REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 83 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE MUATHE NZYIMI MULOI (DECEASED)

TITUS MAINGI MUATHE ....1ST PETITIONER/APPLICANT

GIDEON NZYIMI MUATHE ....2ND PETITIONER/APPLICANT

VERSUS

BENSON MULWA KILONZO ....1ST RESPONDENT/INTERMEDDLER

ANN KAVEMBA KAULA ....2ND RESPONDENT/INTERMEDDLER

ONESMUS KITENYE KAULA ....3RD RESPONDENT/INTERMEDDLER

R U L I N G

1. The Petitioners herein filed an application dated 14/06/2019 seeking for orders *inter alia*: that the Respondents/intermeddlers herein be restrained from intermeddling and/or interfering with land parcel number **OKIA/NZUUNI/1391** which form part of the deceased's land; that the costs of the application be borne by the respondents.

2. The application is supported by the Affidavit of Titus Maingi Muathe sworn on even date in which he raised several issues *inter alia:* that the suit property forms part of the estate of the deceased as it is registered in his name; that the grant has already been confirmed; that the administrators are unable to distribute the estate of the deceased pursuant to the confirmed grant as the Respondents have unlawfully entered the suit land and started cutting down trees and committing other acts of wanton destruction which actions are illegal and unjustifiable and in violation of Section 45 of the Law of Succession Act: that it is necessary to preserve the estate of the deceased by the issuance of an order of injunction from this court.

3. The application is opposed. The 1st Respondent filed a replying affidavit sworn on 28/06/2019 in which he raised several grounds of opposition *inter alia*: that they have been in actual possession of the suit land for over forty years; that the suit land is the subject of a pending appeal to the Minister responsible for lands vide LA/245/97; that the applicants have their own adjacent P**arcel No. OKIA/NZUUNI/1052**; that the land registrar has already entered a restriction against the suit land pending the determination of the appeal to the minister; that the application should be dismissed as it lacks merit.

4. Parties agreed to canvass the application vide written submissions. It was the submission of the learned counsel for the petitioners that by virtue of having been appointed as administrators of the estate of the deceased and the grant having been confirmed then they are legally entitled to take such steps to protect the properties of the deceased from being interfered with and or wasted. It was finally submitted that the Respondents being intermeddlers should be stopped by an order of injunction.

It was submitted by the Respondents that they have been in occupation of the suit land for more than forty years and that the suit land had been a subject of an arbitration dispute which is now pending determination before the Minister for lands vide LA/245/97. It was also submitted that the Chief Land Registrar has since entered a restriction of the register which is to subsist until the appeal to the minister is finalized: that the applicants are guilty of material non-disclosure by failing to indicate the Respondents presence on the suit land and the existence of a pending appeal to the minister over the said land. It was finally submitted that the petitioners have not established a prima facie case with a probability of success to warrant the orders sought.

5. I have considered the rival affidavits and the submissions presented. It is not in dispute that the petitioners herein have already obtained a confirmed grant to the estate of the deceased and are *ipso facto* at liberty to administer the estate of the deceased. It is also not in dispute that the Respondents have never lodged any protest towards the confirmation of grant regarding the estate of the deceased and further they have not hinted in the replying affidavit of an intention to raise any such protest aimed at revoking and/or annulling the grant issued to the Petitioners. I find the following issues necessary for determination namely:-

(i) Whether the application for injunction is properly before the court.

(ii) Whether the petitioners have satisfied conditions for the grant of an injunction.

(iii) What orders may the court grant?

6. As regards the first issue, it is noted that the application has been brought pursuant to sections 45 (1) and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. Orders of injunction are usually sought for under Order 40 Rule 1 and 2 of the Civil Provisions of the Civil Procedure Rules. The provisions of the Civil Procedure Act and Rules that are applicable in succession matters are introduced therein vide Rule 63 of the Probate and Administration Rules as follows:-

> "*63(1) Save as in the Act or in these Rules otherwise provided and subject to any order of the court or a registrar in any particulars case for reasons to be recorded, the following provision of the Civil Procedure Rules namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules".*

Again Section 47 of the Law of Succession Act enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act and to pronounce such decrees and make such orders therein as may be expedient. The High Court also has inherent powers under Rule 73 of the Probate and Administration Rules to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Further under Rule 49 of the Probate and Administration Rules any person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in these rules shall file summons supported if necessary by affidavit. It seems this is exactly what the Petitioners have done and I see nothing wrong with it. I am unable to fault the Petitioners for approaching the court in this manner. In any event under the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010 the court is enjoined to administer justice without undue regard to procedural technicalities. I am therefore satisfied that the application for injunction filed by the petitioners is properly before the court.

7. As regards the second issue, I note that the Petitioners have urged the court to grant an order of injunction in order to restrain the Respondents from interfering with parcel number **OKIA/NZUUNI/1391**. On the other hand the Respondents maintain that they have been in occupation thereof for the last forty years and that the balance of convenience tilts in favour of denial of the injunctive order. An order of injunction is a discretionary remedy and which imposes an obligation upon an applicant to satisfy the court on a balance that an injunction ought to be granted. Hence the onus is upon the petitioners to discharge. In the case of **Giela –v- Casman Brown & Co. Ltd (1973) EA 358** the East African Court of appeal laid down principles that must be satisfied by an applicant seeking orders of interlocutory injunction namely; that an applicant must establish that he has a prima facie case with high chances of success; that the applicant will suffer irreparable loss that cannot be compensated by an award of damages; that if the court is in doubt it will decide on a balance of convenience.

