REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 177 OF 2013

(IN THE MATTER OF THE ESTATE OF WANGECHI WANGOMBE alias WANGECHI w/o WANGOMBE)

ANNE N. NGUMBA.....1ST APPLICANT

SHELIMITH W. MUGO.....2ND APPLICANT

VERSUS

JEREMIAH J. WANJOHI.....RESPONDENT

RULING

This ruling is in respect of the applicants' summons dated 29 March 2017 brought under section 45 of the Law of Succession Act; Rules 49, 63 and 73 of The Probate and Administration Rules. The prayers which they seek have been framed as follows:

> ***"1. That the application be certified as urgent and its service be dispensed with in the first instance.***
>
> ***2. That pending the hearing and determination of this application, this Honourable Court be pleased to issue an order of injunction restraining the respondent by himself, his employees, agents or any other person acting under him, interfering, entering, partitioning and dealing with land parcel LR. No. Nyeri/Municipality Block 3/218.***
>
> ***3. That a prohibitory order be issued against land parcel L.R. NYERI/MUNICIPALITY BLOCK 3/328 pending hearing and determination of this application and Appeal pending before the Court.***
>
> ***4. That the respondent be liable to all costs of this application."***

In the affidavit sworn by 2nd respondent in support of the summons, the respondent is alleged to have either disposed of or vandalised property in business premises on L.R. NYERI/MUNICIPALITY BLOCK 3/328 (herein "the suit property"). The dispute between the parties is a subject for determination in the Court of Appeal and so the applicants think that it is not right for the respondent to conduct himself in a manner that will prejudice the outcome of the appeal.

The applicant swore further that an application by the respondent to dispose of the suit property had been dismissed by this Honourable Court on 21 March 2017.

It is basically for these two reasons that the applicants seek the orders on the face of the summons.

The respondent opposed the application and swore a replying affidavit to that effect. In it he swore that the suit property is to be shared equally between himself, the applicants and their sister Grace Wanjiru. He swore further that the applicants not only occupy a larger part of the suit property but have also rented it out. In his view the applicants are intermeddling in the estate of a deceased person. He stated that considering that size of the property each of the shares to the beneficiaries is not registrable and therefore the property should be sold and the proceeds shared equally amongst them.

Although this court directed that the summons be disposed of by way of written submissions, only the applicants filed theirs; even then, all they stated in those submissions was more or less what they had deposed in their affidavit.

This cause was concluded way back in April 2015 when I delivered a judgment in which I held that the deceased in this cause died testate and therefore her estate could only be distributed in accordance with her written will. As far as the suit property is concerned, I held that the same should be shared equally between the deceased's four children three of whom, as noted, are the parties in the present application; the other child is Grace Wanjiru.

As correctly stated by the applicants, an application by the respondent to dispose of the property so that the proceeds could be shared out equally amongst the four of them was dismissed by this court on 21 March 2017.

Before then there was another application by the protestor "to strike out or cancel" the certificate of confirmation of grant taken in the wake of the judgment of 13 April 2015. In my ruling, I directed the deputy registrar to issue a certificate that was in conformity with that judgment.

What I gather from these applications and counter applications is that the applicants and their respondent brother do not get along very well; if they did, there ought not to have been any problem in sharing out the suit property in accordance with the wishes of their late mother.

Squabbles or sibling rivalry amongst the deceased's children aside, I am of the humble view that this court has very little it can do in this matter after it delivered its judgment of 18 May 2016 which, for all intents and purposes, determined this cause. The most it can do, once properly moved, is either to have the judgment executed or stayed. The two alternatives are by no means exhaustive but the point I am making is that the court should desist from being enticed into regurgitating issues on which it has made a final determination.

The applicants' application is such an application; as far as I can gather, they are seeking a prohibitory order pending the hearing of an appeal.

For reasons I have given, I doubt this honourable court would be in good stead to determine such an application. It would, of course, have been a different matter altogether if the applicants were seeking a stay of execution of the judgment against which they have appealed pending the hearing and determination of the appeal; if such was the case all that the court would have been concerned with is whether they have satisfied the conditions for such an order.

But to determine an application for an injunction or issue a prohibitory order once the cause has been concluded and the estate distributed would, in my humble view, asking too much of this court. The simple reason is that once the grant has been confirmed and the estate distributed, the court is as good as being *functus officio* and it should not be seen to be going back to matters that it has already pronounced itself upon.

It is not in dispute that once the estate has been distributed, the title to any of the assets is effectively vested in the beneficiaries; the registration of the titles in their respective beneficiaries' names are more or less formalities which cannot deprive the beneficiaries of their vested interests.

As matter of fact, once the estate has been distributed, it ceases to exist as such because the deceased's or his estate's interest in the property is extinguished. Sections 49, 50 and 51 of the Land Act, cap. 280 are to this effect; they provide as follows:

> ***49. Transmission on death of joint proprietor***
>
> ***If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.***
>
> ***50. Transmission on death of a sole proprietor or proprietor in common***
>
> ***(1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of () [deceased]" or "as administrator of the estate of () [deceased]", as the case may be.***
>
> ***(2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—***
>
> ***(a) any transfer by the personal representative; and***
>
> ***(b) any surrender of a lease or discharge of a charge by the personal representative.***
>
> ***(3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.***
>
> ***51. Effect of transmission on death***
>
> ***(1) Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.***
>
> ***(2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor.***

It follows that where a dispute arises on the use or ownership of the property that was once an estate of a deceased person, the proper court to determine such dispute would be the Environment and Land Court in exercise of its jurisdiction under article 162. (2) (b) of the Constitution and section 13 of the Environment and Land Court Act, cap. 12A. In the present circumstances, it is that court that is ideally placed to issue the kind of order that the applicants are looking for.

It follows that in its present form, the applicants' application is misconceived and an abuse of the court process. It is hereby dismissed. Parties will bear their respective costs. It is so ordered.

Signed, dated and delivered on 5 August 2020

Ngaah Jairus

JUDGE