



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CASE NO. 516 OF 2013

IN THE MATTER OF THE ESTATE OF

EVANTUS GIKANDI MAINA DECEASED

AND

MIRIAM WAITHIRA IRUNGU

MARGARET WAIRIMUPETITIONERS

RULING

1. By summons under rule 73 of the Probate and Administration Rules the 1st Petitioner/applicant sought the following orders pending the hearing of application dated 23rd July 2013.
 - i. ***Motor vehicle registration No. KBB 921L Toyota Townace be released to the applicant forthwith.***
 - ii. ***All properties movable or immovable registered jointly or solely in the name of the deceased herein and charged or mortgaged to any money lending institution should not be sold or interfered with in any manner whatsoever until further orders of the court.***
 - iii. ***Motor vehicle registration No. KBM 775H registered in the name of Elam Agencies Ltd be released to the applicant forthwith.***
 - iv. ***The Respondent by herself her agents servants or employees be and are hereby restrained by way of injunction from interfering in any manner whatsoever with the applicants quite possession and enjoyment of her matrimonial home situate on Karatina town Block 1/320 as well as the applicants motor vehicle spare part shop situate on Karatina Block 1/320.***
1. The application was based on the grounds that the estate of the deceased was being sold by lending institutions for recovery of unpaid loan. The respondents had detained the applicant's business equipments and tools of trade thus paralysing the said business. It was further grounded on the ground that the court order dated 20th August 2013 was not clear and that the applicants children were in dire need of upkeep and maintenance.
2. The application was supported by the affidavit of MIRIAM WAITHIRA IRUNGU in which she deponed that she was alive to the court order made on 20th August 2013 and that since the said orders were made the estate of the deceased had undergone extensive negative change and stated that a statutory notice of sale of LR NO. OTHAYA/KIHUGIRU/2109 had been issued by Corporation Bank of Kenya for default in repayment of a loan balance of Ksh. 7,890,532.33 and the property can be sold any time.

3. It was further deponed that the NIC Bank had already sold motor vehicle registration No. KBN 922D Toyota Prado. Motor vehicle registration No. KBM 775H had been repossessed by NIC Bank for a balance of Ksh. 800,000 and that the respondent paid the balance and detained the motor vehicle which is in the name of Elam Agency wherein she is a director.
4. It was further deponed that motor vehicle registration No. KBB 921L which she personally used to secure a loan from Kenya Women Finance Trust is still held by the respondent and that the applicant pays Ksh. 90,000/- every month and that the court order in respect to the said motor vehicle is not very clear and that it used to serve as transport for business known as Mephans Auto Spares Ltd. It was further deponed that motor vehicles registration Numbers KBB 998K, KAR 932J KBA 156N and KAD 994L were seized by the respondent before the succession cause was filed and that the respondent has taken advantage of the court order of 20th August 2013 to cripple her finances and render her family destitute.
5. It was further deponed that tanker for KAD 944L and its wheel had been sold by the respondent after the court order. Motor vehicle registration No.KBA 947T which should be used by her children was seized by the respondent, motor vehicle registration No. KBF 511Y was also seized by the respondent though the applicant used to use it for transporting safaricom products. Motor vehicle registration No. KBB 998K was involved in an accident while in the care of the respondent and is a write off dumped in Nakuru.
6. It was further deponed that the respondent has taken over residential rooms on Konyu/Baricho/705/68 where in the applicant used to collect rent and deposit the money in her sons account. She has been forcefully evicted from the main shop where Elam Agencies Ltd was located on Karatina Town Block 1/174 and Aguthi/Gatitu/667/119 where the respondent is a trustee and the deceased a beneficiary.
7. It was deponed that the respondent disconnected electricity to the applicant flat on Karatina town/Block1/320 which was constructed by the deceased as her matrimonial home thereby forcing her to move to Nairobi where she pays a monthly rent of Kshs. 25,000/- and that she needs the amount to make provision for her children.
8. The application was certified urgent and fixed for interpartes hearing on 6th May 2014 and in reply thereto the respondent filed a replying affidavit on 6th May 2014 in which she deponed that the applicant left Karatina in August 2013 and that she broke into the house at night and attempted to ferry out goods and was stopped by other tenants and the police ordered her to return the goods in the house.
9. It was further deponed that the respondent continue to pay the loans to Equity for the eight motor vehicles and that the applicant was ordered to fix a date for hearing but keeps on shifting goal posts and that the respondent had never hired any person to disrupt the activities of the applicant.
10. The respondent filed a further affidavit wherein she deponed that the applicant has motor vehicles registration Nos. KBN 922D Prado valued at Ksh. 5 million. KAB 363G a Mitsubishi about 4 Million and KAS 517T Toyota Land Cruiser valued at Ksh. 2,380,000.
11. It was deponed that motor vehicle registration No. KBM 775H was repossessed by NIC Bank on 10th May 2013 and impounded at Nakuru police headquarters. The Respondent paid Ksh.800,000/- to NIC and spent Ksh. 115,000/- in repairs. It was further deponed that motor vehicle registration No. KBM 775H belongs to a limited liability company and therefore not subject to this proceedings
12. It was deponed that motor vehicle registration No. KAR 932J had stalled at her home and KBB 998K had been in the possession of Nahashon Wachira Maina the brother of the deceased. It was further deponed that KBH 156N is a tanker which was bought after they sold two tankers KUG 396, KXY 495 and two pickups KXM 092 and KAQ 140J motor vehicle KBA 947T was paid for by moneys obtained from Wakulima Traders and paid to National Bank while KBF 511Y is still in the garage.
13. It was further deponed that if there was any person to be considered by the court then it should be the 2nd respondent who has two children and that what the respondent has done to the best of her ability is to prevent the deceased assets from being repossessed and sold off at a throw away price and that the cause should be heard and conclusively determined.
14. The second respondent on 8th May 2014 filed a replying affidavit whereas she deponed that that the applicant had failed to consider that she was also entitled to part of the estate as a lawful wife of the deceased and that the court should desist from making further orders until letters of

