



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1363 OF 2018

IN THE MATTER OF THE ESTATE OF PETER KIAIRE MUHIA (DECEASED)

RULING

1. Before this Court for determination is the Notice of Motion application dated **12th May 2021** which **MARY MWIHAKI NJUGU** the Applicant seeks the following orders:-

“1. Spent.

2. Spent

3. THAT pending the hearing and determination of this Succession Cause, there be an order to allow the widow of the deceased one Mary Mwhaki Njugi access to her matrimonial home Makuyu/Makuyu/Block 1/1028.

4. THAT this Honourable court in its discretion be pleased to allow Mary Mwhaki Njugi to be a part of the Succession Cause.

5. THAT the costs of this application be in the cause.”

2. The Application was premised upon **Sections 1A,1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya Order 51 Rule 1 of the Civil Procedure Rules 2010. Section 35 of the Law of Succession Act Cap 160 Laws of Kenya** and all other enabling provisions of the law and was supported by the Affidavit of even date and the Further Affidavit dated **17th June 2021** both sworn by the Applicant.

3. The Respondent/Administrator **JOHN MUHIA KIARIE** the Administrator of the estate of the Deceased filed a Replying Affidavit dated **31st May 2021** in which he vehemently opposed the application. The application was canvassed by way of written submission. The Applicant filed the written submissions dated **16th July 2021** as well as the supplementary submissions dated **4th August 2021**. The Administrator/Respondent relied upon his written submissions dated **23rd July 2021**.

BACKGROUND

4. This Succession Cause relates to the estate of **PETER KIARIE MUHIA** (hereinafter ‘the **Deceased**’) who died intestate at **Kenyatta National Hospital** on **26th June 2018** vide Affidavit in support of Petition for Grant of letters of Administration **dated 15th April 2019**. It was indicated that the Deceased was survived by the following persons-

(i) SUSAN WAIRIMU KIARIE – 1st wife (Deceased)

(ii) MARY MWIHAKI NJUGI - 2nd wife

(iii) JANE WAIRIMU KIARIE - Daughter

(iv) JOHN MUHIA KIARIE - Son

(v) HKW – son (minor)

5. The assets and liabilities left behind by the Deceased were stated to be as follows:-

"ASSETS:

- “ a) ONE ACRE OF LAND AT MAKUYU PUNDA MILIA**
- a) TWO PLOTS AT MAKUYU EACH MEASURING AN EIGHTH OF AN ACRE**
- b) TWO (2) PLOTS IN WITEITHIE**
- c) FIVE (5) ACRES OF LAND AT GILGIL**
- d) TWO (2) ACRES OF LAND AT NAIVASHA**
- e) A LAND IN NGONG**
- f) A LAND IN RUMURUTI**
- g) TWO (2) PLOTS AT LANDLESS THIKA**
- h) KIBUTE PROPERTIES**
- i) A PLOT AT GAKUNGU MAKUYU**
- j) A THREE AND QUARTER ACRE PLOT AT ATHARA MAKUYU**
- k) MONIES IN THE BANK**
- l) SHARES**
- m) PENSION AND OTHER BENEFITS**

Total Estimate Value Kshs 30,800,000/-

LIABILITIES

- a) KENYA INDUSTRIAL ESTATE LOAN**
- b) EQUITY BANK LOAN**

Total estimated value Kshs 300,000/-.”

6. Following the demise of the Deceased the Respondent herein and his sister **Jane Wairimu** filed this Succession Cause. A citation dated **9th October 2018** was served upon the applicant. The Applicant did enter an appearance in the matter. However, on the date set down for hearing of this citation, neither the Applicant nor her Advocate appeared. The court then directed that the Respondent and his co-Administrator petition the court for Grant of letters of Administration. On **4th September 2019** a Grant of letters of Administration intestate was issued in respect of the estate of the Deceased. That Grant is yet to be confirmed.

7. The Applicant states that she got married to the Deceased in church on **29th November 2019**, and that unfortunately the Deceased died **six (6) months** after their marriage. The Applicant avers that following the marriage she settled with her husband in **Makuyu** specifically on the property known as **LR. No. Makuyu/Makuyu/Block1/1028** (hereinafter ‘the **suit property**’) on which property the Applicant avers the matrimonial home is situated.

8. The Applicant states that following the death of her husband she was thrown out of the matrimonial home by her step children after they had obtained letters of Administration, hence the present application by which the Applicant seeks orders to reinstate her back to the matrimonial home pending the determination of this Succession Cause. The Applicant also prays for orders to be included in the distribution of the estate of the Deceased.

9. As stated earlier the application is vehemently opposed by the Respondent. The Respondent concedes that the Applicant was indeed married to the Deceased. However, he categorically denies that the suit property was the matrimonial home of the couple. The Respondent insists that the suit property was built and developed by his late mother **Susan Wairimu Kiarie** and that it was the matrimonial home of the **1st** wife.

