



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NUMBER 13 OF 2019

IN THE MATTER OF THE ESTATE OF ELIOT MUNYOKI KITHEKA (DECEASED)

KATHINI KITAVI NGULA....APPELLANT/APPLICANT

VERSUS

SYOMITI MUTEMI.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon.Ombata (MS) Resident Magistrate in SUCCESSION CAUSE NO.111 of 2016 in the CHIEF MAGISTRATE'S COURT at KITUI delivered on 5th February, 2019)

R U L I N G

1. Kithinji Kitavi Ngula, the Appellant/Applicant herein has moved this court vide Notice of Motion dated 24th August 2020 for the following orders namely;-

i. Spent

ii. That the Respondent by herself, his agents, servants or whosoever be and is hereby restrained by way of an interlocutory injunction from carrying out further destructions, grazing, clearance, cultivation, construction or in any way dealing with B2/KWA VONZA.2A/71 pending the hearing and determination of this application.

iii. That the Respondent by herself, his agents, servants or whosoever be and is hereby restrained by way of interlocutory injunction in terms of prayer (ii) above pending the hearing and determination of the appeal herein.

iv. That the orders of Resident Magistrate in Kitui Chief Magistrate's Court Succession Cause no.111 of 2016 be stayed pending the hearing and determination of the appeal herein.

v. That costs be provided.

2. The Applicant has brought this application on the following listed grounds namely:

a. That the Applicant has appealed against the decision of the Resident Magistrate delivered on 5th February, 2019 and that the execution of the said decision would render the appeal nugatory.

b. That the Respondent has without authority removed the fence that had been erected around the property and is now utilising the same to grace her animals following the revocation of the grant.

c. That the Respondent is misinterpreting the revocation of grant to mean that she now has the authority to interfere with the estate of the deceased.

d. That the Respondent's intention is to utilize the land during the pendency of the appeal in order to defeat the applicant's claim on the estate.

e. That the Respondent's use of the estate is detrimental to the Applicant.

c. The Applicant has supported the above grounds with her affidavit sworn on 24th August 2020 where she has majorly reiterated that the revocation of grant did not grant permission to the respondent to interfere with the estate of the deceased and that in the absence of letters of administration she has no authority over the estate.

4. The Applicant is seeking the intervention by this court to protect interference and destruction of the estate by the Respondent.
5. The Applicant through counsel submitted that this court apart from injuncting the Respondent should also grant stay. She however did not sufficiently elaborate the basis for the same.
6. **Syomiti Mutemi**, the Respondent herein has opposed this Applicant vide grounds of opposition dated 16th September 2020 and her replying affidavit sworn on the same day.
7. The Respondent opines that she is entitled to the estate though she has not explained the basis for her entitlement: She posit that this applicant is an afterthought and is aimed at delaying the appeal herein.
8. The Respondent further contents that she occupies and works on parcel in dispute (**Yatta B2/KWA – VONZA/71**) and has been doing so all her life. She argues that to that extent she cannot destroy what she considers her property.
9. The Respondent has faulted the applicant for laches pointing out that the appeal was filed on 5.3.2019 and this application was filed on 24.8.2020 more than 17 months after the filing of appeal. She opines that the affidavit in support is full of falsehoods.
10. This court has considered this application and the response made. From the onset the applicant has invoked the provisions which provisions in my view do not apply in probate matters. Probate and Administration matters has its own set of rules and procedures which are sui generis and the Rules of Civil Procedure Rules do not necessarily apply save for the rules cited under **Rule 63 of Probate and Administration Rules S.1A, 1B and 3A Civil Procedure Act** are not exempted under the said Rule. Furthermore applications in Probate and Administration matters are commenced by way of summons as provided for under **Rule 59(1) of Probate and Administration Rules**. Infact the format of the summons is expressly provided under **Rule 59(5)** of the said Rules.
11. Looking at the application, it is apparent that there is defect in form because, the applicant have moved this court by way of Notice of Motion instead of by way of summons as expressly provided by the Probate and Administration Rules.
12. However that defect notwithstanding, this court considers the defect as one of those insignificant defect curable under **Art 159(d)** of the **Constitution of Kenya 2010**. This court on that basis is inclined to determine this matter on the basis of substance rather the form which I find wanting.
13. The Applicant has also invoked the provisions of **Section 45(1)** Law of Succession Act which I find appropriate as under the said provisions no person is allowed to intermeddle with the estate of a deceased person except as provided under the said statute. The Respondent has not stated that she has any capacity or authority under the Law of Succession Act to deal with the estate of the late **Elliot Munyoki Kitheka**. While it is true that for an applicant to succeed in getting any injunctive reliefs he/she has to prove a number of factors, it is also true that estates of deceased persons under Section 45 must be protected.
14. As observed above for an applicant to get an injunctive relief he/she must establish and show the following:-
 - a. **That she/he a prima case with high chance of success.**
 - b. **That she/ he stands to suffer irreparable loss.**
 - c. **Show that balance of convenience is in her/his favour.**
15. I have considered the reasons advanced by the applicant. I have perused through the record of appeal and the circumstances surrounding this cause plus the fact that the respondent has failed to demonstrate her entitlement to the entire estate and I am satisfied that the applicant has demonstrated sufficient cause to restrain the respondent and restrict her to the 3 acres portion she was reported to have been occupying prior to the revocation of grant. She has not shown why she should be allowed to interfere with the estate of the deceased.
16. I am however not persuaded that the applicant is entitled to any stay of execution. In my view there is nothing to be executed from the decision of the lower court apart from reverting the estate to the name of deceased pending determination of the cause. I do not see how her appeal will be rendered nugatory by reverting the estate to the deceased pending determination of the cause in the lower court.
17. In the end this application partially succeeds. The Respondent is restrained from further occupation, cultivation or dealing in any other way with that property known as **B2/KWA VONZA/71** save for the approximate 3 acres she was occupying prior to the revocation of grant. For avoidance of doubt the injunction granted is temporary pending the determination of the appeal herein. The appellants is also directed to forthwith endeavor to have the appeal processed and possibly set down the appeal for disposal. Towards that end I direct that the lower court file be forwarded to this court for purposes of consideration by this court. The Deputy Registrar of this court to act accordingly. I shall make no order as to costs for now.

Dated, Signed and Delivered at Kitui this 24th day of September, 2020.

R. K. LIMO

JUDGE