



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 531 OF 2013

In the matter of the Estate of GATERU CIMBARA (Deceased)

MICHAEL GICHOVI GATERU.....PETITIONER/APPLICANT

VERSUS

JAMES NDWIGA GATERU.....OBJECTOR/RESPONDENT

RULING

1. This is a ruling on an application dated 20/3/2015 seeking for orders that that the objector be restrained from collecting rent in Plot No. Mbeti/Gachoka/1568 and the tenants be ordered to be depositing the rent in court pending hearing and determination of the matter. The application is supported by the affidavit of Michael Gichovi Gateru. In the affidavit, it is stated that the applicant is the petitioner having filed the succession cause for the estate of their father. The objector is his brother and has been collecting rent from Mbeti/Gachoka/1568 for his own benefit without considering the other beneficiaries of the estate.
2. The respondent did not file a replying affidavit in response to the application.
3. The applicant orally submitted that the deceased had built four rental rooms on LR. Mbeti/Gachoka/1568 and each is rented out at Kshs.500/= per month. He said that the rent is supposed to benefit the entire family of the deceased yet it is only one person benefiting. The respondent does not account for the rent collected and the applicant should be allowed to collect the same.
4. The respondent stated that his mother is the 2nd wife of the deceased and that she is the one who collects the rent. His mother uses the rent collected to pay school fees for his sibling in class seven. The said plot was given to his mother by the deceased. The 1st wife and her family were given plot number Gatari/Githimu/980 where they live and the same has crops that earn the family income. The respondent added that the 2nd wife and her family have no home and live on rented premises.
5. The second widow of the deceased also submitted that the first wife and her children were given another parcel of land by the deceased during his lifetime while she does not have any land.
6. The applicant further submitted that the deceased did not give the second wife the plot in question. He admitted that they have a parcel of land measuring one acre which gives them food for consumption.
7. Section 45 of the Law of Succession provides that;

(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.

(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; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

8. In the matter of the estate of **DAVID JULIUS NTURIBI M'ITHINJI (DECEASED) [2012] eKLR** the court held that according to section 45 of the Law of Succession Act anyone who has no authority under the Act or by any other written law or has grant of representation under the LSA takes possession or disposes or otherwise inter-meddles with any free property of the deceased is guilty of an offence. The court also cited the case of **GITAU AND 2 OTHERS VS WANDAI & 5 OTHERS [1989] KLR 23** where Tanui J. as he then was stated as follows;

According to section 45 of the Law of Succession Act, inter-meddling with the property of a deceased man consists of taking possession, disposing or otherwise inter-meddling with any free property.

9. According to Form P&A 5 the estate of the deceased comprises of L.R. Mbeti/Gachoka/1568 which is the subject matter of this application. The respondent and his mother admit that they collect rent from the said plot. This rent in my view though negligible should be for the benefit of the estate of the deceased and however meagre should not benefit a few beneficiaries. Using the collected rent without accounting for it amounts to inter-meddling of the estate.

10. In view of the provisions of section 45 of the LSA, the rent collected should be deposited in a bank account/or should be collected for purposes of distribution to the beneficiaries of the during confirmation of the grant.

11. I note that the administrator/applicant is from the first family of deceased while the respondent is from the second family. The parties have no dispute on who the beneficiaries of the estate are as I have gathered from the evidence presented in this application. The two families accept each other as the rightful heirs of the estates. The second family through the respondent filed an objection against grant of letters to the applicant Michael Gichovi Gateru on 6/01/2014 who claims that LR. MbetiGachoka/1568 was bequeathed to him by the deceased during his lifetime.

12. This objection was not fixed for hearing. However, the only definite dispute therein is about distribution of the property. This will be sorted out during the confirmation of grant. What requires to be taken care of at this stage is that the interests of the 2nd family to be represented in this case before distribution takes place.

13. The court is informed by the representations of the parties before the court and the documents filed herein. For this reason, the court will move on its own motion to ensure both families are represented in this cause.

14. I note that one parcel of land LR. No. Mbeti/Gachoka/ 1568 is indicated as the only asset of the deceased. This is a plot measuring 0.05 ha. and on which the four rental rooms are situated. It came out during the hearing of this application that the deceased owns agricultural land whose land reference number was not given. The applicant and other members of the first family live on the said land. It was admitted that they cultivate the land and feed from it. The 2nd family said they live on rented premises and have no land to cultivate.

15. The applicant did not explain why he left out that asset from Form P&A.5. It is also not known whether the land is registered in the name of the deceased or in the names of the children of the first

family for no document of ownership were produced. It is a legal requirement that all assets of the deceased be included in the succession cause for purposes of distribution.

16. I have considered all the issues in this application including those that arose during the hearing. In the interests of justice, I make the following orders:-

(i) That the respondent be and is hereby appointed as co-administrator in this case jointly with the applicant and a fresh grant do issue in the joint names of Michael Gichovi Gateru and James Ndwiga Gateru.

(ii) That rent from LR. Mbeti/Gachoka/1568 be collected and deposited in a joint savings account of the administrators pending distribution of the property.

(iii) That any other asset of the deceased not listed herein be included in this cause by way of filing an affidavit by one of the administrators or both to be filed together with a certificate of official search within 21 days.

(iv) That the application for confirmation of grant be filed by the administrators jointly or by any of them within 60 days.

(v) That there be no order as to costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF JULY, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

The applicant

The respondent

All beneficiaries