



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

SUCCESSION CAUSE NO.1273 OF 2014

IN THE MATTER OF THE ESTATE OF FREDRICK KAMAU KIRIMA (DECEASED)

BETWEEN

MARGARET WANJIRU KIRIMA

WANJAU KIRIMA

PROF. BISHOP JANE GATHONI KIRIMA.....APPLICANTS

RUTH KIRIMA

SUSAN KIRIMA

AND

CATHERINE NJERI MACHARIA.....1ST RESPONDENT

TERESIA WAIRIMU KIRIMA.....2ND RESPONDENT

RULING

1. The deceased herein, Fredrick Kirima Kamau died on 16th May 2006 aged 34 years and on 14th May 2014, his spouse, Catherine Njeri Macharia, instituted proceedings for a grant of Letters of Administration intestate seeking to inherit his estate together with her children, Austin Kamau Kirima, Faith Wairimu Kirima and Patience Njoki Kirima.

2. On 29th September 2014, Musyoka J. issued Letters of Administration intestate to the said Catherine Njeri Macharia and Teresia Wairimu Kirima but on 18th March 2015, Margaret Wanjiru Kirima, Wanjau Kirima, Prof. Bishop Jane Gathoni Kirima, Ruth Kirima and Susan Kirima filed a Summons for Revocation of Grant under **Sections 47, 52, 76(b) and (c) 83(b) and (e)** of the **Law of Succession Act** and **Rules 44(1) and 73** of the **Probate and Administration Rules** seeking the following orders;

“(1) ...

(2) That pending the hearing and final determination of this Application interpartes, the Honourable Court do issue a stay of proceedings herein.

(3) That pending the hearing and final determination of this Application the Honourable Court do issue a stay of proceedings herein pending the final determination of Nairobi High Court Succession Cause No.1298 of 2011 Estate of Gerishon Kamau Kirima (“the Main Estate”).

(4) That the grant of Letters of Administration intestate made on the 29th September, 2014 to the 1st Respondent Catherine Njeri Macharia and 2nd Respondent Teresia Wairimu Kirima be revoked.

(5) That pending the hearing and final determination of the Winding up Cause No.26 of 2011 Re-Kirima & Sons Limited, an injunction be issued to prohibit the Respondents from dealing or interfering with the Company’s shareholding.

(6) That the Respondents be ordered to refund to the Main Estate the monies collected on the strength of the fraudulent schedule of assets.

(7) That in the alternative to prayer 5, this Honourable Court do direct that any rents collected on the strength of the fraudulent schedule of assets as declared by the Respondents herein be held in an escrow account to be managed by a person to be appointed by the Court.

(8) That costs of this application be provided for.”

3. The grounds in support are the following;

“(a) That the 2nd Respondent and 3rd Interested Party/Respondent are the administrators of the estate of the late Gerishon Kamau Kirima in Nairobi High Court Succession Cause No.1298 of 2011 which is yet to be finally determined and distribution made to the heirs.

(b) The deceased herein, Fredrick Kamau Kirima is one of the beneficiaries to the Main Estate.

(c) One of the most valuable assets which form part of the Main Estate being shares and assets of Kirima & Sons Limited has been listed as one of the assets in the instant estate.

(d) That the 1st and 2nd Respondents when presenting the present Petition misrepresented assets of the Main Estate as forming part of the deceased’s estate with the full knowledge and collusion of the 2nd Respondent.

(e) That the shareholding of Kirima & Sons Limited to which the Respondents claim 20% is also the subject of a Court dispute in High Court Winding up Cause No.26 of 2011 where the Respondents are parties and which is yet to be determined.

(f) That the Respondents have on the strength of the fraudulent misrepresentation of the assets of the estate assumed control of property constituting the Main Estate and collected income generated therefrom to the detriment of the other beneficiaries.

(g) That the 1st and 2nd Respondents obtained the Letters of Administration herein fraudulently by making a false statement that the schedule of assets belong to the deceased whilst seized of the knowledge that they form part of the Main Estate.

(h) That the grant of Letters of Administration herein were obtained by means of an untrue allegation that the properties named in the schedule of assets belong to the deceased.

(i) That the 2nd Respondent has by presenting the present Petition and including assets of the estate of the late Gerishon Kamau Kirima acted ultra vires her duty as an Administrator and

against the best interest of the Main Estate which she administrates jointly with the Interested Party/3rd Respondent.

(j) That the 2nd Respondent is in a position of conflict of interest as she is acting contrary to the interests of the Applicants by misrepresenting facts before the final determination and distribution of the Main Estate.

(k) That the conflict of interest by the 2nd Respondent is adversely affecting the main estate against the tenets and spirit of the Law of Succession Act and the duties of an administrator.

(l) That the Interested Party who is the Co-administrator of the main estate with the 2nd Respondent has failed to take steps to safeguard the interest of the Applicants in the Main Estate despite complaints by the Applicants.

