



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1298 OF 2011

IN THE MATTER OF THE ESTATE OF GERISHON KAMAU KIRIMA (DECEASED)

RULING

1. There are two issues that I seek to address in this ruling. Firstly, is the question of payment of school fees for the grandchildren of the deceased, and related issues. Secondly, is the matter of the summoning of certain government officials to testify on estate assets, furnishing of statements from banks where the deceased operated accounts and valuation of landed assets to assess the rents payable on such assets.

2. The first issue has come up several times. It had been ordered by consent on 28th November 2012 by Lenaola J in the following terms:-

‘The following beneficiaries of the late GK Kirima with school going children (grandchildren of the late GK Kirima) i.e.

- (i) Alice Kirima*
- (ii) Sam Kirima’s family*
- (iii) Fred Kirima’s family*
- (iv) Stephen Kirima*
- (v) Anne Kirima*
- (vi) Ruth Kirima*
- (vii) Gathoni Kirima*
- (viii) Wanjau Kirima*
- (ix) Irene Kirima*
- (x) Wanjiru Kirima*

shall each receive Kshs. 1 million from the estate to cater for school fees pending finalization of this cause.’

There was a further order made by consent before Lenaola J on 26th March 2013 in the following terms:-

‘Further to the orders issued on 28.11.2011, Kshs. 2 million every term starting 8.4.2013 shall be paid to

- i) Alice Kirima*
- ii) Sam Kirima’s family*
- iii) Fred Kirima’s family*
- iv) Stephen Kirima*
- v) Anne Kirima*

vi) Ruth Kirima

vii) Gathoni Kirima

viii) Wanjau Kirima

ix) Irene Kirima

x) Wanjiru Kirima

xi) Maria Kirima

xii) Susan Kirima

on account of school fees, from the same Account as (2) above.'

3. It would appear that in compliance with the said order, the beneficiaries named have severally been paid the stated amounts since then. The problem appears to be that the payments are not done timeously and beneficiaries have often complained of inconvenience in the circumstances. The response by the administrators has been that the estate account did not hold sufficient funds to facilitate the payment, advising that the beneficiaries ought to patiently wait for the funds to build to allow for compliance. Sometimes the funds held in the account have been utilized to settle other demands having priority, such as taxes due to the Kenya Revenue Authority on account of estate assets and income.

4. One administrator, Ms. Anne Kirima, also known as Mrs. Muchoki, complains that the estate account from which the moneys for school fees should be paid, that is to say Account Number [particulars withheld] Commercial Bank of Africa, Wabera Street, Nairobi, ought, ideally, to always hold sufficient funds to meet all the exigencies of the estate were it that all the income collected from the assets of the estate, of Kirima & Sons Limited and Kirima Trust were all paid into that account as ordered by Maraga J. on 18th October 2011 and 21st October 2011. It has been argued consistently that the monies paid into the estate account dropped drastically after the other administrator stopped paying the income from what is referred in these proceedings as Tumaini estate into the said account. It was stated that the income from the Tumaini estate should be paid into an escrow account to await distribution. Alternatively, a portion of what is due to the estate by way of dividend from Kirima & Sons Limited should be paid into the said estate account.

5. It has been argued on behalf of the other administrator that Tumaini estate belongs to the company and ideally its affairs ought not to be dragged into the dispute in the estate.

6. The matter of the income from Tumaini estate had been raised previously before me, at the close of the examination in chief of the applicant to the confirmation application, by Mr Ojiambo and Mr Ligungya. The two had applied that an order be made that the income from Tumaini estate be paid into the estate account, or, in the alternative, that I order that the said income be held in escrow account. That position was supported by various survivors of the deceased. The application was opposed by some of the other survivors. I directed that that issue be raised after I had heard the testimonies of both the applicant and her co-administrator, as at that stage I would be making a decision having heard both sides. Apparently the parties did not heed to that direction, and have gone back on the issue after it transpired that the administrators had only been able to settle half of what the beneficiaries were entitled to on the account of the education allowance. Yet, at that stage, I had only heard one side on the matter, the other side is yet to testify and to be cross-examined on the same.

