



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 21 OF 2013**

**IN THE MATTER OF THE ESTATE OF KAMUCERE RUBARI IRERI.....DECEASED**

**AND**

**TABITHA CHIORUI KAMUCERE**

**KANINI KAMUCHERE.....APPLICANTS**

**VERSUS**

**NICASIO KABUTE MUTHAIGA**

**WACHIRA MUTHAIGA**

**WILFRED MBIRIGITO NJIRU.....RESPONDENTS**

**RULING**

1. The applicants **Tabitha Ciorui Kamucere** and **Kanini Kamuchere** filed Summons under **Section 47** of the **Law of Succession Act** and **rules 49, 59 and 73 of the Probate and Administration Rules**. They were seeking order of injunction restraining the respondents **Wilfred Mbirigitu Njiru, Nicasio Kabute Muthaiga and Wachira Muthaiga**, by themselves, their agents, servants and or employees from alienating, transferring, cultivating, sub-dividing, felling trees or otherwise interfering in any way on Land Title **Mutira/Kirimunge/1589-1592** the same being resultant parcels emanating from sub-division of the original Title No. **Mutira/Kirimunge/84** or any part thereof until hearing and determination of the application and the suit. They also seek an order that an inhibition order be issued on title No. **Mutira/Kirimunge/1589-1592** being the resultant parcels emanating from sub-division of the original title being **Mutira/Kirimunge/84** until the hearing and determination of the main suit herein. That costs be provided.

2. Interim order of injunction was issued on 13<sup>th</sup> February, 2017 pending the hearing and determination of the application interpartes.

3. According to the applicants, they are the wives of the deceased Kamucere Rubari Ileri whose estate these proceedings relate. They have applied for the Summons for Revocation of Grant in respect of the title No. **Mutira/Kirimunge/1589-1592** which are resultant parcels from sub-division of title No. **Mutira/Kirimunge/84** which is the suit property. The said summons is pending hearing. That on 10<sup>th</sup> February, 2017 the respondents deposited construction material on the suit property a sure sign that they want to construct. According to the applicant she is apprehensive that the respondents may be planning to construct and alienate the suit property to her detriment. That it would be in the interests of justice that



applications have not been heard and determined. The applications have raised various issues. I have given this background to show that there are issues pending determination. On 7<sup>th</sup> October, 2014 the judge directed that parties take directions for the summons dated 6<sup>th</sup> November, 2009. On 20<sup>th</sup> November, 2014 when the matter was mentioned, the applicant was ordered to file a proper summons for revocation of grant. This has not been done. It is not denied that the respondents deposited building material on parcels No. 1589-1592 on 10<sup>th</sup> February, 2017. Though they claim in the affidavit that the land parcels belong to 3<sup>rd</sup> parties, the allegation is not denied. This was done despite the fact that there is an order for status quo to be maintained as per the above order. The court orders are not made in vain. If the respondents are not restrained, they may construct on the property and complicate matters before the matter is heard and determined. This Court is empowered under Section 47 of the Law of Succession Act to entertain applications and determine them. It provides:

***“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”***

The respondents should let the matter be heard and determined since the matter is in court before undertaking activities which may further interfere with the suit property and to void costs. The Court has discretion to make orders that may be necessary for the ends of justice.

From the annexures NKM -1- there is an entry for Kamuchere Rubari. The applicants deposed that they are the wives of Kamuchere Rubari who is deceased. They claim irregularities on how the land changed hands from the deceased. They have a legitimate claim over the estate of their husband and cannot be said to be busy bodies. Indeed it is not clear how the title changed from the deceased to the respondents. The deceased Kamucere Rubari Ileri died on 21<sup>st</sup> July, 1995. The applicants are the administrators of the estate. The respondents were registered before the deceased Kamucere Rubari died, that is, 8<sup>th</sup> April, 1981 as shown on the green card. They were registered through Succession. It is not clear how the entry of the deceased was cancelled through succession when he was still alive. The applicants are seeking orders of injunction. The principles of granting an injunction are laid out in the case of **Giella -V- Cassman Brown Ltd. (1973) E.A. 358**. The applicants must show that they have a *prima facie* case with chances of success. They must also prove that they are likely to suffer irreparable loss which may not be compensated by an award of damages. Where court is in doubt, it must decide the case on a balance of convenience. The applicants have shown that they have a *prima facie* case with chances of success as the deceased was entered as a proprietor of the land parcel before it changed hands to the respondent. The applicants have shown that they are likely to suffer irreparable loss if the respondents construct on the land and transfer to third parties.

This Court has jurisdiction to grant orders of injunction in succession matters. In the case of **Floris Pierro -V- Gianicarlo Falasconi (As the administrator of the estate of Santuzza Bilioti alias Mei Santuzza Civil Appeal No. 145/2012, Court of Appeal Mombasa**, it was held:

***“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the High Court was for a temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a succession cause. The appellants took the position that the Court had no such jurisdiction whereas the respondent took the contrary position. However, the High Court was persuaded that rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunctive orders. In other words, we are of the firm view that section 47 of the Act***

*gives the Court all embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with rule 73 of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders."*

Injunctive relief is available in succession cause. I find that there are issues which need to be determined in the pending application for revocation of grant. The applicants were granted leave to file a proper summons for revocation of grant. I find that the application has merits. I order that injunction do issue as prayed pending the hearing and determination of the main suit herein. I order that an inhibition order be issued on the title No. **Mutira/Kirimunge/1589-1592** pending the hearing and determination of this cause. Costs in the cause.

*Dated and delivered at Kerugoya this 31<sup>st</sup> day of March, 2017.*

**L. W. GITARI**

**JUDGE**

31.3.2017

Mr. Ndirangu for applicant

Applicant present

Court Assistant Martin Mbogo

Mr. Ngige for respondent Absent

Respondents absent this 31<sup>st</sup> March, 2017.

**L. W. GITARI**

**JUDGE**

31.3.2017