(m) That in the circumstances, it is the interests of justice that the grant issued be revoked and the proceedings stayed pending the distribution of the estate of the late Gerishon Kamau Kirima in High Court Succession Cause No.1298 of 2011.”

4. The Summons for Revocation is supported by the Affidavit of Margaret Wanjiru Kirima and the above matters are repeated. In addition and in submissions by Ms. Shaw she specifically sought for prayers 5 and 6 to save the estate from being wasted.

5. In response to the Summons aforesaid, Catherine Njeri Macharia filed a Replying Affidavit sworn on an unclear date but filed on 6th May 2015 and stated that together with her children, she was a dependant of the late Fredrick Kirima Kamau. That M/s. Kirima & Sons Ltd existed long before the deceased herein had died and yet his shares in that company are now being claimed by the Applicants. In any event, if the 2nd Respondent, Teresia Wairimu Kirima, is in breach of her duties in **H.C. Succession Cause No.1298/2011 In the matter of the Estate of Gerishon Kamau Kirima**, the recourse for the Applicants is to file an Application for a remedy in that Cause and not in the present one.

6. It is also the case for the 1st Respondent that she has not received any assets nor received any control of assets belonging to either Gerishon Kamau Kirima or her deceased husband and she has no intention of distributing property that does not belong to her husband's estate.

7. On her part, the 2nd Respondent by her Affidavit sworn on 11th September 2015 deponed that the Summons for Revocation of grant was speculative as no assets had been listed to which rent was being collected fraudulently neither is there evidence that either the present estate or that of Gerishon Kirima had been wasted.

8. Regarding a property known as L.R. No.209/2763/27, she deponed that the said property is registered in the names of Steve Kirima, Samuel Ndei Kirima and Frederick Kamau Kirima and cannot possibly be part of the estate of the late Gerishon Kamau Kirima in which the Applicants have an interest.

9. As for the 1st Respondent's contention that the deceased was a shareholder in M/s. Kirima & Sons Ltd, she stated that such a deposition was incorrect and that in fact the shareholding in that company is disputed save that the late Gerishon Kamau Kirima had 40% shareholding which entitles the survivors of Fredrick Kirima Kamau to a share of that shareholding.

10. Lastly, that it was in the interests of justice that the estate of the deceased herein should not be without a legal representative contrary to the wishes of the Applicants.

11. One other issue was raised by the Parties; that of a child known as P N K. The Respondents have asked that any question regarding the said minor's entitlement or otherwise to the estate herein should be addressed in camera and so I am unable to make any decision on that subject because I am devoid of all the necessary material particulars in that regard.

12. Further, on behalf of the Respondents, Ms. Mwenesi made submissions and of importance is her submission that of the three properties listed in the proceedings as available for distribution, none belong to the estate of the late Gerishon Kamau Kirima and should be distributed without recourse to that estate at all.

13. On alleged rents being collected by the Respondents, she submitted that there is no evidence of such rents and so fraud cannot be proved in the circumstances.

14. I have considered all the matters placed before me and I need to give a background to the dispute before me. I am in that regard aware that in **H. C. Succession Cause No.1298 of 2011**, the deceased in that Cause, Gerishon Kamau Kirima was the father of the Applicants herein as well as the deceased and husband of the 2nd Respondent.

15. It is not contested that the estate of Fredrick Kirima Kamau is listed as a beneficiary of that estate and in consent orders for release of certain monies from the former estate, the 1st Respondent has received those monies as the legal representative or survivor/spouse of Fredrick Kirima Kamau. She also appears in that capacity to represent that estate's interests in all hearings relating to Gerishon Kamau Kirima's estate.

16. Having so said, what are the issues arising for determination? From the Application, responses and submissions, the following issues require determination;

(i) Whether the present proceedings should be stayed pending the determination of **H.C. Succession Cause No.1298/2011**.

(ii) Whether the grant issued on 29th September 2014 should be revoked.

(iii) Whether the Respondents should be prohibited from dealing or interfering with the shareholding in M/s. Kirima Sons Ltd. pending the determination of **Winding Cause No.26 of 2011**.

(iv) Whether the Respondents should be ordered to refund to the estate of Gerishon Kamau Kirima any monies collected from the list of assets declared in this estate.

and

(v) Whether any rents so collected should be held in an escrow account to be managed by persons to be appointed by this Court.

17. Before I address the above questions, what are the assets declared as belonging to Fredrick Kirima Kamau? They are;

i. Plot No.209/2763/27 Gikomba

ii. 50% ownership in Kitisuru NSSF Block 101/222B

iii. 20% shareholding in M/s. Kirima & Sons Ltd.

18. It is not contested that because the grant of Letters of Administration has not been confirmed, the said assets have not devolved to the Respondents but as is expected of them by **Sections 82 and 83 of the Law of Succession Act**, they are entitled to do certain things in relation to the estate including collecting rents from any of the assets that generate such rent.

