



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
MILIMANI LAW COURTS
SUCCESSION CAUSE NO. 138 OF 1983
IN THE MATTER OF THE ESTATE OF KUNGU KARUMBA (DECEASED)
JOHNSON MUCHAI KARUMBA.....1ST APPLICANT
CHRISTOPHER KARUMBA.....2ND APPLICANT
VERSUS
HANNAH WAIRIMU KUNGU.....1ST RESPONDENT
ROSE NJERI NDUNGU.....2ND RESPONDENT
RULING

The Application

What is before the Court is the Summons (the application) dated the 19th day of April 2021 brought by Johnson Muchai Karumba, 1st Applicant, and Christopher Karumba, 2nd Applicant under Certificate of Urgency seeking for the following **ORDERS**: -

1. Spent.
2. That a temporary injunction be issued against the Respondents acting either by themselves or through their agents, servants, employees, assigns or any person or body from selling, leasing, charging, entering into agreements over or in any way dealing with the properties known as L.R No. 1/603, Wood Avenue, Nairobi and Title number Karandini 59 pending the hearing and determination of this application.
3. That a temporary injunction be issued against the Respondents acting either by themselves or through their agents, servants, employees, assigns or any person or body from selling, leasing, charging, entering into agreements over or in any way dealing with the properties known as L.R No. 1/603, Wood Avenue, Nairobi and Title number Karandini 59 pending the hearing and determination of the Applicants' Objection dated the 24th September 2019.
4. That a temporary injunction be issued against the Respondents acting either by themselves or through their agents, servants, employees, assigns or any person or body from taking possession, encroaching upon or in any way causing disturbance or harassment to the person occupying the properties known as L.R No. 1/603, Wood Avenue, Nairobi, and Title number Karandini 59 pending the hearing and determination of this application.
5. That a temporary injunction be issued against the Respondents acting either by themselves or through their agents, servants, employees, assigns or any person or body from taking possession, encroaching upon or in any way causing disturbance or harassment to the person occupying the properties known as L.R No. 1/603, Wood Avenue, Nairobi and Title number Karandini 59 pending the hearing and determination of the Applicants' Objection dated the 24th September 2019.
6. That this Honourable Court be pleased to stay execution of the order made by this Court on the 2nd April 2019 by Hon. Justice J.

N Onyiego pending the hearing and determination of this application.

7. That this Honourable Court be pleased to stay execution of the order made by this Court on the 2nd April 2019 by Hon. Justice J. N Onyiego pending the hearing and determination of the Applicants' objection dated the 24th September 2019.

8. That this Honourable Court be pleased to set aside the court order made on 2nd of April 2019 before Hon. Justice J. N Onyiego.

9. That this Honourable Court be pleased to issue an order of eviction against the Respondents, their agents, servants, employees, assigns or any person or body who may have taken possession or encroaching upon the property known as L.R No. 1/603, Wood Avenue, Nairobi and Title number Karandini 59.

10. That the OCS Kilimani Police Station do ensure strict compliance with the orders of this Honourable Court.

ii. Costs to be provided for.

The application is supported by the affidavit sworn by Johnson Muchai Karumba on his and on behalf the 2nd Applicant on the 19th of day of April 2021. The application is opposed by Hannah Wairimu Kungu and Rose Njeri Ndungu, the respondents vide their respective Replying Affidavits. The affidavit of the 2nd Respondent is sworn by Tevin Nazario Nyagah Ndungu, the son to the 2nd Respondent and holder of a Special Power of Attorney donated by the 2nd Respondent. It is dated 28th April 2021. The 2nd Respondent filed Grounds of Opposition dated the 28th day of April 2021 contesting the Summons on the following grounds:

- a. That the application is frivolous, vexatious and an abuse of the court process as it fails to disclose all the relevant material facts
- b. That the Applicants have not approached this Honourable Court with clean hands to warrant the grant of injunctive relief as they have perpetrated fraud on the property known as L.R No. 1/603, Wood Avenue, Nairobi and Title number Karandini 59 Nairobi
- c. That the Applicants have been intermeddling in the Estate of the late Kungu Karumba by collecting income from L.R No. 1/603, Wood Avenue, Nairobi and Title number Karandini 59 from the 1994 without authority.

