



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 247 OF 2014**

***In the matter of the Estate of HEZRON KINGARU GICHU (Deceased)***

**SAMUEL WARUI GICHU.....APPLICANT/ADMINISTRATOR**

**VERSUS**

**CAROLINE KAARI KARIUKI.....1ST RESPONDENT/PROTESTER**

**JOSEPH KARUIKI ISHMAEL NDWIGA.....2ND RESPONDENT/PROTESTER**

**R U L I N G**

1. The administrator/applicant Samuel Warui Gichu filed an application dated 18/8/2015 while the protester/ respondents filed another application dated 27/4/2015.
2. The administrator's application dated 27/4/2015 seeks for orders that the respondents, their servants and agents be restrained from entering, working on, picking tea, cutting trees or in any way interfering with or wasting property on parcel No. Loc 8/Mwatharite/896 and 1069, the deceased's  $\frac{1}{4}$  acre out of Loc/Kanyenyaini/970, motor vehicle registration No. KAR 293F, KAU 275C & KBH 230W pending hearing and determination of the matter.
3. The respondents/protesters seek for orders that the respondents surrenders motor vehicle registration No. KAR 293F, KAU 275C & KBH 230W to the applicant. The application is supported on the affidavit of Caroline Kaari Kariuki the 1<sup>st</sup> protester.
4. In the affidavit, the respondent/protester states that she is the widow of the deceased. She adopted the contents of her affidavit sworn on 24/3/2015 in the application for revocation of grant and the one sworn on 13/4/2015 in opposition of the 1<sup>st</sup> respondent's application for confirmation of grant. She states that her late husband was the owner of Loc/8/Matharite/896, Loc/Matharite/ 1069 and  $\frac{1}{4}$  acre out of Loc/Kanyenyaini/970. The deceased also the owner of vehicles registration Nos. KAR 293F, KAU 275C and KBH 230W.
5. The respondents have entered the deceased's land and have been picking tea, cutting down trees causing loss to the estate. It is claimed that the respondents have also taken the mentioned vehicles to undisclosed location.
6. The administrator swore the replying affidavit on behalf of the two other brothers stating that the deceased was a brother to the applicants and was not married and died intestate. Prior to his death, he had received threats from the 1<sup>st</sup> protester. Prior to his death, the deceased incurred a bill of KShs.4,911,000/= at Aga Khan Hospital. The 3<sup>rd</sup> applicant gave Aga Khan Hospital a guarantee of the outstanding amount

when the deceased was being transferred to Kenyatta National Hospital. He did this by giving a title deed for Loc/Matharite/1750 while one Bernard Kamau pledged his salary for payment of part of the bill. Due to the financial burden incurred, the family members decided to be plucking the tea after the grant of letters of administration in order to ease the financial burden.

7. It is argued that the respondents did not participate in the fund raising, admission and burial of the deceased and this proves that she was not his wife. The applicant applied and was appointed as the administrator of the estate of the deceased. In order to offset the bill, he got a court order to sell four vehicles raising KShs.1,661,500/=. The hospital bill has not been cleared to date and the guarantors may suffer irreparable loss if the security they offered is sold. The protester is a stranger to the estate of the deceased and has not demonstrated that she was married to him.

8. It is argued that the protester is the one who has been inter-meddling with the estate of the deceased by collecting rent from the tenants of the estate.

9. The respondents filed joint submissions for both the application dated 18/8/2015 and 27/4/2015. With regards to the application dated 27/4/2015 she submitted that she is the widow of the deceased who died on 8/4/2014. The applicants secretly petitioned the High Court at Muranga for letters of administration vide succession number 307 of 2014 and the 1<sup>st</sup> respondent was granted letters of administration. The applicants have since been inter-meddling with the estate and have caused great wastage, damage and loss to the protester. The acts of the 1<sup>st</sup> respondent have culminated to the present application for preservation of the deceased's estate.

10. The administrator submitted that the hospital bills for the estate amounted to KShs.4,911,000/= and the amount realized after selling four motor vehicle belonging to the estate was not enough to offset the bill. The protesters filed a petition for grant of letters of administration to which the applicants filed a protest. The 1<sup>st</sup> protester has not proved that she was a wife of the deceased by proving any evidence of existence of the marriage.

