

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE MATTER OF THE ESTATE OF WILLIAM KAMAU KAMUYU (DECEASED)

SUCCESSION CAUSE NO. 2561 OF 2009

VIRGINIA WANJIKU KAMUYU.....APPLICANT

VERSUS

JOSEPH KAREGA KAMAUADMINISTRATOR/ RESPONDENT

RULING

PLEADINGS

The late William Kamau Kamuyu died intestate on 6th September 2009.

He was survived by;

- 1) Serah Njoki Kamau- widow
- 2) Francis Kamuyu Kamau- son
- 3) Joseph Karega Kamau- son

They petitioned for grant of letters of administration intestate and grant was issued by this court on 29th April 2010 appointing all beneficiaries as administrators of deceased's estate. By application of Summons for Confirmation of grant filed on 18th August 2010; the administrators deposed that they had applied for a loan of Ksh 12 m from Housing Finance (HFCK) using L.R. Dagoretti/Kangemi/328 as per letter dated 27th July 2010 attached to the application. The loan was to enable them to carry out development projects. For the said loan to be disbursed the grant had to confirmed as was done on 10th November 2010 as follows;

NAME	DESCRIPTION OF PROPERTY	SHARES OF HEIRS
Serah Njoki Kamau Francis Kamuyu Kamau Joseph Karega Kamau	L.R.No. Dagoretti/Kangemi/328	Equal shares
Francis Kamuyu Kamau	L.R.No. Dagoretti/Kangemi/329	Absolutely
Serah Njoki Kamau	L.R.No. Dagoretti/Kangemi/330	Absolutely
Francis Kamuyu Kamau	L.R.No. Dagoretti/Kangemi/331	Absolutely
Joseph Karega Kamau	L.R.No. Dagoretti/Kangemi/332	Absolutely
Serah Njoki Kamau	CFC Stanbic A/c No. 01400/158097/01	Absolutely
Joseph Karega Kamau	M/V KAA 248C	Absolutely
Joseph Karega Kamau	M/V KAM 509S	Absolutely
Serah Njoki Kamau	7100 shares at Barclays Bank of Kenya Limited	Absolutely
Serah Njoki Kamau	M/V KAX 59	

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The son of the deceased; Francis Kamuyu Kamau; a beneficiary and one of the administrators died on 24th October 2016 and grant of letters off administration intestate was obtained on 10th July 2017; by his widow Virginia Wanjiku Kamuyu in Succession Cause 278 of 2017. She sought the late husband's share of properties in the instant deceased's estate as per confirmed grant of 10th November 2010. The rent proceeds due to her late husband's estate from the shared proceeds by beneficiaries ceased upon the death of the deceased's widow; Serah Njoki Kamau in 2017.

APPLICANT'S APPLICATION

The application for consideration herein is Notice of motion dated 7/9/2017. The applicant, Virginia Wanjiku Kamuyu stated that following the confirmation of grant of the deceased's estate, her late husband, Francis Kamuyu Kamau was entitled to his share of the estate. After his death, the Applicant received rent proceeds upto the time the widow of the deceased and mother of her late husband passed on. She stated that amongst the shared property is L.R.No. Dagoretti/Kangemi/328 that hold 2 blocks of flats each with 8 units and total rent per month is Ksh 485,000/-. The Respondent has withheld the share of Francis Kamuyu Kamau which has accrued to Kshs. 1,920,000/- while the late Francis's children are in dire of school fees. That the Kshs. 340,000 collected from the late Serah Njoki Kamau's property L.R. Dagoretti /Kangemi/330 which property was freed from any encumbrance after paying off its loan in May 2017 is unaccounted for with a balance of Kshs.238,728/- each month which should be used to pay school fees for Evelyn Wanjiru Kamuyu. She urged the court to intervene and order that each beneficiary take over the management of one block each of the two distinct blocks A & B L.R. No. Dagoretti/Kangemi/328 in which the 2 blocks have equal number of units and the rental collection may be by each surviving beneficiary and manage on their own block of flats. The Court to restrain the Respondent from collecting and using rent proceeds of suit properties.

During oral proceedings of 6th November 2017 and 31st March 2018, the Applicant relied on the supporting affidavit to the Application of 7th September 2018, through Counsel; Mrs. Morara; she stated as widow with 4 children she required funds to educate her children and funds for their upkeep and related expenses. Of importance she annexed to her application documents to show that one of their children; Evelyn Wanjiru Kamuyu was/is studying in Drexel University and was/is in dire need of school fees. During the deceased's widow's lifetime she swore affidavit on 26th May 2016 annexed to the application that she had means and capacity to and she undertook to fully support her granddaughter financially during her studies in USA in Mechanical Engineering for the entire course period.

