



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 721 OF 2007

IN THE MATTER OF THE ESTATE OF MOHAMOOD MOHAMED HUSSEIN (DECEASED)

HODHAN DAHIR MAHAMUD.....ADMINISTRATOR/APPLICANT

V E R S U S

AMINA MOHAMOOD MOHAMED.....RESPONDENT

RULING

Background

1. Hodhan Dahir Mahamud herein referred to as the applicant/co-administrator moved this court vide a Chamber Summons dated 28th April 2020 and filed on 16th June 2020 seeking orders as follows;

(a) That the Honourable Court be pleased to certify the instant application as urgent and service thereof be dispensed with in the first instance.

(b) That pending the interpartes hearing of this application, the Honourable Court be pleased to restrain the Respondent herein by way of a temporary injunction, either by herself, her servants, agents or auctioneers or any of them or otherwise from intermeddling, alienating, excavating, developing, subdividing, receiving and/or handling any monies from the estate of the Deceased, and/or dealing and/or interfering with the vested interests of the Administrator/Applicant herein and other beneficiaries of the Estate of the Deceased, in particular with respect to the property known as Title Number Kajiado/Kaputiei-North/1610.

(c) That owing to the extra-ordinary circumstances brought about by the Covid-19 pandemic, and further in consideration of the Executive Order made by the President of the Republic of Kenya restricting movements in and out of the county of Nairobi where the Applicant and other beneficiaries reside, the order of restraint by way of temporary injunction to stay in force until such a time that the Honourable Court gives further directions.

(d) That the Honourable Court be pleased to restrain the Respondent and further to order the respondent to adhere to and to strictly comply with the terms of consent of all parties dated 28th October 2015 and filed in court on 23rd November 2015.

(e) That costs of this application be borne by the respondent.

2. The application is hinged on grounds on the face of it and a supporting affidavit sworn by the applicant. In response, the respondent filed her replying affidavit sworn on the 5th May, 2020 thus opposing the application. Subsequently, parties through their respective counsel filed written submissions which they fully relied on to dispose the application without highlighting on the same.

3. The brief background of this case is that, the deceased herein whose estate these proceedings relate died intestate on 20th September 2006 leaving behind the following persons surviving him;

(i) Mohamed Mohamood Mohamed Hussein (son)

(ii) Amina Mohamood Mohamed Hussein (daughter)

(iii) Abdulkadir Mohamood Mohamed Hussein (son)

(iv) Kadar Mohamood Mohamed Hussein (son)

(v) Habon Mohamood Mohamed Hussein (daughter)

(vi) Shukri Mohamood Mohamed Hussein (daughter)

(vii) Hodhan Dahir (widow)

4. Among the assets comprising the estate as listed in Form P & A 5;

(a) LR. 209/11243/35 Nairobi

(b) Plot No. 36/2/231 Nairobi

(c) Title No. Kajiado/Kaputei/Naom/1610

(d) Plot No. 47G Isiolo

(e) Motor vehicle Reg. No. KAM 291Z

(f) Money Savings Bank Account No. 145xxxxx with Kenya Commercial Bank Ltd, Milimani Branch

(g) Money in Savings Bank Account with Housing Finance Kenya Ltd

(h) Pension Emoluments from Government of Kenya.

5. Subsequently, Hodhan Dahir Mohamud and Saida Mohamed a holder of Power of Attorney representing Mohamed Mohamood Mohamed Hussein a son to the deceased petitioned for a grant of representation on 3rd April 2009. The estate was gazetted on 22nd May 2009 vide Gazette Notice No. 6790.

6. Consequently, a grant of letters of administration was made to the two petitioners jointly on 21st September 2009. The grant was subsequently confirmed on 20th June 2013 with the estate being distributed to various beneficiaries but the same to be registered in the names of the administrators in trust for all beneficiaries with titles reflecting the share of each beneficiary.

7. During confirmation of the grant, one property known as L.R. Kajiado/Kaputei-North/1610 was not listed as it was the subject of a **Civil Suit No. 458/2017** Kajiado ELC Court and formerly **Machakos ELC Case No. 3/2015**. It was therefore left out of distribution pending the outcome of the said case which finally was determined on 19th April 2018 in favour of the estate.

8. Despite the said confirmation and distribution, a dispute arose between the two houses. The dispute revolved around a disagreement on how the estate was distributed which was not appealing to some beneficiaries. As a consequence, the two families sat down and decided to redistribute the estate vide a consent dated 28th October 2015 and filed in court on 23rd November 2015.

