



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 813 OF 2012

(IN THE MATTER OF THE ESTATE OF JEDIDAH GATHONI MATHENGE (DECEASED))

JANE WAIRIMU MATHENGE.....PETITIONER

VERSUS

JOSEPH WACHIRA MATHENGE.....1ST PROTESTOR/RESP.

NANCY NYOKABI MATHENGE.....2ND PROTESTOR/RESP.

ANN MUMBI MATHENGE.....3RD PROTESTOR/RESP.

SUSAN WANJIRU MATHENGE.....4TH PROTESTOR/RESP.

RULING

The deceased, Jedidah Gathoni Mathenge, died on 20th November, 1997 leaving behind nine children who include the applicant and the protestors. It appears that upon the deceased's demise, the 1st and 2nd respondents took out letters of administration intestate of the deceased's estate and subsequently distributed the deceased's estate to the exclusion of the applicant who apparently was overseas. The petition in which the grant was made and confirmed was filed in the magistrates' court at Karatina, **Succession Cause No. 43 of 2002.**

When the applicant returned home, she applied for revocation of the grant made to the 1st and 2nd respondents; her summons for revocation was allowed by this Court on 10th March, 2010. Upon the nullification or revocation of this grant, the applicant herself petitioned for grant of letters of administration intestate of the deceased's estate; the record shows that this grant was made to her on 31st March, 2014 and as of to date she is the administratrix of the estate of the deceased.

By a summons dated 19th December, 2014 the applicant applied to have the summons confirmed; in the affidavit in support of the summons, she sought to have the deceased's estate distributed equally amongst all her children. For the reasons stated in their affidavits of protest, the respondents opposed the distribution of the estate as proposed by the applicant.

While the respondents' protest was pending for directions the applicant filed a summons dated 6th May, 2015 in which she sought the following orders:-

1. ***That all the rentals and income (together with interest at court rates) from all the properties listed hereunder and interest thereon of the deceased be deposited into a joint account in the***

names of the three advocates representing various parties herein pending the distribution of the assets of the estate that is to say: - P.M. Kahiga & Co Advocates, Muthigani & Co. Advocates and S.M.Kitonga Advocates.

- *Plot Karatina Township Block 1/527*
 - *Plot Karatina Township Block 1/140*
 - *Plot No. 6 Mathaithi Market*
 - *Coffee Farm Plot Konyu/Baricho/628*
2. *That the two previous Administrators account for the rentals from the properties listed in 1 above and other income from the coffee farm that they have been collecting since the demise of the deceased-November, 1997.*
 3. *That the lessees of part of Plot No. Konyu/Baricho/628 be given notice by the two previous administrators to vacate the leased area of the said plot No. Konyu/Baricho/628.*
 4. *That the Coffee account with Mathira Coffee Farmers Society at Karatina be registered in the name of Jane Wairimu Mathenge, the current administrator.*

The summons was made under section 47 of the Law of Succession Act, Cap. 160 and Rule 49 of the Probate and Administration Rules and supported by the applicant's own affidavit; it is this summons that is the subject of this ruling.

In the affidavit in support of the summons, the applicant has sworn that it is necessary that all the income accruing from the deceased's estate be preserved pending the distribution of the deceased's estate. She has also sworn that since the deceased's demise, the previous administrators of the estate have been benefitting from the deceased's estate to the exclusion of all other beneficiaries; she therefore wants the said administrators to account for all income accruing to the deceased's estate since her demise to date.

The 1st and 2nd respondents opposed the application and filed replying affidavits to that effect. According to the 1st respondent, the deceased had directed how her estate should be shared out amongst her children upon her demise. Acting in accordance with those wishes, the deceased's estate had been shared out amongst all her children. This respondent also deposed that after the initial grant was confirmed in **Karatina Succession Cause No. 43 of 2002** the 2nd respondent purchased her sisters' shares in the estate.

The 1st respondent deposed that they excluded the applicant from the succession of the deceased's estate since they were not aware of her whereabouts. He swore that he has been managing the property known as **Karatina Town/Block 1/527** and that he was ready and willing to account for all the income from that property.

The 2nd respondent also filed a replying affidavit sworn on 4th day of June, 2015 in which she associated herself with the depositions made by the 1st respondent. Apart from relying on their affidavits, both the 1st and 2nd respondents also relied on their depositions in the affidavits sworn in protest to the summons for confirmation of grant in which they have reiterated that the deceased's estate should be distributed in accordance with her 'will'.

At the hearing of the application, counsel reiterated the averments made in their pleadings and the depositions in the respective affidavits of their clients. Mr Muthigani for the respondents added that his clients had entered into what he described as a "local arrangement" with respect to the distribution of the estate. Mr Kabaka for the 2nd respondent (though there is a notice of appointment of advocates filed by **Muthigani & Company Advocates** on 4th June, 2015 showing that the same respondent is also represented by that firm) emphasised that his client had purchased part of the estate on the basis of the nullified grant; counsel however, submitted that his client had no problem with the income accruing from any of the assets of the estate being kept in a joint account.

