



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO 637 OF 2016

IN THE MATTER OF THE ESTATE OF HIRAM CHEGE NGARUIYA

RULING

The Applications

This Ruling relates to two applications. The first application is Summons dated 19th April 2021 filed by Eric Muriga Chege, seeking orders that:

1. That Ruth Mugure Ngaruiya, the Administrator of the deceased's estate, be restrained from dealing with the properties held in trust for the beneficiaries and all those properties held by Hiram Chege Holdings Limited pending the hearing and determination of this application
2. That Ruth Mugure Ngaruiya the Administrator of the deceased's estate produces to court a full and accurate account of the completed administration inventory of the assets and an accurate account of all dealings of the estate of Hiram Chege Ngaruiya to date.
3. That 20% share of all the capital assets of the net estate of the deceased Hiram Chege Ngaruiya who died on 2nd March 2016 be appointed to Eric Muriga Chege with or without variation of any appointment already made.
4. That cost of the application be provided for.

This application is supported by an affidavit sworn by Eric Muriga Chege in which he deposed that the deceased is survived by a widow Ruth Mugure Mgaruiya and five children; Susan Waithera Chege, Edward Ngaruiya Chege, Winfred Ngaruiya Chege, Eric Muriga Chege and Lorna Wanjiru Chege; that the surviving spouse has failed to exercise her power of appointment as per section 35(2) Law of Succession Act thereby unfairly denying him his rightful 20% of the estate.

He has listed the property forming the estate of the deceased on paragraphs 8 and 9 of the Supporting Affidavit sworn on the 19th April 2021. He contends that he received L.R NO. Nakuru/Moi Ndabi Parcel xxxx and xxxx and a sum of Kshs. 12,000,000/= only from the assets and that he expects receipt of the following in future;

1. Rental income LR Nairobi Block No 62/xxx Kibera
2. Rental income for Naivasha LR No. 420/xxx House xxx (cottage) Estimated at Kshs, One million annually and,
3. Rental income from HIWI Court estimated at Kshs. One million annually.

And further that, he estimates his future needs to be approximately Kshs. 2,400,000 annually including school fees and maintenance of his two children.

He contends that the surviving spouse and the deceased lived separately and that he had a cordial relationship with the deceased until 2 years before he died. That disagreements on the deceased's estate arose after confirmation of grant on the management of the estate and apportionment of his share of the estate and that the surviving spouse declined mediation on the matter.

He further contends that the administrator is mismanaging the estate and has excluded him from the companies and membership which means he does not get any income from the assets. It is his contention that the Administrator has a fiduciary duty to all the beneficiaries and that he is entitled to his rightful share of 20% in the estate as the same is being wasted.

Ruth Mugure Ngaruiya filed a replying affidavit dated 15th June 2021 in which she opposed the application on the basis that the value of the net intestate estate was grossly exaggerated and that she had exercised her power under section 35(2) of the Law of Succession Act by

making reasonable provisions for and gifting her children some assets. She stated that 3 of the children had utilized their gifts properly while the Applicant wasted his gift and illegally occupied part of the estate causing loss to the sum of Kshs. 4,400,000/= in addition to causing a truck registration No. KAR xxx which was part of the estate to be auctioned. She also stated that the Applicant had become physically and verbally abusive and had illegally alienated part of the estate occasioning loss at the expense of herself and other beneficiaries.

The 2nd application is a Chamber Summons dated 6th May 2021 filed by Ruth Mugure Ngaruiya and supported by affidavits sworn by Ruth, Sandra and Lorna all dated 6th May 2021, seeking the following orders;

1. Spent
2. That confirmation orders granted herein on 26th February 2018 be reviewed/ varied and/ or set aside subsequently, the certificate of confirmation of grant dated 26th February 2018 be annulled and the same has been rendered inoperative.
3. Spent
4. Spent
5. That an injunction does issue, restraining Eric Muriga Chege and Winfred Ngaruiya Chege by themselves and/or through their servants, agents, employees, proxies, wife or wives, husbands, children or otherwise howsoever, from accessing, selling, alienating, altering, transferring, charging, disposing off, pledging, offering for sale or howsoever, dealing or handling any and all of the assets of the estate and from further alienation and all access.
6. That the officers commanding the respective police divisions in the areas where the assets and properties are contained in the certificate of confirmation of grant dated 26th February 2018 and all other assets as may have come forth from the estate do assist in the enforcement of the orders herein.
7. The Costs of the Application be in the cause.

