



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO.1298 OF 2011
IN THE MATTER OF THE ESTATE OF GERISHON KAMAU KIRIMA (DECEASED)

RULING

1. The Application before me is dated 18th August, 2015 and has been made by Mr. Wanjau Kirima, a beneficiary of the Estate of the Late Gerishon Kamau Kirima, seeking the following orders;
 - a. *That an amount of Kshs.16,161,403.00 be paid to Wanjau Kirima from the account of G. K. Kirima Account No.6793310018 held at Commercial Bank of African, Wabera Street branch, being refund for school fees paid by Wanjau Kirima, since the last advance for school fees made in September, 2014.*
 - b. *That the administratrixes be and are hereby directed to execute the necessary bank documents for purposes of implementing order (1) above.*
 - c. *That the interest charged by the bank in respect of the overdraft obtained by Wanjau Kirima to cater for school fees in the interim and other related charges of approximately 4% equivalent to Kshs.40,000.00 be borne by the Estate.*
 - d. *That the costs of this application be in the cause.*
2. Mr. Wanjau' Counsel submitted that he is entitled to the refund of the money he had paid as school fees owing to a Court order in which the beneficiaries of the deceased's Estate consented to payment of Kshs.2,000,000.00 thrice a year to each of them on account of school fees for the deceased's grandchildren.
3. He also claims that the Kirima Education Trust was created by the deceased to ensure that his grandchildren, great grandchildren and generations to follow would receive a decent education as is provided under **Clause 2(a) of the Trust Deed**. He also alleges that Mr. Wanjau had paid school fees to the tune of Kshs.16,161,403.00 out of his own sources including obtaining a loan from Commercial Bank of Africa.
4. He further claims that the Applicant had taken it upon himself to reach out to each of the beneficiaries for the purposes of having them consent to the refund he is claiming but none of the beneficiaries has responded.

5. Mr. Ojiambo and Mr. Arwa for Anne Kirima and Susan Wangari appearing in person supported the Application. Mr. Mungla for Maria Kirima indicated to the Court that he did not have instructions on the matter at hand.
6. Jane Kirima, Margaret Kirima and Ruth Kirima did not file any response to the Application neither did they make any submission on the same.
7. Teresia Kirima and Stephen Kirima opposed the Application through Affidavits sworn on 11th September 2015 and 14th September 2015 respectively. Alice Kirima filed Grounds of Opposition dated 14th September, 2015 and Mr. Mwenesi learned Counsel for Teresia Kirima, Mr. Kyalo for Stephen Kirima and Irene Kirima and Mr. Nyamu for Alice Kirima made submissions on the same. Rachel Ndei and Catherine Njeri also opposed the application.
8. According to Teresia Kirima, Mr. Wanjau has already been advanced a sum of Kshs.16,000,000.00 and yet he had not filed accounts on how he had spent that amount he had received from the Estate. It is also her submission that the Estate is not responsible for educating Mr. Wanjau's children.
9. Mr. Stephen Kirima deponed that the orders sought by Mr. Wanjau could only be made as partial distribution of the Estate and only if there was consent from all the family members. He also states that the amount advanced thrice a year to each of the beneficiaries of the Estate was sufficient to supplement for the school fees of the deceased's grandchildren. Further, that the said amount had been advanced to all beneficiaries and it was not clear why Mr. Wanjau had accrued a claim of the amount in issue. In any event, he claims it was not the responsibility of the estate to pay school fees for the deceased's grandchildren and each of the Beneficiary used to individually pay for their children's school fees during the lifetime of the deceased. It is therefore his contention that the Kshs.2,000,000.00 advanced to each of the beneficiaries was a privilege which should not be abused by any of them or be seen as a right.
10. In her Grounds of Opposition, Ms. Alice Kirima states that the issue of school fees for the beneficiaries' children was not binding on the Estate pending distribution of the Estate. That the children of Mr. Wanjau were not dependants of the deceased prior to his demise and it is therefore her contention that school fees in respect of the beneficiaries' children could only be provided by consent of the parties.
11. I have considered the rival submissions made. The singular issue before me is whether this Court can order a refund of Kshs.16,161,403.00 to Mr. Wanjau Kirima on account of school fees he had allegedly already paid. Is there any known law that entitles this Court to make such orders?
12. Mr. Wanjau's application is premised on **Section 47** of the **Law of Succession Act, Rules 49, 59(2)** and **73** of the **Probate and administration Rules**.
13. In that regard, **Section 47** of the **Act** provides that;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient”

Rule 49 states that;

“A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by an affidavit.”

Rule 59(2) reads as follows;

“In the case of a pending proceedings, the court or a registrar may of its or his own motion or at the request of any party, but without a formal application, cause the matter to be set done for mention before the Court or register upon notice to such persons (if any) as the Court or registrar may direct.”

Section 73 then states;

“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

14. In the above context, while this Court has the jurisdiction to determine any application under the Act and make any orders it deems fit, the law relied upon by Mr. Wanjau does not grant this Court the powers to grant him the orders he has sought. My understanding of the law stipulated above is that the Court has powers to make any orders necessary for the ends of justice, but for it to do so, it can only do that which the law has mandated it to do. In the absence of any specific law empowering the Court, I am unable to grant the orders sought by Mr. Wanjau.