During the hearing, this Court was of the view that due to the urgency of the matter as evidenced by documents produced in Court by Applicant on behalf of her daughter; namely email of 11th November 2017, Financial Warning from Student Financial & Registration Services – Drexel University which depicted the grandchild of the deceased was almost stranded and about to be sent out of University due to lack of school fees and therefore order remittance by EFT of Ksh 400,000/- to the University Account for school fees arrears which was complied with as per the Payment Advice filed in Court by Respondent from Standard Chartered Bank Westlands; Branch on 22nd November 2017.

RESPONDENT'S RESPONSE

The respondent is opposed to the application vide Replying Affidavit filed on 21st September 2017. The Respondent stated that the Applicant derives funds from rent proceeds in the following suit properties;

- a) L.R. Dagoretti/Kangemi/329- Ksh. 350.000/-
- b) L.R. Dagoretti/Kangemi/328- Ksh 60,000/-
- c) L.R. Dagoretti/Kangemi/255 Ksh 200,000/-

Mr. Mahinda for the Respondent; in opposition to the application argued that the estate was distributed and the matter should be closed. He admits that L.R. Dagoretti/Kangemi/328 was shared and transferred to the three beneficiaries. The Respondent admitted that rental income due to the Applicant and her children derived from houses erected on L.R. Dagoretti/Kangemi/328 and L.R. Dagoretti/Kangemi/330 he has not refused to remit the same it is because of the rental income being used to pay loans as per the family meeting of 29th April 2017 as per minutes attached **JK4**. The Respondent stated that he is aware that the deceased brother Francis Kamuyu paid School fees for Evelyn Wanjiru Kamuyu grandchild to the deceased herein in full.

He avers that the administrators to the deceased's estate carried out their mandate to conclusion and after the confirmation of grant on 10th November 2010 had vested all the assets forming the estate of the deceased to the entitled beneficiaries with L.R. No. Dagoretti/Kangemi/328 being confirmed to the three beneficiaries Serah Njoki Kamau, Francis Kamuyu Kamau and Joseph Karega Kamau and a titled issued to that fact indicating that the same ceased forming part of the deceased's estate.

That it was unanimously agreed upon by the beneficiaries that all the rental proceeds from the said property to be utilized for development and deliberated and conceptualized a project to construct their residential homes. Francis's house in Runda was completed in May/June 2016 and his house commenced immediately however, the project to build his house stalled due to his mother's constant ill health which depleted their pool monies. The management of the said property was by Serah Njoki Kamau but she later handed over to Francis Kamuyu Kamau due to her ill health and he took over management of the property sometime on 24th October 2016 after the demise of his brother Francis. On taking up management of the said premises he applied the monies realized from the rent towards the development project. He stated that it was selfish of the Applicant to curtail him from obtaining funds from the pool while she and her late brother benefitted from the same to purchase and construct their home in Runda.

In his further affidavit dated 20th March 2018 Joseph avers there is a borehole that serves plots 328 belonging to Serah N. Kamau, Francis K. Kamau and Joseph K. Kamau plot No. 329 and 331 belonging to Francis K. Kamau and plot 330 for Serah N. Kamau. That plot 329 belonging to Francis K. Kamau shares a gate with plot no. 328 which is jointly held by all beneficiaries and the same is manned by Bridge Security Guards whose payments of Kshs. 81,000/- are catered for by the rental proceeds from plot no. 328. Further, that the late Francis received a grant of Kshs. 2,000,000/- on 31/01/2012 from the late Serah Njoki's Equity Bank account transferred to his company account in the name of Spread Wings and the same was to be applied towards the construction of their home in Runda. That the late Serah Njoki had been wheeled to MP Shah Hospital in critical condition. On 3/8/2016 a deposit of Kshs.450, 000/- was made. That he refunded the Kshs.500, 000/- to the Applicant in two installments; Kshs.300, 000 in May 2016 and Kshs.200, 000 in February 2017. That by the time he took over management of the properties there were no monies in the accounts but pending bills. The reason was/is that his late brother had to pay their late mother's hospital bills while at MP Shah Hospital. Further, that Plot No. 330 owned by his late mother had been used to secure 2 loans advanced by Equity Bank. However, the servicing of the said loan was through proceeds from Dagoretti/Kangemi No. 328 which is jointly owned and three other housing units since their late mother had no other source of income. That Dagoretti/Kangemi No. 330 belongs to Serah Njoki and as such the same is not subject of this matter. With the bills for the borehole being serviced from Plot no. 330. He refutes allegations that fresh water from the borehole is sold every day to the water tankers adding that the same is done on rare occasions when there is no water in the neighborhood with the water being mainly consumed by Dagoretti/Kangemi No 328 jointly with Dagoretti/Kangemi Nos. 329, 330 and 332 owned by Francis Kamau, Serah Kamau and Joseph Kamau respectively. Adding that the properties shared a perimeter wall which gave evidence of a partnership.

