



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 27 OF 1997**

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH KIAMA RUHENI (DECEASED)**

**GEOFFREY GITHAKA KIAMA.....1<sup>ST</sup> APPLICANT**

**SAMUEL KIRUNYU KIAMA.....2<sup>ND</sup> APPLICANT**

**DAVID KIRUNYU KIAMA.....3<sup>RD</sup> APPLICANT**

**JOICE WANJUGU KIAMA.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**JANE NYAWIRA KIAMA.....1<sup>ST</sup> RESPONDENT**

**STEPHEN RUHENI KIAMA.....2<sup>ND</sup> RESPONDENT**

**MARGARET NJERI KIAMA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The estate relates to the late **Joseph Kiama Ruheni (deceased)** who died on the 17<sup>th</sup> November, 1994;
2. The Grant in dispute was first issued on the 14/11/2006 to Ann Nyakihu Kiama (**'Ann'**) and the 3<sup>rd</sup> respondent herein one Margaret Njeri Kiama (**'Margaret'**) as joint administrators; and the same was confirmed on the 23<sup>rd</sup> April, 2008; the administrators then made an application for rectification of the confirmed Grant as some of the assets belonging to the deceased had been inadvertently omitted; the application was granted on the 13/01/2010;
3. Ann died on the 24/12/2009 before finalization of the distribution and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were appointed as co-administrators to administer the estate as joint administrators of the estate of the deceased; and they were issued with a fresh Certificate of Confirmation on the 31<sup>st</sup> July, 2012;
4. The applicants herein have filed the application dated the 15/05/2018 under a certificate of urgency premised under the provisions of Section 76 of the Law of Succession Act and Rule 44 (1) of the Probate and Administration Rules and state that they are beneficiaries of the estate of the deceased; to support their claim the applicants rely on the grounds on the face of the application and on the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant on the 15/05/2018; the applicants seek the following orders against the 1<sup>st</sup> and 2<sup>nd</sup> respondents;
  - i. Spent
  - ii. That the Amended Grant issued to the Jane Nyawira Kiama, Stephen Ruheni Kiama and Margaret Njeri Kiama be revoked forthwith.
  - iii. That a new Grant of Representation be issued in the joint names of Geoffrey Githiaka Kiama, Samuel Kirunyu Kiama, David Kirunyu Kiama, Joice Wanjugu Kiama and Margaret Njeri Kiama.
5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly filed their responses to the application on the 22/11/2018; directions were taken on the 5/07/2018 that

the matter proceed for hearing by way of '**viva voce**' evidence; all the parties gave oral evidence and hereunder is a summary of the applicants' case and the respondents'/petitioners' response;

### **APPLICANT'S CASE**

6. Geoffrey Githiaka Kiama testified that the deceased was his father and owned numerous properties and bank accounts; his evidence was solely against his two siblings, the 1<sup>st</sup> and 2<sup>nd</sup> respondents; the 1<sup>st</sup> respondent was managing the estate unilaterally without involving the other beneficiaries; she was collecting rentals from the commercial properties and making huge withdrawals of monies from the bank accounts of the estate without informing the other beneficiaries on the amounts; particularly she was not disclosing the proceeds from two commercial properties namely Muthathini Bar and Restaurant and North Kenya Butchery;

7. His major complaint was that he had never benefitted from the deceased's estate;

8. The 3<sup>rd</sup> respondent was described as a wife of the deceased; the applicants had no complaint against her and absolved her from any wrong doing; she had gotten her share in the estate and had renounced any further interest in the deceased's estate;

9. The applicants were seeking for orders for the Revocation of the Grant and a new Grant be issued in the joint names of the applicants and the respondents; they also proposed that the commercial properties be sold and the proceeds be shared equally amongst all the beneficiaries;

10. The 2<sup>nd</sup> applicant associated himself with the evidence of the 1<sup>st</sup> applicant; he too stated that he had never benefitted from the estate of the deceased; the applicants claimed to have proved that the estate was being mismanaged and prayed that they be granted the orders sought.