9. For avoidance of doubt and for purposes of ease of reference, the two families are referred to as Family A and Family B. Family A comprises of;

(a) Hodhan Dahir Mohamed (Applicant/Co-administrator)

(b) Habon Mohamood Mohamed Hussein

(c) Shukri Mohamood Mohamed Hussein

(d) Kadar MOhamood Mohamed Hussein

10. Family B also comprises;

(a) Saida Mohamed (Co-administrator)

(b) Bashe Ali formerly known as Mohamed Mohamood Mohamed

(c) Abdulkadir Mohamood Mohamed

(d) Amina Mohamood Mohamed

11. Vide the said consent, the land was redistributed as follows;

(a) L.R. No. 36/11/231, 8th Street Eastleigh be registered immediately in the names of Bashe Ali formerly known as Mohamed Mohamood Mohamed Hussein to be held absolutely by him.

For clarity, Family A's share in the property is worth Kshs. 10,277,777.70, while Family B's share in the property is worth Kshs. 9,722,222.20 as per the valuation carried out by Knight Frank Valuers Limited on the property that put its market value at Kshs. 20,000,000/- as at 3rd April 2013.

(b) L.R. No. 209/11246/35 Sunview Estate be registered immediately in the names of Hodhan Dahir Mohamed to be held absolutely by her.

For clarity, Family A's share in the property is worth Kshs. 7,196,445.10, while Family B's share in the property is worth Kshs. 6,805,555.30 as per the valuation carried out by Knight Frank Valuers Limited on the property that put its market value at Kshs. 14,000,000/- as at 15th March 2013.

(c) Plot No. Mwangaza B 614 Isiolo (Formerly Plot No. 47G) be put up for sale immediately to the highest bidder and the proceeds divided between the beneficiaries in the shares allocated in the Grant.

(d) Title No. Kajiado/Kaputiei-North/1610. This property is presently the subject of the main suit in Machakos E.L.C Case No. 3 of 2015 and in the circumstances is therefore not available for administration at this stage by the families pending the hearing and final determination of the case by that court.

The final outcome of the suit being unknown, the administration of the property will be revisited upon the successful conclusion of the case.

However, as a matter of principle, and with the hope that the suit will be adjudged in favour of the families herein, the families herein now agree as follows;

That upon successful conclusion of Machakos E.L.C Case No. 3 of 2015, and if the outcome is in favour of the families herein, the property be subdivided into two portions in which Family A will initially be allocated 51% share of the property to be registered and held absolutely by them, while Family B will be allocated 49 % share of the property to be registered and held absolutely by them.

For the purposes of compensation to Family A by Family B of the excess arising from L.R. No. 36/11/231, 8th Street Eastleigh and L.R. No. 209/11246/35 Sunview Estate, which excess is the sum of Kshs. 3,472,222.40, it hereby agreed that Family B will further excise from their subdivided portion, land whose measurement shall be equivalent on valuation to the sum of approximately Kshs. 3,472,222.40/-. The portion so further excised shall be allocated to Family A to hold absolutely and shall be in full and final settlement of all outstanding obligations as between the respective families.

(e) It is further agreed that the issue of fees related to survey, registration, valuation, and all other costs connected with the speedy implementation of this consent shall be met by the beneficiaries and/or respective families and the agreed amounts shall be deposited with the respective parties advocates upfront to avoid any delays in the implementation of this consent.

(f) It is further agreed that each respective party and/or family shall bear their respective advocates fees and all costs connected with the completion of the administration and registration of the respective properties in the beneficiaries' names.

(g) Upon adoption of the above terms by all parties, the parties to move the court to review the Grant of Representation so that the properties can be registered in the names of beneficiaries or their nominees and held absolutely. Registration be concluded within thirty (30) days from the date of issuance of Certificate of Rectification of Grant.

(h) The administrators are hereby mandated to execute all necessary transfers and related documents to the beneficiaries without any delay.

(i) This consent of the parties is FINAL and the administrators MUST complete the process of administration within the periods stipulated hereinabove in compliance with the provisions of Section 83 Law of Succession Cap 160 Laws of Kenya.

12. Following the adoption of the said consent, the court rectified the Certificate of Confirmation on 19th April 2017. According to the rectified grant the estate was redistributed as follows;

(i) Bashe Ali formerly known as Mohamed Mohamood Mohamed Hussein to take L.R. 36/11/231, 8th Street Eastleigh absolutely (whole).

(ii) Hodhan Dahir Mohamed to take L.R. 209/11246/35 Sun View Estate Nairobi absolutely (whole).

