



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.1661 OF 2011**

**IN THE MATTER OF THE ESTATE OF STEPHEN MUCHERU WAWERU ALIAS MUCHERU  
WAWERU STEPHEN (DECEASED)**

**TABITHA WAITHIRA MUCHERU.....  
PETITIONER**

**VERSUS**

**HELLEN WANJIRU  
MUCHERU.....OBJECTOR**

**RULING**

Stephen Mucheru Waweru, the deceased to whose estate these proceedings relate died on 8<sup>th</sup> December 2010. On 9<sup>th</sup> August 2011, Tabitha Waithira Mucheru, the widow of the deceased, petitioned the court to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. Among the properties that the Petitioner listed as belonging to the estate of the deceased was LR. No. Ruiru Township/596 (the suit property). This property is commercial and is rented out to various tenants. It was apparent that after the death of the deceased, Hellen Wanjiru Mucheru (the Objector), the daughter of the deceased instructed an estate agent to collect rent from the suit property. It is the Petitioner's case that the rent collected from the suit premises has not, since then, been applied for the benefit of the beneficiaries of the estate of the deceased.

On 11<sup>th</sup> November 2011, the Petitioner filed an application pursuant to the provisions of **Rules 49 and 73** of the **Probate and Administration Rules** seeking orders from this court to direct that all the rents collected from the suit premises to be deposited in court or alternatively the same be managed by an estate agent appointed by the Petitioner pending the hearing and determination of the succession proceedings. The grounds in support of the application were stated on the face of the application. The application was opposed. The Objector swore a replying affidavit in which she deponed that she was in actual fact the owner of the suit premises. She stated that although the suit property was registered in the name of the deceased, the property belonged to her because she had entrusted the money for which the property was purchased and developed to the deceased. In a bid to establish her case, the Objector annexed copies of bank statements which presumably established the fact that she had sent money to the deceased while she was working in Europe. It was therefore the Objector's case that she was entitled to benefit from the rental income received from the suit premises pending the hearing and determination of the succession dispute.

The application was heard by Njagi J on 19<sup>th</sup> December 2011 in the absence of counsel for the Objector. The learned Judge was satisfied that the Objector had been duly served to attend court. After considering the application, the learned Judge allowed the application. He ordered the rent collected from the suit premises to be deposited in court pending the hearing and determination of the succession dispute. The Ruling was delivered on 23<sup>rd</sup> February 2012. Upon becoming aware of the order that was issued, the Objector filed an application dated 17<sup>th</sup> April 2012 seeking to have the said orders issued by the court stayed and further that the said orders be set aside. The grounds in support of the application are stated in the face of the application. The application was supported by the annexed affidavit of the Objector. The application is opposed. The Petitioner swore a replying affidavit in opposition to the application. In essence, the Petitioner stated that the Objector had failed to place sufficient reasons for this court to set aside the order that was issued in her favour.

Prior to the hearing of the application, learned counsel for the Petitioner and the Objector filed written submission in support of their respective client's opposing positions. The said submission were highlighted by Mr. Kinyanjui for the Petitioner and by Mr. P.K. Njoroge for the Objector. This court has carefully considered the said rival submission. The issue for determination by this court is whether the Objector established sufficient basis for this court to set aside the order that was issued by Njagi J. The principles to be considered by this court in determining whether or not to set aside an *ex parte* order were set out in the case of **Macauley v De Boer & Another [2002] 2KLR 260**. Onyancha J held that the court has to decide whether there were reasons for the Applicant's failure to attend court; whether the application to set aside was filed without undue delay; whether the Applicant has a *prima facie* good defence to the subject matter of the dispute; whether the Applicant acted with due diligence generally and whether, in exercising its discretion to set aside, the court will be advancing the course of justice.

In the present application, the Objector's counsel explained in his submission that he had failed to attend court because he was attending to another matter before the Court of Appeal. He explained he had inadvertently failed to diarise the hearing date when he was served with the hearing notice of the date the application was scheduled to be heard. In his view, the reason for his failure to attend court was a regrettable mistake which should be excused. On his part, counsel for the Petitioner stated that the merits of the case demanded that the court issue the orders that it did. The Petitioner urged the court to disallow the application.

Having carefully considered the rival arguments made in this application, it was clear to this court that the following were undisputed facts: it was not disputed that the suit property that is the subject of these succession proceedings is registered in the name of the deceased. It is Objector's case that although the suit property is registered in the name of the deceased, in actual fact, the property belonged to her because she was the one who financed its purchase and the developments thereon. In essence, the Objector is saying that the suit property is not part of the properties that comprise the estate of the deceased. It is on this basis that the Objector would like to continue collecting rent from the suit premises pending the hearing and determination of the succession dispute. The Petitioner on the other hand, is of a different opinion. It is her case that the suit property belongs to the estate of the deceased and therefore any rental income received from the said property should be preserved pending the hearing and determination of the succession dispute. It was clear to this court that the issue that will be determined by this court is whether the suit property is part of the estate of the deceased or belongs to the Objector. That is a matter that can only be determined by this court after hearing oral evidence from both parties. From affidavit evidence, it was evident that prior to his death, the deceased collected rent from the suit premises. The Objector came in to the picture after the death of the deceased. Her claim that the rent that was collected by the deceased was utilized according to her instructions was not supported by evidence.

This court is of the view that pending the determination of the dispute regarding the ownership of the suit property, it is only prudent that the rental income be preserved. In the premises therefore, this court in the interest of justice is unwilling to set aside the order that was issued by Njagi J. If the Objector's application to set aside is allowed, it would result in a situation whereby the rental income received from the suit property would be utilized by the Objector to the exclusion of other beneficiaries of the estate of the deceased before the hearing and determination of the succession dispute. The Objector's application is therefore without merit and is hereby dismissed. The Objector is ordered to comply with the order issued by Njagi J on 23<sup>rd</sup> February 2012. Meanwhile, the parties are ordered to list the case for hearing so that the issue regarding the ownership of the suit property is determined. It is so ordered.

**DATED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2014.**

**L. KIMARU**

**JUDGE**