



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 867 OF 2011**

**IN THE ESTATE OF GLADYS WAIRIMU WANJAH (DECEASED)**

**FELISTA WAMAITHA WAMUTITU.....PETITIONER/RESPONDENT**

**VERSUS**

**PAUL WANJAH WAIRUA.....PROTESTOR/APPLICANT**

**RULING**

1. The protestor/applicant has filed an application dated 11<sup>th</sup> November 2021 seeking for orders that:

1. Spent.

2. Spent

3. That this Honourable Court may be pleased to issue an interim temporary injunction order to restrain the Petitioner/Respondent, her family, servants, agents and or any one working for and or under her from burying the remains of MARY WANGUI WONG'OMBE in Land Parcel Number. THEGENGE/KIHORA/121 until the final disposal of this cause.

4. That this Honourable Court may be pleased to issue a temporary injunction order to restrain the Petitioner/Respondent, her family, servants, agents and or any one working for and or under her from burying the remains of MARY WANGUI WANG'OMBE or any other body in Land Parcel Number THEGENGE/KIHORA/121 until the final disposal of this cause.

5. That a copy of this order to be served upon the Officer-In-Charge Gachatha Police Post to ensure its compliance.

6. That the costs of this application be provided for.

2. The application was supported by the affidavit and written submissions of the applicant. It is the case for the applicant that the deceased in this succession cause was his grandmother. That the deceased left behind land parcel No. Thegenge/Kihora/121 that was jointly registered in her name and in the name of the late Simon Wamutitu Wang'ombe who was the husband of the petitioner/respondent in these succession proceedings. That the succession cause is still pending determination before this court wherein he, the applicant, has filed a protest against the confirmation of the grant to the petitioner. The basis of the protest is that the late husband of the respondent fraudulently caused himself to be registered as co-owner of the land with his grandmother in the year 1994.

3. That on the 7<sup>th</sup> November 2021 the daughter-in-law of the petitioner died and the petitioner intends to bury her on the disputed land. He thereupon moved to this court and filed the instant application to stop the burial. The court granted him interim orders pending the hearing of the application inter-partes. The applicant contends that the daughter-in-law of the respondent should not be buried on land that is in dispute. He is seeking that the court grants him temporary orders of injunction to stop the burial on the disputed land until the final disposal of the succession cause. He contends that if the burial takes place before the determination of the succession cause he and his family members will suffer irreparable loss and damage that would not be capable of being compensated in monetary form.

4. The application was opposed by the petitioner/respondent vide her replying affidavit sworn on the 15<sup>th</sup> November 2021 and the oral submissions of her advocate, **Mr. Kibuka Wachira**. It is the case for the respondent that the subject land measures 6 acres and is registered in the names of the late Gladys Wairimu Wanjahi and her late husband, Simon Wamutitu Wang'ombe. That the share for the late Gladys Wairimu Wanjahi is 4 acres and her late husband's share is 2 acres. That she has already obtained certificate of confirmation of grant in respect to her husband's share, Marked FWW-1. That she resides and occupies her late husband's portion of the land which is the place

where his remains are buried. That her daughter-in-law died on the 5<sup>th</sup> November 2021 and she intends to bury her on her late husband's portion of the land. That she is the administratrix of her late husband's estate and should therefore not be restrained from burying her daughter-in-law on the said portion.

5. Mr. Kibuka submitted that if the applicant is disputing ownership of the land he should move to the court that has the requisite jurisdiction over land ownership disputes and not raise the issue in this succession cause. He argued that the application is misplaced.

6. The applicant on his part pointed out on some discrepancies on the green card to imply that there was fraud on the acquisition of the 2 acres by the late husband of the respondent.

7. I have considered the grounds in support of the application and the grounds in opposition thereto. The applicant is seeking for interlocutory orders of injunction to restrain the respondent from burying her daughter-in-law on the disputed parcel of land. It is trite law that there are conditions to be met before orders of injunction can be granted as was held in the case of **Giella v Cassman Brown & Co Limited** (1973) EA 358 that:

**“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”**

8. There is no dispute that the subject land is registered in the joint names of the late Gladys Wairimu and the late husband of the respondent. The search certificates filed by both the applicant and the respondent shows that the share of Gladys Wairimu on the land is 4 acres while the share of the late husband to the respondent is 2 acres. There is no dispute that the respondent lives on her late husband's portion of the land and that the remains of her late husband are interred there.

9. The applicant is laying claim on the portion of land that is in occupation of the respondent on the ground that the land was transferred to the late husband of the respondent fraudulently. He referred to some discrepancies on the entries in the search certificate to imply that there was fraud in the manner the late husband of the respondent was registered as co-owner of the land.

10. The standard of proof in cases alleging fraud is high. In **Evans Kidero v Speaker of National Assembly & Another** (2018)eKLR it was held that though the standard of proof where fraud is alleged is the same civil standard of proof on a balance of probabilities, it is higher than the ordinary proof on a balance of probabilities but lower than proof of beyond reasonable doubt. The applicant herein has not shown the nature of fraud committed by the late husband of the respondent when he acquired the portion of 2 acres. In the premises, he has not established that he has a *prima facie* case with a probability of success.

11. The applicant alleges that he will suffer irreparable loss if the orders sought are not granted. However, apart from the mere assertions that he will suffer loss, he has not indicated the type of loss that he is likely to suffer. It has to be noted that the applicant is not the one in current occupation of the 2 acres of land that are in the name of the late husband to the respondent. It is the respondent who is in occupation of the land. The applicant will thereby not suffer any loss if the prayers are not granted. In any case, the court can order the exhumation of the body in the event that the applicant's claim succeeds. The second condition for granting of interlocutory injunctions has thereby not been met.

12. Mr. Kibuka submitted that the jurisdiction to determine questions of ownership of land as is being claimed by the applicant falls outside the jurisdiction of the probate court. I do agree with him in that respect. It is the Land and Environment Court that has the mandate to determine disputes related to ownership and title to land. In **In re Estate of Obedi Ndwiga Rubarita (Deceased)**(2021)eKLR it was held that:

**“It is now trite that the primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries..... With respect to matters touching on title to and, and occupation of land, the proper forum ought to be the Environment and Land Court which is established under the Constitution of Kenya 2010 and the Environment and Land Court Act, No. 19 of 2011. This Court (High Court) has no jurisdiction to determine any disputes that centers on ownership, occupation and use of land...”**

In the premises the applicant cannot challenge the ownership of the land by the estate of the late Simon Wamutitu Wang'ombe in these succession proceedings. He has to file a substantive suit in the proper court for that purpose.

13. The upshot is that I do not find any merit in the application dated 11<sup>th</sup> November 2021. The same is dismissed with costs to the respondent.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2021**

**JESSE N. NJAGI**

**JUDGE**

In the presence of:

Applicant

Mr. Kibuka Wachira for respondent

Respondent.

Court Assistant - Mr. Kinyua.

30 days R/A.