



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 917 OF 2013**

**IN THE MATTER OF THE ESTATE OF DORCAS OMENA BINAYO –DECEASED.**

**BETWEEN**

**ESNAS MUTIE KYUNGU.....PETITIONER**

**VERSUS**

**GEOFFREY MUHUNZA SHEM ANYIRA...RESPONDENT/APPLICANT**

**BRIAN MBATI.....INTERESTED PARTY**

**RULING**

1. The respondent /applicant in this succession cause, Geoffrey Muhunzi Shem Anyira, has filed an application dated 11<sup>th</sup> April, 2018 seeking for order that:

1.spent .

2. That the court be pleased to discharge and/or set aside the exparte order granted on 28<sup>th</sup> day of February 2018 to wit:

(a) ORDER NO. 3 : That the interested party/applicant be enjoined in this suit as a party to the proceedings herein.

(b) ORDER NO. 4 : That the interested party/applicant and other beneficiaries namely, Pamela Chepkemei Kasani, Eunice Chepkemei and his brother Evans Beyie Shilamala be and here by re- instated to the home where the respondent evicted them from.

2. The orders of the court made on 28<sup>th</sup> February 2018 were as follows:

(1) The application is hereby certified as urgent.

(2) Pending the hearing and determination of this application inter - parties there be a n order of stay of any further proceedings in respect of this case until the determination of this case/application herein.

(3) The interested party/applicant be enjoined in this suit as a party to the proceedings herein.

(4) The interested party/applicant and other beneficiaries namely, **Pamela Chepkemei Karani** , **Eunice Chepkemei** and his brother **Evans Beyie Shilamala** be and hereby re- instated to the home where the respondent evicted them from.

(5) Succession cause no. 28 of 2014 be and is hereby consolidated with succession cause no. 917 of 2013.

3. The orders of the court made on 28<sup>th</sup> February, 2018 were made following an application by one **Brian Mbat**i, the interested party herein. The application was supported by the affidavit of the said interested party in which he deponed that he is a grandchild and a beneficiary to the estate of the late **Dorc**as **O**mena **B**inayo (herein referred to as the deceased). That the respondent in this succession cause is his uncle

and son to the deceased and also a beneficiary to the estate of the said deceased. That the interested party and **Pamela Chepkemei Karani, Eunice Chepkemei and Evans Beyie Shimala** were living with the deceased before the deceased died. That the interested party's mother had passed away in 2010 and left him and the other above named beneficiaries under the care of the deceased.

That the deceased died in 2013 and left behind a will in which the said beneficiaries were provided for. That the respondent herein later on forced the interested party and his siblings out of the deceased's home saying that the property belonged to his late mother and that they had no right over the same. The interested party then came to court and filed the application dated 27<sup>th</sup> February, 2018 in which he was seeking for, inter alia, orders that:

(1) Pending the hearing and determination of this application Inter—parties there be an order of stay of any further proceedings in respect of this case until the determination of this case/application herein.

(2) That interested party/applicant be enjoined in this suit as a party to the proceedings herein.

(3) The interested party/applicant and other beneficiaries namely; Pamela Chepkemei Karani, Eunice Chepkemei and his brother Evans Beyie Shimala re- instated to the home where the Respondent evicted them from.

(4) Succession CAUSE No. 28 of 2014 be consolidated with Succession Cause No. 917 of 2013.

4. After going through the application, the court issued ex parte orders dated 28<sup>th</sup> February, 2018 and ordered for an inter partes hearing on 28<sup>th</sup> March, 2018. It is those orders that the respondent is seeking that they be discharged and or set aside.

5. The grounds of the respondent's application are set out on the face of the application and supported by his affidavit sworn on the 11<sup>th</sup> April, 2018. He deposes in the affidavit that orders numbers 3 and 4 issued on 28<sup>th</sup> February, 2018 have condemned him without giving him a hearing and have thereby occasioned him a miscarriage of justice. That the making of an order for the interested party to be enjoined in the case before hearing him has prejudiced his case as it shows that the court believed that the interested party is a beneficiary of the estate of the deceased. That the interested party has been aware of this succession cause since it was filed in 2013 and has never wanted to participate in it. That there is no value going to be added by the joinder of the interested party though he is at liberty to participate as a witness. That the prayers sought by the interested party have already been sought by the petitioner.