8. On the issue of prima facie case, the court of appeal in the case of **Mrao Co. Ltd –vs- first American Bank of Kenya & 2 others (2003) KLR 125** held as follows:-

> "*A prima facie case in a civil application include but not confined to a genuine and arguable case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."*

The petitioners have averred that they have already obtained a grant of letters of administration intestate and which grant has since been confirmed. All through the filing of this succession cause upto confirmation of grant the Respondents never lodged any objections staking any claim to the estate of the deceased. A copy of a certificate of official search annexed to the replying affidavit by the Respondents confirms that the suit property **Okia/Nzuuni/1391** was duly registered in the name of the deceased on the 06/05/2002. The deceased is said to have died on the 8/10/2002 just about three months after he had been registered as the proprietor of the suit land. That being the position, I find that the said property could only be dealt with as directed or authorized vide a grant of representation issued by the Honourable court. The Petitioners claim is that the Respondents are intermeddling with the suit property to the detriment of the estate and are in violation of section 45(1) of the Law of Succession Act. The same provides as follows:-

> "*45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under the Act no persons shall, for any purpose take possession or dispose of or otherwise intermeddle with, any free property of a deceased person."*

From the above provision, it is quite clear that the property of a deceased person is protected and that no person should interfere or meddle with it as there are consequences as can be seen in Section 45(2) of the said Act that provides that any person who contravenes the provision aforesaid shall 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. The petitioners who already have a confirmed grant have the locus standi to bring the said application so as to protect and preserve the estate from alienation and wastage for the benefit of the beneficiaries. The property is duly registered in the names of the deceased.

Even if a restriction has been entered against the title, the petitioner's quest vide this application ought to be entertained as the suit property is likely to be alienated by the conduct of the Respondents. I find prima facie the Petitioners case has a high probability of success. Even if an appeal is pending before the minister, the Respondents have not presented evidence to suggest that the said appeal has overwhelming chances of success as against the obvious fact that the deceased is still the registered proprietor of the suit land. The respondents claim that they have been in possession of the suit land for over forty years is not helpful since the land is registered in the name of the deceased and further they have not lodged any objection to the grant as well as confirmation thereof. In the replying affidavit the Respondents have not indicated their wish to lodge any objection even if late in the day but have only claimed that there is a pending appeal to the minister. The restriction entered in the register by the chief Land Registrar only forbade any registration on the title but not a status quo on the ground and as such the

presence of the Respondents on the land amounts to intermeddling warranting the petitioners to seek redress. Musyoka – J in the case of **Estate of Veronica Njoki Wakagoto {2013} eKLR** while interpreting Section 45(1) of the Law of Succession Act stated as follows:

> "*The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious views of intermeddling and makes it a criminal offence and makes it a criminal offence ....*"

There is no doubt therefore that the Respondents are nothing but intermeddlers in the estate of the deceased. They cannot hide behind the restriction entered on the register as they ought to have presented their grievances to the succession court by way of an objection to the making of a grant or confirmation thereof. The respondent's claim of having occupied the suit land for a long period of time does not excuse the intermeddling since the law of limitation does not affect succession matters. They cannot use their alleged long occupation of the deceased's property to defeat the petitioner's quest to administer the estate.

Going by the above observations I find the petitioners/Applicant have established a prima facie case with a likelihood of success.

9. The second test for determination is whether the petitioners will suffer irreparable loss if the injunction is not granted. Land being an immovable property has an intrinsic value and that the owners have a sentimental attachment thereto. The succession cause proceedings herein are at an advanced stage in that the grant has since been confirmed and what is remaining is the distribution of the estate. The said distribution is likely to be prejudiced if the Respondents conduct is not checked. The petitioners stand to suffer irreparable loss that cannot be compensated in that if the Respondents activities are not checked then there will be wastage and alienation of the property. The Respondents will not be prejudiced since their hopes lie in the Appeal to the minister. In any event in the absence of an objection to making of a grant and confirmation thereof the Respondents still are at liberty to commence a suit against the petitioners before the Environment and Land Court for redress if need be. I am satisfied that the petitioners and the beneficiaries to the estate stand to suffer irreparable loss if the order of injunction is not granted. There is a heavy responsibility placed on the shoulders of the petitioners to protect and preserve the estate for the benefit of the beneficiaries who stand to suffer great loss if the injunction order is not granted pending the distribution of the estate. I find the petitioners have duly satisfied the second principle laid down in the **Giella –vs- Casman Brown & Co. Ltd (supra).**

10. As regards the third principle and in view of the aforegoing observations, I find no doubt exists in any mind as to the rights of the parties herein. The Respondents must allow the petitioners to carry out their duties as administrators for the benefit of the beneficiaries while the Respondents are at liberty to move to the Environment and Land Court for redress if need be. The balance of convenient clearly point to the need to preserve the property of the deceased pending distribution by the administrators. The Respondents claims on the suit land if any will be determined in the appeal now pending before the minister.

11. In the result, I find merit in the Petitioner's application dated 14/06/2019. The same is allowed in terms of prayer 2. Each party to bear their own costs.

It is so ordered.

Dated and delivered and Machakos this 23rd day of April, 2020.

D. K. Kemei

Judge