



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 391 OF 2015**

**IN THE MATTER OF THE ESTATE OF BERNARD KILONZO KATIKU – DECEASED**

**MUENI KILONZO.....PETITIONER/1<sup>ST</sup> RESPONDENT**

**VERSUS**

**TRUSTEES, OFFICE BEARERS,MANAGEMENT COMMITTEE AND**

**BOARD OF GOVERNORSOF KATHIMA**

**AIC PRIMARY SCHOOL.....1<sup>ST</sup> INTERMEDDLER/2<sup>ND</sup> RESPONDENT**

**GOD'S APOSTOLIC CHURCH.....2<sup>ND</sup> INTERMEDDLER/3<sup>RD</sup> RESPONDENT**

**JOHN WAMBUA MUTETE.....3<sup>RD</sup> INTERMEDDLER /4<sup>TH</sup> RESPONDENT**

**LUCAS MULINGE MWOVE. ....4<sup>TH</sup> INTERMEDDLER/ 5<sup>TH</sup> RESPONDENT**

**MARIA MBULA MWOVE.....5<sup>TH</sup> INTERMEDDLER/6<sup>TH</sup> RESPONDENT**

**REUBEN KIMANI NJOROGE.....6<sup>TH</sup> INTERMEDDLER/7<sup>TH</sup> RESPONDENT**

**SPENCER MUSYOKA MUTHOKA...7<sup>TH</sup> INTERMEDDLER/8<sup>TH</sup> RESPONDENT**

**AND**

**JOYCE MUKULU KILONZO.....9<sup>TH</sup> RESPONDENT**

**WITH**

**VICTOR NZIOKI KILONZO.....1<sup>ST</sup> OBJECTOR**

**VICTORIA MUTETE KILONZO.....2<sup>ND</sup> OBJECTOR**

**CAROL KATHIO KILONZO.....3<sup>RD</sup> OBJECTOR**

**ALEXANDER KATIKU KILONZO .....4<sup>TH</sup> OBJECTOR**

## RULING

### Introduction

Bernard Kilonzo Katiku (hereinafter referred to as “the Deceased”) died on 16<sup>th</sup> January 2015. At the time of his death he was legally divorced from his first wife, Joyce Mukulu Kilonzo who is the 9<sup>th</sup> Respondent herein, and was married to Mueni Kilonzo, the Petitioner herein. He had four children with his first wife, who are the 1<sup>st</sup> to 4<sup>th</sup> Objectors herein, and three children with the Petitioner. The Petitioner then petitioned for letters of grant of administration intestate, whereupon various objections were filed to the said petition, including by the 1<sup>st</sup> to 4<sup>th</sup> Objectors and the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents.

The Objectors also filed an application by summons dated 6<sup>th</sup> July 2015 seeking to restrain the Petitioner from interfering with or intermeddling with the deceased’s estate, and interim orders were granted in this respect on 8<sup>th</sup> July 2015. The Objectors filed another application by summons dated 17<sup>th</sup> August 2015 in which they joined the intermeddlers as Respondents, and sought orders of injunction, eviction and account against the said intermeddlers with respect to the deceased’s estate. The two applications are pending hearing and determination.

### The Petition

While so pending, the 4<sup>th</sup> Objectors filed yet another summons and A Petition both dated 18<sup>th</sup> May 2016. The 4<sup>th</sup> Objector in the said Petition is seeking letters of administration *ad colligenda bona* under section 67 of the Law of Succession Act. In his supporting affidavit to the Petition, the 4<sup>th</sup> Objector states that he is a son of the deceased, and that there is a dispute as to the properties of the deceased arising from a long standing dispute between the deceased and Joyce Mukulu Kilonzo in **Machakos H.C.C.C No 460 of 1998 – Bernard Kilonzo Katiku vs Joyce Mukulu Kilonzo**. Further, that there has been invasion of the deceased’s properties by intermeddlers which raises special circumstances and great urgency that he be appointed to preserve and collect the estate and evict all trespassers.

The 4<sup>th</sup> Objector seeks orders in the corresponding summons to collect and preserve the rent, income, revenue and assets of the deceased; to open and deposit the rent, income and revenue of the deceased’s estate in an estate account; and to evict all trespassers on the deceased’s assets and properties pending the hearing of the petition for letters *ad colligenda bona*.