### **RESPONDENT'S CASE**

11. In response the 1<sup>st</sup> respondent stated that Marite Enterprises had been contracted to collect rentals for all the deceased's commercial properties; and that the rental income was shared equally among the beneficiaries; one of the properties was sold and a sum of over Kshs.54 million was realized where the down payment was shared equally among the beneficiaries;

12. She admitted that together with the 2<sup>nd</sup> respondent they were the sole signatories to all the bank accounts of the estate; she had no problem in rendering accounts to show how much money had been collected and withdrawn; she had not been able to distribute or transmit the estate as it is so vast; that with the court's assistance she would be able to distribute the estate and this would enable each beneficiary to get their individual share;

### **ISSUES FOR DETERMINATION**

13. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

i. Whether the Amended Grant was obtained procedurally;

ii. Whether to revoke the Grant for failure by the respondents in diligently administering the estate; whether to order the 1<sup>st</sup> respondent to furnish a full and accurate information and accounts of all rental income from the dealings with the commercial buildings comprising the estate of the deceased;

### **ANALYSIS**

#### **Whether the Amended Grant was obtained procedurally:**

14. The application was brought under no particular provisions of Section 76 of the Probate and Administration Rules; and is for the revocation of the Grant on the grounds of failure by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to render accounts;

15. The evidence on record demonstrates that the initial Grant was issued in favour of the 3<sup>rd</sup> respondent and her co-wife Ann Nyakihu Kiama (**'Ann'**) wherein the two widows were appointed as joint administrators of the estate of Joseph Kiama Ruheni (deceased); the Grant was confirmed but Ann passed on the 24/12/2009 before completion of the process of transmission;

16. Since no property had been transmitted it was not necessary for the beneficiaries to file for a full succession cause in respect to the deceased administrator; the beneficiaries thus agreed that Jane Nyawira Kiama and Stephen Ruheni Kiama apply for Limited Letters of Administration Ad Litem and this position is supported by the Consent dated the 25<sup>th</sup> August, 2011 which was filed in court on the same date; this court notes that the four applicants herein duly appended their signatures to the Consent and consented to the appointment of the 1<sup>st</sup> and 2<sup>nd</sup> as administrators '**de bonis non**' to complete the distribution of the deceased's estate;

17. The instances when a court can revoke a Grant are clearly spelt out under the provisions of Section 76 of the Law of Succession; it can be where the proceedings to obtain the Grant were defective in substance; or when the applicant has failed to notify or obtain the consent of the beneficiaries; it can be when the Grant had been obtained by the making of false statements, non-disclosure or concealment; the Grant can also be revoked in instances where the person to whom the Grant was issued fails to produce to court an inventory or account within the time subscribed;

18. Upon perusal of the record this court notes that there is an application made by way of Summons General dated the 22/02/2012 that seeks the appointment of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in place of the deceased administrator Ann Nyakihu Kiama; a Consent Letter to the making of a Grant Ad Litem is annexed to the application and is signed by all the beneficiaries inclusive of the four applicants herein; the application was allowed and the 1<sup>st</sup> and 2<sup>nd</sup> respondent took over the administration of Ann's portion of the estate; the record also reflects an amended Certificate of the Confirmation of a Grant dated the 31/07/2012 which sets out the agreed mode of distribution of Ann's (deceased) portion of the estate to the beneficiaries that survived her;

19. At the hearing of this cause this court noted that the applicants' major complaint was that they had never benefitted from the deceased's estate; but they did not lead any evidence to challenge or controvert the mode in which the Grant to the 1<sup>st</sup> and 2<sup>nd</sup> respondent was obtained; nor was there any evidence tendered disputing that the signatures or marks on the Consent Letter annexed to the application for substitution against their names as not being theirs;

20. No evidence was adduced by the applicants that fell within the ambit of the provisions of Section 76(a)(b) and (c) of the Law of Succession Act; and there is sufficient evidence to demonstrate that the applicants were involved in the process of appointment of the 1<sup>st</sup> and 2<sup>nd</sup> respondent in place of their deceased mother; and therefore there is no dispute on the manner in which the Amended Grant was obtained;

