

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 777 OF 1985

IN THE MATTER OF THE ESTATE OF KIMARI GITERE MACHARIA (DECEASED)

RULING

1. The Motion dated 27th July 2012 seeks amendment of the order made by Lenaola J. on 27th January 2012 so as to list the assets that make up the estate of the deceased. The application is at the instance of Jemimah Jane Waceke, who depones that the Land Registrar has declined to give effect to the order of 27th January 2012 as the assets the subject of the order had not been listed therein.
2. The application is opposed by Charity Waceke Kimari, the respondent. Her take is that there are no grounds for varying the order of 27th January 2012 as the learned Judge had been clear that the assets to be affected by the order were those that were in the deceased's name as at the date of filing the petition for grant but not at the date of his death. She asserts that the order ought to be limited to the assets set out in the petition, and should exclude the assets dealt with in **HCSC No. 1262 of 2004**, In the matter of the Estate of Joyce Wachu Kimari, that is to say Githunguri/Githunguri/165 and T. 209.
3. In her rejoinder the applicant asserts that the order of 27th January 2012 was not limited in time or to the property listed in the petition. It covers assets not listed in the petition. In her view that includes assets that were unlawfully transferred between the date of the deceased's death and the date of the filing of the petition herein. Indeed, she states that the order of 27th January 2012 clearly nullified all such unlawful transfers. In any event, she argues, transfer of assets of a dead person without court sanction amounts to intermeddling.
4. Directions were given on 14th May 2014 that the said application would be disposed of by way of written submissions. Both sides did file their respective written submissions. The applicant's submissions are dated 28th May 2014 and were filed herein on even date. The respondent's submissions are dated 23rd June 2014 and were lodged at the registry on 24th June 2014. The submissions were highlighted on 21st October 2014.
5. The matter for me to determine is fairly straight forward. I am called upon to interpret order number (ii) of the ruling delivered by Lenaola J. on 27th January 2012, which was formally extracted on 12th March 2012, to enable me determine the assets that the learned Judge had in mind in making the said order.
6. Order (ii) as rendered in paragraph 22 of the ruling states as follows:-

“All the properties listed in the Petition for a grant of Letters of Administration as registered in the deceased's names and any other property (if at all) not so listed, shall all revert to the deceased's names pending fresh distribution. For avoidance of doubt, all titles issued and sub-divisions thereof are nullified.”
7. The order was formally extracted on 12th March 2012, in the following terms:-

“That all the properties listed in the petition for a grant of Letters of Administration as registered in the deceased’s names and any other property (if at all) not so listed shall all revert to the deceased’s names pending fresh distribution. For avoidance of doubt all titles issued and subdivisions thereof are hereby nullified.”

8. My understanding of the order is that it refers to all the assets that made up the estate of the deceased. The estate of the deceased ideally comprises of all the assets that he died possessed of. As a matter of course all the assets and liabilities that he died possessed of should be what goes into the schedule in the petition for grant of representation. Ideally, no transfers of any of the assets ought to take place between the date of death and the date of the petition for representation. The order of 27th January 2012 refers, therefore, to all the assets that the deceased died possessed of regardless of whether they were listed in the petition or not.
9. The applicant has attached in her affidavit sworn on 10th October 2013, at paragraphs 7 and 8, the assets that formed part of the estate of the deceased as at the time of death which have since been transferred. The respondent did not file a reply to counter the allegations of fact made in that affidavit. It is therefore not disputed that these assets formed part of the estate of the deceased as at the date of death. They ought therefore to be among the assets the subject of paragraph 22(ii) of the ruling of 27th January 2012 and Order 1(ii) of the formal order extracted therefrom on 12th March 2012.
10. The Motion dated 27th July 2012 invites the court to vary the order of 12th March 2012 or to amend it so that order 1(ii) specifically sets out the assets the subject of the order. I find merit in the said application for the reasons given above. I do hereby allow the application as prayed. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF DECEMBER, 2015.

W. MUSYOKA

JUDGE