This Court on 31<sup>st</sup> May 2016 directed that the Petition for letters *ad colligenda bona* be heard and determined first. The Petitioner filed a response to the said Petition in a replying affidavit and further affidavit she swore on 26<sup>th</sup> July 2016 and 13<sup>th</sup> September 2016 respectively. She stated therein that the 4<sup>th</sup> Objector had not brought any evidence that some of the properties formed part of the estate of the deceased, or of the rent collected from the assets of the deceased. Further, that the purported intermeddlers are *bona fide* purchasers for a valuable consideration, who executed agreements with the deceased.

The Petitioner averred that she is capable of taking care of the estate of the deceased who was her husband, and had filed for letters of administration. She also averred that the 4<sup>th</sup> Objector had concealed her and her children’s existence as beneficiaries of the deceased from the Court, and also included Joyce Mukulu Kilonzo who was divorced from the deceased as a beneficiary. Further, that the Objectors or 9<sup>th</sup> Respondent never showed any interest in the deceased’s medical health and medical expenses which the Petitioner paid, and for which the deceased was advanced monies by the 3<sup>rd</sup> Respondent on the basis of a lease agreement he entered into with the said respondent.

The 3<sup>rd</sup> Respondent confirmed this position in a replying affidavit sworn and filed on 13<sup>th</sup> September

2016 by Michael Wafula Wanyama, its senior pastor, wherein they denied being intermeddlers and stated that they entered into a 5-year lease with the deceased on 2<sup>nd</sup> February 2012 for part of Machakos/Kiandani/2128, a copy of which they attached.

The 4<sup>th</sup> Respondent similarly also denied being an intermeddler in a replying affidavit he swore on 2<sup>nd</sup> August 2016, wherein he stated that he was a *bona fide* purchaser for value from the deceased of various parcels of land, and he attached the sale agreements. The 5<sup>th</sup> Respondent also filed a replying affidavit sworn on 17<sup>th</sup> October 2016 wherein he stated that he purchased three portions of land comprised in Machakos/Kiandani/2128 from the deceased in October 2013 and attached copies of the sale agreement.

Lastly, the 7<sup>th</sup> Respondent also filed a replying affidavit he swore on 2<sup>nd</sup> August 2016 in opposition to the prayers for eviction, and attached a copy of the sale agreement he entered into with the deceased with respect to a portion of Machakos/Kiandani/2128. The 8<sup>th</sup> Respondent attached a copy of a sale agreement dated 28<sup>th</sup> October 2008 entered into with the deceased, to the Objection he filed in Court on 5<sup>th</sup> October 2015.

### **The Issues and Determination:**

The issue herein is whether the 4<sup>th</sup> Objector is entitled to a grant of *ad colligenda bona*. The Court directed the parties to canvass this issue by way of written submissions. The Objectors learned counsel, Moses Odawa & Company Advocates, filed submissions dated 19<sup>th</sup> August 2016 wherein he relied on sections 54 and 67 of the Law of Succession Act, and Rule 36 of the Probate and Administration Rules. He urged that there were orders of the Court issued in this Cause on 8<sup>th</sup> July 2015 against the Petitioner, and against the deceased in **Machakos High Court Civil Case 460 of 1988 -Joyce Mukulu vs Bernard Kilonzo Katiku** restricting dealings with the deceased's properties. Further, that there are numerous pending applications in this matter and other high court cases, and it is fair that the court considers and allows the Petition for purposes of practicality and preservation of the estate of the deceased. Reliance was also placed on the decision in **Re Estate Antony Shem Otieno Odhiambo (Deceased), (2015) eKLR.**

Mrs Nzei the learned counsel for the 9<sup>th</sup> Respondent supported the 4<sup>th</sup> Objector's Petition and relied on a replying affidavit sworn by the 9<sup>th</sup> Respondent on 24<sup>th</sup> July 2016, and filed in Court on 26<sup>th</sup> July 2016. The said Respondent averred therein that she filed Machakos High Court Civil Suit Number 460 of 1998 during divorce proceedings between herself and the deceased to stop him from disposing of the matrimonial properties, and was granted an injunction in a ruling delivered on 25<sup>th</sup> January 2001, which has never been set aside or varied. Further, that she has a 50% right to the matrimonial property hence her objection and cross-petition.

Andrew Makundi & Company Advocates filed submissions dated 18<sup>th</sup> October 2016 for the Petitioner and 3<sup>rd</sup> and 4<sup>th</sup> Respondents, wherein reliance was also placed on Rule 36 of the Probate and Administration Rules and the decision in **Morjaria vs Abdalla, (1984) KLR**, for the argument that the 4<sup>th</sup> Objector had not demonstrated any urgency to warrant him being granted the letters of administration *ad colligenda bona*. Further that the Petitioner had stated she is capable of administering the deceased's estate, and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents had demonstrated that they are not intermeddlers.