11. The 1<sup>st</sup> applicant appointment as the administrator of the estate of the deceased has never been revoked. The protesters are strangers to the estate of the deceased as the applicant and the deceased were not cohabiting together at the time of his death, she did not participate in the admission and burial of the deceased. The allegation by the applicant that the deceased did not leave any liabilities is false as there is a pending hospital bill which has not been disputed by the applicant.

12. The administrator claims that he cannot be accused of inter-meddling with the estate of the deceased as he is the administrator. Tea delivery records annexed to the application cannot be said to be prove of tea picking from the farm of the deceased. He states that he was allowed by court to sell some vehicles belonging to the estate and therefore those vehicles do not form part of the estate.

13. The administrator alleges that the protesters are strangers to the estate as the 1<sup>st</sup> protester was not married to the deceased. She had the burden of proving that she was married to the deceased at the time of his death but she did not. In the affidavit in support of the application for revocation of grant sworn on 24/3/2015, the 1<sup>st</sup> protester herein has attached a birth certificate as annexure CCK2 indicating that the deceased was the father of her child Gloria Hilda Wanjiru. There is however no evidence that she was married to the deceased.

14. On inter-meddling, it is not in dispute that the administrator was issued with the letters of administration intestate. It is also not in dispute that he was granted a court order to dispose of four of the vehicles belonging to the deceased for purposes of clearing the hospital bill at Aga Khan Hospital. The copy of the special grant to sell the four motor vehicles is attached as annexure SWG to the affidavit by the administrator opposing the issuance of grant sworn on 22/8/2014.

15. Section 107 of the evidence act provides that;

(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that facts exist.*

(2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

16. In the case of **DANIEL TOROITICH ARAP MOI VS MWANGI STEPHEN MURIITHI & ANOTHER [2014] eKLR** the court held that

*In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the Evidence Act, as follows;*

*107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

17. In view of the above, the 1<sup>s</sup> protester has the burden of proving that she is a beneficiary of the estate by virtue of being the widow of the deceased. The issue of marriage can only be proved through evidence which has not been done. The 1<sup>st</sup> protester requires to have a ground to stand on otherwise known as *locus standi* to be able to bring an application for an injunction seeking to stop inter-meddling of the estate.

18. None of the parties in this case explained where they reside and who takes care of the deceased's home or property. I find this abit strange. All having been considered, I find this application dated 21/04/2015 unmerited.

19. The 2<sup>nd</sup> application is the one dated 18/8/2015 seeking to allow the administrator to sell motor vehicle KAR 293F, KAU 275C and KBH 230W belonging to the deceased's estate in order to offset a hospital bill at Aga Khan Hospital amounting to KShs.789,500/= and pay creditors of the estate.

20. The other prayer is that the administrator Samuel Warui be allowed to withdraw Kshs.1,661,500/= from Family Bank account Embu, Universal Traders Sacco and savings from Neno Sacco to offset the hospital bill of the deceased and to pay some creditors. The application is supported by the affidavit of Samuel Warui Gichu stating that letters of administration were issued to him but that the same were yet to be confirmed.

21. He claims that the deceased died due to chemical burns inflicted on him by unknown persons and incurred a bill of Kshs.4,911,000/= at Aga Khan Hospital. He was later transferred to Kenyatta National Hospital. The deposits for Aga Khan were sourced from the welfare of Neno Sacco where the deceased was a member and also from close family members.

22. The understanding was that the contributions by the family members would be refunded to them at a later date. Before the deceased was transferred from Aga Khan, his brother Peter Mwega Gichu gave a title deed of Loc8/Matharite/1750 as security while Benard Kamau Gachoka pledged his salary. The administrator petitioned the court to be allowed to sell some of the deceased's assets. He was ordered to sell four vehicles fetching KShs.1,610,000/=.

23. Part of the money collected KShs.68,000/= was used to pay selling agents, guards and drivers leaving a net of KShs.1,542,400/=. This together with the proceeds of a fund raising were used to offset the hospital bill leaving a balance of KShs.789,500/=. Another amount of KShs.1,661,500/= is owed by the estate to persons who contributed their money as afore stated. Since the hospital had given the guarantors up to 27/6/2014 to clear the bill, their securities have been sold causing them irreparable loss. The hospital has given a notice that it intends to take legal action for nonpayment. The grant has not been filed as there is an objection filed by Caroline Kaari which may take time to be determined.