7. From what I am able to ascertain from the material before me, as stated in the various affidavits and reports filed herein, the rulings on record, and the testimony so far recorded, it is not in dispute that some of the assets claimed to form part of the estate are registered in the name of a limited liability company, Kirima & Sons Limited. The said Kirima & Sons Limited appears to be a successor of a firm that the deceased used to run his businesses through, known as Kirima & Son, in which he was in partnership with some of his sons. The manner in which Kirima & Son was wound up, and Kirima & Sons Limited was incorporated, and some of the assets that were in the name of the deceased transferred to the name of Kirima & Sons Limited, is a highly contested matter in proceedings both here and elsewhere. Ultimately the court, in this matter, and, or, in the other causes, will be making a determination one way or other as to whether the processes that led to cessation of business by Kirima & Son, the incorporation of Kirima & Sons Limited and the transfer of some property of the deceased to Kirima & Sons Limited were done properly and above board. Before that happens, the *status quo* should remain, that is that the firm known as Kirima & Son ceased to exist, that Kirima & Sons Limited exists as a limited liability company, and that the assets that were transferred to the name of Kirima & Sons Limited remain the property of that company.

8. The matter of that company was placed before Maraga J, as he was then, who on 21st October 2011, ruled as follows:-

'... It is trite law that a limited liability company is a legal entity distinct and separate from its shareholders. So even if the deceased held a majority of the shares in the Kirima & Sons Limited, the affairs of that company cannot be brought into this cause. ... If the deceased owned shares in and was a director of the company, then the interim administrators should liaise with the other directors of that company and ensure that the interests of the deceased's estate are protected.'

9. Clearly from that order, the court declined to have Kirima & Sons Limited brought into these proceedings. That would mean that the probate court ought not make orders on Kirima & Sons Limited touching the affairs of the company, save to the limited extent of the income due from the company to the estate to the extent of the shares that the deceased had in the company. The order of 21st October 2011 was never reversed or set aside by this court on review, neither was any appeal filed against it. It is therefore alive and subsisting. I am alive to the fact that there is a pending review application. The issues raised in that review application can, and should, ideally, be addressed within the context of the ongoing confirmation hearing.

10. In the said order of 21st October 2011, the administrators were counselled to liaise with the directors of the company with a view to securing the interests of the estate in the company, meaning, of course, the shares held by the deceased in the company. It is not clear from the record before me whether the administrators got into any sort of liaison with the company as directed by Maraga J. As it is now, one of the administrators is a shareholder of the company, while the other holds the view that the company was a fraud designed to spirit away a chunk of the estate for the benefit of one side of the family of the deceased. I believe that that should explain, in part, why no liaison was gotten into by the administrators with the company.

11. I am alive to the fact that there is a suit, being HCCC No. 342 of 2009, between the company and one of its directors, Wanjau Kirima, who denounces the company as a fraud and dissociates himself from its formation and incorporation. The suit pends at the Commercial Division of this court. I called for the court file from the Commercial Division for perusal purposes. I perused it. There is an order therein for stay of those proceedings to await the outcome of these proceedings. The stay order was on application by one of the parties to the instant proceedings. The primary role of the probate court is distribution of the property of the deceased, once the property of the estate and the survivors of the deceased, or the persons entitled to share in the property, have been ascertained. The issues raised in HCCC No. 342 of 2009 are not ideal for determination in the instant cause, the parties in HCCC No. 342 of 2009 ought to pursue that suit to its logical conclusion, and then thereafter place whatever decree that they shall obtained in the suit before the Judge in this cause, so that he can address the matters before him on the question of the interest of the estate the subject of the said suit. So that should it be held by the commercial court that the company was a fraud then its assets would revert to the estate for distribution by the probate court. Should it be found that the company had been properly formed then the probate court would have to look at the matter differently, in terms of distributing the shares in the company owned by the deceased for that would be the only interest that the deceased had in company that would be available for distribution.

12. It would also appear that some of the Tumaini estate assets are claimed by some beneficiaries to have been subjects of gifts made to them by the deceased *inter vivos*. The beneficiaries in question are yet to testify. I believe it would be premature to interfere with *status quo* prior to evidence being taken from them on the matter.

