



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 156 OF 2016

IN THE MATTER OF THE ESTATE OF PAUL NG'ANG'A GACHIE alias

PAUL NG'ANG'A GACHII (DECEASED)

PAUL GACHIE NG'ANG'A.....APPLICANT

V E R S U S

DANIEL NJUGUNA KAMONDIA.....1ST RESPONDENT

NGUGI KAMONDIA.....2ND RESPONDENT

FRANCIS KIMUYA KAMONDIA.....3RD RESPONDENT

NDUNG'U KAMONDIA.....4TH RESPONDENT

CHEGE KAMONDIA.....5TH RESPONDENT

RULING

(1) Before this Court is the Chamber Summons dated **6th September 2018** by which **DAVID GACII NGANGA**, the Applicant / Administrator seeks the following orders:-

(i) That the Respondent, their agents and or servants be restrained by a Court order from interfering, trespassing and or doing any act of waste in the Deceased's parcel of land No. KIAMBAA/KANUNGA/789 until this application is heard and determined.

(ii) An order that the Respondents do remove their semi-permanent structures built on the Deceased's parcel of land No. KIAMBAA/KANUNGA/789.

(iii) That the costs of this application be provided for.

(2) The Application was premised upon **Rule 73** of the **Probate and Administration Rules**, and **Section 45** of the **Law of Succession Act Cap 160, Laws of Kenya** and any other enabling provision of the law and was supported by the Affidavit of even date sworn by the Applicant.

(3) The Respondent opposed the Application through their Replying affidavit dated **27th September 2018** sworn by **DANIEL NJUGUNA KAMONDIA** with the express authority of all the other Respondents. The Summons was canvassed by way of written submissions. The Applicant filed his written submissions on **8th April 2021**, whilst the Respondents relied upon their written submissions dated **28th April, 2021**.

BACKGROUND

(4) This Succession Cause relates to the estate of **PAUL NGANGA GACII alias PAUL NGANGA GACHIE** (hereinafter '**the Deceased**') who died intestate on **8th January 2012**. The Applicant avers that he is the Administrator of the estate of the Deceased. He states that the **1st** to **5th** Respondents are brothers who share a common boundary with the deceased's property being **L.R. No. Kiambaa/Kanunga/789**

measuring approximately **0.2 Hectares**. The Applicant claims that following the demise of the Deceased the Respondents moved into and occupied a portion of **L.R. No. Kiambaa/Kanunga 1789** (hereinafter '**the suit lands**'). That they proceeded to erect semi-permanent structures thereon and have adamantly refused to vacate the suit land.

(5) The Applicant further depones that on **30th July 2018** all the parties appeared in Court when the Respondents denied illegally occupying the Deceaseds land. On that date **Hon. Lady Justice Muigai** gave direction regarding the survey and ascertainment of the boundaries of the suit land. That the Respondents continued to occupy a portion of the land hence the present application seeking their removal therefrom.

(6) On **15th February 2019** the Land Surveyor **Kiambu** visited the suit land and filed in Court his Report dated **1st March 2019** (Annexure **DGN-‘1’** to the Supporting Affidavit dated **30th JUNE 2020**) which report confirmed that the Respondents were indeed in occupation of the land of the Deceased. The Applicant states that before **Hon. Lady Justice Ali-Aroni** could deliver her Ruling on this application dated **6th September 2018** the Respondents raised the issue of a pending Civil Appeal being **Appeal No. 274 of 2011**. By a consent entered into between the parties on **25th February 2019** it was agreed that no further constructions would be carried out on the property by either party.

(7) On **19th June 2020** the Court of Appeal delivered its Judgment dismissing the Respondents' Appeal. Upon dismissal of the Respondents' Appeal, the Applicant filed another application dated **30th June 2020** which application was amended on **21st September 2020** seeking that the Court proceed with the hearing of this application dated **6th September 2018**. Meanwhile the Applicant filed an application being **Civil Application No. SUP 12 of 2020** seeking leave to appeal to the Supreme Court. However that application was dismissed.

(8) The Applicants position is that the Respondents should now be ordered to vacate the land of the Deceased before he applies for Confirmation of Grant as he is apprehensive that the Respondents will refuse to vacate the land or remove the semi-permanent structures on the suit land. On their part the Respondents state that on **15th July 2019** **Hon. Lady Justice Muigai** ordered that the status quo be maintained until such time as the Applicant obtains a full Grant of representation to the estate of the Deceased. The Respondents state that the Applicants issues can best be canvassed under **Section 13(7)** of the **Environment and Land Act**.

ANALYSIS AND DETERMINATION

(9) I have carefully considered the Summons dated **6th September 2018**, the Replying Affidavit filed by the Respondents as well as the written submissions of both parties. The Respondents objected to the application on grounds that the Applicant had no locus standi to file the same as he is yet to obtain a Grant of Letters of Administration in respect of the estate of the Deceased. The Applicant counters as Administrator of the Deceased estate he does have the requisite locus standi. My perusal of the record reveals that on **30th July 2018** **Hon. Lady Justice Muigai** appointed **Cecilia Wakonyo Nganga, Teresia Muthoni Nganga and David Gachie Nganga** (the Applicant herein) as Administrators of the estate of the Deceased under **Section 66** of the **Law of Succession Act**. It is therefore clear that the Applicant is clothed with legal capacity (locus standi) to institute this claim on behalf of the estate of the Deceased.

(10) **Section 45** of the **Law of Succession Act** which deals with the protection / preservation of estates provides as follows:-

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a Deceased person.

(2) Any person who contravenes the provisions of this Section shall-

a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) Be answerable to the original executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

(11) The above provision outlaws any form of interference in an estate by intermeddlers or parties who have no interest in that particular estate. Indeed **Section 45** criminalises any form of intermeddling with the estate of a Deceased person. By this Summons the Applicant is seeking an interlocutory order. He is seeking a temporary injunction to restrain any act of interference (intermeddling), trespass or act of waste on the suit land belonging to the estate of the Deceased. In determining whether or not to grant such interlocutory orders the Applicant must show a prima facie case with a probability of success [see **GIELLA –VS- CASSMAN BROWN & CO. LTD [1973]E.A. 358**].

(12) Although **Order 40** of the **Civil Procedure Rules 2010** requires that such application should be brought under the cover of a suit, **Section 47** of the **Law of Succession Act** empowers the High Court to entertain any application and to make such orders as may be expedient. Similarly **Rule 73** of the **Probate and Administration Rules** provide that:-

“Nothing in these Rules shall limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for t he ends of justice or to prevent the abuse of the process of the Court.”

(13) It has already been established that the Applicant is one of the Administrators of the estate of the Deceased. It has further been demonstrated through the Survey Report dated **1st March 2009** that the suit land forms part of the estate of the Deceased. In my view the above is sufficient to demonstrate a prima facie case. In the circumstances I find that the Applicants prayer for a temporary interlocutory injunction is merited. Accordingly I do allow prayer (1) of this Summons. Prayer (ii) will have to await the Confirmation of the Grant as

Applicant does not as yet hold a Confirmed Grant.

(14) Finally this Court makes orders as follows:-

(1) The Respondents, their agents and/ or servants be and are hereby restrained from interfering, trespassing and/or doing any act of waste on the Deceased's parcel of land No. KIAMBAA/KANUNGA/789 pending issuance of a Confirmed Grant to the lawful Administrators of the estate.

(2) Costs of this Application will be met by the Respondents.

DATED IN NAIROBI THIS 25TH DAY OF JUNE, 2021.

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MAUREEN A. ODERO

JUDGE