REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 36 OF 2002

IN THE MATTER OF THE ESTATE OF EVANSON NGUTI KAMANDA

JECINTER WANJIRU NGUTI …… APPLICANT

VERSUS

SARAH WANJIRU ……..... RESPONDENT

RULING

1. This ruling is in respect of two applications. The first one is the Chamber Summons dated 2nd July, 2014 filed by the firm of *Chemwok & Co. Advocates* on behalf of *Paddy Karanja Nguti,* a beneficiary to the deceased's Estate.

The 2nd application is the one dated 9th January, 2014 filed by the firm of *Limo R.K & Company Advocates* on behalf of *Jecinter Wanjiru Nguti,* the administratix of the deceased's Estate.

On 29th June, 2015 by consent of the parties, the court directed that the two applications be argued together since they were largely inter-related.

2. The application dated 2nd July, 2014 seeks the following orders:-

(a) That the firm of *M/s Chemwok & Co. Advocates* be added as a signatory in the joint account No. 68759/510TSA00/1 held by both counsels at Trans-National Bank.

(b) That the estate do provide for *Esther Kabuti Nguti* monthly stipend of Ksh.20,000/- and or in the alternative she be allowed to collect rent from property No. Eldoret Municipal/Block 7/278 (also known as Lincoln Hotel) the portion she has been collecting during the lifetime of the deceased, pending final distribution.

(c) That the estate do provide for *Paddy Nguti Karanja* a monthly stipend of Kshs. 35,000/- being a refund of Kshs. 1,300,000/- investment on property No. Eldoret Municipal/Block 7/278 (also known as Lincoln Hotel) or in the alternative he be allowed to collect rent on the 7 units he expended on.

(d) That by an order of this honorable court the total monthly collections be determined.

(e) That by an order of this honorable court Metrocosmo Ltd fee note be determined.

(f) That the beneficiaries of the estate be provided for pending distribution of the entire estate.

(g) That distribution of the estate be made as herein below enclosed.

(h) That costs of this application be awarded to the applicant

(i) That the court may be pleased to make any other relief it deems fit and expedient to grant in the circumstances.

The application is supported by an affidavit sworn by the applicant on 2nd July, 2014. In the affidavit, *Paddy Karanja* deposed in the main that there was urgent need to distribute the remainder of the Estate between the beneficiaries to end the hostility and acrimony currently existing between them owing to the desire by each one of them to manage the Estate; that pending distribution, the monthly rental income from buildings known as the Kaptagat House and Lincolin Hotel less expenses be shared by the beneficiaries on a monthly basis and that the widow of the deceased be adequately provided for.

3. The application is opposed by the respondent *Jecinta Wanjiru* through her replying and supplementary affidavits sworn on 13th October, 2014 and 11th May, 2015 respectively. In the two affidavits, the respondent deposed that the application is misconceived since the firm of *Chemwok & Company Advocates* cannot be made a signatory to the bank account when the applicant is neither an administrator nor an executor of the deceased's Estate; that the applicant has never made any improvements and/or developments in Lincolin Hotel and even if he had, he did not have authority to do so; that the applicant is not suitable to be appointed administrator of the Estate; that together with *Sarah Wanjiru* he wasted the Estate by collecting rent from Kaptagat House and Lincoln Hotel without accounting for the rental income making the Estate incur huge utility bills; that the deceased's widow did not need provision as she had already disowned the application vide an affidavit sworn on 8th August 2014 and finally that the applicant does not require any provision since he is in control of assets bequeathed to him by the deceased in his will which generates income worth millions of shillings.

4. In the application dated 9th January, 2014, *Jecinta Wanjiru* named *Sarah Wanjiru* as the respondent. She sought the following substantive orders;

i). That the orders of this honourable court dated 29th May, 2014 be reviewed.

ii). That the firm of *Gicheru & Co. Advocates* be removed as a signatory to the joint account under the names *of Limo R.K & Co. advocates* & *Gicheru & Co. Advocates*.

iii). That rental incomes from Kaptagat building and Lincoln Hotel and Housing Finance account No. 2000071499 which totals to Kshs. 7,831,441/- be divided equally among the beneficiaries after all liabilities due from the estate have been paid.

iv). That the applicant, the legally appointed sole administratix, do operate the estate account, being *Limo R.K & Co. Advocates* and *Gicheru & Co. Advocates*, Transnational Bank account No. 68759001 and Housing Finance account No. 2000071499 with power to receive and disburse rental incomes from Kapatagat Building and Lincoln Hotel to the beneficiaries of the deceased after every 3 months.

v). That costs be in the cause.