In his further replying affidavit dated 20th May 2018 Joseph avers that the deceased used Dagoretti/Kangemi No. 332 as a simple deposit for a loan facility by Stanbic Bank and the title is still encumbered by the outstanding facility. Adding that as per his late father's wishes the property Dagoretti /Kangemi/328 was not to be sold but to be utilized for the benefit of all family members and the purport by the applicant to take over one block on her own is in contrast with is late father's will.

APPLICANT'S RESPONSE

The Applicant in reply to the respondent's further affidavit aver that L.R. No. Dagoretti/Kangemi/328 was jointly registered in the names of all 3 beneficiaries and as such the same does not cease being the property of the estate as the title is one. She denied the respondent's claims adding that his actions are aimed at extorting money from surviving beneficiaries. She added that she and her late husband Francis Kamuyu Kamau built their Runda Home on bank loans from Equity Bank acquired on diverse dates. She refuted claims of there being any partnership agreement or joint ownership as alleged by the respondent nor the same being managed by the late Serah Kamuyu Kamau adding that his late husband managed the said properties until his demise. That her late mother in law fell ill she requested her late husband to deposit Kshs. 500,000/- to the MP Hospital as she did not have money with her with an understanding that the same would be refunded to him upon discharge. She avers that her late husband left children in school and college who depend on the proceeds from L.R. Dagoretti/Kangemi/328 for their fees and upkeep. Adding that Serah Njoki had always taken care of her own medical bills with the income generated from L.R. Dagoretti/Kangemi/330, which amounted, to Kshs. 546,000/- per month. Adding that the said loan facility alleged by the respondent was obtained by the late Serah Njoki and the same was serviced using rental proceeds from her rental units at L.R. Dagoretti/Kangemi/330. That the CFC Bank Loan was obtained by the Respondent against his plot no. L.R. Dagoretti/Kangemi/332 and the same has nothing to do with what is entitled to the beneficiaries of the late Francis Kamuyu. She challenged the Gwikuria Self-help Group, MP Shah Hospital ICU bill, Premier Hospital bill arrears, Dr. Githinji's Cardiologist's arrears. As Serah Njoki's properties Dagoretti/Kangemi/330 and 1/3 share of L.R. Dagoretti/Kangemi/332 continue to draw income. Adding that the borehole generates its own income for maintenance and top up bills. Adding that the security bills alleged is exaggerated. She argues that the staircase electricity bill is unsupported.

ISSUE

Is the Applicant entitled to prayers sought in application filed on 7th September 2017?

DETERMINATION

I have considered the parties pleadings and oral arguments and find as follows;

There is on record a valid, regular and legal confirmed grant of 10th November 2010 that distributed the deceased's estate to the beneficiaries. Unless and until it is set aside appealed against or rectified and/or amended each of the beneficiaries ought to/shall derive their beneficial interest from the assets that comprise of the estate of the deceased as per the confirmed grant.

As the sole administrator, the Respondent ought to by this time and in compliance with **Section 83(e) (f) & (g) of Law of Succession Act Cap 160** to have distributed the estate of the deceased in accordance with confirmed grant within 6 months from the time the grant was confirmed or such longer period as the Court may allow after payment of expenses and debts to the deceased's estate and thereafter file a full and accurate inventory of assets and liabilities and accurate account of all dealings therewith upto the date of account.

In **RE ESTATE OF DAVID KYULI KAINDI (DECEASED) SUCCESSION CAUSE 3403 OF 2005**, It was pointed out as follows;

"The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from personal representatives, and in extreme cases of mal administration and misconduct by the personal representatives.

The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Ac Cap 167 Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives and they hold the same for the benefit of others- beneficiaries, heirs, dependents, survivors, creditors

among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others- they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and statutory obligation.”

From the evidence on record, despite registration of LR Dagoretti/Kangemi/328 from William Kamau Kamuyu to 3 beneficiaries and administrators; the Applicant has not received any funds from the shared proceeds since the demise of widow of deceased in 2017. The Respondent after the confirmation of grant of the late William Kamau Kamuyu has continued managing the funds realized from the two jointly owned properties specifically L.R.Dagoretti/Kangemi/328 and L.R. Dagoretti/Kangemi/330.

The Respondent in his reply to the applicant’s application purported to adduce account of various liabilities in form of loans, from the record there is HFCK loan of 12 million in 2010 against suit property Dagoretti/Kangemi/328, Equity Loan of Ksh 3.7 in 2010 against suit property L.R. 7785/1039 (IR No 9711) and Equity Loan of Ksh 4m against L.R. Dagoretti/Kangemi 330. The Respondent referred to CFC loan but no further information was disclosed. Despite documents of the loan agreements being attached, no documents as to loan repayments and /or discharge of property (ies) are produced to confirm the status /progress and /or completion of payment(s) of the loans. Of interest the loans pertain to specific properties and therefore the suit properties that are free from loans, their rent proceeds ought to be utilized by beneficiary as described in the confirmed grant. With regard to suit property Dagoretti/Kangemi/328, despite the loan, the Applicant admitted that she received her share of rent proceeds from the property upto the time the widow of the deceased died. The Respondent admitted that the Applicant is entitled on behalf of her late husband’s estate to rental income from the suit properties but did not explain why such remittances were not done.

