



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO.231 OF 2008

IN THE MATTER OF THE ESTATE OF BENJAMIN WAMBUA KAVOLOTO (DECEASED)

AMBROSE MUSYOKA WAMBUA)

CAROLINE NDUNGE WAMBUA).....PETITIONERS/APPLICANTS

-VERSUS-

BEATRICE KAMENE MUTUKU.....1ST RESPONDENT

ALICE NDAVE MWANGANGI.....2ND RESPONDENT

JULIANA MAKASI NZAU.....3RD RESPONDENT

ALICE NTHANZE MUNENE.....4TH RESPONDENT

PASCAL KIOKO.....5TH RESPONDENT

GEOFFREY GICHURU MUTULILI.....6TH RESPONDENT

MARINA NDUKU KIMANGA.....7TH RESPONDENT

KEVIN MWANGI.....8TH RESPONDENT

RULING

1. The background to the application is that the applicants herein together with Catherine Mutindi Wambua and Tabitha Kamene petitioned for letters of administration which was granted on 1.7.2008 but however the same is yet to be confirmed.

2. The applicants herein then filed an undated summons on 1.7.2020 under section 47, 49 and 59 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules seeking injunctive orders against the respondents from dealing in the land parcels Machakos/Kiandani/459 and Machakos/Kiandani/80 pending the finalization of the succession cause.

3. The orders sought were as follows;

a) Spent

b) That the honorable court be pleased to issue injunctive orders restraining the respondents by themselves, their agents, workmen, servants and/or any other persons claiming under them or through them from intermeddling with all the deceased's assets and in particular Machakos/Kiandani/80 and Machakos/ Kiandani/459 by encroaching, subdividing, alienating, disposing, felling trees, constructing any buildings, fencing and depositing any construction materials or in any other way interfering with the parcels of land pending the finalization of this succession cause;

c) That the honorable court be pleased to issue an eviction order against the 5th to 8th respondents and a permanent injunction restraining the 5th to 8th respondents, their agents, servants, employees and or assignees and/ or any other persons claiming under them or through them from claiming and/ or interfering with the land parcels particular Machakos/Kiandani/80 and Machakos/Kiandani/459 pending the finalization of this succession cause;

d) That any such further orders as may serve the end of justice;

e) That the costs of this application be provided in the cause.

4. It is supported by supporting affidavit sworn by **Caroline Ndunge Wambua** sworn on **1.7.2020** and filed on an even date. In the said affidavit, the deponent averred that the succession cause initially had four administrators two of whom were deceased and their names deleted from the record whereupon the court issued fresh letters (CNW1) in the names of the applicants to continue administration of the estate. It was averred that the suit properties were part of the estate of the deceased and that the court made an order (CNW2 (a) and (b) that Machakos/Kiandani/459 was to revert back to the estate of the deceased. According to the deponent, it was discovered in 2015 that the 5th respondent had erected structures on a portion of Machakos/Kiandani/459 and he informed the deponent that the 1st respondent, a daughter in law to the deceased had sold the said portion of land to him and given him authority to construct. It was averred that the deponent and her co-administrator were approached by the 2nd, 3rd and 4th respondents to append their signatures to a sale agreement (CMW4) in respect of sale of a portion of Machakos/Kiandani/80 by the 1st respondent to the 2nd, 3rd and 4th respondents. The deponent averred that she was informed that the 2nd, 3rd and 4th respondents had paid Kshs 52,500/- to the 1st respondent and were making arrangements to remit the outstanding Kshs 2,747,500/- and take possession of the parcel of land. It was averred that the deponent discovered that there was construction undertaken on Machakos/Kiandani/459 by the 5th respondent and that the 7th and 8th respondents had encroached on the land and fenced off the same on the footing that they had purchased their portions of land from the 1st respondent. The court was urged to grant the prayers sought.