(iii) Out of Plot No. Mwangaza B 614 Isiolo (formerly Plot No. 47G) which is to be sold and proceeds shared as follows;

(iv) Hodhan Dahir Mohammed to get 9/72

(v) Amina Mohamood Mohamed, Habon Mohamood Hussein and Shukri Mohamood Mohamed Hussein each to get 14/72

13. According to the applicant/co-administrator, after this re-distribution, peace and harmony was restored in the family. After the ELC determined the ELC case in Kajiado in favour of the estate, the grant was once again rectified on 22nd October 2018 with L.R. Kajiado/Kaputei-North/1610 shared out in the ratio of 51:49 in favour of Family A and B respectively and more specifically shared out as below;

(a) Hodhan Dahir Mohamed 9/72

(b) mina Mohamood Mohamed, Habon Mohamood Mohamed Hussein, Shukri Mohamood Mohamed Hussein each 7/72.

(c) Bashe M. formerly known as Mohamed, Mohamood Mohamed and Abdulkadir Mohamood Mohamed and Kadar Mohamood Mohamed Hussein each 14/72.

Applicant's Case

14. From the body of the application and the affidavit in support, the applicant's prayer for injunction is pegged on the allegation that although sub-division of the properties in particular L.R. Kajiado/Kaputei-North/1610 has been going on as contemplated in the consent agreement aforesaid, family B decided to retain their portion rather than sell it.

15. That although Family A is not opposed to Family B retaining their portion of the property after sub-division, family A had allegedly received disturbing reports that the respondent herein has already started excavation and construction on the property without any authority and consultation from other family members and in particular the personal representatives of the estate. A copy of photographs showing heaps of soil with people working at the background were attached and marked "HDM-5".

16. That the respondent's action is in violation of Section 45 of the Law of Succession as it amounts to intermeddling with the estate of the deceased. He further averred that, as personal representative, she is authorized to sanction sub-division and commencement of any development on the said property.

17. She contended that her family (Family A) is entitled to compensation of Kshs. 3,472,222.00 from Family B which sum is supposed to be distributed once sub-division is completed. She further stated that the ongoing excavation and construction will jeopardize the ongoing sub-division process thus devaluing the estate.

18. She further contended that the respondent has not been allocated her specific area to develop before subdivision. She expressed the view that the ongoing development will erode the market value of the property to the detriment of other family members. That if allowed to continue with construction, anarchy will arise in the family.

Respondent's Case

19. In response, Saida Mohamed co-administratrix filed her replying affidavit sworn on 5th May 2020. She stated that the respondent is resident in U.K and due to Corona Virus lockdown in UK, she was not in a position to access any legal services to swear an affidavit before a notary public. She averred that the two families have no dispute over the mode of distribution of the estate.

20. She contended that the respondent and her siblings cannot be forced to sell their share nor can they be stopped from developing or using the same. She stated that, the respondent has been merely rearing chicken on an area of 50X100 ft being her portion for the last 5 years and has even connected electricity thus improving the value of the land. She further averred that the applicant is at liberty to sell her portion to any prospective buyer without interfering with other beneficiaries' shares.

21. She claimed that the delay in subdivision of the land has been occasioned by the applicant's family's failure to compensate Family B part of the legal fees they incurred in defending the ELC case.

Rejoinder by the Applicant

22. In her rejoinder to the replying affidavit of Saida, Hodhan swore a supplementary affidavit sworn on 11th May 2020 in which she stated that the consent agreement only provided for sub-division of L.R. Kajiado/Kaputei-North/1610 into two portions with each family taking its portion in the ratio of 51:49 and not individual beneficiaries. According to her, nobody should carry out development before sub-division and issuance of title deeds. She denied the allegation that the respondent is carrying out farming activities nor has electricity been connected.

23. She reiterated the averment that none of the beneficiaries knows the exact location of his or her share. That nobody knows whether the area being developed will overlap with future demarcation or beacons.

Applicant's Submissions

24. Through the firm of Rachuonyo and Rachuonyo, the applicant filed her Summons on 15th June 2020 reiterating the averments contained in the affidavit in support of the application and the supplementary affidavit. Counsel submitted that the respondent was acting in contempt

of court as she has flouted the consent agreement which only provided for sub-division of the property in question into two between the two families.

25. That the respondent's conduct amounts to breach of Section 45 and 82 of the Law of Succession in so far as intermeddling is concerned. In support of this argument counsel referred the court to the decision in the case of **Protus Masibo Watibin and Another vs. Conceptor Wanjala Watibin and Another Kitale Succession Cause No. 82/2011** in which the court found a purchaser as having illegally occupied and put temporary structures in the deceased's property before distribution of the estate.