- administration are issued.
15. It was further deponed that motor vehicle registration KBM 775H is in the hands of the 1st respondent who had admitted having paid Kshs. 800,000/0 to NIC and that Kshs. 1,700,000 were paid by the deceased and that the said motor vehicle does not form part of the estate of the deceased.
 16. It was further deponed that the court had made comprehensive orders on 6th March 2014 which should not be interfered with as that will compromise the full settlement of the cause.
 17. The applicant on 13th May 2014 filed a further affidavit in which she denied vacating her matrimonial home at night and further stated that the house was broken into by goons sent by the respondent and that whatever money the respondent has spent in settling the debts is from the estate of the father of the deceased who is a beneficiary and can be offset against his share.
 18. It was further deponed that the applicant pays school fees of Ksh. 150,000/- per term for the three children and that KBN 922D was repossessed by NIC Bank and sold as she could not repay the loan after all the vehicles serving her business were taken away and that KAD 363 G is in garage in industrial area where the deceased left it.
 19. Miss Kingoo for the applicant submitted that they seek release of motor vehicles registration No. KBB 921L and KBM 778h. It was submitted the motor vehicle registration No. KBM 775H is registered in the name of Elam Agencies together with NIC Bank.
 20. Mr. Mwangi for the 1st respondent submitted that there was no evidence to support the claim that motor registration No. KBN 922D had been repossessed by the Bank and that the issue relating to the said motor vehicle is governed by companies act and that it is only proper that an administrator be appointed for the estate to enable them take charge of the estate.
 21. Mr. Nderi for the 2nd respondent submitted that the applicant had not made a case for the release of motor vehicle registration No. KBM 775H as the same was registered in the name of Elam Agency and is not part of the estate and that it is almost one year when the petition was filed and no action has been taken.
 22. To enable the court determine the issues herein a brief history of this cause will be necessary. On 25th July 2013 the applicant under certificate of urgency filed summons general for under section 45 of Law of succession Act rules 49 and 73 for an order restraining and prohibiting the respondent from interfering directly or otherwise dealing with the deceased property which application was certified urgent and fixed for interpartes hearing and on 20th August 2013 this court made orders in respect of the motor vehicles herein in the following terms.

“the parties herein to continue using the motor vehicles in their possession that is to say”

23. The court further ordered that all the motor vehicles registered in the name of the deceased and in possession of any other person rather than the 1st respondent and the 1st petitioner were to be preserved pending the hearing of the application interpartes on 30th August 2013 when the court fixed the application for interpartes hearing on 23rd September 2013 and ordered that the parties to file and exchange documents and witness statement for the application to be heard by way of oral evidence
24. From the court record it is clear that the parties have filed their list of documents and witness statements and therefore the matter is ready for hearing as ordered by court.

ISSUES

25. From the pleadings and submissions herein I have identified the following issues for determination.
 - a) *Was the court order of 20th August 2013 in respect of motor vehicle registration No. KBB 921L not clear.*
 - b) *Is the application subjudice the application dated 23rd July 2013.*
 - c) *Has the applicant made up out a case for the grant of orders sought.*

DETERMINATION

1. On the issue of motor vehicle registration No. KBB 921L as per paragraph 22 of the affidavit in reply by the respondent the said motor vehicle was in the possession of the respondent having stated that the same is charged to Equity and was lying at home. This would therefore bring the same in the scope of the courts order to the effect that the parties to continue using the motor vehicle in their possession.
2. I therefore take the view that this issue should have been clarified had the applicant made an appropriate application as there was an apparent error on the face of the court order herein.
3. The present application is seeking the same orders as those sought in the application dated 23rd July 2013 which application had been dealt with at interlocutory stage and orders issued thereon. I therefore take the view that to make any order on the current application without the court being moved to review its earlier order will amount to an abuse of the court process as this application is to subjudice the earlier application.
4. As regards motor vehicle registration No. KBM 775H all the parties herein have confirmed that the same is registered in the name of Elam Agencies and therefore does not form part of the estate of the deceased. This court therefore exercising its probate jurisdiction can not make any order that will be in the nature of affecting propitiatory right of a limited liability company.
5. It is for Elam Agencies Ltd to take out civil proceedings against any party holding motor vehicle registration No. KBM 775H and if it wishes that the same be in the custody of applicant then a court exercising civil jurisdiction will be best placed to make the orders and not this court while exercising probate jurisdiction since it does not form part of the estate of the deceased.
6. The applicant has failed to establish a prima facie case for the grant of orders sought and would therefore dismiss the application dated 18th March 2014 with no orders as to cost.
7. The court had expressed itself as regards the matters in controversy and ordered that it was in the best interest of the parties to either settle the matter or have the same heard by way of oral evidence and further issue orders as regards the motor vehicles herein which order has not been reviewed or set aside.
8. The parties should therefore fix the main application for hearing on priority basis in view of the issues raised by the applicant.

Dated, signed and delivered at Nyeri this 13th day of June 2014.

J. WAKIAGA

JUDGE

13/6/2014

Before Justice J. Wakiaga

Court clerk - Ndungu

Mr. Wachira for objector

Mr. G. Mwangi for the 1st respondent.

Miss Muhoro for Nderi for the 2nd Respondent

Mr. Achoki for Miss Kingori for applicant.

Court: Ruling read in the presence of the above named. The applicant has right of appeal.

J. WAKIAGA

JUDGE