5. In reply to the application are four affidavits deponed by **Kevin Maingi, Marina Nduku Kimanga, Beatrice Kamene Mutuku** and **Pascal Kioko** on 15.7.2020. Kevin Maingi, the 8th respondent and Marina Nduku Kimanga, the 7th respondent averred that they had not intermeddled in the suit property neither had they purchased the same hence they were wrongly joined as parties to the proceedings. They urged the court to remove their names from the application.

6. Beatrice Kamene Mutuku, the 1st respondent averred that she was a beneficiary to the estate of the deceased being a daughter in law who was married to the late son of the deceased called Hansbury Mutuku. It was averred that the deponent built a permanent home on the land parcel Machakos/Kiandani/459 where she was shown by her late father in law who was the deceased. It was her averment that she and her late husband had been living on the permanent home from 1980 to 2005 when her husband died and left her with their children. She pointed out that she buried her late husband on land parcel Machakos/Kiandani/459 and that in order to educate her children she sold a portion from her share of the parcel. However, she proposed that what was sold be deducted from her share of part of the estate. She promised to desist from further sale of any share of the deceased's land until the succession cause is finalized and urged the confirmation of grant to proceed so that each beneficiary may get their share.

7. Pascal Kioko, the 5th respondent averred that he was a purchaser for value of 50x100 plot in Machakos/Kiandani/459 that he purchased from the 1st respondent and developed the same. It was reiterated that the 1st respondent sold her share of the land and not the share of any other beneficiary and he promised not to intermeddle with the suit land.

8. The court directed that the application be canvassed vide written submissions.

9. Counsel for the Applicants in his submissions pointed out to court that the claim against the 7th and 8th respondents was withdrawn and as a result the remedies in prayer 3 were now against the 5th and 6th respondents. Learned counsel raised two issues for consideration; firstly, are the 5th and 6th respondents intermeddlers of the deceased's estate and secondly is the honorable court clad with powers/discretion to issue eviction orders against the 5th and 6th respondents?

10. Learned counsel while appreciating the import of section 45 of the Law of Succession Act as well as the case of **Mutio Kamota Mbila & Another v Mutie Mutua (2019) eKLR** submitted that this court had powers to make orders as to meet the ends of justice including an eviction order. It was pointed out that the 5th respondent had been warned of intermeddling but he put up rental houses and was collecting rent from the tenants who rented the houses. The court was invited to consider the case of **Re Estate of David Lawrence Wangalachi (2019) eKLR** where the court issued eviction orders against a respondent who upon reading the case I noted did not oppose the application by failing to file a reply.

11. Counsel for the 1st Respondent vide written submissions filed on 9.10.2020 submitted that it would be unjust to evict the 5th respondent from the plot he bought from the 1st respondent who is a beneficiary of the estate. It was submitted that an order for preservation of the estate be issued and not an eviction order. Counsel for the 5th respondent submitted that the 1st respondent has a share in the land Parcel Machakos/Kiandani/459 and it was a portion of the same that he innocently bought hence he ought not to be evicted but that the estate of the deceased be preserved.

12. In this application, the 5th respondent is claiming a purchaser's interest over what the 1st respondent is claiming was allocated to her. The applicants case is that the actions constitute intermeddling and therefore the intermeddlers ought to be evicted. It appears that the contest is who would defeat the interest of the other over the disputed property and, after going through the evidence on record, I find the following issues for determination:-

i. *Whether the applications have merit.*

ii. *Whether the court may grant the orders sought.*

iii. *What orders may the court grant?*

13. The 5th respondent's justification on remaining on the land is that he had purchased a plot out of the land that the 1st respondent is entitled to.

14. Section 82(a) of the Law of Succession Act provides that;

“Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

15. In interpreting the above provision of law, the court in the case of **Alexander Mutunga Wathome v Peter Lavu Tumbo & Another [2015] eKLR (Machakos Succession Cause No. 80 of 2011)** noted that;

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”

15. Section 45 of the Law of Succession is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

16. The court takes the view that any of the actions in dealing with the disputed properties should only be by the applicants who have been appointed as administrator to the estate of the deceased and that if it is by anyone else then the same amounts to intermeddling.

