



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 567 OF 2017

IN THE MATTER OF THE ESTATE OF STEPHEN KEROSI AKORI

JACKLINE MOKEIRA MOKAYA.....PETITIONER/APPLICANT

VERSUS

DAMARIS MUTHONI KAMAU.....RESPONDENT

RULING

1. Before me for determination is a notice of motion dated 29th June 2017 and filed on the same day seeking orders as follows:

- a) That this matter be certified as urgent to be heard ex-part at the first instance.
- b) That the Motor Vehicle Registration Number KCF 209S Mitsubishi Pajero be retained by O.C.S. Athi River Police Station pending hearing and determination of this application interpartes and/or further court orders.
- c) That the Motor Vehicle Registration Number KCF 209S Mitsubishi Pajero be released to the Applicant for safe custody and use of the deceased school going children pending hearing and determination of the petition.
- d) That the respondent do account for the following motor vehicles:
 - i. Motor Vehicle Registration Number KBH 131S
 - ii. Motor Vehicle Registration Number KCE 958P
 - iii. Motor Vehicle Registration Number KCH 447T
 - iv. Motor Vehicle Registration Number KAG 699N
 - v. Motor Vehicle Registration Number KCF 209S

and do surrender them to the petitioner to be kept in safe custody or

in the alternative the same to be kept in a neutral safe place pending hearing and determination of the Petition.

e) That a temporary order by way of injunction be issued against the Respondent by herself or her agents from evicting or interfering with the Applicant's peaceful stay in PLOT NO. 6664 EMBAKASI RANCHING pending hearing and determination of this application interpartes and/or further court orders or directions.

f) That a temporary order by way of injunction be issued against the Respondent by herself or her agents from evicting or interfering with the Applicant's peaceful stay in PLOT NO. 6664 EMBAKASI RANCHING pending hearing and determination of the Petition.

g) That a temporary order by way of injunction be issued against the Respondent by herself or her agents restraining her from interfering with the deceased's assets enumerated in paragraph (i) to (xxxiii) of the petition pending hearing and determination of the Petition.

h) That the Respondent be jailed and/or fined for intermeddling with the assets of the deceased.

2. Application which is filed under rule 73 of Cap 160 of the Law of Succession by one Jackline Mokeira Kerosi herein referred to as the applicant is predicated upon grounds on the face of it and her affidavit in support and further affidavit deponed on 29th June 2017 and 27th July 2017 respectively.

3. In response, Damaris Muthoni Kamau hereinafter referred to as the respondent, filed her replying affidavit sworn on the 7th July, 2017 and a reply to a further affidavit sworn on 2nd August, 2017. She further relied on the affidavits of Aaron Tafari Ouko sworn on the 2nd August, 2017 and Moriasi Samuel sworn on 2nd August, 2017.

4. On 30th June 2017, application herein then filed under certificate of urgency, was certified as such before me and orders granted in terms of prayers 1 and 2. The matter was fixed for interpartes hearing which for various reasons never took off until this time.

5. The deceased herein Stephen Kerosi Makori died intestate through a traffic road accident on 16th January 2017 leaving behind several assets among them land, shares and motor vehicles. Upon his death, a dispute arose between the applicant and the respondent both of whom claimed to have been married to the deceased hence wives for all purposes and intents including but not limited to succession and inheritance of his property.

6. Apparently, the applicant claimed to be the only legally married wife to the deceased and any claim by the respondent as a second wife was baseless and therefore a stranger.

7. Prior to the filing of the instant application, the respondent had filed a citation to accept or refuse letters of administration against the applicant, Collins Makori Kerosi, Cynthia Kemunto Kerosi and Maureen Kaari Kerosi, both listed as children to the deceased. The citation which dated 15th May 2017, was accompanied with a substantive petition application seeking a full grant of letters of administration with the respondent and one Evans Ondieki Makori the deceased's brother as joint petitioners/applicants.

8. It is this citation and petition for representation of full grant that provoked the applicant herein thus filing entry of appearance for citation and application (petition) for full grant with her daughter Cynthia Kemunto Kerosi as joint petitioners. Subsequently, she filed the application herein seeking to collect and preserve the said estate to the exclusion of the respondent whom she referred to as a wife imposter (stranger).

9. According to the applicant's affidavit in support of the application, the respondent had intermeddled with the estate thereby transferring into her name motor vehicles registration number KCF 209S, KBH 131S, KCE 958P, KCH 447T and KAG 699N. The applicant pleaded for release of motor vehicle registration number KCF209S currently detained at Athi River Police pursuant to a court order for her use and safe custody and that the rest be kept at a central place.

10. To bolster her claim, she attached a search in respect of motor vehicle registration number KCF 209S dated 28/2/2017 and KCH 447T dated 24/2/2017 reflecting the deceased as the registered owner (see annexure JMN-4 of her further affidavit). She also attached a letter from National Transport Authority dated 20/4/2017 confirming that motor vehicle KCF 209S and KCE 958P were still registered in the name of the deceased.

11. On the other hand, the respondent claimed the said motor vehicle was her personal property the same having been gifted to her by the deceased before his death hence not part of the estate. To buttress that claim, she attached a copy of records dated 5th July, 2017 showing that motor vehicle registration number KCF 209S was registered in her name. The log book attached indicates that transfer was done on 9/2/2017 i.e. after the death of the deceased. However, there is confusion as to when the actual transfer was effected considering that there is a search adduced by the applicant showing that the deceased was still the registered owner of motor vehicle KCF 209S as at 28th February, 2017.

