



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO 34 OF 2018

IN THE MATTER OF THE ESTATE OF MARY NG'ONDU MWANUNGA (DECEASED)

RULING

1. By a Summons dated 8th March, 2019, the Applicant herein, seeks an order of injunction restraining **Sammy Mwithama Ngundu**, **Miriam Ndunge Ngundu** and **Brigit Kamene** from diverting the funds of the estate of the deceased herein being the proceeds from rents collected from various businesses and premises of the deceased to Account No. [xxxx] held at Equity Bank Limited, Tala Branch. They also seek an order that the court compels **Dr Charles Kyalo** to reopen Tala Academy, a school owned and managed by the deceased as its closure amounts to intermeddling. It was further sought that the co-administrator, **Sammy Mwithama Ngundu** be restrained from intermeddling with the deceased's properties including any sale, transfer, lease or licence of any of the properties of the deceased or withdrawal of any funds from her accounts without the consent of the applicant being a co-administrator.
2. In the supporting affidavit, the applicant, a co-administrator of the estate of the deceased deposed that though the grant herein is yet to be confirmed, the assets of the deceased have been interfered with by **Charles Kyalo Kilonzo**, the deceased's nephew who has continued to interfere with the deceased's property, Tala Academy, which he ordered to be closed down leaving the children and their parents with no place to go.
3. Apart from that the assets of the deceased have also been interfered with by **Sammy Mwithama Ngundu**, **Miriam Ndunge Ngundu** and **Brigit Kamene** who have been collecting rents from the deceased's residential property and businesses and diverting the proceeds therefrom to a new account opened in Equity Bank, Tala Branch Account No. [xxxx] without accounting to anybody contrary to the terms of the tenancy agreement. Instead the said intermeddlers have been using the said income on their own without disclosing or accounting to the other beneficiaries despite attempts by the beneficiaries to have them do so.
4. It was based on the foregoing that the applicant sought the orders the subject of this application.
5. Though there were replying affidavits filed herein, when the matter came up for hearing none of the parties opposed the grant of the orders sought in the summons.

Determination

6. I have considered the application, the affidavit in support of and in opposition to the application and the submissions filed.
7. 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.

8. 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.”

9. 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.”

10. 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.

11. A person who wishes to take steps in respect of an estate of deceased person ought to proceed under Rule 36 of the *Probate and Administration Rules* which provides that:

(1) where, owing to the special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.

12. I agree with the position adopted in Sheila Nkatha Muthee vs. Alphonse Mwangemi Munga & Others [2016] eKLR that:

“the issuance and purpose of a grant of letters of administration ad colligenda bona is...to enable the [applicant] to collect, give entry, receive the estate and do such acts as may be necessary for the preservation of the estate of estate of the deceased until the grant is made.”

13. 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.”

14. In whom does the estate of a deceased intestate vest between the time of death and the time when the grant of whatever nature is issued? A five judge bench of the Court of Appeal in Trouistik Union International and Anor. vs. Mrs. Jane Mbeyu and Anor Civil Appeal No. 145 of 1990 [1993] KLR 230 expressed itself *inter alia* as follows:

“It is common ground that the deceased in this case did not die intestate and therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next inquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says “administrator means a person to whom grant of letters of administration has been made under this Act”...At common law, death by itself automatically divests the deceased of his chose in action and the reason for this is because in law, the dead have no rights. But no legal right is without an owner so it must be vested in a person or entity. According to the English Law before the Judicature Act, 1873, the personal property of an intestate in the interval between death and the grant of letters of administration was deemed to be vested in the Judge of the Court of Probate and since, 1925, by the provision of the Administration of Estates Act of that year, the property of an intestate before the grant vests in the President of the Probate, Divorce and Admiralty Division. In some Commonwealth jurisdictions, such right is vested in the Chief Justice or some other statutory designated body or entity. Our Law of Succession Act, Cap 160, did not provide for the vesting of an intestate’s property between the date of death and the grant of letters in any entity. So the suggestion that it will be vested in the courts conforms with the common law notions of the transmission of an intestate’s right or estate. It ought to be remembered that all these temporary custodians of an intestate’s rights are bare trustees only. But as soon as a grant is obtained, the right or estate vests automatically and by force of the grant in the administrator.”

15. It therefore follows that unless and until a grant is issued, the property of a deceased can only be dealt with pursuant to a court order. In my view where a grant has not been issued, as the Court of Appeal held in Trouistik Union International Case (supra), the Court, as the protector of the interests of those who cannot protect themselves is the proper custodian of such interests. However, where a grant has been issued, it is only the administrators who are empowered to administer the estate of the deceased since it is only the administrators that can under section 83(e) the Act be called upon to account. The said section sets out one of the duties of personal representatives as follows:

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.

16. 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.*

17. In the same vein, where there are more than one administrators of the estate of a deceased, all the administrator must act jointly. This is so because 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.”

18. In this case the contention is that the applicant has been kept in the dark about the ongoing in the estate by his co-administrator. In my view unless an administrator acts in accordance with the instrument that appointed him, in this case jointly, he may well be considered to be intermeddling with the estate since his powers and authority must always be jointly exercised.

19. In the premises I find merit in this application and issue the following orders:

1) An injunction restraining Sammy Mwithama Ngundu, Miriam Ndunge Ngundu and Bridgit Kamene from the diversion of funds of the estate of the deceased in the form of rents collected from the various businesses and premises of the deceased to Account Number[xxxx] held at Equity Bank Limited, Tala Branch.

2) That the said account be closed and the proceeds deposited in account No. [xxxx] held at Cooperative Bank Limited.

3) That the beneficiaries do remit the funds withdrawn from the account Number [xxxx] held at Equity Bank Limited, Tala Branch to the estate of the deceased.

4) That the beneficiaries of the estate of the deceased herein or their agents or servants are hereby restrained from intermeddling in the said estate of the deceased through the sale, lease, transfer or wasting of the estate.

5) That the co-administrator is hereby restrained from restricting the applicant access to her home together with her children or denying access to any businesses or property owned by the deceased that form part of the Estate.

6) That Dr. Charles Kyalo and/or the beneficiaries of the estate of the deceased are hereby compelled to reopen Tala Academy, a school owned and managed by the deceased as its closure amounts to intermeddling.

7) That the co-administrator, Sammy Mwithama Ngundu, is hereby restrained from unilaterally intermeddling with the properties of the deceased together with any purported sale, transfer, lease or license any of the properties of the deceased or withdrawing any funds from her accounts without the consent of the applicant being the co-administrator.

8) That file be kept in the strong.

9) That the costs of this application be in the cause.

20. It is so ordered.

Read, signed and delivered in open Court at Machakos this 10th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kimeu for the 1st administrator

Mr Mackenzie for the 2nd administrator

Mr Mutinda for the interested party

CA Geoffrey