



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 3222 of 2005

IN THE MATTER OF THE ESTATE OF SAMUEL KINYANJUI KARIUKI [DECEASED]

RULING

By summons dated 28.04.06 and filed on 17.05.06 stated to be brought under section 45 of the Law of Succession Act, Cap.160 and rules 49 and 73 of the Probate and Administration Rules, EMILY MARURA KINYANJUI and PETER KIIRU KARIUKI applied for the following orders:-

1. THAT service of the application be dispensed with in the first instance due to the urgency thereof.
2. THAT Mr John Mbugua Kariuki be ordered to cease management of the deceased's commercial building situated at Mai Mahiu on Title No. Kijabe/Kijabe Block 1/3796 (sic – should be 3795) and further be ordered to immediately cease rent collection from the tenants in occupation thereof and to allow the Administrators of the deceased's estate take over the management of the building and collection of rent and that these orders be complied with within seven (7) of the making thereof.
3. THAT Mr John Mbugua Kariuki be ordered to furnish the Administrators of the deceased's estate with accounts of all rents and other monies due to the deceased's estate arising from the management of the aforementioned commercial building at Mai Mahiu and further be ordered to deliver all such monies to the Administrators of the deceased's estate and that these orders be complied with within seven (7) days of the making thereof.
4. THAT Mr John Mbugua Kariuki be ordered to immediately cease rent collection of the deceased's public house and rental houses located on Title No. Kijabe/Thimbigua 3249 and be ordered to allow the Administrators of the deceased's estate take over the management and rent collection of this property and that such orders be complied with within seven (7) days from the making thereof.
5. THAT Mr John Mbugua Kariuki be compelled immediately and within seven (7) days from the making of such order to release the following motor vehicles and there (sic) respective Log Books to the Administrators of the deceased's estate as they make up free property of the said estate:-
 - i. Toyota Hilux Pick-up Reg. No. KAL 576 N
 - ii. Toyota Pick-up Reg. No.KAE 673 V
 - iii. Mercedes E 250 Diesel Reg. No. EBH 624
 - iv. Lorry Reg. No.KAH 688 Y
 - v. Massey Ferguson Tractor Reg. No. KAJ 258 X

- vi. Massey Ferguson Tractor Reg. No. KAJ 257 X
- vii. Massey Ferguson Tractor Reg. No. KAH 690 Y
- viii. Massey Ferguson Tractor Reg. No. KAJ 258 Y

6. THAT this Honourable Court be pleased to order that the Officer Commanding Station – Kiamba Police Station and Kijabe Police Station, or whichever Police Station in the jurisdiction of the properties listed above, and a licensed firm of auctioneers do assist in enforcement of orders 2, 4 and 5 above.

7. THAT in default of compliance of any of the orders above this Honourable Court do order that Mr John Mbugua Kariuki be committed to jail for a period of one year or such other period as the Court would deem fit and just to order.

8. THAT this Honourable Court be pleased to grant such further or other order as it may deem fit and just so to grant.

The grounds upon which the application is based are:-

- a) THAT Emily Marura Kinyanjui and Peter Kiiru Kariuki having been appointed as Administrators of the estate of Samuel Kinyanjui Kariuki (Deceased) on 26.01.06 are legally mandated to take over the management of the estate.
- b) THAT prior to the appointment of the Administrators Mr John Mbugua Kariuki was in management and control of the deceased's properties and remains so to date.
- c) THAT despite requests made by the Administrators to Mr John Mbugua Kariuki he has without any justifiable cause refused to relinquish management of the deceased's commercial property in Mai Mahiu to the Administrators of the deceased's estate, since occupation of the deceased's plot in Mai Mahiu, and to deliver to the Administrators the aforementioned motor vehicles all of which constitute free property of the deceased. His failure to do so constitutes intermeddling with free property of the deceased's estate.
- d) THAT the Applicants/Administrators are apprehensive that the deceased's above – mentioned properties are at risk of being wasted, damaged and/or alienated by Mr John Mbugua Kariuki, and that he would be unwilling to comply with the orders of this Honourable Court without assistance from the police and licensed firm of auctioneers.

