



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO.294 OF 2015**

**THE MATTER OF THE ESTATE OF REUBEN WALTER MUVYA MUIU (DECEASED)**

**FLORENCE NDUKU MUIU.....APPLICANT/ADMINISTRATOR**

**VERSUS**

**VICTORIA TATU MUIU.....1<sup>ST</sup> RESPONDENT/ ADMINISTRATOR**

**ROBERT MUNYAO MUIU.....2<sup>ND</sup> RESPONDENT/ADMINISTRATOR**

**RULING**

1. This ruling relates to two applications one dated **3.1.2016** filed on 3<sup>rd</sup> February, 2016 and the other dated **11.7.2016** filed on 18<sup>th</sup> July, 2016. The 1<sup>st</sup> application by the Applicant is against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are administrators of the estate of the deceased. The application is vide summons under Section 47 of the Law of Succession Act.

2. The application seeks the following orders:

**a) Spent.**

**b) That the respondents did not disclose all the assets of the deceased in their application for letters of administration intestate and the applicant would wish to add the following properties; Kithimani Adjudication plot No. 182, 406,1181,2893,2081,2895,2080,3920,4620,4621,40,4181,4182,4183,4184,4185,4186,4187,4188,4189,4190,4191,4192,4193,4194,4195,4196,4029,4030,3918,3919,3920.**

**c) That the respondents, land registrar and adjudication officers be prohibited from transferring, leasing, subdividing, charging or otherwise disposing of the property of the deceased (Kithimani "A" adjudication plot No.3999,4000,4001,4003,4004,4005,4006,4009,4010,4011,4012,4013,4014,4015,4016,4017,4018,4019,4020,4021,4022,4023,4024,4025,4026,4027,4031,406,1181,2893,2081,2895,2080,3920,4620,4621,40,4181,4182,4183,4184,4185,4186,4187,4188,4189,4190,4191,4192,4193,4194,4195,4196,4029,4030,3918,3919,3920) pending the hearing and determination of the succession cause.**

**d) That the respondents do render true and correct account of the rents they have been collecting from the deceased's assets without involving the applicant and other beneficiaries from the time of the death of the deceased and any further rent collected be deposited in a joint account to be opened in the names of the three administrators as signatories and account holders.**

**e) Costs be awarded to the applicant.**

3. The facts constituting the application as indicated in the supporting affidavit of the applicant sworn on 27<sup>th</sup> January, 2016 are that the applicant is a daughter of the deceased and that the deceased had two wives, that is her mother Priscilla Mukulu Mwangangi and the 1<sup>st</sup> Respondent being the second wife. She averred that the the 2<sup>nd</sup> Respondent is a son to the 1<sup>st</sup> respondent and that the respondents did not include all the properties of the deceased in the application for letters of administration and that the respondents are in the process of disposing part of the estate of the deceased and hence the need for an injunction order and a prohibitory order.

4. The application was opposed vide a joint replying affidavit deponed by the respondents on 27.4.2016 wherein they averred that part of the estate of the deceased was transferred before the death of the deceased as hereinbelow:

<b>Parcel No</b>	<b>Beneficiary</b>
406	Edward Muli Muiiu & Florence Nduku
2893	Florence Nduku
2081	Edward Muli Muiiu
3920	Robert Munyao Muiiu

4620	Edward Muli Muiu
4621	Immaculate Brenda Ngii Muiu
40	Edward Muli Muiu
182	Edward Muli Muiu & Florence Nduku

5. It was averred that the only parcels that constitute the estate of the deceased are 4181,4182, 4183, 4184, 4185, 4186, 4187, 4188, 4189, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 2080 and 2898 and this information was not available as at the time of applying for letters of administration. It was averred that parcels 3999 to 4031 are still in the names of the deceased and that the respondents are not aware of the existence of plots 4181 to 4196. The respondents denied selling off parcels of the estate of the deceased and averred that they were not averse to rendering accounts. They also averred that the orders sought are self-defeating for the process of issuing titles in the names of the administrators is ongoing and the orders sought would amount to abdication of the duties of the applicant and further that the grant is not confirmed hence the deceased's estate cannot be disposed of as alleged.