The matter came up for hearing and the parties took directions to dispose of the same by way of written submissions following which the Applicants filed their joint written submissions and list of authorities both dated the 7th day of June 2021. The 1st Respondent filed her written submissions and list of authorities both dated the 12th day of July 2021. The 2nd Respondent filed her written submissions and list of authorities both dated the 14th day of June 2021.

I have read all the affidavits in support of the application and in opposition as well as the grounds of opposition. These documents form part of the pleadings in this case and are on record. I need not replicate their contents in this ruling. I have however understood the case for the applicants and the case for the respondents.

The Applicants' Case

It is the Applicants' contention that the Grant of Letters of Administration was made to the Public Trustee on the 15th of March 1983 and confirmed on the 30th day of November 1992 based on a family Deed of Accord signed by the three widows, Tabitha Kung'u, Mary Wanjiku Karumba and Esther Wanjiru Kung'u. They contend that despite the existence of the aforesaid Grant, the Respondents together with one Michael Njoroge Kung'u (now deceased) illegally and fraudulently took another Grant of Letters of Administration Intestate over the estate on the 4th of June 2019 without the Applicants' knowledge.

It is their contention that the 1st Respondent together with one Esther Wangari (now deceased) filed an application seeking orders to sell the property known as L.R No. 1/603, Wood Avenue, Nairobi and that the same was never served upon the Applicants; that the said application was settled vide consent order dated 2nd April 2019 authorizing the sale. Further, they instructed the firm of A.I Onyango & Co. Advocates to come on record and institute objection proceedings in addition to an application for the setting aside of the consent order upon its discovery. They contend that the firm of A.I Onyango & Co. Advocates (their now erstwhile advocates) mistakenly filed the application for setting aside of the consent orders in ***H.C.S.C No. 2860 - the matter of the Estate of Tabitha Muthoni Kung'u (deceased)*** dated 12th August 2020 instead of filing the same in the matter of the Estate of Kungu Karumba (deceased) as instructed thereto. Having realized that mistake on the part of the erstwhile advocates, they instructed their current advocates – Tim Njenga & Co. Advocates to withdraw the said Summons.

The Applicants aver that on 16th April 2021, unknown persons invaded L.R No. 1/603 Wood Avenue, Nairobi and purported to take over the premises on the basis that they had leased it from the Respondents and on the basis of a court order which they were not aware of. They claim that they are not aware of any transaction involving this property and that the Respondents have been involved in underhand dealings aimed at disinheriting the applicants.

The Respondents' Case

The 1st Respondent contents that this application is misplaced given that there already exists a court order directing that the property comprising in L.R No. 1/603, Wood Avenue, Nairobi be sold and the proceeds be shared at 33 1/3% to each of the three houses. She avers that the Order was made in the presence of the Applicants former advocate, which Order remains unchallenged and that the firm of A.I Onyango & Co. Advocates was served with the citation as directed by the Court which service was acknowledged.

She deposes that the Applicants have been using and letting out the said property for their own gain at the expense of all the other beneficiaries. She denies allegations that the Grant of Letters of Administration was obtained fraudulently and states that the matter was taken from the Public Trustee by consent of all the parties following which three administrators were appointed from each of the three houses. She states that the applicants are assuming a wrong position by alleging that the Grant was confirmed on the 30th day of November 1992 based on a family Deed of Accord signed by the three widows of the deceased and further denies that the property in issue had been awarded to Tabitha Muthoni Kung'u - the 1st wife of the deceased.

The 1st Respondent also deposes that the applicants took out the Grant of Letters of Administration in ***H.C.S.C No. 2860 - the matter of the Estate of Tabitha Muthoni Kung'u (deceased)***, to her and her sisters' exclusion and obtained and confirmed the Grant by use of falsified letter from the chief which matter has been taken up by the DCI. She further states that L.R No. 1/603, Wood Avenue, Nairobi does not solely belong to the applicants and that no strangers have invaded the property since the same was rightfully leased.