The application is supported by the applicants' affidavit sworn on 28.04.06.

At the hearing of the application on 05.06.07 the applicants were represented by learned counsel, Mr. M. Machira while the respondent was represented by learned counsel, Mr. M. Kinuthia..

Applicants' counsel informed the Court that prayer 1 was spent and that the applicants were seeking prayers 2, 3, 4, 5, 6, 7 and 8. He clarified that administrator Emily Marura Kinyanjui is the deceased's widow and that by the prayer regarding auctioneer, the applicants sought an order that a licensed auctioneer, once appointed by the applicants/administrators or their advocates, assists in enforcement of orders issued pursuant to prayers 2, 4 & 5. It was applicants' counsel's contention that the enumerated landed properties and motor vehicles constitute the deceased's estate and free property; that failure by John Mbugua Kariuki constitutes intermeddling, within the meaning of section 45 of the Law of Succession Act, with the deceased's free property within the meaning of 'free property' under section 3 of the Act. Counsel drew attention to paragraph 3 of the applicants' supporting affidavit sworn on 28.04.06 and pointed out that the deceased was the registered owner of the motor vehicles listed therein; that paragraph 5 of the applicants' supporting affidavit deposes that the Administrators asked John Mbugua Kariuki to deliver the vehicles to them but he declined to do so. Counsel also referred to paragraph 3 of the applicants' further affidavit sworn on 15.12.06 annexing at 'EMK 4' Title Deeds to land parcel No. Kijabe/Kijabe Block 1/3795 and land parcel No. Kijabe/Thimbigua 3249 which show those landed

properties as registered in the name of the deceased herein. Applicants' counsel said the applicants are apprehensive that John Mbugua Kariuki will waste, damage or alienate the deceased's properties unless restrained by the Court from doing so and that John Mbugua Kariuki should be restrained through the police and auctioneers.

With regard to annexures relied on by John Mbugua Kariuki, applicants' counsel submitted that the said annexures are of no evidentiary value since they do not indicate that they relate to purchases and in what respect the purchases were made. Counsel also faulted various annexures for not being on letterheads, for not being signed and for not bearing revenue stamps although they are receipts for over Kshs.100/= while some are blank. He cited as examples in this regard the annexures at pages 3 – 7 in John Mbugua's affidavit. He contended that the evidence in John Mbugua Kariuki's replying affidavit is too fantastic to be true. Applicants' counsel asked the Court not to accept the receipts as evidence. Applicants' counsel referred to paragraph 7 (iii) of the applicants' further affidavit sworn on 15.12.06 contending that even if respondent John Mbugua Kariuki's father developed the subject properties, which the applicants deny, that does not confer upon John Mbugua Kariuki ownership rights over the properties. Applicants' counsel drew attention to annexures at pages 72 – 120 in respondent John Mbugua Kariuki's replying affidavit sworn on 25.07.06 comprising a mixture of documents including freight charges demanded of the deceased herein, and maintained that the said annexures do not give respondent John Mbugua Kariuki any colour of right to claim from the estate of the deceased. Applicants' counsel submitted there is no evidence that respondent John Mbugua Kariuki was appointed to manage the deceased's estate. Applicants' counsel described as hearsay John Mbugua Kariuki's report at paragraph 5 of his replying affidavit sworn on 25.07.06 that the deceased had told him that he had bought Plot Numbers Kijabe/Kijabe Block 1/3796 Kijabe/Thimbigua/3249 for Kshs.200,000/= and Plot No.3795 for Kshs.300,000/= in 1990 as family property. With regard to respondent John Mbugua Kariuki's claims at paragraphs 6, 7 and 8 of his aforesaid affidavit that he had found documents that his father the deceased herein had spent Kshs.2,633,610/= in buying cement and steel for building houses on the 2 plots up to 1997 when the deceased died (paragraph 6) and documents that the deceased had spent Kshs.9,265,324/= on labour, building stones and transport relating to the plots (paragraph 7), applicants' counsel contended that there is no evidence to prove the allegations. As regards the respondent's claim at paragraph 8 of his same affidavit that he had put up an extra floor on Plot No. Kijabe/Kijabe Block 1/3796 and two floors on Plot No. Kijabe/Thimbigua/3249 at a cost of Kshs.300,000/=, applicants' counsel submitted that there is no evidence to prove that allegation either.

