



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 262 OF 2012

IN THE MATTER OF THE ESTATE OF KIMANI MUNGAI (DECEASED)

RULING

The deceased herein Kimani Mungai died intestate on 4/7/2010 and was survived by a widow Winnie Wanjiru Kimani, Mary Wanjiru Waiganjo (sister), Ndungu Wanjiku Mungai (sister), John Mwathi Mungai (brother), Peter Mungai Mwathi (nephew) and Jane Wanjiku Kariuki.

Upon his death, the deceased left a net intestate estate comprising of L.R. No. Ngenda/Kahugu-ini/506, L.R. No. Ngenda/Kahugu-ini/T.139 and L.R. No. Ngenda/Kimunya/896.

At the time of instituting the petition herein for grant of letters of administration, all beneficiaries signed consent forms for making a grant except for Tamar Wanjiku Kariuki (sister-in-law) and Peris Wanjiku (sister). Consequently, Winnie Wanjiru Kimani (widow) and John Mwathi Mungai (brother) through a citation dated 9/2/2012 cited the two demanding for them to show cause why a grant could not issue or be made to the two applicants.

Tamar the applicant herein filed objection dated 17th October, 2012 objecting to the presentation of grant to the two. Unfortunately, the court had already issued a grant of letters of administration intestate to the two applicants one Winnie Wanjiku Kimani and John Mwathi Mungai on 20th July, 2015 after the citee (objector) failed to respond to the citation.

A certificate of confirmation of grant was issued on 12/2/2016 and estate shared out without the objector's participation. It is this certificate of confirmed grant that the objector is challenging vide her notice of motion dated 3rd February, 2017 pursuant to Section 47 and 76 (a) of the Law of Succession Cap 160 Laws of Kenya, and rules 17 (11), 26 (1), 44 and 73 of the Probate and Administration rules seeking for the following orders:

- (a) That the matter be certified as urgent.
- (b) That pending hearing of this application an order be issued restraining/stopping/preventing the respondent, their representatives, assigns, employees, servants, agents and anyone else acting on their behalf from entering into, alienating and taking possession of any portion/part of, and or whatsoever interfering with the applicant and her family's peaceful, quiet and actual possession, user and enjoyment of land title No. Ngenda/Kihuguini/T.139.
- (c) That the certificate of confirmation of grant dated 12th July, 2016 issued to Winnie Wanjiru Kimani and Mwathi Mungai be revoked and applicant be allowed to put in her proposed mode of distribution of the estate of the deceased.

(d) Costs of the application be provided for.

Application is supported by grounds on the substantive motion and affidavit in support deposed by Tamar Wanjiku Kariuki the applicant herein.

During the hearing, both parties agreed to canvass on ground (b) only with regard to restraining orders (injunction) and the prayer for revocation (prayer c) to be argued later as substantive prayer after taking directions on how to proceed whether by submissions or viva voce evidence.

Basically, the applicant is a sister-in-law to the deceased being a wife to one Stanley Mwangi Mungai a brother to the deceased herein Kimani Mungai.

Apparently, Stanley died earlier on 10/9/2008 and the applicant processed a grant of letters of administration intestate in respect of his estate being her husband vide Succession Cause No. 2371/2010 which she is the administrator. However, Tamar argued that the estate belonging to the deceased herein one Kimani Mungai was held in trust for his siblings among them Stanley her husband the same having been given to Kimani Mungai by their mother. She further contends that, in 1980 through HCC No. 1275/1976 the issue of trust was determined and the late Kimani Mungai the defendant then was ordered to continue holding the properties as a trustee for the rest of the family members. The said court order was annexed and marked (JWK-2).

The applicant further avers that, she was not informed or consulted when the grant was confirmed and that her proposed mode of distribution was ignored hence the prayer for revocation. She alleged that, pursuant to the confirmation and distribution of the estate, the respondents have already put on sale the property being occupied by her and the family hence the urgency in seeking for restraining orders as they are likely to be evicted.

In her reply, John Mwangi Mungai swore an affidavit on 16th March, 2017 on behalf of the other respondents denying allegations of misrepresentation of facts.

The respondents avers that, the applicant is not entitled to any share out of the deceased's estate as he was not holding the same in trust for the applicant's family. They argued that the trust declaration made by the High Court in HCCC No. 1275/1976 does not affect the applicant, her husband Stanley, nor her children. The respondents further argued that the share of the disputed property should be shared between the applicant and her step-son Peter Mungai Mwangi a son to Stanley from his first wife who died before the applicant got married.

Both counsels submitted in court orally giving different versions and all manner of interpretation with regard to trusteeship of the land in issue which forms the estate of the deceased.

Mrs. Njagi submitted that the applicant was in danger of being evicted from her land unless restraining orders are issued pending hearing and determination of the main application for revocation. She submitted that there will be no prejudice if the orders sought are not granted.

Mr. Mbichire for the respondents maintained that the applicant has no right over the land in issue and that she has already benefited from the estate of her husband and that there was no fraud nor misrepresentation of facts.

I have gone through the application herein, supporting affidavit and replying affidavit plus submissions by both counsels. I have however not considered authorities submitted by Mrs. Njagi a day after the hearing as Mr. Mbichire would have no right of reply.

The key issue for determination is whether there is good ground to warrant an order for injunction in this case.

The principles for award of an injunction are well laid out under Order 40 of the civil procedure rules

2010 and in the celebrated case of Giella vs Cassman Brown and Co. Ltd. 1973 EA 353. Is the applicant likely to suffer any irreparable loss which cannot be compensated by monetary award. Has the applicant established a prima facie case on a balance of probability, does the scales of justice tilt in her favour.

In Mrao Ltd. vs First American Bank of Kenya Ltd and 2 others (2003) eKLR the court held that:

“a prima facie case in civil application includes but is not confined to “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly, directing itself will conclude that there exists a right which has apparently been infringed by opposite party as to call for an explanation or rebuttal from the later”.

In this case, a grant has been confirmed and estate shared out to the dissatisfaction of the applicant. The applicant avers that there is eminent danger of her being evicted as potential buyers have gone to see the land to buy. Land is an emotive issue in this country and any slight mistake or mishandling may ignite or spark fire and ultimately death. Courts must therefore be cautious and extra careful when dealing with land issues as they are basically the umbilical cord of somebody’s livelihood”.

I do not see any harm in issuing an order restraining the respondents from alienating, disposing or selling any of the property that constitutes the estate of the deceased pending the determination of the main application for revocation.

If the order is not granted, the applicant may suffer irreparable loss given that her and her family will be evicted and their homes demolished. Besides irreparable loss, respondents will not suffer any prejudice if the orders are granted. Further to the above, the applicant has demonstrated that she has a good and arguable case in her application and further on a balance of convenience, scales of justice are tilting towards her hence favourable to her.

I do agree with Mr. Mbichire that, since both parties are in occupation of the estate, the status quo should be maintained in addition to the restraining orders. This is meant to preserve the estate before final orders are made in the substantive application.

Accordingly, application herein is allowed in terms of prayer (b) and in addition the status quo be maintained to the extent that nobody should do any major and or permanent developments thereon. Costs in the cause.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH. 2017.

J.N. ONYIEGO (JUDGE)