10. The Respondent further states that the suit property ancestral land which originally belonged to the **MUHIA** family and is registered jointly in the names of the Deceased and his siblings. That said property does **not** form part of the estate of the Deceased. The Respondent states that he and his siblings have built their home respective homes on the suit property and that he lives there with their adopted brother **H** who is a minor.

11. The Respondent denies that the applicant ever resided in the suit property. He avers that the Applicant lived in a rental property in **Makuyu town**. That the Deceased was intending to settle the Applicant in **Gilgil** but he died before this could be achieved.

12. The Respondent states that there exists extreme animosity between the larger **Muhia family** and the Applicant due to the family's belief that the Applicant had a hand in the death of the Deceased which the family views as suspicious. He avers that it would not be possible for him to reside on the suit property with the Applicant due to this animosity. That the Applicants efforts to re-enter the home were thwarted by the area '**Nyumba Kumi**'. According to the Respondent this application is an attempt by the Applicant to secure possession of the suit property through the backdoor thereby evicting her step children. Accordingly, the Respondent prays that this application be dismissed in its entirety.

ANALYSIS AND DETERMINATION

13. I have carefully considered the present application, the Affidavit in Reply as well as the written submissions filed by both parties.

14. It is common ground that the Deceased herein passed away intestate on **26th June 2018**. A copy of the Death Certificate serial No. **0403654** is annexed to this Petition for letters of Administration. It is further common ground that **Susan Wairimu Kiarie** who was the 1st wife of the Deceased pre-deceased her husband having passed away on **24th September 2010**. A copy of her death certificate (Annexure '**JMK-1**') is annexed to the Replying Affidavit dated **31st May 2021**.

15. The parties all agree that the Applicant was the 2nd wife of the Deceased. That their union was celebrated by a marriage conducted on **29th November 2017** at the **Makuyu Don Bosco Catholic Church**. A copy of their marriage certificate serial Number **14993** is Annexed to the supporting Affidavit dated **12th May 2021** (Annexure '**MMJ-1**').

16. Lastly, it is a fact that the Respondent and his sister **Jane Wanjiku Kiarie** were appointed as Administrators of the estate of the Deceased through a Grant of letters of Administration Intestate issued by the **High Court** to the two on **4th September 2019**.

17. There are three issues, which arise for determination in this application.

(i) Whether the Application is fatally Defective.

(ii) Whether the Applicant ought to be allowed access to the suit property.

(iii) Whether the Applicant should be allowed to participate in this Succession Cause.

18. The Respondent has submitted that the present application is fatally defective as the same was brought by way of a Notice of Motion as opposed to a summons as provided by **Rule 49** and **Rule 59** of the Probate and Administration Rules. They urge that the application be struck out.

19. In my view this submission is not merited as the manner in which the application has been brought is a matter of form not substance. **Article 159** of the **Constitution of Kenya 2010** exhorts courts to administer substantive justice **without undue regard to technicalities**. The filing of a Notice of Motion instead of a summons does not render the application fatally defective. I therefore dismiss this objection

ii) Grant of Order of Access

20. Although the Applicant has by prayer **(3)** of her application sought for temporary orders to allow her access to the suit property, what the Applicant is an actual fact seeking is an interlocutory mandatory injunction to allow her to re-enter and occupy the suit property.

21. The Applicant claims that the suit property was her matrimonial home an allegation which is hotly disputed by the Respondent. The question of whether or not this was the matrimonial home and the question of whether the Applicant has right of access to the property cannot be determined at this interlocutory stage on the basis of Affidavit evidence. These are issues which can only be determined after a full hearing of the suit on its merits where parties will be invited to call evidence in support of their respective positions.

22. As stated earlier the Applicant is in effect seeking a mandatory injunction to allow her to enter and occupy the suit property. A mandatory injunction is issued when a court directs a person to perform certain acts as opposed to a prohibitory injunction which rises to preserve the *status quo*.

23. **Blacks Law Dictionary Tenth Edition** defines a mandatory injunction as:-

“An injunction that orders an affirmative act or mandates a specified course of conduct”.

24. It is trite law that the courts should only grant mandatory injunctions in clear and simple cases. In cases where there are issues which are yet to be determined then such mandatory injunction ought not be granted at the interlocutory stage as this would amount to pre-judging the case which may ultimately embarrass the court if a different decision is reached upon determination of the suit.

25. In the case of **Lucy Wangui Gachara – vs Minudi Okemba Lore Malindi Civil appeal No. 4 of 2015**, the **Court of Appeal** held as follows:-

26. “.....Ultimately the court granted what was for all intents and purposes a mandatory injunction for the eviction of the appellant from the suit property. It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage.

