



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2680 OF 2009

IN THE MATTER OF THE ESTATE OF NOAH KIMUYU KARIUKI (DECEASED)

SALOME MUTHONI NYAGA.....1ST APPLICANT

BERNARD KARIUKI KIMUYU.....2ND APPLICANT

VERSUS

GRACE NJOKI KIMANI.....1ST RESPONDENT/ADMINISTRATOR

DAVID MWANGI NDUNGU.....1ST RESPONDENT/ADMINISTRATOR

RULING

1. The deceased Noah Kimuyu Kariuki died intestate on 17th September 2009. On 21st December 2009 his widow Grace Njoki Kimani (the 1st respondent) and David Mwangi Ndungu (2nd respondent) petitioned this court for the grant of letters of administration intestate. The joint grant was issued on 10th May 2010, and confirmed on 14th June 2011.

2. When the respondents petitioned for the grant, they swore that the deceased had left one widow (the 1st respondent) and three children: BKK (2nd applicant), SNK and BLWK. B was indicated to be 12 years old, S 7 years and B was 1 year. The 1st respondent was 31 years old. The estate of the deceased comprised:-

- (a) Title No. Ruiru/Ruiru East Block 4/T. xxxx
- (b) Title No. Ruiru/East/Juja East Block 2/xxxx
- (c) Title No. Dagoretti/Uthiru/xxxx;
- (d) Title No. Nyandarua/South Kinangop/xxxx;
- (e) Motor Vehicle Reg. No. KAQ xxxX
- (f) Motor Vehicle Reg. No. KAL xxxA
- (g) Motor Vehicle Reg. No. KAK xxxW
- (h) Motor Vehicle Reg. No. KBH xxxP;
- (i) Motor Vehicle Reg. No. KAX xxxY
- (j) Consolidated Bank A/C No. xxx/xx/xxxxxx/xx;

- (k) Consolidated Bank A/C No. xxx/xx/xxxxxx/xx;
- (l) Co-operative Bank A/C No. xxxxxxxxxxxxxxx;
- (m) Baraka Molem Self Help Group Certificate No. xxx;
- (n) Juja Farms (1976) Limited Certificate No. xxx;
- (o) xxxxx Safaricom Shares; and
- (p) xxxxx Kengen Shares.

3. In the certificate of confirmation, the 1st respondent got Dagoretti/Uthiru/xxxx absolutely. B got Ruiru/Ruiru East Block 4/T.xxxx absolutely, the three children were to equally share Nyandarua/South Kinangop/xxxx and Barnard and S were to equally share Baraka Molem Self Help Group Certificate No. xxx. Dagoretti/Uthiru xxx had rental income and so did Baraka Molem Self Help Certificate No. xxx. 20% of the income from either property was to be used for the repair of the property and 80% was to be used for the upkeep and maintenance of the children until they were of age. The vehicles KAX xxxY and KAK xxxW were to be sold and proceeds used to bring up the children. KBH xxxP was to go to the 1st respondent. The money in the banks was shared among the children, and so were the shares at Safaricom and Kengen. Because of the age of the children, the property was to be kept in the name of the 1st respondent until they were of age.

4. On 7th July 2020 the 1st applicant Salome Muthoni Nyaga and the 2nd applicant filed summons to revoke the grant issued and confirmed to the respondents. Their case was that the 1st applicant, the biological mother of the 2nd applicant and S, was the first wife of the deceased, and therefore the deceased had two houses, with the 1st respondent (the mother of B) constituting the 2nd house. The material information, they stated, was fraudulently not disclosed by the respondents to the court, with the effect that the 1st applicant had been disinherited. As for the 2nd applicant, he stated that he was not aware of the what was going on, and that when he became aware he found that, not only had his mother been disinherited but also that what was meant to be a trust into which the proceeds of the minors were to be kept until they were of age had not been created, and what was due to them had gone to the 1st respondent. Secondly, B had benefited more than them in the distribution. An example was given where B got Ruiru/Ruiru East Block/T.xxxx absolutely whereas the 2nd applicant and S were asked to equally share Ruiru East/Juja East Block 2/xxxx. Secondly, the banks had a total of Kshs.937,235/25. Out of that, B was to get Kshs.437,235/25 and the two sons were to equally share Kshs.500,000/=. The applicants stated that even after this disproportionate sharing, what was due to the sons had ended up with the 1st respondent, and no trust was created into which their share was kept.

5. Along with the summons was filed the present notice of motion dated 7th July 2020 that sought the following orders: -

“a) THAT this application be certified urgent and be heard *ex parte* at the first instance.

b) THAT pending the hearing and determination of this application, this Honourable Court be pleased to issue a temporary injunction restraining the respondents whether by themselves or through their servants or agents or anybody claiming through them for selling, transferring, mortgaging, charging or dealing in any matter whatsoever with land parcel Nos. Dagoretti/Uthiru/xxxx, Ruiru/Ruiru East Block.4/T. xxx and Baraka Molem Self Help Group (Certificate of ownership No. xxx) on Land Reference No. xxx/xxxxwithin Kariobangi South Estate, Nairobi, together with developments hereon;

c) THAT pending the hearing and determination of the summons for Revocation/Annulment of Grant filed herewith this Honourable Court be pleased to issue a temporary injunction retraining the respondents whether by themselves or through their servants or agents or anybody claiming through them from selling, transferring, mortgaging, charging or dealing in any manner whatsoever with land parcel Nos. Dagoretti/Uthiru/xxxx, Ruiru/Ruiru East Block.4/T. xxx and Baraka Molem Self Help Group (Certificate of ownership No. xxx) on Land Reference No. xxx/xxxxwithin Kariobangi South Estate, Nairobi, together with developments thereon;

d) THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue an Order directing the parties herein to jointly appoint an Estate Agent to be in charge of managing rental houses developed on. Dagoretti/Uthiru/xxxx, Ruiru/Ruiru East Block.4/T. xxx and Baraka Molem Self Help Group (Certificate of ownership No. xxx) on Land Reference No. xxx/xxxxwithin Kariobangi South Estate, Nairobi, collecting monthly rental income and depositing the same in a joint account to be opened by all parties for preservation.

