



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT MILIMANI
SUCC CAUSE NO. 2131 OF 2011

IN THE MATTER OF THE ESTATE OF THIONG'O NGINYAYU MUTHIORA – (DECEASED)

RULING

The deceased whose estate is the subject of this cause, Thiong'o Nginyayu Muthiora, died testate on 19th June 2011. His will was made on 11th September 2008. Under its terms he appointed George Ndungu, the executor thereof. The said executor obtained representation to the estate on 21st February 2012 when a grant of probate was made to him.

Three months after the making of the said grant, Michael Kuria Thiong'o, moved the court by a summons in chambers dated 24th May 2012 asking for restraining orders against the executor to stop him from taking possession, disposing of or otherwise intermeddling with the estate, for rental income to be deposited in the joint account operated by the executor and the applicant with such other persons as the court may determine, and for accounts.

The applicant, Michael Kuria Thing'o is a son of the deceased and one of the beneficiaries named under the will. The executor is equally as son of the deceased and a beneficiary.

Section 79 of the Law of Succession Act vests the property of the deceased in the personal representative. For the avoidance of doubt, the said provisions states as follows:-

“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 in the grant all the property of the deceased shall vests in his as personal representative.”

The effect of **Section 79** is that the personal representative steps into the shoes of the deceased so far as his property is concerned. The property passes to the personal representative as legal owner in his capacity as such. He can deal with such property as the deceased would have were he alive, save that the personal representative would be so acting as trustee. This means that he can sue and be sued over the estate, he can sell or turn assets to account, he can enter into contracts over the assets, he can invest estate property, among others.

Since **Section 79** allows the personal representative to deal with the assets as if he were the owner thereof so far as he acts as such in his representative capacity, he cannot be accused of intermeddling where he deals with the estate. That explains **Section 45(1)** of the Law of Succession Act, which is clear that intermeddling can only be by a person who handles estate property without lawful authority given him by the Law of Succession Act, any other written law or by a grant of representative. Again for the avoidance of doubt I will quote Section 45(1) of the Law of Succession Act in verbatim, it says:-

“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 propose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

The executor in this case, who is named in the instant application as the respondent, is the personal representative of the deceased as grant of probate was made to him. The grant constitutes him the personal representative of the deceased. He represents the deceased so far the affairs of the deceased concerning the estate property are concerned. The estate vests in him. He holds the legal title to the assets which make up the estate. He can deal with the assets as if he is the owner thereof, albeit in a representative capacity. He is the person to be sued by third parties over the estate or to sue such third parties to protect the estate. He is the person with power to enter into contracts on behalf of the estate and to enforce contracts that exist between the estate and third parties. He has the power to sell assets, to convert them into money, to invest estate funds, to compromise suits on behalf of the estate, among others. He has these powers, given to him by **Section 79 and 82** of the Law of Succession Act, and by various provisions of the Trustee Act, Cap 167, Laws of Kenya.

A personal representative who handles estate property in the manner enumerated above commits no wrong and he cannot be accused of intermeddling. When the respondent in this application handles estate property in the manner stated above he cannot be said to have intermeddled with the estate, since the estate vests in him. **Section 45(1)** of the Law of Succession Act is clear that a person holding a grant of representation who takes possession or disposes of the free property of the deceased person commits no offence.

Drawing from the above, there would be no legal basis for granting restraining orders against a personal representative who does any of the things enumerated above. The business of a personal representative entails taking possession of estate property and disposing of it. He cannot be restrained from discharging his usual duties, for that is what they amount to. Indeed, it is for this reason that the Law of Succession Act has not provided for grant of injunctive orders against personal representatives.

For the purpose of administration, the Law of Succession Act, at **Section 83** of the Law of Succession Act, has imposed certain duties on personal representatives. One such duty is to get in all the free property of the deceased. This is the duty to collect and gather the estate. Collecting rents is one such duty. **Section 83** should be read together with **Section 79**. Since the property of the deceased vests in the personal representative, the personal representative is entitled to collect any rents and profits accruing from such property, and **Section 83** reinforces this by making it a statutory duty for the personal representative to do so.

The deceased appointed only one executor. This means that there is only one personal representative. The role of managing the estate herein therefore falls only on the said executor. There is no legal basis at all to order that some other person do act jointly with him. It is for the executor to collect rents, and to deposit the said rental income into such banks accounts as he may open to hold estate funds.

It is important to point out that beneficiaries or survivors who are not personal representative have no role at all in the administration of the estate. They should wait for the personal representative to do their work of running the estate, in terms of getting in the estate, paying debts and liabilities and thereafter distributing the net estate among the beneficiaries and heirs. If the administrators do not appear to be doing the right thing, then the available remedy will be in asking that the administrators or personal representatives render a true account of their management of estate.

I will emphasize that personal representatives are for all practical purposes trustees. They hold property for the benefit of others. The property vested in them by virtue of **Section 79** does not belong to them. It does not vest absolutely. They hold such property in trust for creditors, heirs, beneficiaries and dependants. They stand in a fiduciary position with respect to the estate to the creditors, heirs, beneficiaries and dependants. As such they are obligated to account to the court and to the creditors, heirs, beneficiaries and dependants for their handling of such estate property.

In view of everything that I have said above, I will make the following orders:-

1. Prayers 2 and 3 of the application are dismissed as there is no basis legally for their being granted.
2. Prayer 4 of the application is allowed. The executor has 30 days to prepare and place before the court a true and accurate account of the rental income accrued from the rented premises of the estate from the date of the deceased's death to date.
3. Prayer 5 is not granted as the grant has not been confirmed, and the executor cannot possibly access the deceased's bank accounts without a confirmed grant.
4. As six months have expired and to avoid unnecessary suspicion and anxiety the executor is hereby directed to file an application for the confirmation of the grant within 60 days.
5. Costs of the application shall be borne by the estate.

SIGNED DATED and **DELIVERED** in open court this **10th** day of October, **2013**.

W.M. MUSYOKA

JUDGE