The 1st Respondent contends that the applicants have not demonstrated the grounds warranting the granting of the prayers sought and as such the Summons should be dismissed.

The 2nd Respondent, through her son and holder of the special power of attorney, avers that the Administrators of the estate of the deceased resolved to lease the L.R No. 1/603, Wood Avenue, Nairobi for the benefit of all the beneficiaries; that Kshs. 20,000,000 was advanced to the Administrators through the firm of Kabaiku & Co. Advocates being payment for one year pending giving vacant possession thereto; that the proceeds have since been distributed to the beneficiaries through the appointed Administrators of the three houses and that it is only the Applicants who have refused to collect their shares from the 1st Respondent, who is the administrator appointed to represent their house.

She further states that the application herein has been overtaken by events on the ground that the Public Trustee has already handed over the matter to the three Administrators and that numerous attempts were made to serve the applicants with the proceedings before Justice Onyiego which service was refused.

In response to the issue of the family meeting(s) and agreement(s), she avers that the issuance of the Grant of Letters of Administration to the Public Trustee on the 15th day of March 1983 and the subsequent confirmation made on the 30th day of November 1992 supersedes any earlier family meeting and/or resolution and that the deceased's estate had been under the administration of the Public Trustee since the year 1983 until the 4th day of June 2019 when the said office ceased to act; that the Office of the Public Trustee had always been suspicious of the activities of the Applicants with respect to the property in issue and to that effect, a meeting was called at Sheria House on the 1st day of March 2018 following numerous complaints made by some the beneficiaries.

She alleges that the applicants intended to unjustly obtain, to the exclusion of all other beneficiaries, L.R No. 1/603, Wood Avenue, Nairobi, by filing ***H.C.S.C No. 2860 - the matter of the Estate of Tabitha Muthoni Kung'u (deceased)***, even though the said property is registered in the name of Kungu Karumba (deceased) and not Tabitha Muthoni (now deceased).

Further, the 2nd Respondent states that the valuation report on the property as relied upon by the Applicants is misleading given that the same is describing the property as a leasehold, yet it is freehold and states that proper valuation was conducted by Silvereal Appraisers (K); that the funds held by the Office of the Public Trustee together with the title on L.R No. 1/603 Wood Avenue, Nairobi and the lease for Title Number Karandini 59 were released to the current three Administrators and that a Consent was signed on the 21st day of November 2019 for the distribution of the funds to all the three houses.

The Respondents accuse the applicants of fraud with the following particulars: -

- a. The applicants forged a letter purporting to have been signed by the 2nd wife, Mary Wanjiku Kung'u, and the 3rd wife, Esther Wanjiru Kung'u, giving the properties to Tabitha Muthoni Kung'u claiming to be the Family Deed of Accord dated the 11th day of January 1984.
- b. The applicants forged letter claiming that on the 19th day of July 1995 Tabitha Muthoni Kung'u, the Applicant's mother, had renounced her respective share of her inheritance and authorized the Public Trustee to distribute her share to the Applicants.
- c. The applicants misled the Chief of Lussigetti Location on the 28th day of August 2012 to give them a letter in which they omitted the name of two of their siblings Hannah Wairimu Kung'u and Esther Wangari Kung'u as children and beneficiaries to the Tabitha Muthoni Kung'u (now deceased).
- d. The applicants failed to mention the rest of their siblings from the second house and the third house as the children and beneficiaries of the estate of the Kung'u Karumba while pursuing the letter from the Chief of Lussigetti Location.
- e. The applicants fabricated Petition and Supporting Affidavits bearing wrong properties owned by the estate of Tabitha Muthoni Kung'u (now deceased).
- f. The applicants acquired a Certificate of Confirmation of Grant bearing properties which do not belong to the Estate of the Tabitha Muthoni Kung'u.
- g. The applicants placed depressed value to the properties they sought after by lying to the court while filing ***H.C.S.C NO. 2860 of 2012 – In the matter of Tabitha Muthoni Kung'u.***

h. The family of Kung'u Karumba never met on the said dated purported by the applicants to pass such Family Deed of Accord.

i. The applicants quest to register the properties in their own names and therefore effectively disinheriting their sisters from the first house.