Respondent John Mbugua Kariuki states at paragraph 9 of his aforesaid replying affidavit sworn on 25.07.06 that his father the deceased herein obtained money, *inter alia*, from the National Bank of Kenya Ltd to develop the suit plots. Applicants' counsel's rejoinder is that the advances in question were to a different entity and secured by property not part of the deceased's estate. I pause here to note that the three letters from the National Bank of Kenya in respect of the advances in question include a letter dated 17.06.92 to the effect that the Bank had approved banking facilities of Kshs.1,000,000/= to Mr Duncan K. Kinyanjui, who is the deceased father but then trading as Banana Hill Store.

The last major point made by applicants' counsel was that although respondent John Mbugua Kariuki, vide paragraph 3 of his replying affidavit sworn on 25.07.06, denied the applicants' claim at prayer 3 of the summons that he (respondent) collected money during his management of the commercial building at Mai Mahiu, the respondent subsequently admitted at paragraph 16 of his same affidavit that he collected rent from the Mai Mahiu plots except that the rent is used in maintaining the houses on the plots, fuelling motor vehicles, tractors, etc. and ploughed back into the family business. At paragraph 17 of his aforesaid affidavit, respondent John Mbugua Kariuki has stated that on 16.01.06 he spent Kshs.89,000/= in towing and repairing lorry Reg. No. KAH 668 Y. Applicants' rejoinder to that claim is that even if John Mbugua Kariuki spent the stated amount of money on towing and repairing the lorry, that does not entitle him to retain the said lorry.

Applicants' counsel urged the Court to grant the prayers sought in the summons application dated 28.04.06.

On the other hand, respondent John Mbugua Kariuki's counsel opposed the application and relied on

the replying affidavit of the respondent, John Mbugua Kariuki sworn on 25.07.06. He maintained that the plots alleged to belong to the deceased are not free properties of the deceased. He noted that the landed properties are registered under the Registered Land Act, Cap.300 and pointed out that the mere fact of them being registered in the deceased's name does not relieve the deceased of obligations as a trustee in view of the Proviso to section 28 of the Act. As for the motor vehicles, respondent's counsel conceded that they are registered in the deceased's name but argued that this establishes only a *prima facie* case of ownership under section 8 of the Traffic Act, Cap.403 and that the respondent's replying affidavit has shown the contrary. Respondent's counsel contended that the deceased herein was working for the United Nations in Nicosia, Cyprus and that his father managed the properties for him here at home until 1977 when the deceased's father died. The deceased himself died on 28.01.05 as shown in the grant of letters of administration issued to the administrators on 26.01.06 – see Annexure 'EMK 1' to the administrators summons dated 28.04.06. Respondent's counsel contended that all the deceased's family members, including the present deceased agreed that the respondent would manage the assets which the deceased's father had been managing. Counsel drew attention to paragraph 7 of respondent's John Mbugua Kariuki's replying affidavit sworn on 25.07.06 to the effect that the respondent believed his late father paid cash estimated at Kshs.9,265,324/= for building materials and transportation for the subject plots. It was respondent's counsel's contention that while working in Cyprus, the deceased herein exported the motor vehicles referred to at page 122 of the annexures to the respondent's replying affidavit sworn on 25.07.06. Counsel drew attention to a letter at page 123 of the respondent's replying affidavit calling for a family meeting to discuss distribution of the deceased's estate but pointed out that no such discussion has taken place because the applicants do not want discussion. Respondent's counsel contended that the present application cannot be decided on affidavits but requires oral evidence to determine the free estate of the deceased herein Samuel Kinyanjui Kariuki which would be different from the estate of his late father Duncan Kariuki Kinyanjui. Counsel referred in this regard to paragraph 16 of the respondent's replying affidavit, apparently to draw attention to the complexity of the matter in controversy.

Regarding the applicants' request for an auctioneer to enforce orders to be made by the Court, respondent's counsel contended that there is no basis upon which the Court would appoint an auctioneer as there is no debt found due by the respondent.

