



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.2679 OF 2000

IN THE MATTER OF THE ESTATE OF LAWRENCE KIMANI KHIRRECU - DECEASED

JAMES MUIGAI KHIRRECU.....APPLICANT

VRSUS

MONICA MUKUHI KHIRRECU.....1ST RESPONDENT

AUGUSTINE NGUGI KHIRRECU.....2ND RESPONDENT

RULING

1. The Application coming for consideration in this ruling is the Summons for revocation and/or annulment dated 25.2. 2019 seeking the following orders:

(i) THAT this matter be heard ex-parte as a matter of urgency, be certified as urgent and service upon the Respondents be dispensed with in the 1st instance.

(ii) THAT this Honorable Court be pleased to make an order of inhibition, inhibiting transfer of all that land better known as PRESENTLY known as KIAMBAA/WAGUTHU/2947, 2948, 2949,2950,2951,2952,2953,2954,2955,2956,2957,2958,2950,2960 – (Formerly known as KIAMBAA/WAGUTHU/832, NAIROBI/BLOCK 90/153, KIAMBAA RUAKA/707, NAIROBI/BLOCK 116/972, KARURI TOWN PLOT NO. 50 (KARURI URBAN COUNCIL, PLOT NO. 43 RUAKA, LR NUMBER KAJIADO/KAPUTIEI-NORTH/15138, LR NO.KAJIADO/KAPUTIEI NORTH/69174, KJD/KAPUTIEI-NORTH/69173 until further orders of this Court.

(iii) THAT the Honorable Court be pleased to revoke and annul the Certificate of rectified grant issued on the 25th February 2013.

(iv) THAT the Honorable Court be pleased to revoke and cancel the transfers and titles emanating from the utilization of the rectified grant dated 25th February, 2013 more specifically LR KIAMBAA/RUAKA/707,116/972, KARURI URBAN TOWN PLOT NO. 50 (KARURI URBAN COUNCIL, KIAMBAA/WAGUTHU/832 (presently known asKIAMBAA/WAGUTHU 2947, 2948, 2949,2950,2951,2952,2953,2954,2955,2956,2957,2958,2950,2960

(v) THAT the Honorable Court be pleased to substitute the administrators with the Applicant and any other Nominee from the beneficiaries of the estate herein.

(vi) THAT the Honorable Court be pleased to distribute the Estate of the late LAWRENCE KIMANI KHIRRECU in the mode proposed in the affidavit of the Applicant.

(vii) THAT Costs of this application be borne by the Respondents.

2. The Application is supported by the Affidavit of JAMES MUIGAI KHIRRECU (hereafter referred to as the Applicant) dated 25.2.2019 in which he has deposed as follows:

(i) THAT the 1st Respondent has subdivided and sold a property forming part of the Estate specifically KIAMBAA/WAGUTHU/832 without the consent of the beneficiaries.

(ii) THAT the grant which was extracted and rectified on 25.2.2013 was fraudulently obtained without the consent of all the beneficiaries.

(iii) THAT the grant omitted the words "TO HOLD IN TRUST DURING HER LIFE TIME" and further that the Respondent has been disposing of the properties secretly.

(iv) THAT the 1st Respondent has sold properties in Nyandarua and Kajiado and that she has put up a family home at KAJIADO/KAPUTIEI NORTH/15138 from which she wants to kick out the Applicant yet the money used to put up the home came from the estate of the deceased.

(v) THAT the 1st Respondent with one of the beneficiaries THOMAS KHIRRECU have been wasting the property of the estate without a single benefit to the applicant.

(vi) THAT one prime property forming part of the estate namely NAIROBI/BLOCK 90/153 is in the process of being disposed of unless this Court intervenes.

(vii) THAT after the sale of Nyandarua property the estate acquired land and put up rental properties where the 1st Respondent is receiving and enjoying the income solely.

(viii) THAT the Applicant and Paul have never been given any share of the net rental income yet they are beneficiaries of the Estate.

(ix) THAT an inhibition should issue and the Administrators should be substituted with Paul and himself and further the estate should be distributed as per his proposed mode contained in his affidavit.

3. The 1st Respondent filed a Replying Affidavit sworn on 2.8.2019 in which she deposed as follows:

(i) THAT the Applicant obtained orders of inhibition fraudulently by misrepresentation and concealment of material facts.

(ii) THAT contrary to allegations contained in the Affidavit in support of the Application KIAMBAA/WAGUTHU/832 was subdivided into 14 portions in September 2008 after which the proceeds of sale were channeled towards the education of the Applicant and the wellbeing of the other beneficiaries.

(iii) THAT the Applicant particularly benefited from the sale as the 1st Respondent purchased a canter lorry for his exclusive use and gave him capital of Ksh.500,000 which he chose to run down.

(iv) THAT she has justly and truthfully administered the estate of the deceased at all material times and she duly obtained the consent of the beneficiaries.