Respondent's Submissions

26. The firm of James Njoroge and Co. Advocates appearing for the respondent filed their submissions dated 12th May 2020 vehemently opposing the application. Counsel adopted the content of the replying affidavit in opposition to the application. It was submitted that the respondent has not acted in breach of the consent agreement. That the respondent has occupied her share and therefore has the freedom to develop the same without seeking authorization from any party.

27. Further, counsel contended that the respondent has a specific share as a beneficiary out of Kajiado/Kaputei-North/1610 as per the grant rectified on 22nd October 2018. Counsel asserted that the applicant has no superior claim or right over the property than any other beneficiary. To support this argument, counsel placed reliance in the decision in the case of **Hudson Esendi Kivunaga v. Timothy Asiligwa Essendi and Another (2006)eKLR** where the court held that the petitioner and the objectors in that case were all beneficiaries and therefore entitled to be on the land of their father in accordance to their occupation preceding the death of their father.

28. Regarding the allegation of intermeddling with the estate of the deceased, counsel submitted that distribution has already been determined with each beneficiary getting his or her share.

Analysis and determination

29. I have considered the application herein, response by the respondent and rival submissions by both counsel. Issues for determination are;

(i) Whether the applicant has met the threshold for grant of injunctive relief.

(ii) Whether the respondent has intermeddled with the deceased's estate.

(iii) Whether the respondent has acted in breach of the consent agreement dated 18th November, 2015.

30. The applicant in this case is seeking injunctive orders restraining the respondent herein, agents, servants or any representative from intermeddling, alienating, developing, excavating or receiving any monies from the estate of the deceased pending interpartes hearing.

31. For an order of injunction to issue, a party seeking such order is duty bound to prove that; there is a prima facie case with a possibility of success; he or she is likely to suffer irreparable damage which cannot be compensated in monetary terms; on a balance of convenience the scales of justice tilts in favour of the applicant and finally, for any other sufficient reason or public interest as the court may determine.

32. The above stated principles have well been espoused in the often quoted decision in the case of **Giella v Cassman Brown and Company Limited (1973)EA 358.**

33. It is therefore incumbent upon the applicant to prove that on the material presented before court, he has a prima facie case thus establishing that, his right or interest the subject of litigation has been infringed. In the case of **Mrao Ltd v First American Bank of Kenya Ltd and 2 Others (2003)eKLR** the court pointed out on what constitutes a prima facie case as:-

“A case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

34. From the facts of this case and the prayer sought for injunction pending interpartes hearing, there is no substantive suit pending determination from which the court can assess whether it has a probability of success or not. In any event, the prayer was for exparte orders pending interpartes hearing which is already spent. For those reasons the first condition has not been established as there are no proceedings pending determination.

35. Regarding the general requirement of proof of irreparable damage which cannot be compensated in monetary terms, the applicant must prove that by the respondent planning to develop a portion of the deceased's estate to which she is entitled to a share, the applicant will suffer loss. The applicant has not with specificity established the loss or damage suffered or likely to be suffered owing to the alleged activities of the respondent. See **Joseph Ntombura v Godfrey Simiyu and 4 Others (2018)eKLR** where the court set out the test in determining what constitutes irreparable damage as;

“The test should be whether the person applying for the injunctive relief will suffer irreparable harm. The test is not whether the person against whom the orders is to be made will suffer irreparable harm.”

36. It is admitted by both parties that, the mode of distribution of the estate is not in dispute. In the rectified grant of 22nd October 2018 the contentious property L.R. Kajiado/Kaputei-North/1610 was shared out between the two houses (families) in the ratio of 51:49 pursuant to a

consent order and thereafter each beneficiary got a specific share in terms of a fraction out of the total acreage.

37. From the specific acreage, each beneficiary is entitled to develop his or her portion in a legally permissible way without seeking any authority from anybody. However, in this case, the subdivision has not been done so that each beneficiary will know the actual or physical portion to occupy on the ground after providing for access road in between the plots.

38. It is the applicant's view that, by the respondents starting development before being shown the specific portion to occupy will amount to breach of the consent order. Although the respondent does not deny excavating some portion, she claims that the portion excavated is only 50X100ft which will fall on her share. Has the applicant suffered any damage by these activities?

39. The applicant has not proved that she has suffered or likely to suffer loss or damage. If anything, it is the respondent who will suffer if an access road were to pass through the area intended to be developed or developed. Accordingly, I do not see any irreparable damage suffered by the respondent carrying out farming activities on a portion of the said land to which she is entitled a share as a beneficiary.