The grant of letters *ad colligenda bona* is recognized in sections 54 and 67 of the Law of Succession Act which provide that a court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule, and that no grant of representation, other than a limited grant for collection and preservation of assets (a grant *ad colligenda bona*), shall be made until there has been published notice of the application for the grant.

The relevant provision of the law as to its issue of a grant of letters *ad colligenda bona* is Rule 36 of the Probate and Administration Rules which provides as follows:-

**“(1) Where owing to special circumstances the urgency of the matter is so great that it would possible for the court to make a full grant of representation to the persons who would by law be entitled there to 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 defunct 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.**

**(3) An application for such a grant shall be by petition in form 35 signed by the applicant in the presence of not less than two adult witnesses supported by an affidavit containing material facts together with the reason for the application and showing the urgency of the matter and shall be made at the principal registry or at the Mombasa, Kisumu, Nakuru, Nyeri, Kisii, Kakamega, Meru, Machakos, Eldoret and Bungoma registries.**

**(4) The provision of rule 7 (4) shall not apply to applications under this rule.**

**(5) Copies of the proceedings and of the grant when issued shall be served upon such persons (if any) and in such manner as the court shall direct”**

This court has duly noted these provisions, and after applying them to the facts herein, makes a finding that the sole purpose of a grant *ad colligenda bona* is to collect and getting in the estate property as held in **Morjaria vs Abdalla, (1984) KLR** and **Re Estate Antony Shem Otieno Odhiambo (Deceased), (2015) eKLR**, the decisions relied upon by the parties herein.

A grant of *ad colligenda bona* is not meant to enable an applicant stand in the shoes of the deceased as personal representative. Therefore, the orders of eviction cannot be the subject of an application of a grant of *ad colligenda bona*. This Court in this regard observes that the facts that are giving rise to the petition arise from a long-standing civil case filed in 1998 whose current status is not known, and also from orders issued in 2001 again whose current status are not verified. The said case and orders cannot be argued to be urgent factors for the issue of the grant sought.

In addition, the orders issued against the Petitioner herein on 8<sup>th</sup> July 2015 arise from the Objector’s own application and doing, and the 4<sup>th</sup> Objector cannot in equity and fairness now be allowed to rely on the said orders for a grant *ad colligenda bono*. Lastly, a majority of the so-called intermeddlers have demonstrated their beneficial interest in the deceased’s properties through the various sale agreements and lease agreement they attached that they entered into with the deceased before his death.

It is thus my finding that the Petition presented by the 4<sup>th</sup> Objector does not meet the required legal threshold, and is hereby denied. The 4<sup>th</sup> Objector’s Summons dated 18<sup>th</sup> May 2016 is accordingly dispensed with, as it was premised on the grant of the letters *ad colligenda bona*. Notwithstanding these findings, this Court notes that the properties of the deceased need to be preserved pending the determination of the pending objections and applications. In addition I have also noted that the parties who have priority in the administration of the estate are the Petitioner who is the deceased’s wife, and the Objectors who are his children from a previous marriage.

Pursuant to the inherent powers of this Court provided by section 47 of the Law of Successions Act I accordingly therefore order as follows:

1. The prayers sought in the 4<sup>th</sup> Objector’s Petition and Summons dated 18<sup>th</sup> May 2016 are hereby denied.
2. The rent, income and any revenue due from the deceased assets as shall be agreed by the Petitioner and Objectors, shall be deposited in an interest earning account to be opened in the joint

names of the Petitioner's and Objector's Advocates on record with effect from January 2017.

3. The *status quo* that shall obtain as regards all the properties and assets belonging to the estate of the deceased pending the appointment of administrators and issue of grant of administration shall be that the Petitioner, Respondents and Objectors shall continue to be in possession and occupation of the deceased's properties and assets they currently occupy, and the said Petitioner, Respondents and Objectors shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by any of the parties herein.

4. The orders granted herein on 8<sup>th</sup> July 2015 are varied to the extent of orders 1 and 2 in the foregoing.

5. Each party shall meet their respective costs of the Petition and Summons dated 18<sup>th</sup> May 2016.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 11<sup>th</sup> day of January 2017.**

**P. NYAMWEYA**

**JUDGE**