(v) THAT she got married to the deceased in the year 1969 and all along up to the time of his death she was working and she equally contributed to the acquisition and development of the Estate and she became the sole administrator of the Estate after the death of the deceased.

(vi) THAT beneficiaries of the Estate who are her children together with the Applicant consented to the confirmation of grant on 14.5.2003

(vii) THAT the Applicant is the greatest beneficiary of the Estate and despite being a 38 year old, he lives off the 1st Respondent and continues to live in her house while the other children left home at the age of 23 years.

(viii) THAT the Applicant seeks to be granted an interest in KAJIADO/KAPUTIEI NORTH 15138 which the 1st Respondent has developed as a family home.

4. The Parties filed written submissions in the Application dated 25.2.2019 which I have duly considered. The Applicant submitted that the two Respondents have sold to properties of the Estate without the consent of the other beneficiaries or the Court.

5. The Applicant is seeking annulment of the grant on the grounds that it was fraudulently rectified and further that his consent was not obtained. Applicant stated in his submissions that the rectified grant does not indicate that the 1st Respondent is holding the properties in trust for the beneficiaries of the estate of the deceased.

6. The Applicant argued in his written submissions that section 37 of the law of Succession Act provides that a surviving spouse entitled to a life interest under the provisions of section 35 & 36 can only sell the property of the Estate with the consent of all children of full age or with the Consent of the Court.

"Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court"

7. The Applicant submitted that the 1st Respondent registered the properties solely in her name and she has disposed of them. Further that

she admitted to have sold KIAMBAA/ WAGUTHU/832 and the Nyandarua Property.

8. He further submitted that after selling Nyandarua Property she bought land known as LR NO. KAJIADO/KAPUTIEI NORTH and build a family home where she wants to kick out the Applicant yet it was purchased and built with proceeds from the estate.

9. The Applicant submitted that the grant has become useless and inoperative though subsequent circumstances as the 1st Respondent has disposed of properties of the estate and she has not accounted for the rental incomes received and further she is about to dispose of NAIROBI/BLOCK/153 without the consent of the beneficiaries.

10. He also said the 1st Respondent has wasted the Estate and the wastage is demonstrated through the lack of accountability for a sale of the Nyandarua, Runda, Kiambaa and now NAIROBI/BLOCK 90/153 at Loresho.

11. He wants the court to revoke the grant and to appoint him as the administrator of the Estate. He is also seeking for orders that the estate be distributed amongst the 6 beneficiaries.

12. The 1st Respondent submitted that the Applicant has been the greatest beneficiary of the estate and she enumerated the benefits which have accrued to the Applicant including school fees, free accommodation, dowry for his wife and related expenses, purchase of canter KAS 469 B and a fighter Lorry and Saloon Subaru which he drives to date and medical procedures and maintenance among others.

13. The 1st Respondent further submitted that this issue has been adjudicated in ELC Case No. 186 of 2018 and the same is *res-judicata*.

14. The 1st Respondent submitted that she has administered the estate fairly and in the best interests of the beneficiaries and that is why she has been able to sustain the Applicant. Further that the Applicant became jealous when she gifted his sister 4,000,000 and he is now bitter and vindictive.

15. The 1st Respondent said she has always acted with the consent of all the beneficiaries who agreed to have her appointed administrator of the estate as she contributed to the acquisition of the assets.

16. She further stated that revocation of the grant under **section 76** of the law of Succession Act can only be done at the discretion of the Court under circumstances provided for in that section. She said she is holding the Properties for the interest of all the beneficiaries under **section 37** of the law of Succession Act.

17. She urged the court to see the interest of the Applicant to stop the sale of the Loresho House and to evict her from her home due to his laziness, greed and selfishness.

18. I have considered the submissions filed herein and I find that it is not in dispute that upon the demise of the deceased, the 1st Respondent was appointed administrator of the intestate estate together with the 2nd Respondent and issued with grant of letters of administration on 1.3.2001 which was confirmed on 14.5.2003.

19. The grant was amended on 14.11.2006 and further rectified on 25.2.2013 and the 1st Respondent has been running estate until this application was filed by the Applicant seeking revocation of grant.

20. The issues for determination in this application are as follows:

- (i) Whether the rectified grant issued on 25.2.2013 should be revoked.**
- (ii) Whether the 1st Respondent should be substituted as Administrator with the Applicant and a nominee from the estate.**
- (iii) Whether the Estate of the deceased should be distributed to the 6 beneficiaries.**
- (iv) Whether this Application is *res judicata*.**
- (v) Who pays the costs of this Application?**

21. On the issue as to whether the rectified grant should be revoked, I find that the Applicant is seeking revocation on the grounds that it was fraudulently obtained without consent of all the beneficiaries and further that the 1st Respondent who is holding the properties solely has been disposing of the same without the consent of the beneficiaries and the court.