24. In a replying affidavit, the protester stated that a fund raising done after the death of her husband raised KShs.1,600,000/= which was paid directly to the hospital. The administrator was later given a court order and allowed to sell five motor vehicles belonging to the estate of the deceased. He managed to sell four vehicles proceeds of which remain unaccounted for to date. The protester states that she is aware that sale proceeds were over three million. The administrator and his brothers have been picking tea from the deceased's parcels to allegedly help clear the hospital bill. The three vehicles that the applicant intends to sell have been in his possession and he has not disclosed about the proceeds since he has been doing business with them.

25. The applicant submitted that although he had earlier on sold four vehicles, the proceeds were not enough to offset the hospital bill as there is still an outstanding amount of KShs.789,500/=. The family of the deceased borrowed from family members and promised to pay back. The allegations that KShs.1,600,000/= was raised during the fund raiser are false. The minutes attached to the replying affidavit are not authentic as they are not even signed.

26. The protestor/respondent submitted that the deceased left a widow and a child who rank first in priority as far as the estate of the deceased is concerned and respondent is also entitled to a life interest. The administrator in his affidavit in support of the application for confirmation of grant and replying affidavit to the protesters application dated 27/4/2015 disclosed the proceeds of the fund raising and sale of the four motor vehicles.

27. The respondent has not proved that she was married to the deceased. It is not true that the estate of the deceased did not have liabilities. The administrator has a duty under Section 79, 82 and 83 of the Law of Succession Act to pay the just debtors of the estate of the deceased and cannot be sanctioned by section 45 of the said Act.

28. Form P&A.5 shows the assets of the deceased and that the liabilities include hospital bill Aga Khan University Hospital for KShs.4,700,000/= and a hospital bill for Kenyatta National Hospital for KShs.211,000/=. The applicant in the supporting affidavit states that he needs to sell three more vehicles and to access Family Bank Embu account and Embu Universal traders Sacco account to pay the hospital bill at Aga Khan University Hospital and to pay some creditors of the estate of the deceased. He also states that there are family members who need to be repaid after they helped cater for the hospital bill.

29. The applicant has not disclosed who he refers to as "*other creditors of the estate of the deceased*" because form P&A.5 is clear that there were only two creditors of the estate of the deceased at the time of filing the succession.

30. The applicant has also not explained how much was collected from the sale proceeds of the four motor vehicles so as to shed light on whether the amount raised was misappropriated. Selling three more motor vehicles and withdrawing KShs.1,661,500/= from both accounts owned by the deceased is unjustified without first proving that the money recovered from the earlier sale was not misappropriated.

31. The applicant has a duty as the administrator to ensure preservation of the deceased's estate pending determination of the succession. It is his duty to account for every penny of income from deceased's assets. The respondent states that the applicant has been picking tea from Muranga farms of the deceased and has not accounted for the tea income.

32. The applicant was given an order in Muranga Succession Cause No. 307 of 2014 to sell three vehicles of the deceased to clear the hospital bill. The vehicles were sold but the funds have not been accounted for. In his affidavit, the applicant has attempted to explain how the funds were spent. However, this falls below accountability standards. Proper accountability calls for agreement for sale of the vehicles, receipts for any payments made among other documents. Having not accounted for the proceeds of sale of the three vehicles, the applicant should not expect to get another court order to sell more vehicles.

33. The applicant has not explained what he is doing with the other vehicles of deceased in his custody. The respondent said the vehicles are in use by the Applicant for public transport business. If

this is the case, the applicant has a duty to the court to account for the income from the vehicles. This income should as well have been used to clear the pending hospital bills.

34. As for creditors of the estate, their particulars have not been given on who they are and how much they are owed. Are they creditors of the estate or creditors of the administrator? The Law of Succession Act provides for the manner in which creditors can make their claim in the deceased's estate. Only two creditors were named in these proceedings being Aga Khan University hospital and Kenyatta National Hospital. The other creditors are not known and it is apparent that they did not exist at the time these proceedings were filed.

35. I find the two applications dated 18/08/2015 and 27/04/2015 unmerited and dismiss them accordingly.

36. The parties should fix the protest for hearing without delay to facilitate expeditious determination of this case.

37. Each party to meet their own costs of these applications.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF SEPTEMBER, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Ms. Wairimu for petitioner**