REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 275 OF 2007

IN THE MATTER OF THE ESTATE OF NAOMI KABURA NGARUIYA (DECEASED)

RULING

1. There are three applications for determination, dated 30th June 2011, 19th July 2011 and 2nd April 2012.

2. The one dated 30th June 2011 is brought at the instance of Margaret Waruiru Kimani. She seeks stay of execution of a judgment that was delivered herein on 21st April 2011. The grounds upon which it is predicated are set out on the face of the application as well as in the affidavit of the applicant sworn on 2nd June 2011. In her affidavit, the applicant states that in the said judgement the court had dismissed her plea for joinder to the proceedings. She complains that the judgement was delivered without notice to her, she only learning of it after she was served with an application that the other side filed and served on her. She evinces an intention to proffer an appeal against the judgement.

3. The second application is dated 19th July 2011. It is brought at the instance of one of the administrators of the estate, Margaret Kabura Nyaga. It seeks several orders – the discharge of an order made on 1st July 2011 or its variation, dismissal of the application dated 30th June 2011, the respondent be commanded to render accounts for the rents collected from estate properties since 5th November 2006 when the deceased died, the respondent to release the deceased's documents titles papers and items that she was holding since the deceased's death, and the court to correct an error in the judgment. The applicant swore an affidavit on 14th July 2011 to provide a factual background to the prayers sought in the application and to expound on the grounds set out on the face of the application.

4. There are several affidavits on record sworn by the applicant in the first application, and by other parties who allege to be beneficiaries of the estate either in reply to or support of the two applications.

5. The third application is dated 2nd April 2012. It is at the instance of Margaret Waruiru Kimani. She seeks that a Notice of Appeal dated 6th June 2011 be deemed to have been duly filed and served within time. It is urged that as the judgment sought to be appealed against was delivered without notice the applicant was unable to lodge her notice of appeal within the time allowed. There is an affidavit in reply to that application sworn by Margaret Waruiru Kimani on 19th April 2012.

6. Counsel for both sides urged the applications before me on 14th March 2016.

7. I have gone through the record, and noted that the application dated 2nd April 2012 was argued before GBM Kariuki J. on 30th April 2012. A ruling thereon was delivered on 13th February 2015, allowing the said application. The disposal of the said application had the effect of rendering the earlier one dated 30th

June 2011, which sought similar orders, spent.

8. That left the application dated 19th July 2011. That application is premised on section 45 of the Law of Succession Act, Cap 160, Laws of Kenya, which makes provisions on intermeddling. The said provision defines intermeddling, makes it an offence and states that an intermeddler is ultimately answerable to the rightful administrators of the estate. It is averred in the affidavit in support of the application, that the respondent, Margaret Waruiru Kimani, had ben tasked with collecting rent from estate properties and with depositing the same into an estate account. She is accused of not going as per that arrangement, and it is averred that she never deposited the rental proceeds that she collected into the estate account and she has never accounted for the said moneys to the estate. She is also accused of having taken into her possession all the estate's documents and original titles which she has refused to surrender to the administrators. It is further alleged that she took possession of the deceased's motor vehicle registration mark and number KRL 715, a Mazda pick-up.

9. The respondent responded to some of these allegations in her affidavit 16th November 2011. She does not deny being put in charge of collection of rents, but denies taking advance of estate assets and colluding with tenants. She denies taking possession of the assets, saying that the motor vehicle lay unused within the compound. On the documents and other personal effects of the deceased, she pleads that the administrators have never asked for them. She categorically denies intermeddling with the estate.

10. Although the application is premised on section 45 of the Act, I would agree with the respondent that she did not intermeddle with the estate with respect to collecting rent, but she would be an intermeddler with respect her conduct with regard to anything else. In the applicant's own words, she was placed in charge of collecting the rent, which constituted authority to handle estate property.

11. I note that the respondent does not deny being in possession of documents and titles of the estate. Indeed, she appears to concede that she has possession of the deceased's personal effects, but counters that the administrators have never asked for them. Section 79 of the Act vests estate property in the personal representatives of the deceased. That confers upon them temporary legal title over the said assets. That includes the right to possession of documents of title. Ideally, therefore, once the court granted representation of the estate to the applicant and the others they became entitled to possession of all the assets of the estate and documents of title relating to them. It also fell upon them to allocate the said assets to family members for occupation and use purposes. It need not be emphasized that respondent was bound to surrender all the assets of the estate and the documents of title relating thereto to the administrators.

12. Regarding the accounts, and especially as they relate to the rent, I bears repeating that the property of the estate vests in the personal representatives. The rent collected from estate property was estate property which vests in the administrators. Any non-administrator tasked with collecting it on behalf of the estate must account for it to the administrators. Indeed, the responsibility of collecting the rent was that of the administrators, after all the estate vested in them, and it was their duty to administer the property, any other person could only deal with it with the express authority of the administrators, and ultimately was under an obligation to account for it to the administrators. The respondent has not denied that she was tasked with collecting the rent. Neither has she denied that she did collect the rent. She has not stated what she did with the rent after collecting it, or whether she ever accounted for it to the administrators and the estate.

13. The duty to account by a non-administrator arises from her interaction with any asset of the estate, whether she has authority to handle it or not. She must account to the administrators for her handling of any assets with authority, and also for any assets that she has intermeddled with in terms of not having authority to deal with them.

14. The other order sought in the application touches on an order that was made on 1st July 2011. The record before me is incomplete for it does not have the handwritten minutes of the proceedings for the period between 25th May 2009 and 12th October 2011. A copy of the formal order extracted therefrom is

however attached to the affidavit in support. It was ostensibly made on the application dated 30th June 2011, and it granted stay of execution *ex parte*. The stay order was extended several times. It was last extended on 14th December 2011 to 30th January 2012.

15. The application dated 30th June 2011 was never heard and determined on its merits. It was overtaken by the determination of the latter application dated 2nd April 2012. It is now spent, and with it any interim orders that might have been made founded on it. It would appear that the orders made on 1st July 2011 were meant to be interim, pending further orders. This would explain the necessity to extend them on 12th October 2011, 7th December 2011 and 14th December 2011. The failure to have them extended on 30th January 2012, when the matter came up in court next, meant that the said orders expired automatically on the said date. There is therefore nothing for me to discharge or vary.

16. I have perused the judgment dated 21st April 2011 at page 36, and I have noted the error at lines 4 and 5 thereof. The typographical error ought to be corrected.

17. In view of everything that I have said above, I shall determine the three applications dated 30th June 2011, 19th July 2011 and 2nd April 2012 in the following terms:

> **(a) that the stay of execution order made on 1st July 2011 expired on 30th January 2012, and it is therefore not available for discharge or variation;**
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> **(b) that the application dated 30th June 2011 was spent when the court determined the application dated 2nd April 2012 on 13th February 2015, and therefore the two applications are not available for determination; and**
>
> **(c) That the application dated 19th July 2011 is allowed in terms of prayers 5, 6, 7 and 8.**

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF FEBRUARY, 2017.

W. MUSYOKA

JUDGE