In the foregoing, the 2nd Respondent maintains that the Administrators' dealings in L.R No. 1/603 Wood Avenue, Nairobi and Title Number Karandini 59 is in strict compliance with the law and all the attendant requirements and that as such the Application before the court lacks merit and the same be dismissed with costs to the Respondents.

Analysis and Determination

I have taken time to study and understand this matter and the issues raised by all parties. It is clear to me that the estate of Kung'u Karumba was initially administered by the Public Trustee. There is a Grant of Letters of Administration Intestate issued to the Public Trustee on 15th March 1983. That Grant was confirmed on 30th November 1992. The property was shared out equally to the three houses represented by the three widows of Kung'u Karumba, Tabitha Muthoni, Mary Wanjiku and Esther Wanjiru, all now deceased. That distribution was in percentages not in terms of which property goes to which house. I guess it was left to the parties to work out the shares.

I have also noted that the Grant issued to the Public Trustee was revoked by this court and Hannah Wairimu Kung'u, Michael Njoroge Kung'u and Rose Njeri Ndung'u appointed administrators. The Public Trustee handed over all documents of title to the administrators. By an order of this court issued on 17th December 2020, Michael Njoroge Kung'u, now deceased, was substituted with Peter Muchai Kung'u. The court record is clear that the current administrators of this estate are Hannah Wairimu Kung'u (representing the house of Tabitha Muthoni), Peter Muchai Kung'u (representing the house of Mary Wanjiku) and Rose Njeri Ndung'u (representing the house of Esther Wanjiku). The two applicants are siblings of Hannah Wairimu Kung'u and belong to the house of Tabitha Muthoni.

From the court file, it appears that the Applicants obtained a Grant of Letters of Administration in respect of the estate of their mother Tabitha Muthoni in Succession Cause No. 2860 of 2012. That Grant was confirmed on 17th March 2014. The Certificate of Confirmation shows the following properties as forming the estate of Tabitha Muthoni:

- i. Dagorretti Plot/Karandini Number 59.
- ii. Wood Avenue Flat No. 1/603.
- iii. Mbuyu part C.
- iv. Personal effects.

The first two properties are the same ones mentioned as properties in the estate of Kung'u Karumba and are the disputed properties in this succession cause. They also form the subject of the particulars of fraud advanced by the Respondents herein.

With that understanding of the court record, I now turn to the application under consideration. The applicants are seeking injunctive orders. In their submissions dated 7th June 2021 they have framed their issues and submitted in support of each issues as follows:

Whether the Applicants are entitled to the orders of injunction

They have submitted that this court has jurisdiction under Law of Succession Act to grant injunction. They submitted that the applicable principles for granting of temporary injunctions are laid down in the case of **Giella –v- Cassman Brown. (1973)E. A 358** as follows that an applicant must show that he has a prima facie case with chances of success; that the applicant is likely to suffer irreparable loss which cannot be compensated by an award of damages and that where the court is in doubt it must decide the case on a balance of probabilities.

They argue that they have demonstrated the prima facie case with chances of success. They contend that the Certificate of Confirmation to the Public Trustee was based on the Family Deed of Accord to the effect that this estate be shared out amongst the three houses in the ratio of 33 1/3rd %; that their mother Tabitha Muthoni inherited, among other properties, land comprised in L. R. No, 1/603 Wood Avenue Nairobi and Title No. Karandini 59 and that being the sons of Tabitha Muthoni, these properties devolved to them after the death of Tabitha Muthoni. They argue that the Respondents, through concealment of material, approached this court and were appointed administrators of this estate and that they have raised an objection.