On the issue of feared alienation of the properties in controversy, respondent's counsel said there is no allegation of alienation so far and that if anything the respondent has improved the properties in question by constructing two floors at a cost of Kshs.3000,000/=, etc. and that the controversy herein cannot be determined on an interlocutory application.

Respondent's counsel urged the Court to dismiss the summons dated 28.04.06 with costs.

In reply, applicants' counsel denied existence of any trusteeship relationship regarding the landed properties in this case, pointing out that if such relationship existed, it should have been indicated as required by section 126 of the Registered Land Act. With regard to the motor vehicles, applicants' counsel contended that the presumption in favour of the deceased as owner arising from the fact of registration of the vehicles in his name had not been disproved or dislodged. Applicants' counsel submitted that no evidence of a family members' meeting had been tendered in this case. Regarding the summary at page 122 in the respondent's replying affidavit sworn on 25.07.06, applicants' counsel said it is not an official receipt and that the respondent has not proved he paid the amounts reflected at page 122 as no official receipts were exhibited. With regard to annexure 'E' at page 123 in the respondent's replying affidavit sworn on 25.07.06, applicants' counsel pointed out that it was on a 'Without Prejudice' basis and is inadmissible under section 23 of the Evidence Act, Cap. 80. With regard to respondent's contention that affidavit evidence is inadequate to determine the matters in controversy at this stage, applicants' counsel drew attention to rule 63 of the Probate and Administration Rules which, *inter alia*, invokes Order XVIII of the Civil Procedure Rules and submitted that respondent's counsel should have invoked Order XVIII rule 2 and call the applicants to cross-examine them on their joint affidavit sworn on 28.04.06 as well as their further affidavit sworn on 15.12.06. Applicants' counsel submitted it is not correct to say the orders sought herein cannot be concluded on an interlocutory application. He referred to paragraph 16 of the respondent's replying affidavit sworn on 25.07.06 alluding, *inter alia*, to school

fees and pointed out that no details were given as to which school or child were being referred to or what amounts were involved, etc. Applicants' counsel pointed out that the applicants came to Court under rule 73 of the Probate and Administration Rules invoking the inherent power of the Court. He challenged the respondent's claim to have improved on the subject properties and pointed out that there were no photographs to illustrate the improvements alluded to.

Applicants' counsel urged the Court to allow the summons application dated 28.04.06 in the interests of justice so that the administrators can administer the deceased's estate according to law.

I have given due consideration to the rival submissions of the parties.

Documents in the Court file show that on 26.01.06 the High court issued a grant of letters of administration intestate of the estate of the deceased herein to the applicants, Emily Marura Kinyanjui and Peter Kiiru Kariuki stated to be widow and son, respectively, of the deceased who died on 28.01.05. A photocopy document entitled 'TO WHOM IT MAY CONCERN' dated 11.03.05 ascribed to Kiambaa Location Senior Chief states that Emily Marura Kinyanjui (1st applicant) is the deceased's only widow and that Peter Kiiru Kariuki is one son of the deceased.

The applicants' summons application dated 28.04.06 and supporting documents show that after being appointed administrators of the deceased's estate, the applicants asked the respondent herein John Mbugua Kariuki, stated to be the deceased's brother who had been managing various properties of the deceased, to hand over those properties to the administrators for them to administer the same in accordance with their mandate as administrators but that the respondent declined to hand over the properties. The respondent cited a mandate he said he was given apparently by members of the deceased's wider family to manage various properties which according to the respondent comprised properties which his late father Duncan Kariuki Kinyanjui, who was also the father of the deceased herein Samuel Kinyanjui Kariuki, used to manage on behalf of the deceased herein and on behalf of the wider family of the said Duncan Kariuki Kinyanjui. The bottomline of the respondent's position is that the properties the applicants want him to hand over to them do not belong solely to the deceased herein, Samuel Kinyanjui Kariuki but are properties in which other members of the wider family of the deceased's late father, Duncan Kariuki Kinyanjui have an interest and a share.

