



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISCELLANEOUS CIVIL APPLICATION NO. E022 OF 2021

DAVID MWANGI.....APPLICANT

VERSUS

JECINTA WACHUKA GATHUNGU.....RESPONDENT

RULING

1. The applicant is a son of the late Isaac Mbuki Mwangi (hereafter *the deceased*). The respondent is his step-mother.
2. The applicant claims that after the burial of the deceased, the respondent denied him access to their home situated on L.R. No. 10890/61 in Maki area within Murang'a County. She also prevented him from "*paying homage*" to the deceased at the gravesite on the property.
3. The applicant alleges that the respondent, who does not hold any letters of administration, is intermeddling in the estate or wasting it. He is also apprehensive that the respondent may alienate or dispose of the property.
4. The applicant thus seeks six primary reliefs: Firstly for an order of access to the gravesite; secondly, an order for the respondent to vacate the property pending conclusion of the succession matter; thirdly, an injunction to restrain the respondent from trespassing into or wasting the property; fourthly, to compel her to give the applicant title deeds or other documents relating to the property; fifthly, that all rents from godowns erected on another property known as L.R. No. 10890/62 be deposited in court; and, lastly, that the OCS Kirwara do enforce the first two orders above.
5. All those matters are pleaded at length in the *notice of motion* dated 3rd May 2021 and the applicant's deposition of even date.
6. The application is contested by the respondent through a replying affidavit sworn on 19th July 2021. She avers that the suit property is her matrimonial home and that the orders being sought would amount to an eviction. She claims that she accommodated the applicant when he returned to the country for the deceased's funeral. She also allowed him to pay homage at the gravesite. However, the applicant then demanded keys to the house and "*an immediate division of the assets*" of the deceased.
7. When the applicant and a number of people attempted a forcible entry on 30th April 2021, she reported the matter to Kirwara Police Station. She denies that the applicant used to reside in the house. It is averred that the rent proceeds from the godowns has largely been used to meet the deceased's hospital bills. An amount of Kshs 480,321 is still outstanding. Copies of the hospital bills are attached. She claims that she requires the rental income for her upkeep and that of her two children.
8. On 21st March 2021, I heard further arguments from the learned counsel for both disputants.
9. I take the following view of the matter. There is no dispute that the applicant is a *son* of the deceased; and, that the respondent is the *widow*. A copy of the marriage certificate is attached. Both disputants are unsure of whether the deceased left any *will*. I thus presume he died *intestate*. I say that guardedly and without making a finding as these are *not* succession proceedings.
10. It is also common ground that the deceased died a year ago on 18th April 2021. It is not also disputed that none of the disputants has taken out letters of administration. Under section 2 of the **Law of Succession Act**, save for persons exempted from the statute, all intestate and testamentary proceedings to the estate of the deceased shall be made under the Act.
11. The applicant has exhibited the burial permit and death certificate. It is thus not clear why the respondent or applicant have not applied for a grant. A close reading of section 46 of the Act requires an application for representation to be made within *one month* of the death. Furthermore, section 45 of the Act prohibits persons from *intermeddling* with the estate.
12. That said, I remain alive that under section 35 of the Act, the widow has a *life interest on the whole residue of the net intestate estate* for the ultimate benefit of the children. In short, none of the disputants has power at the moment to alienate or distribute the capital assets.

13. But like I stated, these are *not* succession proceedings. I thus readily find that the *miscellaneous civil application* filed here is highly irregular. True, some of the prayers are of a civil nature but they may well be brought under the succession cause. It is not lost on me either that there is no plaint. To demonstrate the futility of the action, the applicant is seeking injunctive relief “*pending the conclusion of the succession matter*” yet no such cause has been lodged.

14. Granted those reasons, it would be unjust at this stage to evict the respondent from the property which she asserts is her matrimonial home. That fact is yet to be proved or disproved. But it is equally true that the applicant lives in New Hampshire, United States of America. There is also no cogent evidence that the respondent is in possession of the titles or documents relating to the property. Prayers 3 and 5 of the notice of motion are thus without merit and are dismissed.

15. I will turn briefly to the prayers for injunction. The principles governing the grant of *prohibitive injunctions* are well settled. See ***Giella v Cassman Brown and Company Limited*** [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

16. In ***Mrao Limited v First American Bank of Kenya Ltd and others*** [2003] KLR 125, the Court of Appeal stated that a *prima facie* case is one –

Which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

17. An injunction is a *discretionary remedy*. There would be no reason to bar the applicant from visiting his father’s grave. The respondent however avers, which fact has not been controverted, that the applicant had an ulterior motive to take over her residence. She claims that he initially demanded the keys but when it was not forthcoming, he and other persons tried to make forcible entry on 30th April 2021.

18. There is ample authority that a party, who has acted in a manner not acceptable to a court of equity, will be denied an equitable remedy. See ***Kenya Hotels Limited v Kenya Commercial Bank and another*** [2004] 1 KLR 80, ***George Munge v Sanjeev Sharma & 3 others*** HCCC ELC 677 of 2011 [2012] eKLR. I am accordingly disinclined to grant prayer 2 of the notice of motion.

19. There is no evidence that the applicant is alienating or selling any of the two properties. If prayer 4 were to be granted as drawn, it would prevent the widow from accessing her current residence. For the reasons I gave earlier, I find that it would not be efficacious to grant such relief at this stage.

20. I am thus not persuaded that the applicant has established a *prima facie* case for grant of a prohibitive interlocutory injunction. Having reached that conclusion, I do not need to weigh the balance of convenience. ***Kenya Commercial Finance Company Ltd v Afraha Education Society*** [2001] 1 E.A. 86.

21. The respondent admits that she is collecting rent from godowns erected on another property known as L.R. No. 10890/62. She claims to be doing it in trust for the estate. Ultimately, the succession court will require her to make an account of all those proceeds. That court will also determine to whom the estate should be distributed. The prayer for deposit of the rent in court should be made in the succession cause. As I observed earlier, this *miscellaneous civil application* is irregular.

22. I have also stated that the respondent has delayed in making an application for representation in respect of the estate. If the applicant is well advised, he has remedies under section 35 (3) of the Act. The less I say about it the better.

23. Lastly, the applicant sought an order for the OCS Kirwara Police Station to enforce orders 2 and 3 in the *notice of motion*. As a general rule, orders of the High Court are enforced by the court bailiff. There is no provision to involve the police directly. In the event the court bailiff requires assistance of police to keep the peace, the bailiff would make a suitable application to court. See ***Kuria Kanyoro T/A Amigos Bar & Restaurant v Kinuthia*** [1985] KLR 126. That prayer is accordingly denied.

24. The upshot is that the applicant’s *notice of motion* dated 3rd May 2021 is devoid of merit. It is hereby *dismissed* but with *no* order on costs.

25. Before I leave the matter, I am alive that the court has inherent power to preserve the property. To ensure that the ends of justice are not defeated, and noting that none of the parties has applied for a grant, I order that the estate of the deceased be *preserved* until further orders by the succession court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 28TH DAY OF APRIL 2022.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Gitonga for the applicant instructed by Majau Maitethia & Associates Advocates.

Ms. Irungu for the respondent instructed by J. M. Mugo & Company Advocates

Ms. Susan Waiganjo, Court Assistant.