6. Further that in ordering that the interested party and others named be reinstated to the home where the respondent evicted them from means that the court has condemned the respondent without a hearing and shows that the court believed that the interested party and the named persons to be beneficiaries of the estate of the deceased and that he had evicted them from an unnamed home.

7. Further that by granting the two orders complained of there is nothing left to be argued inter partes. That all the other prayers stated in the notice of motion dated 27<sup>th</sup> February 2018 can be argued at the hearing of the petition and that the interested party may be a witness if he chooses to be one.

8. The application was opposed by the interested party vide his replying affidavit sworn on the 17<sup>th</sup> May, 2018. He says in the affidavit that the applicant/respondent admits that he evicted them from their late grandmother's home after her demise. That the respondent did so without any right as he is not an administrator of the estate of the deceased which makes his actions an illegality. That the orders made on 28<sup>th</sup> February, 2018 were meant to preserve the estate of the deceased and to protect the rights of the interested party who has a right to be enjoined in the matter. That the act of him being enjoined in the case will not cause any delay in the hearing of the matter. That the applicant/respondent has not demonstrated how he stands to suffer prejudice if the orders granted on 28<sup>th</sup> February, 2018 remain in force. That the applicant/respondent has never lived with them in the interested party's grandmother's home but has always lived at his biological father's home.

9. I have considered the application dated 11<sup>th</sup> April, 2018 and the grounds in opposition to the application. The application seeks to have the orders of the court made on 28<sup>th</sup> February, 2018 discharged and or set aside. The gist of the application made by the interested party on the 27<sup>th</sup> February, 2018 is that the respondent/ applicant had evicted them from the home where the deceased herein had left them. The interested party was thereby seeking to be enjoined in the succession cause so that he can protect his perceived rights against eviction. He also wanted the court to make ex parte orders to be re-instated to the home from which he and the other named person were evicted from by the respondent /applicant pending the hearing of the matter inter partes. The court saw merits in the application and granted the two orders ex parte pending inter partes hearing.

10. The applicant/respondent has not in the application dated 11<sup>th</sup> April, 2018 denied that he evicted the interested party and the other named persons from the home where the interested party's grandmother had left them. The fact that the applicant/respondent has not denied that he evicted the people from the home makes his application to set aside the order untenable. The applicant /respondent has not shown that he is an administrator to the estate of the late Dorcas Omena Binayo. He thereby has no authority from evicting anybody from the deceased's property. The order of the court was meant to preserve the status quo as it was before the eviction. The interested party has shown through his affidavit that he has a proprietary right to protect pending the hearing of the inter partes hearing. The applicant/respondent has not demonstrated that he will suffer any prejudice by the interested party being enjoined in the case or him and the other named persons being reinstated to their grandmother's home pending the hearing of the matter inter partes.

11. Only a person who has a grant of representation can take possession of or otherwise intermeddle with any free property of a deceased person- section 45 of the Law of Succession Act. The applicant/respondent has not filed any such grant that would allow him to evict the interested party from the home where the deceased left him. The court 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. The court can use such inherent powers to make orders for the preservation of status quo in respect to the estate of a deceased person pending inter partes hearing. The orders of the court dated 28/2/2018 were therefore legally tenable. The applicant/respondent has not shown otherwise.

12. The application by the respondent dated 27<sup>th</sup> February, 2018 did not specify the land parcel number where the home the respondent evicted them from is situate. However the home where the respondent and the other named persons were evicted from by the applicant is known by both the applicant and the respondent. There should therefore be no difficulty in the applicant complying with the orders of the court.

13. In the foregoing the application dated 11<sup>th</sup> April, 2018 is devoid of merit. The same is dismissed with costs to the interested party.

**Delivered, Dated and signed at Kakamega this 20<sup>th</sup> day of June, 2018**

**J. NJAGI**

**JUDGE**

In the presence of:

.....for applicant/respondent

.....for interested party.

Court assistant.....

Parties:

Applicant/respondent.....

Interested party.....

Petitioner.....