22. The 1st Respondent on her part said she has been running the estate fairly and in the interest of all beneficiaries and further that the Applicant has been the greatest beneficiary of the estate.

23. I find that the 1st Respondent has a life interest in the residual estate in accordance with **Section 35** of the Law of Succession which provides as follows:

Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

(a) The nature and amount of the deceased's property;

(b) Any past, present or future capital, or income from any source of the applicant and of the surviving spouse;

(c) The existing and future means and needs of the applicant and the surviving spouse;

(d) Whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) The conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) The situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) The general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

24. The Court in the Case of **BOB NJOROGÉ NGARAMA Vs MARY WANJIRU NGARAMA and ANOTHER (Succession Causes No. 307 of 1995)** had the following to say:

“The import of these provisions of the law are to my mind clear and unequivocal. The petitioner/respondent as the surviving widow of the deceased has a life interest in the net residue of his estate. Her life interest would only come to an end upon her death or re-marriage. There is no evidence (neither is it alleged) that the petitioner/respondent has re-married. The surviving children of the deceased are only entitled to a bequest by way of gift under section 35(2) of the Law of Succession Act but such gift will be made at the sole discretion of the widow. As such the objector/applicant does not have a legal right to any portion of the estate of the deceased while his widow is still alive” (emphasis added)

25. The Court in **TAU KATUNGI Vs. MARGARETTE THORNING KATUNGI and ANOTHER (Succession Cause No.1040 of 1991)** also observed as follows:

“Life interest” is not defined in the Law of Succession Act. Black's Law Dictionary, ninth edition, West, 2009, defines it as “an interest in real or personal property measured by the duration of the holder's or another person's life.” In the context of Section 35 it is an interest held by the surviving spouse during their life “in the whole of the residue of the net interest estate.” Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons. In the context of Section 35, the widow is entitled to enjoy rights over the residue of the net intestate estate, that is after taking away the chattels and settlement of liabilities, during her life time with the property passing to the children upon her demise or remarriage of she be a widow.

The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.

The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.

Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interest dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property the subject of life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.

[20] At life interest there is a convergence of the interests of the surviving spouse and those of the children. The device seeks to secure the interests of both. Where the deceased therefore is survived by both a spouse and children, the net intestate estate will not pass absolutely to either of the two categories of survivors during the life time of either. The holder of the life interest in this case is still alive, and has not remarried, she is therefore still entitled to the property at this time and the same cannot be conveyed to the children. Conversely, all the children of the deceased are still alive, consequently the widow cannot have the property absolutely to herself, but she is entitled to whatever income that derives from it.”

26. I find that in the current case, the 1st Respondent enjoys a life interest on the property as a surviving spouse. The Applicant who is one of the beneficiaries cannot substitute her as an administrator.

27. Under **Section 35** the surviving spouse if it is a widow has interest which determines upon death or her remarriage. In the current case, there is no indication that the 1st Respondent has wasted the estate. Her life interest can only terminate upon her re-marriage or death.

28. I find no basis for revoking the rectified grant since the Applicant has not established the grounds for revocation under **section 76** of the Law of Succession Act. The power to revoke the grant is discretionary.

29. The Applicant has not denied that he is still living off the 1st Respondent. If she had wasted the estate, the Applicant would have been rendered destitute.

30. On the issue as to whether the Applicant should be substituted as Administrator with another nominee of the estate, I find that the 1st Respondent who enjoys a life interest has been managing the estate for the benefit of all the beneficiaries.

31. The Applicant has not displayed qualities of a good administrator. He is still a dependent of the Estate at the age of 38 years. His interest in the estate has not matured and he is admonished to be patient and to note that the law protects a surviving spouse from being rendered destitute.

32. The law provides that the surviving spouse can gift any of the beneficiaries but she cannot be forced (see **Section 35 (2)**).

33. On the issue as to whether the Estate of the deceased should be distributed, the answer is in the negative. The Reason being that the surviving spouse enjoys a life interest which terminates upon her death.

34. On the issue whether the application dated 25.2.2019 in *res judicata*, I find that the Applicant had an application in the ELC Court No. 1186 of 2018) in which he was seeking to stop the administrator from selling some property. The ELC Court said the proper forum is the Succession Court. I find that the application is not *res-judicata*.

35. However, the same lacks in merit for reasons aforesaid and I accordingly dismiss the application dated 25.2. 2019 and direct as follows:

(i) THAT the application dated 25.2.2019 is dismissed for want of merit.

(ii) THAT the 1st and 2nd Respondents will continue to be administrators of the Estate of the deceased.

(iii) THAT the 1st Respondent enjoys a life interest in the estate which will terminate only upon her remarriage or death.

(iv) THAT the rectified grant to be further amended to reflect that the 1st Respondent is holding the Properties as trustee for her own benefit and for the benefit of the other beneficiaries.

(v) THAT this being a family matter, each party to bear its own costs.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 11TH DAY OF OCTOBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.