They have argued that they stand to suffer irreparable loss or damage that no amount of damages can compensate them. The support this assertion by submitting that the respondents have leased out the property on L.R. No. 1/603 Wood Avenue, Nairobi to a third party without right to do so and without consulting the applicants thereby disinheriting the applicants. They claim that there is no amount of damages can atone for their disinheritance.

On the last principle they argue that the balance of convenience lies in favour of granting the injunction orders in order to preserve the estate pending the hearing and determination of the applicants' objection.

Whether the Applicants are entitled to the Order of Stay of Execution of the Order made on the 2nd day of April by Hon. Justice J. N Onyiego

The applicants' arguments on this point are that there is imminent threat of damage or illegal sale, lease or transfer of the property on L.R No. 1/603 Wood Avenue and title No. Karandini 59 and that this will result in irreparable loss to the applicants. The applicants argue that the respondents have admitted to leasing out the disputed property and a payment of Kshs 20 million paid. They claim that they have not received any money. They argue that the order to sell the property has not been implemented by the respondents but instead they have leased the property. They urge this court to grant stay of the orders of Justice Onyiego pending the hearing and determination of their objection.

Whether this Honourable Court should set aside the court order made on the 2nd day of April 2019

On this issue the applicants have argued that the orders by Justice Onyiego were made pursuant to Summons dated 30 May 2018 which Summons was not served on them. They claim that there is no evidence of service on them and that they learned later of the order dated 2nd April 2019. They have submitted that the respondents misled the court into granting the order made on 2nd April 2019 with the aim of intermeddling with the property in this estate and to disinherit the applicants for their own selfish gain. They urged this court to set aside the order in issue.

Whether the Applicants are entitled to the Orders of eviction

It is the Applicants' case that unknown intruders invaded the disputed property having leased the same from the Respondents; that by their own admission leasee is already in possession of the property; that the basis of this possession as explained by the respondents is the order dated the 2nd day of 2019 and that the respondents in leasing the said property were not acting in accordance with the order.

The applicants argue that it therefore follows that it is only prudent and in the interest of justice that the third parties, having taken possession as admitted by the respondents, be evicted from the said property. The applicants rely on *re Estate of David Lawrence Wangalachi (Deceased) [2019] eKLR* where the court proceeded to evict the respondents having found that their occupation was illegal and amounted to intermeddling.

Who bares the Costs of this Summons

The applicants argue that the respondents have necessitated this application and therefore must bear the costs of the same.

On the other hand, the respondents claim that it is the applicants who have been intermeddling with the estate; that the applicants filed H.C. S. C. No. 2860 of 2012 claiming that they were the only surviving children of their mother Tabitha Muthoni; that the applicants lacked capacity to deal with L.R. No. 1/603 Wood Avenue Kilimani because this property belongs to this estate and not that of Tabitha Muthoni. The respondents have submitted that the applicants have never been administrators of the estate of Kung'u Karumba and therefore have no powers to deal with this estate.

The respondents submitted that the actions taken by the administrators in taking over L.R. No. 1/603 Wood Avenue were in line with the law and compliant with all requirements. They argue that did this in good faith and in the interest of all the beneficiaries.

The respondents argue that the respondents have not come to court with clean hands. They cited *Nguruman Limited v Jane Bonde Nielsen and 2 others [2014] eKLR* where the Court of Appeal in reference to the principles of temporary injunction stated that:

“The conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. This means that if the applicant does not establish a prima facie case, then irreparable injury and balance of convenience do not require consideration.”

The respondents argue that this application was made in bad faith since the respondents have been intermeddling with the estate to the exclusion of the other beneficiaries. They argue that the applicants have failed to demonstrate that they will suffer harm that cannot be quantified in monetary terms or that cannot be cured. They cited *Kenleb Cons Limited v. New Gatitu Service Station Limited and another [1990] eKLR* where it was stated that:

“to succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction.”

The respondents argue that the balance convenience tilts in favour of the respondents. They argue that the applicants are the only members of the family who are against the rest of the family; that the applicants are part and parcel of the Kungu Karumba family and that there is no loss or damage on them and that the proceeds from the lease were shared out equally between the three houses and that the applicants have failed to collect their share of the money from the lease agreement from the 1st Respondent.