13. I am reluctant to order that the income of Tumaini estate be dealt with in the manner proposed in the oral application made before me for the reasons that I have given above. However, as the estate is entitled to shares in the company which owns the Tumaini property, I find, without going into the merits as to whether the company is a fraud or not, that the estate is entitled to information from the company relating to the income that the company has generated since its formation, and the percentage of that income that ought to be paid to the estate. In that regard, the company should provide the administrators, jointly or severally, with its audited accounts for the years in question, which I believe is in accord with the orders made by Maraga J. on 21st October 2011. Upon being served with such accounts, the administrators should then take such steps as are prudent with regard to the funds due to the estate from the said income. Alternatively, the court may give directions thereon.

14. It has been submitted that there were other beneficiaries collecting revenue from other assets of the estate. Some were mentioned by the applicant in the course of her testimony. The said beneficiaries are yet to take the stand where they would have opportunity to defend themselves. It is only after that that I would be able to pass judgement. It would be unfair to condemn them unheard. I cannot make orders at this stage with regard to that matter. One of the devices for dealing with intermeddlers is to call them to account. That can, and should, be done at the conclusion of the proceedings once all the parties have been heard.

15. Regarding the summoning of government officials or agencies to testify on various aspects of the assets of the estate, I tend to agree with Mr Kalii. The input from such state agencies would be useful in terms of laying on the table the current status of the various assets that the court is being invited to distribute. However, such witnesses ought to come in at the tail-end, after the members of the family have testified. Such witnesses may be summoned at the behest of Mr Kalii's client, or they may come in as witnesses summoned by the court. I would prefer that they come as witnesses summoned by the court to update it on the status of the assets owned by the deceased as per their official records.

16. On the question of the banks being required to provide up-to-date statements on the balances standing on the accounts that the deceased held in such banks, I would too agree with Mr Kalii. Such information would be useful as the court would then embark on distributing moneys that it knows to be in existence. An order should therefore issue to the banks directing them to prepare and place before the court statements on the balances standing in the bank accounts of the deceased as at the date of this ruling.

17. On valuation of landed assets for rent purposes, I hold the view that that such an exercise would be coming too late in the day. It would be involving and time consuming, and, no doubt, costly, bearing in mind that the administrators have been expressing frustration with raising funds to meet the estate's obligations on payment of moneys for school fees. I am reluctant to grant the said request. However, should any party feel strongly that such exercise would be indispensable, there is liberty for them to embark on it, at their own expense.

18. I shall not advert to the matter of the court making orders at this stage to have Clifford Foster paid the sum of Kshs 300, 000.00, that the applicant is alleged to have admitted, during cross-examination, as owing to that firm. I dealt with the matter in open court. I have not yet heard the position of the other administrator on the matter. Orders on it shall be made in the final judgement at the conclusion of the confirmation hearing.

19. In the end, I shall make orders in terms of what I have stated in paragraphs 13, 15, and 16 of this ruling. For avoidance of doubt, it is hereby ordered:-

(a) That the directors of Kirima & Sons Limited are hereby ordered to furnish the administrators of the estate herein, within thirty (30) days of the date of this ruling, with audited accounts of the company from the date of its inception to date;

(b) That the Deputy Registrar shall issue witness summons addressed to the Registrar of Companies requiring him to attend court herein to furnish the court with records relating the shareholding held by the deceased in all the companies listed in the Summons herein for confirmation of grant;

(c) That the Deputy Registrar shall issue witness summons addressed to the Registrar of Lands requiring him to attend court herein to furnish the court with records relating to ownership of all the landed assets listed in the Summons herein for confirmation of grant; and

(d) That an order hereby issues commanding all the banks listed in the Summons herein, for confirmation of grant, in which banks the deceased operated accounts, to furnish the court, within thirty (30) days of this order, with up to date statements on the balances standing on all those accounts.

20. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 4TH DAY OF OCTOBER, 2018.

W. MUSYOKA

JUDGE