This application is supported by the grounds that the Applicant is the sole spouse and administrator of the deceased's estate and that she made gifts to all the beneficiaries as set out on paragraph 4 of the Supporting Affidavit; that 2 of the beneficiaries, Eric Muriga and Winfred Ngaruiya, have been uncooperative and have been interfering with the net estate through threats, physical and verbal abuse and illegal alienation of the assets.

Eric Muriga Chege filed a Replying Affidavit to this application dated 14th June 2021 where he reiterated the contents of his application and stated that the Administrator misrepresented the value of the deceased estate as being approximately Kshs. 360,000,000/= when it was in fact Kshs. 800,000,000/=. He also contended that the resolution expelling him from Hiram Chege Holdings Limited board was null and void as he was not given notice and the assets considered were not in the company's name and that the same was not witnessed by directors. He denied the contention that the estate lost Kshs. 8,000,000 due to his staying at the Great Rift Valley Lodge and attributes the loss to the pandemic. He further contended that the administrator and one Sandra Waithira Chege had received Kshs. 100,000,000 and failed to account for the same while applying for letters of administration and also that they mismanaged various businesses of the estate. He also denied the claim that the administrator had paid for his children fees and upkeep. It is therefore his contention that he stands to lose his share of the estate if his application is allowed.

Ruth Mugure Ngaruiya filed a supplementary affidavit dated 7th July 2021 in support of the application dated 6th May 2021 and in opposition to the application dated 19th April 2021. She deposed that Eric Muriga was incapable of maintaining a business as he had run to ground several enterprises and that he had abdicated business enterprise with the hopes of living off the deceased's estate including illegally occupying a hotel in the estate.

She also contended that Eric had signed a consent during confirmation of grant knowing very well that the shares of Adlife Plaza had not been indicated and stated that the deceased held 5% share in Adlife Plaza and the same was sold and payment included in the list of assets which she then equally distributed to her children. It was therefore her contention that her application should be allowed.

In turn Eric Muriga Chege filed a further affidavit dated 19th July 2021 where he denied the proceeds/ shares of Adlife Plaza being represented in the confirmation for grant and stated that the sale was illegally sold without court consent. He also contended that his 20% share had been taken back when he was excluded from Hiram Chere Holdings Limited. He also denied running down enterprise including Beachline limited and stated that the same collapsed due to tax arrears dating back to the year 2005 and further that Sandra Chege executed over 90% of all payments by Beachline to the amount of kshs.400,000,000/= and failed to account the same to the beneficiaries. It was also his contention that when he took over the company he secured Kshs. 330,000,000/= which the administrator and Sandra Chege frustrated.

Submissions

Pursuant to the directions of this court issued on 12th July 2021 that the two applications be heard together by way of written submissions, parties have filed written submissions. Ruth Ngaruiya, Edward Ngaruiya, Sandra Waithira and Lorna Wanjiru filed joint written submission dated 10th July 2021. They identified 6 issues for determination as follows:

- (i) Review of the Confirmation Orders.
- (ii) Injunctive Relief and Police Protection.

(iii) Reasonable Provisions.

On the issue of review, it is submitted that the Confirmation Orders have become completely inoperable and unachievable by reason that all the assets set out to devolve to the company known as Hiram Chege Holdings have been rejected by the directors and majority shareholders of the company following a resolution by the Board to that effect and secondly that the Administrator is entitled to a lifetime interest in the property, which information she did not have at the time of confirmation of grant. On this point she has relied on **Civil Appeal No 80 of 1985 Wangechi Kimita Vs Wakabiru Mutahi** to emphasize the point that she has sufficient reason under Order 45 Rule 1 of the Civil Procedure Rules to seek review.

