

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APP. NO.65 OF 2005

E.N. NG'ANG'A & CO. ADVOCATES.....APPLICANT

VERSUS

JOYCE WANJIRU GITAKA

LAWRENCE KIMANI GITAKA

JACINTA WAKONYO GITAKA (ADMINISTRATORS OF THE ESTATE

OF GEOFFREY GITAKA KIMANI – DECEASED).....RESPONDENTS

RULING

The Respondents are the Administrators of the Estate of Geoffrey Gitaka Kimani (deceased). Joyce Wanjiru Gitaka was replaced by John Muhuhu Gitaka as one of the administrators of the estate of the deceased. The Applicant herein was previously the Advocate of the estate of the deceased. After a disagreement, the Applicant ceased to act for the estate of the deceased. He filed his Advocate-Client bill of costs to enable the court assess his costs. The Applicant's bill of cost was taxed at Kshs.3,829,494/-. Judgment was entered in favour of the Applicant for the said sum of Kshs.3,829,494/- on 4th March 2008. The estate of the deceased was required to pay the said sum together with interest at court rates from 10th November 2006. The Applicant executed the said decree by obtaining prohibitory orders against all the real properties that comprise the estate of the deceased. The prohibitory orders were registered against the titles of the said properties.

The beneficiaries of the estate of the deceased have agreed on the mode of distribution of the estate of the deceased. In fact, the estate has already been distributed to the beneficiaries. The deceased was married to three (3) wives. The beneficiaries of the estate of the deceased agreed to distribute the properties that comprise the estate of the deceased more or less in accordance with the three houses (widows) of the deceased. The court has already issued a certificate of confirmation of grant distributing the properties that comprise the estate of the deceased to the beneficiaries. However, the beneficiaries of the estate of the deceased are unable to agree on how to settle the decree that was issued in favour of the Applicant as against the estate of the deceased. After protracted negotiation, some of the beneficiaries of the estate of the deceased agreed to pay the Applicant on the basis of the houses of the deceased. At the time this agreement was reached, the decretal sum to be paid to the Applicant had increased to a sum over Kshs.7.5 million. The second and third houses of the deceased have each paid the sum of Kshs.2,666,000/- to the Applicant. This comprised ? of the decretal sum. The first house is adamant that it cannot pay the balance of the decretal sum until its initial and subsequent contribution in the litigation process in terms of costs is taken into account. For this reason, the Applicant has not withdrawn the prohibitory orders that it lodged in respect of the titles of the properties that have been inherited by the beneficiaries from the second and third houses.

It was for that reason that the second and third houses have filed more or less similar application seeking orders from this court to lift the prohibitory orders lodged in respect of the properties that the two houses have inherited. In the case of the 2nd Respondent, he has prayed that prohibitory orders be lifted in respect of LR Nos.13425/2, 13425/3 and 13425/6. The 2nd Respondent (on behalf of the second house) also prayed for prohibitory orders in respect of 20 acres in LR. No.3777/529 Ol Kalao farm and 20 acres in LR.No.3777/210 Gilgil farm be lifted. On their part, the third house asked for prohibitory orders in

respect of 30 acres in LR. No.3777/529 (IR No.44774) Ol Kalao farm and LR.No.3777/331 (IR No.7631) Gilgil farm be lifted. The reason for seeking the lifting of the prohibitory orders is obvious: the second and third houses are of the view that since they have already paid their share of the cost that is due to the Applicant, the portion of the estate that they have inherited should no longer be encumbered with the prohibitory orders. The Applicant on his part is opposed to the applications on the grounds that the estate of the deceased should first settle the decretal sum before the court can order the removal of the prohibitory orders. The first house insists that accounts have first to be taken so as to determine how much each beneficiary is required to pay (or the respective houses as the case may be) before the prohibitory orders are lifted.

Having carefully considered the facts of this case, it was clear to this court that although the court directed that the decretal sum be paid by the estate of the deceased, such estate is no longer in existence. This is because the properties that comprise the estate of the deceased have already been distributed to the respective beneficiaries. This court is of the view that it behooves the respective beneficiaries to settle the decretal sum due to the Applicant. In this case, some of the beneficiaries have already entered into an agreement with the Applicant whereby the Applicant has already been paid ? of the decretal sum. The said amount was paid by the second and third houses. The first house was not involved in the negotiation that led to the agreement. The first house justifiably felt excluded from the process and is unwilling to abide by the terms of the agreement. This court is however of the view that the agreement reached by some of the beneficiaries for each house to bear ? of the decretal sum in this case is reasonable in the circumstances. The fact that the Applicant accepted to be paid by the second and third houses implicitly confirmed that the Applicant had acknowledged and consented to the fact that he was no longer owed by the said second and third houses. If the first house has any issues with the second and third houses regarding any settlement of accounts in respect of the estate of the deceased, it should organize a meeting with the other houses to resolve the issue and where no agreement is reached, it will be at liberty to move the court in the succession cause.

The upshot of the above reasons is that the two applications filed by the 2nd and 3rd Respondents cannot be resisted. They are hereby allowed. The prohibitory orders issued in respect of the properties that their two houses have inherited are hereby lifted. The prohibitory orders against the 1st Respondent representing the first house shall be maintained until they settle their respective share of the decretal sum. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2013

L. KIMARU

JUDGE