN THE MATTER OF THE ESTATE OF JOHN MULWA NZIOKI (DECEASED)

1. BENARD MUTINDA MULWA

2. JACKSON MUISYO MULWA.....PETITIONERS/RESPONDENTS

VERSUS

1. MICHAEL WAMBUA MULWA

2. ANDERSON MUIINDE MULWA.....APPLICANTS

RULING

1. By a Summons dated 8th October, 2020, the Applicants herein seeks an order that the rents collected by the Petitioners from the deceased's developed properties Machakos Town Block II/285 (Kiwanjani Building) and Machakos Municipality Block II/277 since April 2020 and all subsequent months be deposited in court till this succession cause is determined.

2. According to the Applicants, they are children of the deceased herein who died on 4th April, 2020 leaving several properties including the two aforesaid rental properties within Machakos Town. According to them the deceased purchased half share of Plot No. 285 from **Kibuba Nzioka** who co-owned the said property with **Munyao Kiilu**. With respect to plot no. 277 the same is also co-owned with the deceased owning half a share.

3. Both plots, according to the applicants are developed and are occupied by several tenants who were paying rents to the deceased. However, following the demise of the deceased the Respondents wrote a letter dated 20th April, 2020 to the tenants instructing them to deposit the rents in Account No. [...] opened in their joint names in with Co-operative Bank. It was deposed that on 26th May, 2020 the Respondents also instructed their advocates to write to one of the tenants, M/s Mulleys Ltd to continue depositing rents into Account Number [...] at Standard Chartered Bank belonging to the deceased.

4. The Applicants were baffled as to why some rent was being deposited in a private account of the petitioners while the others were being deposited in the deceased's account. Considering the fact that the distribution is likely to be highly contested and might take long to conclude, it was the Applicants' position that injustice is likely to be meted to the beneficiaries hence the necessity to have the rents deposited in court.

5. It was deposed that the Respondents arrogated to themselves the responsibility of collecting the rents without the consent and authority of the family members and that there is no way of ascertaining how much is collected and deposited hence a danger that the estate might be wasted by the petitioners.

6. The 1st Applicant, who deposed that he is from the 1st family, denied that they sat down and appointed the 1st Petitioner to represent the 1st family's interests and challenged the allegation by the Respondents that the deceased authorised them to collect the rents. According to the Applicants since the deceased operated the Standard Bank Account, there was no need to pen another one. The Applicants contended that apart from three tenants who are depositing the money in the joint account, the rest is being collected by the Petitioners and not being banked.

7. The Respondents responded to the application vide a replying affidavit sworn by **Bernard Mutinda Mulwa** in which he accused the applicants of causing chaos in the family even during the lifetime of the deceased. According to him, his co-petitioner represents the 2nd family while he represented the 1st family an arrangement that existed even during the deceased's lifetime since the deceased had prior to his death had in various family meetings appointed the two as the leaders of the two families. According to the deponent, even prior to the

deceased's death he was the chairman of the family.

8. It was deposed that the deceased instructed them that all the rents collected from his properties be deposited in an account and that the proceeds be shared equally between the two families once everything is settled. He stated that on 17th April, 2020, the family had a meeting where it was resolved that a joint account be opened in the names of the two petitioners for the purposes of depositing the rents to avert any wastage and in line with the wishes of the deceased. The said meeting was not attended by the Applicants despite having been duly informed. Accordingly a joint interest earning account in the Respondents' names was opened at Co-operative Bank where all the rents were paid with exception of the defaulting tenants. However some of the tenants continued paying rents directly into the deceased's account as they used to do during the deceased's lifetime.

9. According to the deponent, no cent has been withdrawn from that account since it was opened. It was averred that their letter referred to by the petitioners was prompted by the actions of the Applicants informing the tenants that they are imposters and claiming that the Applicants are the administrators of the deceased's estate. To the Respondents the prayers by the Applicants is absurd since they want the monies deposited in court where there is no interest which would be a loss to the estate. The Respondents undertook to render an account at any time at the request of the court or any beneficiary.

10. According to the Respondents, the application is a cover-up by the applicants who have been collecting rents from plot number Machakos Town Block II/242-Grogon after the demise of the deceased and putting the same to their personal use without accounting for the same. It was therefore sought that the applicants be ordered to account for the same and that they do deposit all the rents collected therefrom in the joint interests earning account.

11. According to the Respondents, the applicants are sworn enemies of the deceased even during the deceased lifetime who sued the deceased in various cases and even after the deceased's death unsuccessfully sought to have his body exhumed. Since the applicants admitted in the said proceedings that they had never visited the deceased for the past 14 years, they were not aware of the deceased's wishes hence their ignorance. Further the applicants opposed the filing of this succession cause by failing to execute the necessary consents necessitating the Respondents to seek the court's intervention.

Determination

12. I have considered the application, the affidavit in support of and in opposition to the application and the submissions filed.