I note that in respect of some of the properties the applicants have asked the respondent to surrender, the applicants have furnished photocopy title documents of the following which are registered in the name of the deceased herein, Samuel Kinyanjui Kariuki:-

1. Landed Properties

- a) Title No. Kijabe/Kijabe Block 1/3795
- b) Title No. Kijabe/Thimbigua 3249

2. Motor Vehicles/Tractors

- a) Mercedes Benz lorry/truck Reg. No. KAH 688Y
- b) Toyota Van/Pick-up Reg. No. KAE 637 V
- c) Massey Ferguson wheel tractor Reg. No.KAH 690 Y
- d) Toyota Van/Pick-up Reg. No. KAL 576 N
- e) Massey Ferguson wheel tractor Reg. No. KAJ 258 X
- f) Massey Ferguson station wagon Reg. No.KAJ 257 X.

With regard to the subject landed properties, the respondent John Mbugua Kariuki deposed at paragraph 5 of his replying affidavit sworn on 25.07.06 that the deceased herein, Samuel Kinyanjui Kariuki who worked in the United Nations in Cyprus told him in 1998 that he (deceased) had bought the said properties as family property. As against this deposition, the two landed properties listed above, i.e. Kijabe/Kijabe Block 1/3795 and Kijabe/Thimbigua 3249 are registered under the Registered Land Act, Cap.300 in the name of the deceased as absolute proprietor. If, as the respondent maintains, the deceased intended the said landed properties to be for his father's entire family, section 126 of the Registered Land Act expects the instrument of the deceased's acquisition of the properties to have described him 'as trustee'. There is no such description on record shown to the Court and I am constrained at this stage to assume that no trusteeship exists with regard to those two landed properties.

As regards the six motor vehicles/tractors enumerated above, I note that they too are registered in the deceased's name. Section 8 of the Traffic Act, Cap.403 provides:

'The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.'

The presumption of ownership arising from the fact of the vehicles in question being registered in the deceased's name is rebuttable if concrete evidence to the contrary is brought forth. I have not seen such evidence as yet.

The affidavit evidence on record leaves gaps which, when the final stage of distribution of the deceased's estate comes, may require to be supplemented by *viva voce* evidence.

For now I am of the view and I hold that at this interlocutory stage, the two landed properties and the six motor vehicles/tractors enumerated hereinabove which are registered in the deceased's name do, *prima facie*, belong to the deceased, Samuel Kinyanjui Kariuki and are to be administered by the applicants. If the respondent has concrete evidence to dislodge the presumption of the deceased's ownership of the above enumerated landed properties and motor vehicles/tractors arising from the fact of their being registered in his name such as to make them fall outside the category of his 'free property' as defined in section 3 of the Law of succession Act, the respondent is at liberty to file an affidavit of protest at the stage when the two administrators apply for confirmation of the grant issued to them.

The upshot is that I allow the summons application dated 28.04.06 and make the following orders:-

- a) Prayer 2 is granted, save that the applicable landed property is title No. Kijabe/Kijabe Block 1/3795 while the applicable period is 14 days instead of 7 days.
- b) Prayer 3 is granted, save that the applicable period is 30 days instead of 7 days.
- c) Prayer 4 is granted, save that the applicable period is 14 days instead of 7 days.
- d) Prayer 5 is granted in respect of the following motor vehicles/tractors:
 - i. Mercedes Benz lorry/truck Reg. No. KAH 688 Y
 - ii. Toyota Van/Pick-up Reg.No.KAE 637 V
 - iii. Massey Ferguson wheel tractor Reg. No. KAH 690 Y
 - iv. Toyota Van/Pick-up Reg.No. KAL 576 N
 - v. Massey Ferguson wheel tractor Reg. No. KAJ 258 X
 - vi. Massey Ferguson station wagon Reg. No. KAJ 257 X,

save that the applicable period is 14 days instead of 7 days.

e) As this is a family civil dispute, service of the orders made herein shall be effected under the normal civil law process without at this stage having to involve the police, who should be left to concentrate their efforts in fighting crime. Prayer 6 is , therefore, refused at this stage.

f) Applicants are at liberty to apply with regard to prayer 7.

g) Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 30th day of July, 2007.

B.P. KUBO

JUDGE