



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 297 OF 2015**

(IN THE MATTER OF THE ESTATE OF ISAIAH WAWERU RUKUNGU ALIAS WAWERU RUKUNGU (DECEASED))

**LUCY WAIRIMU RUKUNGU.....APPLICANT**

**-VERSUS-**

**JOSEPH MBUTHI WAWERU.....PROTESTER**

**JUDGMENT**

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

The applicant and the respondent are the only children of the late Isaiah Waweru Rukungu who died intestate on 13 August 2007. He hailed from Endarasha location in Nyeri county and was domiciled in the Republic of Kenya.

The grant of letters of administration intestate of the deceased's estate was made to the applicant on 15 September 2015. She subsequently filed a summons for confirmation of grant dated 31 March 2016. In the affidavit in support of the summons, she proposed to share equally with her brother land Title No. Nyeri/Endarasha/117 measuring approximately 4.1 hectares but to be registered as joint owners of a commercial property known as Title No. Endarasha Township/11. The two properties are the only ones listed in the petition as comprising the deceased's estate.

The applicant's brother was not satisfied with the proposed scheme of distribution and so he filed an affidavit of protest dated 8 May 2017. The reasons for his protest, as far as I understand his affidavit, are that:

- a. the deceased had a property in Matanya location, apparently in Nyeri county which the applicant has not disclosed;
- b. the protester has spent Kshs. 1,804,005/= on renovation of Title No. Endarasha Township/11;
- c. Title No. Endarasha Township/11 can be registered in the joint names of the protester and the applicant subject to payment of the amount spent on renovation;
- d. The applicant has not disclosed that she was given Title No. Nyeri/Endarasha/137 in exchange of her interest in Title No. Nyeri/Endarasha/117;
- e. The applicant has failed to disclose that she is in exclusive occupation of Title No. Nyeri/Endarasha/137

These are the same reasons he proffered at the hearing of his protest. He added that he improved Title No. Endarasha Township/11 to the extent that he had added eight more shops to the commercial building, tiled the floor and constructed a septic tank. He had also constructed an additional floor to the building. The source of funds for all these improvements is alleged to have been a loan from Taifa Savings and Credit Co-operative Society. He produced an architectural plan of the works he had allegedly undertaken on this part of the estate. However, he admitted that he did not have any receipts for his expenditures. It was his evidence that the applicant collects rent from one of the shops while he himself collects rent from seven other shops. His average monthly rental income is Kshs. 14,000/= per month.

The protester's witness Peter Ndegwa Muhoro testified that the protester contracted him to undertake the works on the estate; these included

masonry, plumbing, carpentry and even paintwork. His fee was Kshs. 1,500/= per day though he did not have any evidence in proof of this fact. He also couldn't remember the number of days he worked.

The applicant disputed the protester's allegations and contended that property in issue was developed by the deceased. The protester, according to her evidence, had been collecting rent since 2008. She knew nothing about the architectural plans which the protesters had presented as the works he had undertaken on the property.

The law on distribution of an intestate estate where only a child or children survive the deceased is found in section 38 of the Act; that provision of the law reads:

**38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.**

The two children here are all adults and therefore section 41 of the Act which caters for property held in trust for beneficiaries below the age of 18 years old does not apply; neither does section 42 which deals with settlement or appointment of any property to the surviving children.

With the two sections out of the equation, the guiding principle in the distribution is equality; each of the surviving children is entitled to an equal share of the estate.

The protester's fundamental complaint appears to be that he has improved part of the estate to the tune of Kshs. 1,804,005/=.

Section 45(1) of the Act presupposes that there shouldn't be a dealing of any sort of a deceased's property until a grant of representation; that section reads as follows:

**45. (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.**

Subsection (2) goes further to spell out the penalty for breach of section 45 (1); it states:

**(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.**

By necessary implication, a person dealing with an estate of a deceased person in any manner other than as authorised by the law does so to his own detriment; besides exposing himself to the threat of criminal sanctions he may not be eligible for restitution unless it can be proved that it was inevitable or necessary that he deals with property in the manner he did or that in doing so, he was protecting the estate from alienation or waste, of one form or the other. Nonetheless, he still has to demonstrate that he couldn't not have obtained the requisite authority even after exercise of the reasonable diligence.

In the present case, it has not been proved to my satisfaction that the protester has spent any money to improve the deceased's estate; there is no evidence that he borrowed money from a Sacco as he alleges, and if he did, there is no proof that he spent such money on improving the deceased's estate. Further, there is no proof works of any sort having been undertaken on the deceased's estate subsequent to his demise. All that the protester presented is some sort of an architectural plan described as "*proposed alterations of existing rooms to creat(sic) extra shops and tea room on plot No. 11 Endarasha township*"; the deceased is named in that plan as the client.

The plan does not appeal to me to have been approved by the relevant authorities but more importantly; there is nothing to suggest that the plan was implemented or implemented at the instance of the protester.

But even if the works were undertaken after the death of the deceased, they were probably undertaken for the protestor's own benefit; this, I gather from his own evidence that he has been collecting rent from most of the shops on the suit property for his exclusive benefit. In a nutshell, he has intermeddled with the deceased's estate. If this be the case, he certainly cannot lodge a claim for restitution based on an illegality.

In the final analysis, I cannot find any reason why the deceased's estate should not be shared equally between his two children. Accordingly, the protester's protest dated 8 May 2017 is dismissed; in the same vein, the applicant's summons for confirmation of grant dated 31 March 2016 is allowed.

For avoidance of doubt the deceased's estate is hereby distributed as follows:

**1. Title No. Nyeri/Endarasha/117**

Shall be divided into two equal shares each of which shall be transmitted and registered in the names of:

**(i) Lucy Wairimu Waweru**

**(ii) Joseph Mbuthi Waweru**

**2. Title No. Endarasha Township/11**

Shall be registered in the joint names of:

**(i) Lucy Wairimu Waweru**

**(ii) Joseph Mbuthi Waweru**

Parties will bear their respective costs; it is so ordered.

**Dated, signed and delivered on this 9<sup>th</sup> day of April, 2020**

**Ngaah Jairus**

**JUDGE**