6. The second application is vide notice of motion under Section 1A & 3A of the Civil Procedure Act, Section 45, 47 & 53 of the Law of Succession Act and Order 40 Rule 1(a) (b) of the Civil Procedure Rules.

7. The application seeks the following orders.

**a) Spent.**

**b) That the 3<sup>rd</sup> Petitioner, Florence Nduku Muiu be forthwith restrained by an order of the court from interfering or intermeddling with the real estate of the deceased person inconsistent with the law pending the issuance of an order confirming the grant.**

**c) Costs of the suit.**

8. The facts constituting the application as indicated in the joint supporting affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> Administrators sworn on 11.7.2016 are that the applicant is intermeddling in the estate of the deceased and forcefully demanding a subdivision of the estate of the deceased.

9. The application was opposed vide a replying affidavit deponed by the 3<sup>rd</sup> Administrator on 5.9.2016 and she averred that she had been denied from accessing her late father's estate by the 1<sup>st</sup> and 2<sup>nd</sup> Administrators who have built a chicken house and constructed a house together with a borehole on the homestead. The deponent admitted the existence of family meetings and averred that the same were not illegal but intended to mediate the matter. She denied violence and averred that the 2<sup>nd</sup> administrator was violent and added that she had not forcefully demanded subdivision of the estate. The application was supported vide affidavit deponed by Sheila Muniyiva Muvya who sought that the same be allowed. Vide supplementary affidavit deponed on 17<sup>th</sup> January, 2017, Florence Nduku Muiu averred that the gift intervivos wishes made by the deceased in respect of parcels 182, 406, 2705, 1181, 2893, 2081 raise suspicion of fraud as the deceased was in good health and wondered why it is indicated that he thumb printed the disposition of the captioned properties. She averred that the deceased left parcel 182 in her names as well as Edward Muli Muiu with instructions that the same was to be divided equally.

10. Vide a joint supplementary affidavit deponed on 6.10.2016 by the 1<sup>st</sup> and 2<sup>nd</sup> administrators, it is averred that the deceased expressed his wishes in respect of parcels 182, 406, 2705, 1181, 2893, 2081 as per annexure RMM1. It was averred that the evidence of ownership of parcels 3920, 4620, 4621 and 406 was as per letter dated 17.9.2015 marked RMM 2; that the transfer of the allotments were effected intervivos and that the titling in respect of the same is ongoing. It was averred that the 1<sup>st</sup> administrator is entitled to build a house on the homestead and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were presently collecting rent from the cyber café and Silver Hotel that are on parcel 40 that is owned by Edward Muli Muiu as evidenced by letter dated 17.9.2015 marked as RMM3. It was averred that parcel 1181 comprises parcels 4181 to 4196 that were gifted vide letter dated 5.7.1994. It was averred that parcel 182 comprised of parcels 3999 to 4031 excluding parcel 4002 that was gifted to Catholic Church:

Parcel No	Beneficiary
3917	Sold to Felista Mbeneta Musilu
3918	Robert Muiu
3919	Vicky, Joyce and Sheila Muiu
3920	Robert Muiu
4028	Sold to Nicholas Mutiso
4029	Gifted to a ministry of Lands

	official
4030	Sold to Luke Mutiso
2705	Transferred to Elizabeth Ngii Muiu
2893	Transferred to Florence Nduku
2895	Belongs to the estate
2080	Pertain to the estate

11. The court directed that the applications dated 3.1.2016 and 11.7.2016 be heard via viva voce evidence. Pw1 for the objector was Florence Nduku Muia who testified that the deceased had a vast estate and that the purported will was sneaked in after she filed the objection. She averred that the deceased was in good health as at the date of the alleged will and wondered why he thumb printed the same. She testified that she has only been given title to one plot and she is supposed to get more and wondered why her father's estate was distributed amongst strangers. She told the court that the respondents have refused to give an account of the deceased's estate from the time of his death. She testified that the estate of the deceased ought to be subdivided equally amongst all the beneficiaries of the estate of the deceased and that she ought to be allowed to visit the homestead of the deceased. The applicant closed her case and the respondents failed to tender evidence as they were absent hence their case was ordered closed since the date of hearing had been taken by consent.