5. The application is supported by grounds stated on its face; an affidavit sworn by *Jecinter Wanjiru* on 9th January, 2015 and a further affidavit sworn on 17th July, 2015. It is *Jecinter's* case that prior to the demise of her co-administrator, an account No. 200-0071499 had been opened at Housing Finance for purpose of depositing rent collected from Kaptagat House and Lincoln Hotel pending sale of the said assets; that this court vide an order dated 29th May, 2004 declared that she was the sole administratix of the Estate but ordered that rental income from the aforesaid fixed assets be deposited into a joint account

in the names of *Limo R.K & Co. Advocates* and *Gicheru & Co. Advocates* who were then the advocates on record for the parties; that since then, the respondent and her advocates have frustrated the administration of the Estate by unreasonably withholding their consent to have monies withdrawn from the account for the purpose of paying due statutory charges, water and electricity bills which continue to accumulate as well as legal fees for processing of titles to individual beneficiaries as per the confirmed grant; that lack of funds has crippled the administration of the Estate hence the prayer to have the orders of the court dated 29th May, 2014 reviewed by having the respondent's advocates removed from being a signatory to the joint account.

Finally, *Jecinter* averred that all the beneficiaries desired to have the rental income collected by the appointed agent and deposited in the joint account distributed amongst themselves equally in line with the confirmed grant dated 23rd June, 2004.

6. The application is contested by *Sarah Wanjiru* through her replying affidavit sworn on 1st July 2015. It is also partially opposed by *Paddy Karanja Nguti* in his Replying Affidavit sworn on 20th March 2015.

In her affidavit, *Sarah* denied that the firm of *Gicheru & Co. Advocates* have been frustrating efforts by the applicant to effectively manage the Estate by withholding their consent to withdraw funds from the joint account to pay liabilities and statutory charges accruing to the Estate; that the said firm of advocates is only interested in ensuring accountability in the management of the Estate; that the firm of *Gicheru & Co. Advocates* should not be removed from being signatory to the joint account as it was appointed by her late husband to represent Hotel Lincoln Ltd and thus ought to remain to protect the hotel's interest; that the application is misconceived as it does not satisfy the grounds for review as sought and that the applicant should produce to the court a full inventory of the assets, liabilities and accurate accounts regarding the management of the Estate before the same could be distributed. The Respondent further claimed that the application amounted to an abuse of the court process and ought to be dismissed.

7. On his part, *Paddy Karanja* in his replying affidavit maintained that he had incurred expenses in the sum of Kshs.1, 500, 000 in putting up extra buildings at Lincoln Hotel for which he was entitled to a refund; that being the only surviving son of the deceased he should be appointed as a co-administrator of the Estate; that the funds in the joint account said to be Kshs. 7,831,441 was far below what was expected to have been collected as rental income todate.

8. He agreed with the Respondent that the applicant needs to render a true account of the management of the rental income from the two buildings. At paragraph 4 of the affidavit, *Paddy Karanja* confirmed that he had no objection to the firm of *Gicheru & Co. Advocates* being removed from being signatory to the joint account but urged the court to have his advocates enjoined as signatory in their place.

9. To buttress their respective positions, all the parties filed written submissions: those of the applicant were filed on 17th July 2015; those of *Sarah Wanjiru* were filed on 27th July 2015 while those of *Paddy Karanja* were filed on 28th July 2015. On 30th July, 2015, learned counsels for the respective parties highlighted the said submissions before me in which they expounded their client's cases as contained in the depositions made in affidavits filed by their respective clients. Learned counsel *Mr. Kibii* appeared for *Jecinter Wanjiru* while *Mr. Mathai* and *Mr. Chemwok* represented *Sarah Wanjiru* and *Paddy Karanja* respectively.

10. I have carefully considered the two applications, the affidavits filed by the parties, the written and oral submissions made on their behalf by their counsel on record and the few authorities cited.

Having done so, I wish to start by determining *Paddy Karanja's* application dated 2nd July, 2014. But before delving into the issues raised in this application, I wish to point out that in the applicant's written submissions dated 27th July, 2015, *Mr. Chemwok* abandoned prayer (b) of the application which sought to have a monthly provision in the sum of Kshs.20,000 made to the widow of the deceased. However, though this prayer was abandoned, prayer (f) which sought provision for the beneficiaries of the Estate pending distribution remained intact.

11. It is also worth noting that though in his written and oral submissions *Mr. Chemwok* urged the court to appoint the applicant as a co-administrator to the Estate, the instant application did not contain such a prayer. It is trite law that parties are bound by their pleadings. Consequently, a party cannot validly seek or benefit from orders or reliefs not prayed for in the pleadings. In the premises, this court will not expend any time or effort in considering that particular prayer.