17. I find that the application has raised weighty legal issues with regard to a purchasers interest and where such issues are raised in a succession cause, rule 41(3) of the Probate and Administration Rules provides that claims which are *prima facie* valid should be determined before confirmation. It states that :-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.”

18. In light of the evidence presented in court and the above mentioned provisions of the law, I am of the view that the issues raised by the 1st and 5th respondents cannot be fully canvassed in this application. However the court is duty bound to prevent wastage of the estate of the deceased. The power to do so is set out under the inherent jurisdiction of the court and under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. To that end, the court has power to grant injunctive orders to meet the ends of justice in a bid to preserve the estate pending confirmation of the grant.

19. This was observed in the case of **The Estate of George M'Mboroki (Deceased) [2008] eKLR** where the court held that *“it holds such intrinsic authority so as to observe the due process of the law, to prevent the abuse of the process, to do justice between the parties and to secure a fair trial between them”*.

20. The celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** sets out the grounds for granting an injunction. On the first principle as set out in the case, I am satisfied that the applicants have established a *prima facie* case as described in **Mrao v First American Bank & 2 others [2003] KLR, 125**. It was evident from the facts tendered in court that part of the estate of the deceased has been subjected to what amounts to intermeddling in the estate by both the 1st and 5th Respondents and yet the application for letters of administration is pending before the court. In the case of the Estate of **Veronica Njoki Wakagoto (Deceased) 2013 eKLR** where the court stated *“that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law.... the law takes a very serious view of intermeddling and makes it a criminal offence”*.

21. I am not satisfied that if the order so sought by the applicants is not granted, there will be irreparable loss to the estate of the deceased that cannot be compensated by damages. In **Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others (2016) eKLR**, the court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages. The 5th respondent had stated that he is solely on the portion that was said to have been allocated to the 1st respondent who gave evidence to the effect that she had what would amount to a gift *inter vivos*; whether or not this is true would have to be established at the stage of confirmation of the grant.

22. The 1st respondent has also raised the issue that she derives income from the suit property and that there was nothing that stopped her from approaching the court for a limited grant or an *ad colligenda* to allow her deal in the property as per the direction of the court. The court in the case of **Re Estate Of David Kyuli Kaindi (Deceased), Succession Cause No. 3403 Of 2005**, pointed out that:

“[18] Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. ...”

23. The purchasers interest alleged by the 5th respondent in order to defeat the title would be better proved in an ELC court in the terms of section 25, 26 of the Land Registration Act and section 13 of the ELC Act, hence I advise the 5th respondent to file pleadings in the court with the requisite jurisdiction.

24. Despite the 1st and 5th Respondents not being appointed as personal representatives and having been satisfied that there has been interference in what may or may not be the estate of the deceased, this court being a court of equity, and the 1st respondent having explained her actions it is just that the 1st respondent gives an account of what transactions she has engaged in with regard to the estate.

25. From the foregoing, I am satisfied that one of the principles for granting injunctions as set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd 1973 EA 358**, has been met. There exist are serious issues to be tried.

26. The applicants have sought that the 5th and 6th respondents be evicted; the 6th respondent having offered no response, I grant the order as prayed in prayer 3 of the application and I am guided by the reasoning in the case of **Re Estate of David Lawrence Wangalachi (2019) eKLR** where the court issued eviction orders against a respondent who did not oppose the application by failing to file a reply.