40. As regards prove on a balance of convenience whether justice tilts in favour of the applicant, the court will have to consider a number of factors: firstly, whether the land in question has been sub-divided and therefore each beneficiary shown his or her actual ground; Secondly, whether any permanent development before physical survey and sub-division is done will jeopardize the provision of other physical amenities like access (roads), supply of electricity or water in future should the intended development fall on their way; thirdly, whether permanent development before actual survey will jeopardize other beneficiaries in determining the value of the location one is eventually allocated after sub-division.

41. The above questions have been addressed by the applicant. It is not in dispute that the property in question is measuring over 16.5 acres. Due to various reasons among them lack of funds for sub-division, the property has not been sub-divided. Up to now, nobody knows which part of the property belongs to her or him. Before sub-division is done, it will be difficult to ascertain or determine which part of the property belongs to who despite the grant specifying the size each is entitled to.

42. In the absence of sub-division, it is difficult to ascertain the actual area of allocation of each individual beneficiary. To avoid a situation where each beneficiary will allocate himself or herself the ground he or she perceives to be more valuable than the other thus occasioning physical confrontation, it is prudent and fair for the ends of justice to be met that none of the beneficiaries should engage in constructing any permanent structures on the said property until sub-division is duly done and each of them shown what actually belongs to him or her on the ground. Prima facie on a balance of convenience, justice demands that an order do issue against the respondent or any other beneficiary from erecting any development permanent in nature on L.R. Kajiado/Kaputei/1610.

43. Further, it will be difficult to start removing or relocating some social amenities like access roads, water and electricity lines should the permanent structures fall on their way. However, this does not affect any temporary structures for purposes of carrying out farming activities such as chicken rearing which can be removed anytime should the survey and sub-division establish that the beneficiary concern would have encroached on another beneficiary's portion.

44. There is therefore sufficient cause to restrain the respondent from carrying out any permanent development on the said property based on the already stated reasons.

45. Concerning the issue of the respondent intermeddling with the estate, Section 45 of the Law of Succession is clear. Section 45(1) provides that;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

46. Intermeddling with the estate simply refers to unauthorized handling of the property making up the estate of a deceased person without authority. In the case of Gitau and Two Others v. Wandai and Five Others (1989)KLR 231 the court held that:-

“Any act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate.”

47. According to the applicant, the respondent did not seek authority or permission from the legal representatives of the estate before engaging in doing any development or activity in the said land. On the other hand, the respondent claimed that she had authority to enter into the property and develop her portion.

48. From the court record, the respondent has already been allocated a share on the property in issue. She has a specified amount of land allocated to her although not physically identified on the ground. For all purposes and intends, the respondent's act complained of cannot amount to intermeddling of the estate. She has authority of the court recognizing that she is a beneficiary entitled to a specific amount of the estate. She has already assumed ownership or engaged on developments on part of the estate. She is not a trespasser nor has she benefitted more than her entitlement as authorized by the court.

49. Save for lack of identification of the actual ground allocated due to lack of survey, the applicant does not need to be consulted by any beneficiary on how to handle her or his share. Whether a beneficiary decides to sell or retain her share is not for the administrators to determine. For the above reasons stated, it is my finding that the applicant has not proved the act of intermeddling which is a criminal offence.

50. Touching on breach of the consent agreement, nobody has challenged the consent order giving rise to the rectified Certificate of Confirmation of Grant dated 19th April 2018. Instead, it is the administrators who have failed their duty by completing the administration of the estate. It is now 2 years since the grant was finally rectified and confirmed.

51. By law, they should have completed administration of the estate within 6 months. They cannot hold beneficiaries hostage by not sub-dividing the estate. They should move with speed and have the land sub-divided and each beneficiary to assume his or her portion and do whatever he or she wants. Parties are not opposed to implementation of the consent agreement. It is the administrators who are dragging their feet. Any beneficiary can move the court for their replacement if they fail to complete the administration of the estate within reasonable time. To that extent, it is my holding that the respondent has not claimed more than she was allocated hence I do not see any act of breach of the consent order.

52. Having held as above, it is my finding that, the applicant has proved her case on a balance of probability only to the extent that;

(a) The respondent, her agents, servants or representatives are hereby restrained from erecting any permanent structure on property known as L.R. Kajiado/Kaputei-North/1610 until sub-division of the said land is carried out and each beneficiary allocated actual ground as per the rectified grant dated 22nd October 2018;

(b) That the respondent may continue with her temporary farming activities on the portion that she has been occupying pending the sub-division of the said land;

(c) That the administrators of the estate shall move with speed to complete the administration of the estate by facilitating sub-division of the same and transfer of the individual shares to the respective beneficiaries;

(d) This being a family dispute each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY 2020.

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J. N. ONYIEGO

JUDGE