The record shows that the petition for grant of letters of administration of the deceased's estate was made on the premises that the deceased died intestate and I suppose it is for this reason that on 31st March, 2014, this Court granted the applicant 'letters of administration intestate' of all the estate of the late Jedidah Gathoni Mathenge. As far as I can gather from the record, no objection was raised against the petition and neither is there any pending application challenging the grant on the ground that the deceased died testate or on any other ground for that matter. In these circumstances one can legitimately conclude that the administration and distribution of the deceased's estate is subject to intestate provisions of the **Law of Succession Act**.

The applicant is the administratrix of the deceased's estate; as an administratrix the law bestows upon her certain powers and responsibilities whose main object is to protect the deceased's estate from waste or other adverse interests until such a time that it is fully administered or distributed. For instance, **section 79** of the Act vests all the property of the deceased in the administrator or administratrix as the personal representative of the deceased; **section 83** requires of the administratrix to produce to 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; under **section 83 (g)** the administratrix is required to complete administration of the estate and to produce to court a full and accurate account of the completed administration.

And in **rule 25 (5)** of the **Probate and Administration Rules** the court itself may at any time and from time to time require the personal representative to render to it a true account of the estate of the deceased and of his administration of it.

I understand all these provisions to suggest that a deceased person's estate must not only be preserved but must also be accounted for pending such a time that it is fully administered and distributed. The responsibility to ensure that the estate is preserved and properly accounted for lies squarely on the administrator or administratrix. Looking at the applicant's application from this perspective, I am persuaded that it has some merit.

The respondent's collective argument that the estate has been distributed does not find favour with the law since the grant on whose basis the estate was purportedly distributed was nullified; the nullification of the grant effectively reverted the interest in those assets comprising the deceased's estate to the deceased who is now personally represented by the applicant. Secondly, the grant has not been confirmed and the estate distributed and therefore a claim to, or any form of disposition or alienation of any part of the estate would be premature; this in essence is what **section 45** of the Act says. **Subsection (1)** of that section states:-

45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

If the respondents have shared out the estate as they argue, they have done so without the authority of this Act and in the words of **section 45(1)** of the Act, they have intermeddled with that part of the deceased estate that comprise her net intestate estate. Under **subsection (2) (a)** of **section 45** their actions would invite criminal sanctions; that subsection provides;

(2) Any person who contravenes the provisions of this section shall -

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment;

For purposes of determination of the application before court subsection **(2) (b)** of that section would be more apt; apart from being criminally liable under **section 45(2) (a)**, **section 45(2) (b)** provides that a person who contravenes the provisions of **section 45(1)** must also account to the administrator the extent of the assets with which he has intermeddled.

I agree with the applicant that if this court has to distribute the deceased's estate fairly and, in any event, in consonance with the law, then all assets comprising the estate and any net income that has accrued from all or any of these assets since the deceased's demise must be accounted for and must necessarily be brought into the common hotchpotch. It must also be noted that before confirmation of the grant, the court must be certain of the extent of the deceased person's net intestate estate besides ascertaining the identities of the beneficiaries beneficially entitled to that estate; it is so expressed in the proviso to **section 71** of the Act. **Rule 40 (4)** of the **Probate and Administration Rules** is consistent with this proviso; it states:-

40. (4) Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.

On the whole I am satisfied that the applicant's application is merited and ought to be allowed; under **section 79** of the Act, she would have been perfectly in order to ask this court to vest in her the entire estate pending the confirmation of grant or the completion of the administration but I will not venture to grant more than what has been prayed for. For avoidance of doubt I allow the application dated 6th May, 2015 in the following terms:-

1. All the income accruing as rent from the assets comprising the deceased's estate and in particular, all those assets referred to as **Plot Karatina Township Block 1/527, Plot No. 6, Plot Karatina Township Block 1/140, Mathaithi Market** and **Coffee Farm Plot Konyu/Baricho/628** shall be deposited in a joint interest earning bank account which shall be opened in a reputable banking institution in the joint names of the parties' firms of advocates namely, **Messrs P.M. Kahiga & Co Advocates, Messrs Muthigani & Co. Advocates and Messrs S.M.Kitonga Advocates** within 30 days of the date hereof.
2. The first and second respondents are hereby ordered to file in this Court within a period of 30 days from the date of this ruling a full and accurate account of the rental income accruing from the assets referred to as **Plot Karatina Township Block 1/527, Plot Karatina Township Block 1/140, Plot No. 6 Mathaithi Market** and **Coffee Farm Plot Konyu/Baricho/628** since the demise of the deceased to date.
3. The Coffee account with Mathira Coffee Farmers Society at Karatina shall be registered in the name of Jane Wairimu Mathenge, pending the completion of administration.
4. Parties will bear their own respective costs.

It is so ordered.

Dated, signed and delivered in open court this 12th February, 2016

Ngaah Jairus

JUDGE