12. Having said that, I now turn to enumerate what I think are the issues emerging for my consideration in this application. After analysing the pleadings and the submissions by the parties, I find that four issues arise for my determination which are as follows:-

(i) Whether the firm of *M/s Chemwok & Co. Advocates* should be added as a signatory to the joint account No. 68759001 held by the firm of *Limo R.K & Co. Advocates* and *M/S Gicheru & Co. Advocates* at Transnational Bank.

(ii) Whether the applicant is entitled to a refund of Kshs. 1,300,000 allegedly invested in the improvement and development of property known as Eldoret Municipal/Block 7/278 also known as Lincoln Hotel.

(iii) Whether provision should be made for the beneficiaries pending distribution of the Estate.

(iv) Whether total rental income from the Estate or fees payable to the Estate Agent namely Metrocosmo Ltd should be set by the court.

13. Starting with the first issue, it is not disputed that *Paddy Karanja* has never been an executor or an administrator of the deceased's Estate. It is common ground that the aforesaid joint account was established for the sole purpose of having rental income from the two remaining assets of the Estate deposited therein. It is therefore an account which ideally ought to be central to the management of the Estate. The Law at ***Section 82*** of the ***Law of Succession Act*** *(the Act)* is very clear that only personal representatives have power or authority to run the affairs of a deceased person's Estate. And ***Section 79*** of the ***Act*** expressly provides that all property belonging to a deceased person vests in his personal representative. If the court were to appoint the firm of *Chemwok & Co. Advocates* as signatories to the joint account, this would by necessary implication give them authority to manage funds belonging to the Estate while as their client *Paddy Karanja* is not a co-administrator of the Estate. In the circumstances, I find that there is no legal basis upon which this court can make such an order.

14. Turning to the 2nd issue, the applicant has claimed that he had spent Kshs.1,300,000 to build additional buildings in the Lincoln Hotel and that the same should be refunded by payment of monthly installments of Kshs.35,000.

In his written submissions however, the applicant gave a different figure of the amount expended whose refund was being claimed. He gave a figure of Kshs. 1,500,000. No explanation was given regarding the variance between the amount claimed in the application and in the written submissions. Be that as it may, what is important to note is that as correctly submitted by *Mr. Kibii* for *Jecinter*, the applicant did not avail any evidence to prove that he had actually incurred such expenditure on behalf of the Estate.

15. Even if the court were to accept his claim that he had spent the said money in improving the hotel, he did not present any evidence to prove that he had done so with the consent or authority of the administrators of the Estate. In the absence of proof that he had invested any of his monies in the Estate and that this was done with the authority of the administratix, I find that the applicant is not entitled to any refund.

16. On the issue concerning provision of the beneficiaries, ***Section 30*** of the ***Law of Succession Act*** is very clear. It prohibits the making of applications for provision of dependants after a grant of representation had been confirmed. It is not disputed that in this cause, the grant of probate was confirmed on 23rd June, 2004. The applicant filed his application on 2nd July, 2014 about 10 years after the grant had been confirmed. It therefore goes without saying that owing to the clear provisions of

Section 30 of *the Act*, no provision can be made for any of the beneficiaries at this point in time. Once a grant has been confirmed, the administrator has no obligation to make provisions for dependants. His or her duties are only limited to paying liabilities accruing to the Estate and to facilitate the distribution of the Estate in accordance with the certificate of confirmation.

17. In support of the prayer that the court determines the total rent collected from the Estate and the fee payable to the Estate Agents, *Mr. Chemwok* submitted that the administratix *(Jecinter)* was wasting the Estate and has failed to account for its management as ordered by this court on 29th May, 2014. *Mr. Mathai* supported the applicant in this submission. With due respect, it is my view that this prayer is misconceived. I am at a loss as to how I can make such a determination given that I have no information or details concerning the size of the two buildings, the units offered for rent and the amount of rent charged for each unit. Similarly, the court cannot set a certain fee for payment of the Estate Agent charged with the responsibility of collecting rent on behalf of the Administratix. The Agent was appointed by the administratix and not by the court and the fee payable would depend on the contract between the two of them and unless the same is unreasonable, I do not see how this court can interfere with their arrangement.

18. In my considered view, the concerns raised by learned counsel *Mr. Chemwok* regarding the alleged wastage or misappropriation of the rental income by the administratix which appears to be causing serious acrimony between the beneficiaries can only be resolved once and for all if the beneficiaries were to either agree on the shares each of them would individually get from the two buildings or have the assets sold and the proceeds of sale shared equally among them or in default of such agreement have the issue resolved by the court as expeditiously as is practically possible.