On the issue of Injunctive relief, the Administrator has relied on section 63 of the Probate and Administration rules and Order 40 of the CPR as well as on the cases of **Giella V Cassman Brown 1973 E.A. 358** where the court held that;

A party wishing to get an order of injunction must establish:

(i) A prima facie case with a probability of success,

(ii) That he will suffer irreparable loss if the injunction is not granted and the loss cannot be compensated by an award of damages,

(iii) That if the court is in doubt, it will decide the application on a balance of convenience.

She also relies on **East African Industries Ltd v Trufoods Limited 1972 E.A 420** and Court of Appeal case **Mrwao V First American Bank of Kenya Limited & 2 Others 2003 KLR 125** where the court held that;

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which on the material presented to court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is submitted that a prima facie case exists in this case because the administrator is the sole spouse of the deceased and is entitled to the net intestate estate for her lifetime as per section 35(1) (a) and (b); that the suit property is in danger of being wasted by Eric Muriga, as he had done before by taking a loan with motor vehicle No. KBZ 068M Mercedes Benz ML; that she had received threats and aggression from Eric Muriga and Winfred Ngaruiya and that Eric Muriga had settled into the Great Rift Valley Lodge occasioning loss.

On the issue as to whether Eric Muriga Chege is entitled to any further reasonable provision it is submitted that Eric’s application cannot succeed because it is based on section 35(3) LSA but he claims 20% of the value of the estate. It is submitted that no special need has been pleaded nor dependency on the deceased. It is contended that Eric was gifted part of the estate (10 acres of land in Nakuru/Moi Ndabi and kshs.11,687,500/=) by the administrator, the same as other beneficiaries, which was both sufficient and reasonable and that Eric has received far more from the estate than the other beneficiaries and has additionally received or forcefully and illegally acquired the following;

1. Medical cover and school fees for his children
2. Two houses at sunset boulevard, Mombasa Road
3. Cottage in Naivasha Great Rift Valley Lodge
4. Vehicle registration No. KBZ xxx
5. Truck registration KAR xxx

She has cited **Tau Katungi V Margethe Thorning and Another** to support her case that the deliberate intention of the law is to protect the spouse and enable her enjoy matrimonial property during her lifetime and that the widow is entitled to an exclusive right over the net intestate estate. Additionally she relied on **Re estate of James Makau Nginga 20 of 2020** and **Re Estate of Johnson Musambayi Katumanga No 399 of 2007 (2014) eKLR**.

Submissions by Eric Muriga Chege are dated 19th July 202. He has identified eight (8) issues for determination. On whether he is entitled to request for books of accounts of the estate, he relied on Section 83(g) of the Law Succession Act and submitted that it is in the interest of the beneficiaries and estate that the accounts be produced in court. He submitted that the administrator has been dealing in the estate without accounting for it and has expelled him from the board of Hiram Chege Holdings which holds assets in the estate and he believes the same will be wasted and that he will be disinherited as he already does not benefit from the estate. He relied on the case of **re Estate of Kitele Kitungu (deceased) (2021) eKLR** where the court held that beneficiaries have the statutory right to obtain an account from the executors of the estate and at any time they may ask for estate books and documents. He also cited **Re Estate of Abdulkarim Chatur Popat 2019 eKLR** where the court held that; duties of a personal representative over the estate of a deceased person are well set out in section 83 of the Act. the requirement to produce accounts is stipulated in sections 83(e) to (i).

On whether he is entitled to apply for appointment of 20% share of the capital estate of the deceased under Section 35(3) LSA, he relied on **Re Estate of Rosemary Mukwanjeru Kiria (2016) eKLR** where the court observed that;

“... under the above provisions the surviving spouse only gets chattels absolutely and is only entitled to the life interest in

the rest. The ultimate destination of the property the subject of the life interest is to the children in the event of the demise of the surviving spouse as provided in section 35 (5) Law of Succession Act.”

He submitted that the surviving spouse cannot claim absolute right to the property as the same is held in trust for the beneficiaries of the estate. He argued that his removal from the board of Hiram Chege Holdings was for the purpose of disinheriting him. He cited *Bethuel Kimiti Gathage V Wangechi Gachingiri and 2 others (2016) eKLR* where the court held that “**the surviving spouse can upon agreement with beneficiaries distribute the estate either at confirmation proceedings or in exercise of the power of appointment will ultimately achieve this purpose. Also that the estate should be divided equally amongst the spouse and children in their names.**” It is therefore his argument that he is entitled to 20% of the estate.