21. This court is satisfied that the applicants were involved in the process of obtaining the Grant; they are found to have had full knowledge and participated in the process by giving their consented to the proceedings and by affixing their signatures and is further satisfied that the procedure of obtaining the Grant was not by means of an untrue allegation of a fact or concealment of material facts; and is satisfied that the resultant Grant was obtained procedurally; and for these reasons the Amended Grant cannot be revoked;

**Whether to revoke the Grant for failure by the respondents in diligently administering the estate; and whether to order the 1<sup>st</sup> respondent to furnish a full and accurate information and accounts of all rental income from the dealings with the commercial buildings comprising the estate of the deceased;**

22. This court notes from the evidence adduced that the applicants seek for revocation on the grounds that the administrators have failed to proceed diligently in the management of the estate;

23. The bone of contention is the properties that are held in trust by the 1<sup>st</sup> and 2<sup>nd</sup> respondent for themselves and on behalf of the beneficiaries;

24. The 1<sup>st</sup> respondent calls the applicants greedy; but from the applicant's testimony it is apparent that the applicants have become weary and impatient and contend this is due to the manner in which the particular properties that are held in trust are being managed by the respondents prompting them to institute this instant;

25. The applicants are at loggerheads with the 1<sup>st</sup> respondent over the management of the commercial properties; it was their contention that from the date the 1<sup>st</sup> respondent was appointed as an administrator things started to fall apart as she was not working in consultation and or with their consent;

26. The applicants evidence was that the 1<sup>st</sup> respondent was managing the estate unilaterally with the assistance of the agents referred as Marite Enterprises; that they had no idea how much the tenants were paying; that up to the time of filing of the instant application there were no statements of account on the rental income and the withdrawals that were ever provided to them by the 1<sup>st</sup> respondent;

27. The applicants denied that the properties were ever charged; and were aware that the properties were all free from any encumbrances; they further denied ever having received any monies during the family meetings or as loans that were guaranteed by the family members;

28. In answer to the allegations the 1<sup>st</sup> respondent stated that one of the subject properties had to be sold to settle advocates' fees and the balance was shared out equally between the 13 beneficiaries; that any money that was withdrawn was either distributed to the beneficiaries or loaned out to the beneficiaries under guarantee by the other family members;

29. The applicants' prayer was for accounts to be rendered on the rental income that was being deposited at Equity Bank; and that more administrators be added so as to finalize the distribution.

30. The applicable is found at Section 76(d) of the Law of Succession Act which reads as follows;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

**... (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—**

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

**(ii) to proceed diligently with the administration of the estate; or**

**(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is**

**required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

(e) that the grant has become useless and inoperative through subsequent circumstances.”

31. Commenting on this provision the Court in **In re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR** stated:-

“13.The other case would be where the administrator fails to proceed diligently with administration of the estate, see section 76(d) (ii) of the Law of Succession Act. The duties cast on administrators are set out in section 83 of the Law of Succession Act. Failure to discharge any of those duties effectively would amount to a failure to proceed diligently with administration. It includes the failure to get in all the free property of the deceased including pursuing debts owing to the estate and moneys payable to the estate by reason of the deceased’s death, failure to ascertain the debts and liabilities of the estate, failure to render accounts, and failure to complete administration of the estate within the timelines set out by the Law of Succession Act. The very being of an administrator is to discharge these duties. The other situation would be where accounts are not rendered as and when required by law. The office of a personal representative is one trust. The personal representative holds the property of the estate on behalf of others, be they survivors, beneficiaries, heirs, dependants or creditors. He stands in a fiduciary position with regard to the assets and the persons beneficially entitled. He owes them a duty to account for his administration and the management of the assets that he holds on their behalf. The duty is also owed to the court by reason of the court having appointed the personal representatives through the grants of representation.”