On whether the applicants should get the order for stay, the respondents argue that they were aware of the court proceedings and that the order dated 2nd April 2019 was made after their former advocate had been served on several occasions and failed to attend court. They further argue that the applicants are not entitled to eviction order because the properties in issue belong to the estate of Kungu Karumba and not any of his widows, now deceased. They argue that these properties are still in the name of Kungu Karumba and that all the beneficiaries including the applicants are entitled to a share.

I have given this matter careful consideration. I note that the Applicants have said nothing about the allegations of fraud made by the respondents. They have remained completely silent on those accusations. They have not said anything about the properties named in the Certificate of Grant issued in respect of the estate of Tabitha Muthoni and which properties are said to belong to the estate of Kungu

Karumba.

I have noted from the record that the Public Trustee handed over the management of the estate to the beneficiaries but following mismanagement, the Public Trustee took over management until this court appointed new administrators and revoked the grant to the Public Trustee. I find no fraud on the part of the administrators or the respondents in the manner they obtained the grant. It was a legal action and the grant was obtained through a court order. There is nothing from the Office of the Public Trustee to show that the appointment of other administrators and revocation of the grant held by the Public Trustee was fraudulent. In any event, the legal channels were open for any aggrieved party to go on appeal.

I have considered all the authorities cited and rival arguments. The applicants have failed to demonstrate that the properties herein, being L. R No. 1/603 Wood Avenue and Title No. Karandini 59 belong to them through the estate of their late mother Tabitha Muthoni. They have not shown any evidence to that effect save for the Grant issued in Succession Cause No. 2860 of 2012. The Certificate of Confirmation of Grant issued to the Public Trustee did not give particular properties to particular beneficiaries. It was a percentage that needs to be worked out to know which property goes to which house. That is yet to be done. This is what I can discern from the records. This court is unable to understand where the applicants are coming from in claiming those properties as belonging to their late mother. With this failure to demonstrate they are entitled to those properties to the exclusion of the other beneficiaries, the applicants have failed to show that they have a prima facie case with chances of success.

Further, the applicants are the only members of the family claiming to be entitled to the properties to the exclusion of the other beneficiaries. Even their sister, the 1st Respondent is not with them on that issue. The respondents are clear that whatever they have done was in the best interests of all the beneficiaries including the applicants and that they are acting legally as administrators to ensure that the estate is administered according to the law.

It is my considered view, having taken into account all the material placed before me, that the applicants have also failed to demonstrate that they will suffer irreparable loss that cannot be compensated in monetary terms.

I have not found anything adverse against the administrators of the estate. They were legally appointed as administrators and took up the duties of the administration of the estate according to the law. It is true that they have leased the property instead of selling it but that to me is not illegal given that the proceeds of the lease are shared equitably between all the beneficiaries. The court order did not give timeline for the sale of the property. In my view therefore the window is still open for the sale of the property.

I find no evidence that the applicants are entitled to the orders they are seeking. The respondents have argued that the Summons giving rise to the orders being sought to be stayed and set aside was served on the former advocate for the applicant. I find nothing tendered to negate that the said advocate was served and failed to act. I find it curious that the orders were issued on 2nd April 2019 but this application has been brought on 19th April 2021.

Consequent to my reasoning in this ruling, the application dated 19th April 2021 has no merit and must fail. The applicants do not deserve the orders they are seeking. They have failed to demonstrate to this court that they have a prima facie case with chances of success or that they will suffer any loss. They do not deserve setting aside of the orders of this court dated 2nd April 2019 or having them stayed. They do not deserve evidence orders either because the lease agreement was executed by the administrators in the course of their legal duties as such administrators. The Application dated 19th April 2021 is hereby dismissed. This is a family matter and I direct that each party bears own costs of this Summons. Parties are at liberty to pursue any other pending application in this cause. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2021

S. N. MUTUKU

JUDGE