On whether shares held at Hira Chege Holdings are a representation of his shares in the estate, he submitted that the company was incorporated by the administrator before confirmation of grant with beneficiaries holding equal shares but since he was ousted the other shareholders benefit while he does not. He submitted that he cannot be excluded from administration by being denied voting rights in the estate as Hiram Chege Holdings. He submitted that the administrator exceeded her authority by excluding him as a beneficial owner of Hiram Chege Holdings and also cancelling his membership to Green Park Golf and Country Club Complex.

On whether the issue before the Children Court can be considered by the family court, he submitted that the children’s report should be struck out. He relied on Section 7 Civil Procedure Act and stated that the affidavits of the Administrator and other beneficiaries are aimed at bringing his character into disrepute under section 35(4)(e) of the Law of Succession Act.

On whether the deceased’s widow is entitled to the capital assets of the deceased he submitted that the surviving spouse is entitled to personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate as per section 35 of the Law of Succession Act.

On whether he had a good relationship with the deceased and has a good relationship with the administrator, he submitted that he had few normal disagreements with the deceased and that he had a good relationship with the administrator before the deceased’s demise and sometime after but after confirmation of grant they started to disagree. He stated that he apologized for breaking a door at the administrator’s house.

In opposing the Application dated 6th may 2021, he has submitted that the Grant was obtained procedurally and no event had rendered it inoperative other than the administrator’s unwillingness to implement the Grant. He relied in *Estate of Juma Shitsewa Linani (2021) eKLR* and submitted that the Grant has not been rendered inoperative and the administrator has not provided an alternative in dealing with the assets thus the prayer is ambiguous.

He submitted that the estate is held in the name of the deceased and surviving spouse thus he cannot transfer, charge, dispose, pledge or alter them without the administrator’s consent.

On whether he can be banned from accessing the deceased's estate he submitted that he is a beneficiary in the estate and has the right to access the property unless sufficient reasons are given. He has submitted that he has not taken any action against the estate and therefore he cannot be barred from accessing the same.

He submitted that the application dated 6th May 2021 is not merited as it is aimed at digressing the court from issues in dispute and that the Administrator has failed to disclose some assets in the estate and has misled the court on the value of the estate.

Analysis and Determination.

In determining this matter, I have considered the two applications subject of this Ruling, all the supporting affidavits, the replying affidavits, rival submissions and cited authorities. All these documents form part of the court record and I need not replicate them in this ruling. The Application dated 19th April 2021 is the first one to be filed. It is pegged on Section 35 (3) of the Law of Succession Act. It seeks restraining orders against the Administrator from dealing with properties held in trust for the beneficiaries; provision of accounts and appointment of 20% of the estate to Eric Muriga Chege, who is the applicant in that application.

Eric has supported that application with detailed information contained in his Supporting Affidavit and detailed submissions. It is my view that the issues raised by Eric Muriga Chege can be condensed into four, namely:

- a) Powers of the administrator under Section 35 of the Law of Succession Act.
- b) Restraining orders against the administrator from dealing with properties held in trust for the beneficiaries.
- c) Accounts in dealing with the estate.
- d) 20% appointment in favour of Eric Chege.

My understanding of Section 35 (2) and (3) of the Law of Succession Act is that a surviving spouse has power during the continuation of the life interest of appointment of all or any part of the capital or the net intestate estate by way of gift among the surviving children. This gift takes effect immediately. The section also allows any child who considers that the power of appointment has been unreasonably exercised or withheld to apply to court for the appointment of his share. From my reading or prayer 3 of the application dated 19th April 2021, Eric is seeking appointment of 20% share of the estate with or without variation of any appointment already made. He is seeking additional appointment to what has already been done.

The Administrator has provided evidence that Eric is a beneficiary of a properties from the estate, gifted to him and his siblings. Three of the siblings have sworn affidavits supporting their mother that this is the case and that they are satisfied with their gifts. There is claim that Eric has taken properties of the estate for himself and without authority of the administrator. He has not denied this.