12. The applications were canvassed vide written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> Administrators vide submissions dated 11.1.2017 and filed on 12.1.2017 submitted in respect of the 1<sup>st</sup> application that the named properties do not fall within the estate of the deceased as he gifted the same in his lifetime vide document dated 27<sup>th</sup> May, 2000. Counsel submitted that if the applicant had any dispute then the same ought to be addressed in the Environment and Land Court. Reliance was placed on the case of **Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others (2012) eKLR**. Counsel added that a succession court cannot adjudicate on a gift *intervivos*. With respect to the 2<sup>nd</sup> application, counsel submitted that the applicant had no right to convene meetings with the elders and hence the 2<sup>nd</sup> application should be allowed.

13. Counsel for the applicant vide submissions dated 17.1.2017 submitted that the applicant sought to include the named properties in their application as she disputed the fact that they were distributed in the lifetime of the deceased. Reliance was placed on the case of **Re Matter of the estate of Wachira Kiore Manyetu alias Samuel Wachira Kiore (Deceased) (2015) eKLR**. With regard to the order restraining the land registrar and adjudication officers from transferring, leasing, subdividing, charging or otherwise disposing of the property of the deceased (Kithimani "A" adjudication plot No. 3999,4000,4001,4003,4004,4005,4006,4009,4010,4011,4012,4013,4014,4015,4016,4017,4018,4019,4020,4021,4022,4023,4024,4025,4026,4027,4031,406,1181,2893,2081,2895,2080,3920,4620,4621,40,4181,4182,4183,4184,4185,4186,4187,4188,4189,4190,4191,4192,4193,4194,4195,4196,4029,4030,3918,3919,3920 pending the hearing and determination of the succession cause, counsel submitted that the orders should be granted pending the confirmation of grant as there was a risk of the properties being alienated from the rest of the estate to the detriment of the beneficiaries. Counsel placed reliance on Section 82 of the Law of Succession Act that prohibits sale of immovable property before confirmation of the grant and such action would amount to intermeddling. Counsel cited the case of **Gitau & 2 Others v Wandai & 5 Others (1989) KLR**.

14. On the issue of rendering accounts, counsel submitted that that the respondents have a statutory duty to account for monies that they received on behalf of the estate and reliance was placed on the case of **Re Estate of Peter Muigai Ruhii (Deceased) (2015) eKLR**. On the issue of intermeddling, it was submitted that no cogent evidence was tendered to support the prayer sought against the applicant hence the prayers in that respect be dismissed.

15. The duty of the succession court has been reiterated in numerous cases and it is distribution of the estate of the deceased. In **Re Estate of G K K (Deceased) [2017] eKLR Musyoka J** held that:

**“The primary function of a probate court is distribution of the estate of a dead person.”**

16. The issues for determination are whether the subject land was given out as gift *intervivos* by the deceased as well as the merit of the applications for injunction relief and accounts pending confirmation of the grant. The applicant's case is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been transacting in the estate land to the detriment of her and other beneficiaries hence she has sought for injunction reliefs as well as order for accounts whereas the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case is that the deceased had gifted them the subject land and therefore they imputed that the subject land does not form part of the estate of the deceased and a prohibitory order ought not to be issued and further that the applicant be restrained from interfering with the suit land pending confirmation of grant. Counsel for the applicant on the hand submitted that documents forming the basis of the gift *intervivos* were suspect.