If authority were required for the above proposition, they are countless. In *Shepherd Homes Ltd V. Sandahm [1971] 1 Ch. 34*, Megarry, J. stated:-

“.....it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation...”

And in *LOCABAILL INTERNATIONAL FINANCE LTD. V. AGROEXPORT [1986] 1 ALL E.R. 901*, Mustil, LJ restated the same principle thus:

“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case....”. (own emphasis)

27. In this case the question of whether or not the suit property was matrimonial property as alleged by the Applicant is yet to be determined. Secondly, the question of whether the suit property forms part of the estate of the Deceased is also yet to be determined. This is because the Title Deed for Title Number **Makuyu/Makuyu Block 1/1028** indicates that the property is registered in the names of **Peter Kiarie** (the Deceased), **Lucy Njeri Muhia**, **Michael Mwangi Muhia** and **Mary Muthoni Muhia**. A copy of the Title Deed is Annexure ‘JMK’4 to the Replying Affidavit. The question then arises as to whether the entire parcel of land comprising **0.612 Hectares** can in the circumstances be said to be part of the estate of the Deceased. This can only be determined after a full hearing in which witnesses are called.

28. It is noteworthy that the Applicant claimed to have been thrown out of the suit land following the demise of the Deceased in the year **2018**. One wonders why if the Applicant believed she had a right to occupy the suit property. She took no action until the year **2021** almost **three (3)** years after her alleged ejection from the property.

29. From the above it is evident that this is certainly not a clear and simple case in which an interlocutory mandatory injunction may issue. Even under the conditions for grant of interlocutory injunctions as set out in the celebrated case of *GIELLA – VS – CASMAN BROWN & CO. LTD (1973) E.A. 358* this application would still fail. The applicant has not demonstrated a *prima facie* case as required.

30. There is evidence of great hostility between the Applicant and the Respondents family. The Respondent avers that it would not be possible for the two groups to co-exist on the suit property. The applicant concedes that the relationship between herself and the family of the Deceased is not good.

31. Her efforts to gain access to the suit property have been unsuccessful. I am convinced that in light of the prevailing situation it may cause further animosity possibly leading to a breach of the peace between the family members if the orders sought are granted at this stage. Based on the foregoing I decline to allow prayer (3) seeking temporary orders granting the Applicant access to Title No. **Makuyu/Makuyu Block 1/028**.

(iii) Whether the Applicant should be allowed to participate in the Succession Cause.

32. By virtue of the fact that the Applicant is the 2nd wife (and now widow) of the Deceased then she is automatically party to this Succession Cause. Indeed the Applicant is listed as one of the survivors of the Deceased in the Affidavit dated **15th April 2019** sworn by the Administrators in support of their Petition for Grant of letters of Administration Intestate.

33. I find no evidence of any move by any party to exclude the Applicant from participating in this Succession Cause. On the contrary there is evidence that a citation dated **9th October 2018** was taken out by **Jane Wanjiku Kiarie** (the 2nd Administrator) which citation was served upon the Applicant. Upon service of the citation the Applicant did enter appearance in the matter through Ms **Kanyi Kiruchi & Company Advocates**.

34. The citation was then listed for hearing on **3rd April 2019**. On that date despite having notice of the hearing date neither the Applicant nor her Advocate appeared in court. The court proceeded to allow the citation. Thereafter the two administrators applied for Grant of letters of Administration.

35. It is therefore manifest that the Applicant has at all times been included as a party in Succession Cause and has even been named as a beneficiary to the estate.

36. The Applicant was served with a citation. She did not petition this court for letters of Administration neither did she file an objection to the petition filed by the Administrators. Thus the suggestion that she has been excluded is baseless as she has been included each step of the way.

37. I note that the Applicant has filed an Affidavit of Protest dated **26th May 2020**. However from the record no summons for confirmation of Grant has as yet been filed. The Grant in this matter was issued on **4th September 2019**. More than **six (6)** months have elapsed since said Grant was issued. In order to move the matter forward I direct that the Administrators file a summon for confirmation of Grant within **21** days. The summon to be served upon the Applicant who equally has **21** days to respond to the same. Thereafter parties will appear in court for directions.

38. Finally and in conclusion, the Notice of Motion dated **12th May 2021** is dismissed in its entirety. In order to advance this Succession Cause the court directs as follow:-

- (1) **The Administrators to file a summons for confirmation of Grant within 21 days of todays date.**
- (2) **The summons for confirmation of Grant to be served upon the Applicant MARY MWIHAKI NJUGU.**
- (3) **Upon service the Applicant has 21 days to file a reply.**
- (4) **Mention on 10th February 2022 for further directions.**
- (5) **Each party to meet its own cost.**

DATED IN NAIROBI THIS 26TH DAY OF NOVEMBER 2021.

.....

MAUREEN A. ODERO

JUDGE