The life interest held by the Administrator is not absolute but shall terminate upon her death of remarriage. The property then will go to the children.

My careful reading of all the material placed before me does not show that Eric has tendered evidence to persuade this court to interfere with the Administrators power of appointment under Section 35. He has benefitted from the property gifted to him by his mother and has gone ahead to apportion himself other properties and occupy some premises which are part of the estate without authority from the administrator and for the detriment of other beneficiaries.

On the issue of restraining orders against the Administrator, it is my considered view that Eric has not tendered evidence why he thinks he is entitled to this prayer. The Administrator has exercised her power of appointment to each of her five children. Three of these children are satisfied with those gifts, two are not. The residue net intestate estate remains under her as holder of life interest. She cannot deal with it in other manner. It will devolve to her children upon her death. This court is therefore not satisfied that Eric Muriga deserves prayer one (1) of his application dated 19th April 2021.

On the issue of accounts in dealing with the estate, the law requires that this be done. It is one of the duties of an administrator. I have noted that the Administrator has provided evidence on the dealings with the estate but these do not come as accounts as envisaged under Section 83 of the Law of Succession Act. There is nothing wrong in providing accounts. I will give my directions on this issue at the conclusion of this ruling.

Turning on the application dated 6th May 2021, I note that the reasons given for seeking this order are that the confirmation orders have become completely inoperable and unachievable by reason that all the assets set out to devolve to Hiram Chege Holdings have been rejected by the Directors and majority shareholders in that company making the confirmation order inoperable. The problem I have with this prayer is that the Administrator does not provide an alternative if this court were to allow this prayer. It is my considered view that with the materials placed before me, the Administrator has not persuaded this court that review ought to issue.

On the issue of injunctive orders against Eric and Winfred I have considered Section 47 of the Law of Succession Act that enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act and to pronounce such decrees and make such orders therein as may be expedient. I have also considered the inherent powers of this court under **Rule 73 of the Probate and Administration Rules** to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The Administrator has provided evidence that in my view satisfies the principles laid out in the celebrated case of **Giella –v- Cassman Brown. (1973) E. A 358** to warrant the issuance of the injunctive reliefs. It is the Applicant who must establish a prima facie case in the circumstances herein. It has not been disputed that Ruth Mugure Ngaruiya is the widow to the deceased and the sole administrator in the estate thereto. The administrator contends that Eric Muriga Chege has unlawfully interfered with some of the assets of the estate of the deceased. It has been averred, for instance, loan facilities were secured using motor vehicles that belong to the deceased. The administrator has produced document in support of this claim including a letter addressed to Eric Muriga Chege making inquiries about the loan balance. The latter has not contested this evidence no provided evidence to the contrary. It is my view that she has satisfied the court that she deserves the order she is seeking in prayer five (5).

The administrator is urging the Court to issue injunctive orders to avert irreparable loss that is likely to be occasion to the estate of the deceased. She is of the view that unless the said orders are issued, there will be nothing to go back to and that estate of the deceased is in danger of being wasted, damaged, or alienated. I agree with the administrator that the balance of convenience tilts in favour of granting the injunctive orders for purposes of preserving the integrity of the estate of the deceased.

In respect to prayer 6, she has failed to state where these properties are located to aid this court in granting that prayer. A party is bound by his/her pleadings. Without particulars of where the properties are located having been pleaded, this court cannot issue prayer 6.

Consequent to my analysis and determination of this matter, it is my view that the Application by Eric Muriga Chege, dated 19th April 2021 cannot stand and must fail save for prayer 2. In that regard, this court directs that the administrator does, within a period of 60 days, prepare, file and serve a full and accurate accounts in respect of the administration of this estate. For this purpose, this matter shall be mentioned before the Presiding Judge of the Family Division, High Court of Kenya at Millmani Nairobi after 60 days from the date hereof for further directions and orders.

In respect of the application dated 6th May 2021, Prayers 2 and 6 are hereby declined. I however grant Prayer No. 5 of that application. Each party shall bear own costs in the two applications under consideration. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF NOVEMBER 2021.

S. N. MUTUKU

JUDGE