19. In that context, I see that the main issue arising from question No.(vi) above is whether in fact any of the three assets listed above generates any rent. Without admitting or denying that in fact rents are

payable, the Respondents have demanded that the Applicants ought to give evidence that in fact rents are collectable but the Applicants have not answered that demand. I have looked at the record and I am unable to ascertain whether indeed rents are collectable from either the Gikomba or Kitisuru properties and whether M/s. Kirima & Sons Ltd has any properties where rents are collected by the Respondents.

20. I have also perused **H.C. Succession Cause No.1298 of 2011** and the issues surrounding M/s. Kirima & Sons Ltd are so convoluted as to make it difficult for me to make a specific order in this Cause touching on it.

21. That then leads me to question No.(iii) above. Again, that question is difficult to address for reasons above and also for reasons that I am not seized of **H.C Winding up Cause No.26 of 2011** and I do not know how it relates to the present Cause or **H.C Succession Cause No.1298/2011**. To make drastic orders such as are sought in a legal and factual vacuum is an invitation I decline to accept.

22. That leaves me what I consider to be the two substantive questions to address; whether a stay order should be granted and whether the grant herein should be revoked. I will address the revocation of grant first for reasons to be seen shortly.

23. **Section 76** of the **Law of Succession Act** provides as follows;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the Court orders or allows;

or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the Court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

24. I have elsewhere above reproduced the grounds in support of the summons for revocation of Grant and it is clear that **Section 76(a)** and **(b)** are pertinent to the determination of the same. If that be so, has fraud been proved and were the proceedings to obtain the grant defective in substance?

25. On fraud, it is very difficult for me on the basis of what has been placed before me to say that the conduct of the Respondents was fraudulent. Questions around whether Teresia Wairimu Kirima could be an administratrix both in the estate of her husband (Gerishon Kirima) and her son (Fredrick Kamau Kirima) cannot amount to fraud because under **Section 56** of the **Law of Succession Act** I see no bar to such a

person applying for a grant of Letters of Administration. However, I have seen evidence that the ownership of M/s. Kirima & Sons Ltd is confusing. While the 1st Respondent claims that 20% shareholding in it belongs to her deceased husband, the 2nd Respondent disputes the same without stating what shares, if at all, the deceased held in that company. Such a dispute leads me to conclude that something is amiss but like I stated above I do not have sufficient material to enable me make any decision regarding that matter save that I shall make appropriate orders shortly.

26. On the two other properties in question; NSSF and Gikomba, I have noted that there is a dispute as to whether these properties were acquired solely and directly by the deceased or they were given as gifts *inter vivos* by Gerishon Kirima during his lifetime. Catherine Njeri Macharia has in that regard stated that she and her children were dependants of Fredrick Kirima Kamau who has rights to the larger Kirima estate. **Section 28** of the **Law of Succession Act** provides that in making a provision for dependants of a deceased person the Court must ask itself “***whether the deceased had made any advancement or other gift to the dependant during his lifetime.***” Even if the deceased herein was not a dependant of the late Gerishon Kirima, under **Section 66** of the said **Act**, in distributing a polygamous intestate’s estate the Court, while guided by **Section 40** of the **Act**, must also take into account any other facts placed before it, including any properties given as gifts to any of his survivors to ensure equity and the equality expected by **Section 40**. In other words for as long as the properties above are contested, it would be best if they did not devolve to any survivor of the late Fredrick Kirima, until the estate of his father, Geishon Kirima, is fully distributed and the Court has taken into account the question raised in this Cause.

27. Having so said, should I stay the present Cause until **H.C. Succession Cause No.1298/2011** is finalized? As I understand it, stay orders are a matter of discretion and like all discretion, it must be exercised judiciously. In the present Cause, I have said that I see an intertwining thread between this Cause and that of Gerishon Kirima.

28. I also see an intertwining thread with another Cause **H. C. Succession Cause No.290/2014 – In the Matter of the Estate of Samuel Ndei Kirima**. I have laboured for 5 years to try and finalise the distribution of the estate of the late Gerishon Kirima and although it is true that I advised the filing of the latter two Causes, it was advise given to clarify many unclear issues and it is now obvious that there is need to carry the three Causes side by side.

29. If that be so, I see great value, both practical and judicial, in granting stay of these proceedings to enable clarification of the intertwining issues in all the three Causes.

30. In the event, the Application dated 18th March 2015 is allowed only to the extent that these proceedings are stayed pending further orders of this Court.

31. As was agreed by the Parties, although the properties in **H.C Succession Cause No.290/2014 - In the estate of Samuel Ndei Kirima** are different, the issues in contest are the same and as further agreed, this Ruling will apply *mutatis mutandi* to **H.C Succession Cause No.290/2014** which is also stayed until further orders of this Court with costs being in the Cause. A copy of this Ruling shall be placed in that file for the record.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JANUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mrs. Shaw for Applicant

Mrs. Mwenesi for 1st Respondent and holding brief for Mr. Mwenesi for 1st Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

A copy of the Ruling to be supplied.

ISAAC LENAOLA

JUDGE