15. But suppose in fact I am able to grant the orders in the interests of justice? In that regard, I note that the application before me was also premised on consent orders granted by this Court and it is indeed true that the Court on 28th November, 2012 by consent of the beneficiaries made the following order;

“The following beneficiaries of the late G. K. Kirima with school going children (grandchildren of the late G. K. Kirima) i.e. Alice Kirima, Samuel Kirima’s family, Fred Kirima’s family, Stephen Kirima, Anne Kirima, Ruth Kirima, Gathoni Kirima, Wanjau Kirima, Irene Kirima and Wanjiru Kirima shall each received Kshs.1,000,000.00 from the estate to cater for school fees pending finalization of case.”

By consent of all the beneficiaries, a similar order was made on 20th December, 2012 providing for an additional payment of Kshs.1,000,000.00 to the same beneficiaries with school going children.

16. Further, on 26th March 2013, the Court by consent of the beneficiaries, made the following orders;

“Further to the orders issued on 28th November, 2011 Kshs.2,000,000.00 every term starting 8th April, 2013 shall be paid to Alice Kirima, Samuel Kirima’s family, Fred Kirima’s family, Stephen Kirima, Anne Kirima, Ruth Kirima, Gathoni Kirima, Wanjau Kirima, Irene Kirima, Wanjiru Kirima, Maria Kirima and Susan Kirima on account of school fees.”

17. On 25th July, 2014, the beneficiaries further consented as follows;

“Further to the consent order issued on 26th March, 2013 Mr. Wanjau Kirima shall receive an advance of Kshs.2,000,000.00 to cater for school fees of his children and the said sums to be paid out of the Estate of the late G. K. Kirima from Account No.6793310018 at commercial Bank of Africa, Wabera Street.”

18. On 12th September, 2013 by consent of the beneficiaries, another order was made to the effect that, ***“Kshs.2,000,000.00 shall be paid to Wanjau Kirima as his quarterly advance form the Estate Account.”***

19. It is against the above background that Mr. Wanjau now claims a refund of Kshs.16,161,403 from the Estate’s account. He states that the last payment made to him was in September, 2014 and he has had to fund the education of his children who are schooling in South African out of other

means including bank loans and advances. It is his position therefore that he is entitled to a refund.

20. Those who oppose the Application have done so on two grounds; firstly, that paying Mr. Wanjau the amounts as he claims would amount to partial distribution of a heavily contested estate. Secondly, that the Estate of G. K. Kirima is not responsible for the education of Mr. Wanjau's children as they are not beneficiaries neither was the deceased responsible for their education expenses during his lifetime.

21. Looking at the unique facts of the estate before me, it is clear that at all times, payments have been made out of the deceased's Estate with consent of all the beneficiaries. There is specifically a consent order made on 26th March, 2013 to the effect that each of the beneficiaries with school going children to be paid Kshs.2,000,000.00 per term beginning 8th April, 2013. None of the beneficiaries is claiming that the said consent was made by fraud, coercion or misrepresentation. In fact, at the hearing of the Application, the issue of the consent order did not arise at all. That consent order has never been set aside and it is therefore binding on all the beneficiaries.

22. Having said so, I heard Mr. Wanjau to say that he has not received the money he is entitled to this year. However, Mrs. Teresia Wairimu Kirima in paragraph 3 of her Affidavit stated as follows;

“That owing to technical hitches at the bank I was not able to obtain a statement print out showing that in fact Wanjau Kirima has received money as ordered by the Court as follows;

- i. ***On 15th April, 2013 by Account transfer TT13105H6FHF for Kshs.2,000,000.00***
- ii. ***On 29th August, 2013 by Account transfer TT132410PNCT for Kshs.2,000,000.00***
- iii. ***On 23rd December, 2013 by Account transfer TT13357FOH11 for Kshs.2,000,000.00***
- iv. ***On 9th April, 2014 by Account transfer TT14099NDQHX for Kshs.2,000,000.00***
- v. ***On 28th July, 2014 by Account transfer TT14280FFNKL for Kshs.2,000,000***
- vi. ***On 7th October, 2014 by Account transfer TT14280FFNKL for Kshs.2,000,000.00***
- vii. ***On 8th April, 2015 by Account transfer FT150986XD2W for Kshs.2,000,000.00***
- viii. ***On 25th August, 2015 by Account transfer FT15237JGSLH for Kshs.2,000,000.00 (all totaling to Kshs.16,000,000)”***

23. The above assertion has not been denied.

24. It is also uncontroverted that Mr. Wanjau's children are neither the beneficiaries of the Estate of G. K. Kirima nor were they dependants of the deceased. I am therefore of the view that Mr. Wanjau is only entitled to the payments that were consented upon by all the beneficiaries and the interests of justice cannot be served by partial distribution of the estate to one beneficiary whatever his circumstances, unless the beneficiaries consent, as they have previously done, to such partial distribution.

25. In the circumstances, the Application dated 18th August 2015 is dismissed and costs shall be in the cause.

26. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Ngacha for Applicant

Mr. Ojiambo present and Mr. Ligunya and Mr. Jelle present

Mr. Nyaberi present

Mr. Kyalo present

Mr. Nyamu present

Susan Kirima present

Margaret Kirima present

Catherine Njeri present

Rachael Ndei present

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

By Court

1. Ruling on the Application dated 14/9/2015 to be delivered on 22/1/2016.
2. Any party is at liberty within 30 days to file an Application under **Section 45** of the **Law of Succession Act**.
3. Mention on 11/12/2015.

ISAAC LENAOLA

JUDGE

13/11/2015