17. From the evidence on record, I note that the application for letters of administration listed parcels 3999 to 4031 excluding 4028 to 4030. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents pleaded that the same were gifted/sold to a number of persons. It was averred by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that parcel 1181 comprises parcels 4181 to 4196 that were gifted vide letter dated 5.7.1994. It was averred that parcel 182 comprised of parcels 3999 to 4031 excluding parcel 4002 that was gifted to a Catholic Church.

18. A gift is a voluntary transfer of personal or real property without consideration. It involves the owner parting with property without pecuniary consideration. It is essentially a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money. It has been legally defined as “the transfer of certain existing moveable or immoveable

property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee” (see **Black’s Law Dictionary, Revised Fourth Edition, (1968) St. Paul, Minn. West Publishing Co., at p. 187**). A gift *inter vivos* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift. In order to decide in favour of the applicant, the court has to be satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had furnished evidence whose level of probity was such that a reasonable man, having considered the evidence adduced by the respondent, might hold that the more probable conclusion is that for which the applicant contended, since the standard of proof is on the balance of probabilities / preponderance of evidence (see **Lancaster v Blackwell Colliery Co. Ltd (1918) WC Rep 345**). The burden of proof was on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prove on the balance of probabilities that the respective donees had better claims to the land than the one made by the applicant and the beneficiaries of the estate.

19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the basis of the gift *intervivos* was vide letter dated 5.7.1994, which I am unable to accept at this stage because the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not testify to speak on the same. No one has brought cogent evidence that they received and utilized the land. During confirmation of the grant, the court will have a chance to hear from the various beneficiaries and donees as it were, otherwise at this point it is premature to hold that the subject lands were given to the respective donees as a gift *inter vivos*. There is also nothing to show that the applicant distributed the deceased’s property without obtaining letters of administration hence contravening the provisions of the Succession Act. I therefore, find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have failed to prove on a balance of probabilities that the suit land was given as a gift *inter vivos* and prayer 2 and 3 of the application dated 3.1.2016 appear to be meritorious. However executing the same poses handicaps due to absence of the details necessary to make the orders. It was alleged that parcels 4028 and 4030 were sold to named persons but no cogent documentary evidence was availed.

20. There is evidence that there are persons dealing with the assets of the deceased. It is not clear who sold the suit land. However it is clear as to who is using the letter dated 5.7.1994 as a basis to deal with the suit lands. Section 45 of the Law of Succession is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

21. The court takes the view that any of the actions in dealing with the disputed properties and yet the grant has not been confirmed amount to intermeddling.

22. I find that the application has raised weighty legal issues with regard to the issues of alleged fraud and issues of identity of the legal nature of the interest in the disputed properties. In **Rosemary Wanjiku Murithi v George Maina Ndinwa (2014) eKLR**, the Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud is not proof of fraud and where such issues are raised in a succession cause, rule 41(3) of the Probate and Administration Rules provides that claims which are *prima facie* valid should be determined before confirmation. It states that :-

**“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.”**

23. In light of the evidence presented in court and the above mentioned provisions of the law, I am of the view that the issues raised by the applicant cannot be fully canvassed in this application. However the court is duty bound to prevent wastage of the estate of the deceased. The power to do so is set out under the inherent jurisdiction of the court and under Section 47 of the Law of Succession Act and Rule 73 of the probate rules and to that end the court has power to grant injunctive orders to meet the ends of justice. There is need to preserve the assets of the deceased so as to ensure that the beneficiaries are taken care of in the end.

24. This was observed in the case of **The Estate of George M’Mboroki (Deceased) [2008] eKLR** where the court held that **“it holds such intrinsic authority so as to observe the due process of the law, to prevent the abuse of the process, to do justice between the parties and to secure a fair trial between them”**.