13. Sections 79 and 80 of the *Law of Succession Act* provide as hereunder:

79. The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

80. (1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.

14. Therefore as held in **Nzusyo vs. Housing Finance Company Of Kenya Ltd [2008] 2 EA 281:**

“Under sections 79 and 80 of the Law of Succession Act, Chapter 160, Laws of Kenya, the law is that the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant and all property of the deceased shall vest in the personal representative of the estate.”

15. In this case it is not in doubt that the Respondents are the administrators of the estate of the deceased. The law is that where a grant has been issued, it is the administrators who are empowered to administer the estate of the deceased.

16. Any other person who purports to act as the administrators of the estate without being issued with letters of administration commits an offence since Section 45 of the *Law of Succession Act* provide as follows:

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

17. I associate myself with the opinion of Musyoka, J in **Veronica Njoki Wakagoto (Deceased) [2013] eKLR** that:

“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

18. I also agree with the position in re Estate of M’Ngarithi M’Miriti [2017] eKLR that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

19. It follows that any action taken by a person whose effect would be to interfere with a property of a deceased intestate without being authorised to do so by the court amounts to intermeddling with the estate under section 45 of the *Law of Succession Act*. Absence an order from this court, no one is lawfully authorised to interfere with the estate of a deceased.

20. **Lenaola, J** (as he then was) in Republic vs. Chairman Machakos Land Disputes Tribunal & Others Ex Parte Late Mutheke Ndeti & Others Machakos HCMA NO. 252 of 2006 held that:

“It is trite law that the interests of deceased persons cannot be tampered with unless a properly appointed legal representative has been handed over the management of their estates.”

21. However, intermeddling, if proved may well render the intermeddlers liable lack of grant notwithstanding since section 45(2)(b) of the Act states that they *would be answerable to the rightful executor or administrator, to the extent of the assets with which they have intermeddled after deducting any payments made in the due course of administration.*

22. An administrator is in the position of a trustee for the benefit of the beneficiaries. Just like other trustees, he must act in the best interests of the beneficiaries. It was therefore held in Willis Ochieng Odhiambo vs. Kenya Tourist Development Corporation & Another Kisumu HCCC No. 51 of 2007 based on *Lewin on Trusts* 16th Ed at 181 that:

“In the case of co-trustees of a private trust, the office is a joint one. Where the administration of the trust is vested in co-trustees they all form as it were one collective trust and therefore must execute the duties of their offices in their joint capacity.”

23. In this case the contention is that the Respondents have opened a joint account in their names and the Applicants are apprehensive that the estate is likely to go to waste in absence of any accountability mechanism. The Respondents have averred that they opened the said account in order to collect the proceeds due to the estate and that they are not wasting the same. Apart from mere suspicion and bare averments, there is no concrete evidence that the deceased’s estate is being wasted. Administrators of the estate of a deceased person, as trustees are perfectly entitled to open an account into which the proceeds accruing for the benefit of the estate are to be deposited. The Respondents have chosen to do so in an interest earning account but the Applicants would wish to have the same deposited in court. As rightly pointed out by the Respondents, deposits in court do not accrue interest as opposed to a joint interest earning account. Financial prudence would dictate that as trustees, the Respondents invest the income of the estate in an interest bearing account. In the absence of any evidence of pilferage, the Respondents’ action cannot be faulted.

24. The Respondents are however obliged to render accounts as and when directed by the court since under section 83(e) of the said Act the administrators are enjoined:

within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

25. As regards the alleged actions of the Applicants with respect to Machakos Town Block II/242-Grogon, since the Respondents are the administrators of the estate of the deceased, nothings bars them from incorporating into the estate the said property if it truly belongs to the estate of the deceased. In fact they are under a legal obligation to do so. However, if the Applicants have collected any rents therefrom I agree with **Kemei, J** in Re Estate of Reuben Walter Muvya Muiui (Deceased) [2019] eKLR that:

“With regard to an order for account, an intermeddler becomes an executor de son tort. This is where the obligation to render accounts stems from.”

26. In Keshavlal Bhoja vs. Tejalal Bhoja [1967] EA 217, it was held that if the administrator intermeddles with property of the deceased, he will make himself liable as executor *de son tort*.

27. It follows that if it turns out the Applicants have been collecting monies from Machakos Town Block II/242-Grogon which belongs to the Estate of the deceased herein, similarly they shall apart from any other proceedings that may be taken against them, be liable to account for the same to the court and the beneficiaries of the estate. In these proceedings, based on the material placed before me I cannot, however, make a finding that the deceased had interest in the said property and cannot make the orders in the manner suggested by the Respondent more so as the matter before me is an application by the Applicants and not the Respondents.

28. In the premises the summons dated 8th October, 2020 fails and is dismissed with no order as to costs.

29. It is so ordered.

Read, signed and delivered in open Court at Machakos this 2nd day of March, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muumbi for the Petitioners/Respondents

CA Geoffrey