12. It therefore means, the respondent must have acquired ownership after 28th February, 2017 without a court order hence intermeddling with the estate or if not, there is some element of collusion with NTSA.

13. For those reasons, the motor vehicle is still regarded as part of the estate for purposes of distribution unless the contrary is shown during distribution stage by way of evidence that the same had been gifted to the respondent. Accordingly, the motor vehicle shall be preserved pending distribution of the estate when evidence shall be adduced to prove actual ownership as at the time the deceased died. Since there is no application for a limited grant of letters of administration by way of Ad colligenda bona for purposes of collection and preservation of the estate pending hearing and determination of a full grant, the status quo with regard to the said motor vehicle shall prevail. The said motor vehicle shall remain in police custody pending further court orders.

14. As to motor vehicle registration no. KCE 447T, the respondent denied knowledge of the same as it was not in her possession. However, the applicant claimed in her paragraph 15 of her further affidavit that the motor vehicle is with the deceased's brother one Evans Makori. In paragraph 7 of the reply to further affidavit sworn by the respondent on 2nd August, 2017, she attached family minutes where it was resolved that the deceased's mother be given the said car for use. Although the family have no powers to distribute the estate of the deceased, it would appear like the old sickly mother to the deceased has been using the said motor vehicle even during his son's life time.

15. To that extent, the motor vehicle which is still in the name of the deceased is part of the estate capable of distribution. The old sickly lady shall continue retaining it for her own use pending distribution and the same shall not change hand or be transferred to any 3rd party.

16. As regards registration No. KCE 958P, the applicant in paragraph 16 of her further affidavit attached a letter from Director Registration and Licensing National Transport and Safety Authority (JMM-6") dated 5th April, 2017 confirming that the said motor vehicle was registered in the deceased's name. However, the respondent claimed the same as her personal property and it was the one the deceased was driving when he died hence the same was written off.

17. Since there is no proof that the said motor vehicle has been disposed off and at what value, the same should be preserved pending further evidence as to ownership since NTSA records shows that as at the time the deceased died it was in his name. The respondent shall retain the so called written off car pending appointment of the administrator, distribution of the estate or further orders from the court.

18. Concerning motor vehicle registration No. KAG 699N, the applicant claimed that the same belonged to the deceased although he had not transferred it into his name. To prove that claim, an affidavit sworn by Dr. Nicholas Tinega and Samuel Moriasi were attached. Dr. Tinega averred that when his motor vehicle was involved in a road accident, the deceased gave him the said motor vehicle to use for over one year. In paragraph 13 (m) of her replying affidavit, the respondent denied the said motor vehicle was part of the estate. She also did not claim ownership of the same. An affidavit by Aaron Tafari Ouko the

registered owner of the said motor vehicle attached to a further affidavit sworn by the respondent confirmed that he had sold the said motor vehicle to the deceased. The respondent cannot therefore disown it.

19. Since the respondent has disowned the said motor vehicle yet in her reply admits through Aaron's affidavit that the motor vehicle was purchased by her husband, I am convinced that the property forms part of the estate of the deceased hence must be preserved pending distribution. Accordingly, the motor vehicle shall be released to the applicant for safe custody pending further court orders.

20. With regard to KBH 131S, the applicant claimed the motor vehicle belonged to the deceased. She attached a copy of the insurance cover marked as annexure "JMM-7" in which the deceased is indicated as the insured and therefore the owner of the motor vehicle. However, the respondent in paragraph 13 (j) of her replying affidavit averred that the motor vehicle did not belong to the deceased or herself. Since she has disowned the motor vehicle as part of the estate, I do find that the applicant has established a prima facie case that the motor vehicle belongs to the deceased's estate hence should be preserved pending further orders from the court. Accordingly, the motor vehicle shall be released to the applicant for safe custody.

21. As to the rest of the properties, there was no dispute that the same belongs to the deceased. I shall order that the status quo remains until appointment of the administrator and subsequent distribution.

22. Ideally, any interested party should have filed an application for a temporary grant of letters of administration ad colligenda bona for purposes of collection and preservation of the estate pending filing of a full grant. Since there is no such application, the status quo shall prevail pending determination of the citation which shall determine who shall file or petition for a full grant. Prayers No. 5, 6, 7 and 8 cannot be awarded at this stage as there is need for evidence to determine who is entitled to what.

23. The upshot of it all is that, the application herein is hereby allowed with orders as follows:

(1) That the applicant and respondent, their agents, servants and representative be and are hereby restrained from interfering with, disposing, transferring and or alienating any property belonging to the estate of the deceased including but not limited to motor vehicles registration Nos. KBH 131S, KCE 958P, KCH 447T, KAG 699N and KCF 209S.

(2) That pending hearing and determination of the citation and subsequent application for issuance of a full grant of letters of administration, motor vehicle registration No. KCF 209S shall remain at Athi River Police Station pending the appointment of an administrator and further court orders.

(3) Motor vehicle registration No. KBH 131S, KAG 699N shall remain in the custody of the applicant until appointment of an administrator and further court orders.

(4) Motor vehicle registration No. KCH 447T currently being used by the deceased's mother shall remain in her custody pending appointment of an administrator and further court orders.

(5) That motor vehicle registration No. KCE 958P shall remain in the custody of the respondent pending appointment of the administrator and further court orders.

(6) That both parties shall engage a joint valuer for purposes of determining the correct value of the said motor vehicles in case of deliberate wastage.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF DECEMBER, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of

Ms Mwikali holding brief for Mr. Nyakiangana..... Counsel for Applicant

Ms Mwikali holding brief for Mr. Mwangi Counsel for Respondent

Mr. EdwinCourt Assistant