25. The applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have sought injunction reliefs. The celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** sets out the grounds for granting an injunction. On the first principle as set out in the case, I am satisfied that the applicant has established a *prima facie* case as described in **Mrao v First American Bank & 2 others [2003] KLR, 125**. It was evident from the facts tendered in court that part of the estate of the deceased has been subjected to what amounts to intermeddling in the estate and yet the grant of letters of administration is pending before the court. In the case of the Estate of **Veronica Njoki Wakagoto (Deceased) 2013 eKLR** where the court stated **“that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law.....the law takes a very serious view of intermeddling and makes it a criminal offence.”**

26. I am satisfied that if the order sought by the applicant is not granted, there will be irreparable loss to the estate of the deceased that cannot be compensated by damages. In **Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others (2016) eKLR**, the court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages. The facts speak for themselves and intermeddling in the estate of the deceased cannot be compensated by way of damages since the assets comprise of parcels of land which have intrinsic values. The objector has averred that the remains of her parents were interred on some of the parcels of land.

27. I am satisfied that the principles for granting injunctions as set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd 1973 EA 358** have been met by the objector herein. In considering the pleadings, there does exist a serious issue to be tried, one that forms the subject matter of this suit and in preserving it, would only culminate in meeting the ends of justice as sought by the parties. The 1<sup>st</sup> and 2<sup>nd</sup> administrators in their application dated 11.7.2016 have not convinced me that the objector is out to intermeddle with the estate. They failed to appear in court to controvert the evidence of the objector. The objector came out as a candid individual out to protect her interest and those

of her siblings as the Respondents appear to have elbowed them out of her father's estate. The respondents seem to be unhappy at the objector's quest to pursue her interest in the estate and have now branded her as an intermeddler yet she is one of the administrators in the estate and entitled to participate and to question any goings on. On the whole I find the objector's application dated 3.1.2016 has merit and is allowed in terms of prayers 3 and 4 thereof. On the other hand the respondents' application dated 11.7.2016 lacks merit and is dismissed.

28. 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. Further Section 83(h) of the Law of Succession Act provides that the legal representatives are liable: 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.

29. Thus this commends me to make an order that the applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either jointly or severally do prepare and file in this cause statements of accounts showing the monies which have come into their hands from the estate of the deceased and what they have spent within a certain timeline. As administrators they are under obligation to render accounts either jointly or severally by giving an inventory of the estate of the deceased from the date of his death to date.

30. The applications having been determined, the court proceeds to make the following orders:

**i. The applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either jointly or severally do prepare and file in this cause statements of accounts showing the monies which have come into their hands from the estate of the deceased and what they have spent within 45 days from the date of this order.**

**ii. The applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall also either jointly or severally within 45 days from the date hereof give an inventory of the estate of the deceased from the date of his death to date of this ruling.**

**iii. Any further rent collected from premises belonging to the deceased be deposited in a joint account to be opened in the names of the three administrators as signatories and account holders within the next 45 days failing which the same shall be deposited into court pending the confirmation of the grant.**

**iv. The 1<sup>st</sup> and 2<sup>nd</sup> administrators/ respondents, land registrar and adjudication officers are hereby prohibited from transferring, leasing, subdividing, charging or otherwise disposing of the property of the deceased (Kithimani "A" adjudication plot No. 3999,4000,4001,4003,4004,4005,4006,4009,4010,4011,4012,4013,4014,4015,4016,4017,4018,4019,4020,4021,4022,4023,4024,4025,4026,4027,4031,406,1181,2893,2081,2895,2080,3920,4620,4621,40,4181,4182,4183,4184,4185,4186,4187,4188,4189,4190,4191,4192,4193,4194,4195,4196,4029,4030,3918,3919,3920 pending the confirmation of the grant.**

**v. Having found that no gift intervivos has been established, a temporary injunction order be and is hereby issued against the respondents, land registrar and adjudication officers their agents, servants or any person acting under their authority restraining them from intermeddling or dealing in any manner with the assets of the deceased pending the confirmation of the grant.**

**vi. The parties are directed to file summons for confirmation of grant once within sixty (60) days from the date hereof.**

**vii. Each party to bear their own costs.**

It is so ordered.

Dated and delivered at Machakos this 4<sup>th</sup> day December, 2019.

D. K. Kemei

Judge