



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 936 OF 2019

IN THE MATTER OF THE ESTATE OF TABITHA MURINGI NGUNYI (DECEASED)

AYUB KAMAU MUIRURI.....APPLICANT

VERSUS

JERIOUS WANJIKU KAMAU.....1ST RESPONDENT

ZELIAH WANGUI RUMINJO.....2ND RESPONDENT

RULING

1. This ruling disposes the Notice of Preliminary Objection dated 22nd February, 2021 in which the Respondents seek to have the Notice of Motion application dated 2nd February, 2021 struck out on the ground that the probate court has no jurisdiction to issue the orders sought.

2. In the Notice of Motion application dated 2nd February, 2021 and brought under **sections 1A, 1B and 3A of the Civil Procedure Act, Order 40, rule 1 of the Civil Procedure Rules, 2010** and all other enabling provisions of the law, the Applicant herein seeks orders and reliefs in the following terms:

i. *Spent.*

ii. A temporary injunction restraining the Respondents by themselves or through their agents, servants and/or employees from collection of rent, selling, alienating, constructing, evicting or in any way interfering with the property known as LAND PLOT NUMBER (OLD) 269 (NEW) 277 WITHIN LR. NUMBER 8469/4 pending the hearing and determination of the petition.

iii. The Respondents refund all the monies collected from the tenants at the property known as LAND PLOT NUMBER (OLD) 269 (NEW) 277 WITHIN LR. NUMBER 8469/4 as from the year 2018 totaling up to Kshs. 988,000/=, and be restrained from collecting any other rent and managing the property pending the hearing and determination of the petition.

iv. The Cost of the application be granted.

3. The application is supported by an affidavit sworn by the Applicant on 2nd February, 2021 and premised on the grounds that the Applicant is a widower and beneficiary of the deceased herein and the registered owner of the property known as LAND PLOT NUMBER (OLD) 269 (NEW) 277 WITHIN LR. NUMBER 8469/4. It is averred that the Applicant was managing the property when the deceased was alive and the deceased had no disputes as to ownership and management of the property. That the Respondents have however trespassed onto the property, and have been collecting rent therefrom, alleging that they are Executors of the last will and testament of the deceased.

4. On 15th June, 2021 the Court directed that the Preliminary Objection be disposed of by way of written submissions. Learned Counsel Mr. Ngunjiri filed written submission dated 22nd June, 2021 on behalf of the Respondents whereas learned Counsel Ms. Lucy Gitonga filed written submissions dated 16th July, 2021 on behalf of the Applicant.

5. According to Mr. Ngunjiri, the orders sought in the Notice of Motion application relate to the environment and the use and occupation of, and title to land. That the Applicant ought therefore to have filed a fresh suit and application in the Environment and Land Court. Counsel contended that the primary duty of the Probate Court is to distribute the estate of the deceased to the beneficiaries, and that the jurisdiction does not extend to determining issues relating to the environment and the use and occupation of, and title to land.

6. Counsel urged that **Order 40 of the Civil Procedure Rules** does not apply and the Law of Succession Act does not in any way grant powers to court to entertain injunctions. That the Court cannot therefore rely on Rule 73 of the Probate and Administration Rules to grant the injunction orders sought. Counsel cited the decisions in **Re Estate of Abasi Wacheke Njeri (deceased) [2021] eKLR** and **Lydia Karimi**

& another vs. Joanina Kaimuri Mbwiria & 2 others [2014] eKLR and urged the court to uphold the Preliminary Objection.

7. On her part, Ms. Gitonga urged the court to dismiss the Preliminary Objection for want of merit. In Counsel’s view, the fact that this is a probate court does not limit the court’s power to issue injunctions in deserving cases especially where the estate is being tampered with. That **section 45 of the Law of Succession Act and rule 73 of the Probate and Administration Rules** empowers this court to make such orders as may be expedient and as may be necessary for the ends of justice to be met. To this end, Counsel cited the decision in **Floris Piezzo & Another vs. Giancarlo Falasconi [2014] eKLR**.

8. At a cursory glance of the record it appears that the deceased whose estate is in issue died domiciled in Kenya on 27th December, 2012. Therefore, by dint of **section 2(1) of the Law of Succession Act (CAP 160)**, the intestate or testamentary succession to her estate and the administration thereof is subject to the provisions of the **Law of Succession Act**. There is on record a Petition for Probate of Written Will dated 22nd May, 2019. It appears that the Petition has since been gazetted but is yet to be listed. It also appears that the deceased’s original will is missing and only a copy of the will is on record.

9. **Section 53 of the Act** provides that it is only upon proof that the deceased left a valid will that a grant of probate can issue to the Executors named in the will in respect of all the property to which such will applies. **Section 55(1)** goes on to provide that no grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in **section 71**. Therefore, until and unless the last written will of the deceased is proved either by production of the original or authentication of a copy, the Respondents, irrespective of their claim of executorship, cannot purport to exercise free range over the properties listed under the will.

10. This court is alive to the elementary principle of law that an Executor derives authority from the will and not from a grant of probate. **Section 80(1) of the Law of Succession Act** stipulates that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. An executor or executors can therefore, before grant of probate, commence an action, release a debt and generally act as the personal representative of the deceased until he is required to prove his title as such. (See - **Kothari vs. Qureshi & Another [1967] E.A at 566**). It is trite that probate is nonetheless required to prove the will and thereby clothe the Executors with the power to administer the deceased’s estate in accordance with the will upon proof.

11. In making their case, the Respondents argued that any claim in respect of the suit property is the purview of the Environment and Land Court which is clothed with jurisdiction to hear and determine disputes on the use and occupation of, and title to land. In the instant case, the right and authority that the Respondents exercise over the suit property derives from the Last Will and Testament of Tabitha Muringi Ngunyi, the deceased herein. The will is however yet to be proved and is contested by amongst others, the Applicant herein who is said to have been the husband of the deceased. It is imperative to point out that disputes in respect of testamentary succession and the administration of the estates of deceased persons, as is the case herein, are governed by the provisions of the **Law Succession Act**, which vests in the High Court, and by extension the Probate Court, the power to determine any dispute under the **Act**. It is therefore apparent that the Respondents’ argument that the Probate Court is not clothed with jurisdiction in pertinence to the suit property is misplaced.

12. An examination of the pleadings on record reveals that there were previously proceedings filed in Milimani Chief Magistrate’s Court, Environment and Land Case No. 4836/2019 in pertinence to the suit property. However, by a ruling delivered on 25th February, 2020, the Court struck out the plaint citing lack of jurisdiction. The Respondents were the Applicants in the lower court proceedings. The Respondents stated that they were aggrieved by the decision of the Magistrates’ Court but there is nothing on record to indicate that the ruling has been appealed against.

13. In view of the foregoing, the arguments advanced by the Respondents must collapse. Not only is this court clothed with jurisdiction with respect to property comprising the deceased’s net testate estate but it is also clothed with jurisdiction to issue the injunctive reliefs sought in the application if they are found to have merit. The provisions of **section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules** clothe this court with wide discretion to do what is necessary to ensure that the ends of justice are met. This includes the grant of injunctive reliefs where appropriate to preserve and safeguard the estate of a deceased person as affirmed by the Court of Appeal in **Floris Piezzo & Another vs. Giancarlo Falasconi [2014] eKLR**.

14. In view of my analysis above, it is my conclusion that the Preliminary Objection is unmerited. Accordingly, the Notice of Preliminary Objection dated 22nd February, 2021 is hereby struck out with costs to the Applicant. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 25TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the Respondents.