32. The duties of an administrator are explicitly set out under the provisions of Section 83 of the Law of Succession Act which provides as follows;

“Personal representatives shall have the following duties—

- a. to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
- b. to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- c. to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- d. to ascertain and pay, out of the estate of the deceased, all his debts;
- e. 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;
- f. subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- g. within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- h. to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, 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;
- i. to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration”

33. The contentious issue was the rental income and the expenditure; the applicants evidence was that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not managing the estate in a transparent manner; and that they had no idea how much the tenants were paying; and that the agents only reported to the 1<sup>st</sup> respondent who never availed any records for their inspection;

34. The question that begs an answer is whether the agents was appointed unilaterally and without the consensus of the beneficiaries;

35. There was no evidence adduced by the applicants to demonstrate that the agents were unilaterally appointed by the 1<sup>st</sup> respondent; in any event it was proper for the agents to have either one or two of the administrators that they reported to so as to avoid the arduous and laborious task of interacting with the 14 beneficiaries individually; but this arrangement notwithstanding the mere fact of denying the applicants access to even basic information demonstrates that the 1<sup>st</sup> respondent was not working in consultation with or in concert with the beneficiaries; nor was she working in their best interest;

36. The other evidence that pointed to the fact that the 1<sup>st</sup> applicant was not acting in a manner that was beneficial to the estate was the

evidence in respect of the renovations carried out on one of the contentious properties namely the Mt.Kenya Butchery; the 1<sup>st</sup> respondent stated in cross-examination that the renovations were agreed upon at a family meeting; it is this court's view that the manner of appointing the contractor could have been done unilaterally by the 1<sup>st</sup> respondent which factor can again be overlooked;

37. But the factor that is questionable and cannot be overlooked is the fact that the 1<sup>st</sup> respondent stated that the sum expended on renovations amounted to Kshs1,600,000/- but she had no documentary evidence in the form of invoices to support this expenditure; the only evidence she had was a cheque to confirm payment for the renovations;

38. The 1<sup>st</sup> respondent did not also avail any documentary evidence in the form of agreements or family meeting minutes to support the purported loans given out to the beneficiaries under guarantee; there were no documents in the form of receipts tendered to support the amounts paid out for Land Rents and Rates which the 1<sup>st</sup> respondent stated was in the region of Kshs.50,000/- to Kshs.60,000/-; nor was there any documentary evidence to support the payment of the Advocates fees in the sum of Kshs.600,000/-;

39. The 1<sup>st</sup> respondent stated that one property was sold for the sum of Kshs.56 Million which sum had been deposited into equity bank; and stated that the deceased's estate was vast and hence the challenges in its administration; that the estate was still intact and that she would be amenable to providing an accurate account of the estate; and was also not opposed to the appointment of other administrators.

40. It is trite law that deceased's estate is entrusted to the administrators and one of their duties entails availing to the court a full and accurate inventory of the assets and liabilities of the estate; and from the evidence adduced this court is satisfied that the management of the contentious subject properties has been carried out without the knowledge, or consultation or with the consent of the applicants herein;

41. This court shall put the respondents on notice to furnish a full and accurate information and account of all rental income from the dealings with the commercial buildings comprising the estate of the deceased from the date of appointment as an administrator within 90 days from the date hereof; the contents of the report or default in filing the same will determine whether the applicants' prayers for revocation of the grant and/or addition of administrators is merited;

#### **FINDINGS & DETERMINATION**

42. In the light of the forgoing this court makes the following findings;

- i. This court finds no defect in the manner the Amended Grant was obtained;
- ii. The application for Revocation of the Amended Grant issued to the Jane Nyawira Kiama, Stephen Ruheni Kiama and Margaret Njeri Kiama is found to be premature and is hereby disallowed;
- iii. The 1<sup>st</sup> respondent and 2<sup>nd</sup> Respondent to furnish a full and accurate information and account of all rental income from the dealings with the commercial buildings comprising the estate of the deceased from the date of appointment as administrators within 90 days from the date hereof;
- iv. Mention on the 9<sup>th</sup> day of March, 2020 to confirm compliance;
- v. This being a family matter each party shall bear its own costs;

It is so ordered accordingly.

**Dated, Signed and Delivered at Nyeri this 5<sup>th</sup> day of December, 2019.**

**HON. A. MSHILA**

**JUDGE**