27. In respect of the 5th respondent, it is trite law that the principle that an owner of a property has the right to evict a trespasser who has refused to vacate the property (see **Harvey v. Brudges 14M & W437**) and that where such eviction is effected, the owner may also remove the property and goods of the person evicted to leave the premises empty. The applicants are not yet the owners of the suit property; they are administrators and or trustees of the property on behalf of the beneficiaries. Therefore, an eviction order and a permanent injunction would jeopardize what the 5th respondent has pointed out to be his interest in the suit property. I am of the view that granting a permanent injunction at this particular stage, when there are material facts in dispute, would tantamount to determination of the matters on affidavit evidence. On the other hand, the 5th respondent could only be entitled to continue staying in the suit property if upon determination of the matter by a competent court (ELC court) it is found that the applicants had no right to demand the 5th respondent out of the premises. The principle in this regard is that if there are triable issues the court must consider whether it will be just or convenient to refuse or allow the injunction. One such consideration is whether preserving the status quo would meet justice or convenience for the parties. Conversely, the court will consider whether maintaining the status quo will ameliorate or prevent injustice or inconvenience (**Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina [1977]3 All E.R.803**).

28. The *Status quo ante* to maintain is that pending confirmation of the grant, and the filing of the substantive suit in the ELC Court, the 5th respondent, continues on the premises, must not undertake any further developments, must not admit any other tenants on the premises. That status quo must have a timeline and must be conditional so as to prevent abuse of the court process.

29. The other consideration is whether denying or granting the injunction may finally dispose of the matter. In the words of Lord Diplock in **N.W.L. Ltd v Woods [1979] 1294, 1307**, it is stated:

“Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the applicant would have succeed in establishing his right to injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other”.

30. I grant prayer 3 with a disclaimer that further intermeddling is restrained. In respect of prayer 4, I decline to grant a permanent injunction as well as an eviction order against the 5th respondent and direct that the status quo on the suit property is maintained in terms of paragraph 28 above. The 5th respondent is directed to file a suit in the ELC court within 30 days to claim his interest failing of which the eviction order shall issue.

31. Section 54 of the Law of Succession Act that provides; **“A court may, according to the circumstances of each case, limit a grant of representative which it has jurisdiction to make, in any of the forms described in the fifth schedule”**. I would advise the 1st respondent to utilize the said provision of the law so as to legalize any action that she may take in respect of the estate of the deceased. In addition, I advise the petitioners to accelerate the hearing of the confirmation of grant.

32. I therefore make the following orders:-

i. A temporary injunction order be and is hereby issued against the respondents, their agents, servants or any person acting under their authority restraining them from any further intermeddling or dealing in any manner with the assets of the deceased person herein pending issuance of a certificate of confirmation of grant here from or as this court may direct and in particular, Machakos/Kiandani/459 and Machakos/Kiandani/80.

ii. An eviction order doth issue against the 6th respondent and a permanent injunction issue restraining the 6th respondent, his agents, servants, employees and or assignees and/ or any other persons claiming under him or through them from claiming and/ or interfering with the land parcels particular Machakos/Kiandani/80 and Machakos/Kiandani/459 pending the finalization of this succession cause.

iii. A status quo order is issued in the terms that pending confirmation of the grant, and the filing of the substantive suit in

the ELC Court, the 5th respondent, continues to be on land parcel Machakos/Kiandani/459, but must not undertake any further developments, must not admit any other tenants on the said land parcel Machakos/Kiandani/459.

iv. The 1st respondent to give an account of proceeds forming part of the Deceased's estate being from Machakos/Kiandani/459 within 30 days from the date hereof.

v. That in the alternative, the court hereby directs that the proceeds forming part of the Deceased's estate being from Machakos/Kiandani/459 be deposited in court within 30 days from the date hereof pending the hearing and determination of the succession cause.

vi. The part of estate being Machakos/Kiandani/459 that is in occupation by the 5th respondent and contested herein shall be preserved to await the cause to be lodged over same claim in the next 30 days in the Environment and land court. Failure to lodge same as ordered with the next 30 days from the dates herein, the same disputed acreage on Machakos/Kiandani/459 will be subject to distribution thereof and the eviction order shall issue.

vii. The administrators shall file the requisite application for confirmation of grant and fix the same for hearing within Sixty (60) days from the date hereof.

viii. The matter shall be mentioned within 30 days from the date hereof to confirm compliance.

ix. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 19th day of November, 2020.

D. K. Kemei

Judge