e) THAT pending the hearing and determination of the summons for Revocation/Annulment of Grant, this Honourable Court be pleased to issue an Order directing the parties herein to jointly appoint an Estate Agent to be in charge of managing rental houses on Dagoretti/Uthiru/xxxx, Ruiru/Ruiru East Block.4/T. xxx and Baraka Molem Self Help Group (Certificate of ownership No. xxx) on Land Reference No. xxx/xxxxwithin Kariobangi South Estate, Nairobi, collecting monthly rental income and depositing the same in a joint account to be opened by all parties for preservation.

f) THAT costs for this application be borne jointly by the respondents.”

6. The 1st respondent and S opposed the application. S stated that what he wanted was that what was due to him in the certificate of confirmation be passed over to him, now that he was of age. The 1st respondent swore that when she met the deceased in 2004 he was living

with the two children: the 2nd applicant and S. He informed her that he had cohabited with their mother for a short time and from the relationship he had got the two children. The mother had deserted him. The deceased and the 1st respondent began to live together as husband and wife and got B. Kikuyu traditional rights were done to cement the relationship. According to the 1st respondent, the 1st applicant was not married to the deceased. As for the children, she stated that she had brought them up and adequately provided for them in the certificate of confirmation.

7. Mr. Khaemba for the applicants filed written submissions on the notice of motion. So did Mr. Mugo for the respondents. I have considered them.

8. Now that the deceased died on 17th September 2009, the 1st applicant cohabited with him for about five years before the death. Considering that the 2nd applicant and S in age were separated by five (5) years, it means that the deceased lived for a longer period with the 1st applicant.

9. It is material that when the respondents came to this court to petition for the grant of letters of administration intestate, they were carrying an introductory letter from the Chief of Kinoo location of Kiambu District. The letter was dated 16th November 2009. The writer was the deceased's chief. He wrote the letter to say that the deceased had left two wives. The first wife was the 1st applicant and the second wife was the 1st respondent. The chief explained that the 1st applicant had two children: the 2nd applicant and S. The 1st respondent had one child, Lilian (B).

10. The chief's letter is important because of the question whether or not the 1st applicant was the deceased's widow. This question will finally be determined during the application for the revocation of the grant. If it is finally determined that the 1st applicant was the deceased's widow, under **section 51(2)(g)** of the **Law of Succession Act (Cap 160)** and **rule 7(1)(e)** of the **Probate and Administration Rules** she was required to consent to the petition and/or to a citation by the petitioners, unless she had renounced her claim to the grant. Under **section 66** of the **Act** –

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide

the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

11. On the basis of **Guella –v- Cassman Brown [1973]EA 358**, the applicants, who are seeking an interlocutory injunction, are supposed to demonstrate that they have a *prima facie* case with a probability of success; that they will suffer irreparable injury which cannot be compensated by damages, and, if the court is in doubt, it should decide the application on a balance of convenience.

12. The injunction that is brought seeks to restrain the respondents and their agents from selling, transferring, mortgaging, charging or in any other manner dealing with Dagoretti/Uthiru/xxxx, Ruiru/Ruiru East Block 4/T. xxxx and Baraka Molem Self Help Group Certificate No. xxx on LR No. 209/9666 within Kariobangi South East in Nairobi until the hearing and determination of the application for the revocation of the grant. The foregoing discussion of the respective cases of the parties clearly demonstrates that the applicants have a *prima facie* case with a probability of success. Now that the 1st respondent literally owns the entire estate, either absolutely or for the benefit of the children, and there is claim by the 1st applicant that she was disinherited, and by the 2nd applicant that the sharing favoured the 1st respondent's child, it is important that the named properties of the estate be preserved until the application for revocation has been heard and determined. If the application for revocation is heard and determined, there is a demonstrated chance that the estate may be redistributed.

13. At this stage of this dispute, the respondents are the appointed administrators of the estate of the deceased. They have powers under **sections 79, 82 and 83** of the **Act** to manage that estate, and will ultimately account to be beneficiaries and to the court. The issue of appointing an agent to manage rents, and so on, should therefore not arise at this stage.

14. In conclusion, I allow the application dated 7th July 2020 by granting an interlocutory injunction pending the hearing and determination of the application for the revocation of the grant that was issued and confirmed to the respondents. The terms for the injunction shall be that, the respondents shall not sell, transfer, charge or mortgage Dagoretti/Uthiru/xxxx, Ruiru/Ruiru East Block 4/T.xxxx and Baraka Molem Self Help Group Certificate no. xxx on LR No. xxx/xxxx within Kariobangi South Estate, until the application for revocation has been heard and determined, or until any further orders of the court.

15. Costs shall follow the event.

DATED and DELIVERED at NAIROBI this 19TH JULY 2021.

A.O. MUCHELULE

JUDGE