19. For all the foregoing reasons, I am satisfied that the application dated 2nd July, 2014 is devoid of any merit. It is consequently dismissed. Orders on costs will be made at the end of this ruling.

20. I now wish to turn to the application dated 9th January, 2015.

After considering the application and the submissions by the parties, I find that only two main issues arise for my determination namely;

> (i) Whether the order made by this court on 29th May, 2014 (Hon. Ngenye- Macharia J) directing that rental income from the Estate be deposited in a joint account held by *Gicheru Co. Advocates* and *Limo R.K And Co. Advocates* should be reviewed.
>
> (ii) Whether the funds in that account should be shared equally among the beneficiaries.

21. Before considering the above issues, I wish to quickly address a preliminary point raised by *Mr. Mathai* in his submissions regarding the validity of the application.

Mr. Mathai submitted that under ***Rule 59*** of the ***Probate and Administration rules,*** (the Rules) a party can only approach the court through either a petition, a caveat or summons; that the application is defective as looking at its face it is impossible to tell whether it is a caveat, a petition or a summons; that the manner in which a party moves a court goes to the substance of the application and is not a procedural technicality which could be cured under ***Article 159*** of the Constitution.

22. Mr. Kibii while conceding that the application was not in the form prescribed by the Rules submitted that the anomaly was a procedural irregularity which could be cured under ***Article 159 2(d)*** of the Constitution. On my part, I take the view that failure to institute the application in the manner prescribed by the Rules is a matter of form which had nothing to do with the substance of the application. It is a procedural technicality which did not cause the respondents any prejudice, the kind which ***Article 159 2(d)*** of the Constitution encourages courts to disregard in favour of substantive justice. In the spirit of ***Article 159 2(d)*** of the Constitution, I am prepared to disregard the said irregularity and find that the application is not defective and that it is properly before the court.

23. As stated earlier, the application seeks *interalia* a review of the orders of this court issued on 29th May, 2014.

Rule 63 of the Rules donates to this court jurisdiction to apply ***order 45*** of the ***Civil Procedure Rules*** which deals with applications for review to succession causes.

Order 45 is in the following terms;

> ***" 1. (1) Any person considering himself aggrieved-***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred: or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay"***

24. From the above provision of the law, it is clear that a judgment or order can be reviewed if an applicant establishes any of the following grounds;

> (a) That he has discovered new evidence which after the exercise of due diligence was not within his knowledge or was not available at the time the order was made.
>
> (b) That there was a mistake or error apparent on the face of the record
>
> (c) That there is sufficient reason warranting the review sought and that the application had been made timeously.

25. In this case, the applicant contends that she is entitled to a review of one of the orders made by Hon. Ngenye –Macharia J in the ruling delivered on 29th May 2014. The order sought to be reviewed is the one requiring that rental income be deposited in an account held jointly by Limo RK & Co. Advocates and *Gicheru & Company Advocates.* It was argued on behalf of the applicant that having found that the applicant was the sole surviving administratix of the Estate and having restrained *Sarah Wanjiru* from the collection of rents from the Estate, the Hon. Judge erred by maintaining the firm of *Gicheru & Co. Advocates* which was on record for *Sarah Wanjiru* as a signatory to the account.

26. *Mr. Mathai* opposed the application arguing that it did not meet the threshold required to merit a review. He further submitted that the firm of *Gicheru & Co. Advocates* should not be removed from being signatory to the account as it had instructions to represent Lincoln Hotel and ought to stay on board in order to protect the hotel's interest.

27. In ***Nyamogo and Nyamogo Advocates V Kogo (2001) 1 EA 173, the*** Court of Appeal defined what constituted an error on the face of the record. It expressed itself as follows;-

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record"***

Similarly, in ***National Bank of Kenya Limited vs Ndungu Njau*, *Civil Appeal No. 211 of 996 (1997) eKLR*,** the Court of Appeal gave guidance on when orders of review could be issued by the court. The court stated as follows;

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review".***

28. As noted earlier, ***Section 82*** and ***Section 83 of the Law of Succession Act*** leaves no doubt that it is only personal representatives of a deceased's Estate who have legal authority to represent an Estate and to manage all its affairs including the payment of its debts and liabilities as well as distributing its assets. The applicant contends that the firm of *Gicheru & Co. Advocates* has been frustrating her efforts to effectively administer the Estate by withholding their consent to have funds withdrawn from the account to pay statutory charges and other debts accruing to the Estate. The fact that there are debts pending to be paid on behalf of the Estate has not been disputed by the respondents.