The Respondent claimed that by virtue of the family meeting held on 29th April 2017, it was resolved that rental income was to be utilized on development projects. I have looked at minutes of the family meeting annexed to Respondent’s Replying Affidavit; the Respondent chaired the meeting and decided its outcome. I agree with the Applicant that there was no consensus. The Respondent’s claim that the administration of the estate is as per the deceased’s Will annexed to his affidavit filed on 28th May 2018 is not applicable here because , the Petition filed on 7th December 2009 was for grant of letters of administration intestate and reference was made to the Will of deceased.

The Respondent alluded to ongoing construction of his house alleged to have been agreed by widow and sons after which the applicant has challenged. Serah Njoki widow of the deceased had life interest over the estate of the deceased and had beneficial interest in L.R. Dagoretti/Kangemi/330 and her 1/3 share of L.R. Dagoretti/Kangemi/328. Upon her demise her interest ought to be shared by her 2 sons. Francis Kamuyu Kamau, now deceased is represented by the widow, the Applicant who is administrator of his estate. Therefore the suit property L.R. Dagoretti/Kangemi/328 ought to be shared by both sons equally. The suit property L.R. Dagoretti/Kangemi/328 upon completion of payment of loan by widow of the deceased should be shared between both sons of the deceased.

The Applicant denied allegations that they constructed their Runda home from a pool of resources from the family joint property and produced various letters from Equity bank supporting various loan facilities; letter dated 6th October 2010 for Kshs. 3,700,000. Letter dated 17th November 2010 for Kshs. 300,000/-, letter dated 14th March 2013 Kshs. 5,000,000/-. The Respondent however, has not produced any documents or bank statements that support his claim of the pool of resources that were used for development of the beneficiaries’ residential homes. Further, there is no evidence on record to support the alleged agreement amongst the family members for parties to construct homes for both sons of the deceased. As such I find that the respondent has no justification to divert funds to the said construction.

Further, the applicant has produced two letters one dated 29th June 2011 which evidence a loan facility of Kshs. 12,000,000/- by Serah Njoki for construction on her plot **L.R. Dagoretti/Kangemi/330** and a Letter dated 4th December 2014 shows a loan facility taken by Serah Njoki Kamau for Kshs. 4,000,000/-. This is evidence that the two facilities were taken out by Serah on security of her plot for construction the servicing of the loan therefore should and ought to have been realized from the rental income of the said property. There is need to confirm whether the loans are repaid and the property **L.R. Dagoretti/Kangemi/330** is available for distribution.

DISPOSITION

1) From the foregoing, I find that the respondent has not given a true account of the rental proceeds realized from the said 2 suit properties; L.R. Dagoretti/Kangemi/328 & L.R. Dagoretti/Kangemi/330 in compliance with Section 83 e f & g of Law of Succession Act Cap 160. Despite filing accounts; the loan repayment schedules and discharge of property (ies) are not filed. I order that the Respondent files within 60 days and produce before this court a true account of funds realized from the said joint properties since he took over management of estate of the deceased. Based on the accounts the rental income in arrears from L.R. Dagoretti/Kangemi/328 & L.R. Dagoretti/Kangemi/330 shall be determined to be paid. In default what is due and owing shall be paid by Respondent to Applicant.

2) It is not in dispute that L.R. Dagoretti/Kangemi/328 consists of two blocks with similar units fetching same amount in terms of rent. I find it is only fair that the Applicant takes management of Block B as she is entitled to and the Respondent remains with Block A. The rental proceeds shall be utilized by the Applicant for daughter’s education together with rental income from other suit properties as per confirmed grant.

3) The sons of the deceased Francis Kamuyu Kamau (deceased) and Joseph Karega Kamau shall share equally after completion of the loan repayments and expenses attached to suit property L.R. Dagoretti/Kangemi/330 which was allocated to the widow of the deceased Serah Njoki Kamau now deceased.

4) A party/parties may exercise right of appeal.

5) Each party to bear own costs.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF NOVEMBER, 2018.

M. W. MUIGAI

JUDGE-FAMILY DIVISION

IN THE PRESENCE OF;

Mrs.Morara for Applicant:

Ms. Muriraja holding brief for Mr. Munge for the beneficiaries

Ms. Kathungu holding brief for Ms. Mahinda for the Respondent