29. I agree with the applicant (*Jecinter*) that Hon. Ngenye J having found that she was the sole administratix of the Estate and having restrained *Sarah Wanjiru* from collecting rent from the Estate, she ought to have logically removed her advocates from being signatories to the said bank account. This is because the court made a finding that Sarah was not a co- administratix of the Estate and had no locus standi to collect rent on behalf of the Estate. That being the case, it logically follows that her advocates would not in the circumstances have any business operating the joint account in which rental income rom the Estate was being deposited.

30. Given the above, it is my considered view that failure of Hon. Ngenye J to remove Sarah's advocate from being signatories to the bank account amounted to an error apparent on the face of the record which entitles the applicant to a review as prayed. The argument that the said firm of advocates should be retained as a signatory to the bank account as it had allegedly been instructed to represent the interests of Lincoln Hotel Ltd does not hold any water for two reasons; first, it was not demonstrated by any evidence that Lincoln Hotel ltd existed as a legal entity and that any instructions had been given to the said advocates on its behalf and secondly and most importantly, the deceased's Will and the certificate of confirmation of grant proves beyond doubt that the property described as Lincoln Hotel formed part of the assets of the Estate.

Section 79 of *the Act* states that;

> ***"The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, <u>all the property of the deceased shall vest in him as personal representative</u>".(emphasis mine).***

31. In view of the foregoing, there is no doubt that Lincoln Hotel comprised part of the deceased's properties which by law was vested in his personal representative who is *Jecinter Wanjiru*, the applicant in this application. She is the only one who has legal authority to manage the said property on behalf of the Estate and not *Sarah Wanjiru* or her advocates.

32. The upshot is that I find the prayer for review of Order No. 2 of the ruling delivered on 29th May, 2014 merited and it is hereby allowed. I consequently review the said order by adding that the firm of *Gicheru & Company Advocates* be removed from being a signatory to the aforementioned bank account in order to enable the applicant to conveniently and effectively run the affairs of the Estate without any hindrance from any quarter.

All the other orders in the Ruling delivered on 29th May 2014 are not affected by the review and will remain in force.

33. Regarding the prayer that funds already deposited in the Estate account be shared equally among the beneficiaries, it is my view that determination of this prayer should await the filing of audited accounts to determine what would be available for distribution after settlement of the Estate's liabilities. It is significant to point out that though *Jecinter* will now be the sole signatory of the Estate bank accounts, she is not free to utilize or spend the rental income any way she pleases. She must manage it in accordance with the law for the benefit of the Estate and all the beneficiaries. She remains accountable to the beneficiaries and to the court for the management of the Estate under ***Section 83***, ***Section 94*** and ***Section 95*** of the Act.

34. In view of the foregoing and bearing in mind the complaints made by *Paddy Karanja* regarding mismanagement of the Estate's rental income, it is my opinion that the interests of justice requires that this court supervises the management of the Estate with the aim of ensuring that the same is efficiently managed for the benefit of all the beneficiaries. In the interests of justice, under the inherent powers of the court as saved by ***Rule 73*** of the ***probate and Administration Rules***, I invoke ***Section 83 (h)*** of *the Act* and direct that besides complying with Order No. 3 of the ruling dated 29th May, 2014 requiring *Jecinter* to give an account of all deposited rents to the other beneficiaries through their appointed advocates, she will in addition be required to give a true and just account of the Estate: she will file financial statements giving a true and just account of the total rental income collected up to the date of the statement; the liabilities paid on behalf of the Estate and the amount available for distribution to the beneficiaries. The financial statements shall be filed before this court's Deputy Registrar once every two months with effect from 3rd December, 2015 pending determination regarding the manner in which the remainder of the Estate will be shared by the beneficiaries. As stated earlier, this determination must be fast tracked to help the beneficiaries settle down and live together in harmony as members of one family.

As the first Financial statement is due to be filed on or before the 5th December, 2015, I direct that this cause be mentioned on 7th December, 2015 for further orders.

35. On costs, I find that since this is a succession dispute involving members of one family, the order that best commends itself to me is that each party shall bear his or her own costs.

It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET THIS 14TH DAY OF OCTOBER, 2015**

In the presence of:-

Mr. Kibii for the Administratix applicant in application dated 9.1.2015

Miss. Kosgey for Sarah Wanjiru (Respondent)

Ms. Tororei holding brief for Mr. Chemwok for Paddy Karanja