



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 3138A OF 2005**

**IN THE MATTER OF THE ESTATE OF ERASTUS KIRIMANIA MBAABU - (DECEASED)**

**BEATRICE MUTUNE MBAABU.....1<sup>ST</sup> APPLICANT**

**RUTH MARE MBAABU .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CATHERINE KANARIO ITHULA.....1<sup>ST</sup> RESPONDENT**

**MAUREEN KINYA MUGAMBI.....2<sup>ND</sup> RESPONDENT**

**EMMA MUTHONI MUGAMBI.....3<sup>RD</sup> RESPONDENT**

**TLASCEM PHARMACEUTICALS.....4<sup>TH</sup> RESPONDENT**

**AND**

**BEATRICE MUTUNE MBAABU.....1<sup>ST</sup> APPLICANT**

**RUTH MARE MBAABU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE DIRECTOR OF LANDS ADJUDICATION AND**

**SETTLEMENT.....1<sup>ST</sup> RESPONDENT**

**CATHERINE KANARIO ITHULA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the application dated 29<sup>th</sup> November 2016 the applicants Beatrice Mutune Mbaabu and Ruth Mare Mbaabu sought an interlocutory order to restrain the respondents Catherine Kanario, Kinya Mugambi, Muthoni Mugambi and Tlascem Pharmaceuticals by themselves or through their agents, servants or

proxies from entering and remaining on, trespassing, encroaching, dealing with, alienating or interfering with the Plot No. 19B which belonged to the estate of the deceased Eratus Kirimani Mbaabu. They further sought that the 4<sup>th</sup> respondent be ordered to vacate and/or be evicted from the plot; the court do find that the respondents have contravened the provisions of **section 45 of the Law of Succession Act (Cap. 160)**; and that the OCS Maua Police Station be ordered to enforce the orders. In the affidavit sworn by the applicants to support the application they stated that the property in question belonged to the estate of the deceased in respect of which they were the appointed administrators. The 1<sup>st</sup> respondent was the wife of the late Robert Mugambi Mbaabu who was the son of the deceased, and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were her children. It was further alleged that the 1<sup>st</sup> respondent was for 16 years separated from the late Robert Mugambi Mbaabu. The 4<sup>th</sup> respondent was a company carrying out pharmaceutical business in the plot. In 2006 the applicants obtained an order restraining Robert Mugambi Mbaabu from taking possession, disposing off or otherwise intermeddling with this plot, vehicle KWX 223 Isuzu lorry, and the deceased's matrimonial house at Mukuri Village in Maua. There was, however, a compromise, following negotiation, that Robert Mwangi Mbaabu could carry out his legal practice in the premises if he paid some reasonable rent to the estate. He was an advocate of the High Court of Kenya. He died in 2015. The applicants' advocates asked the Law Society of Kenya do appoint an advocate to wind up the firm. The firm of M/s Kevin Nyanyire & Co. Advocates was so appointed. It wound up the firm, following which all files and furniture were removed from the premises. In November 2016 the 2<sup>nd</sup> respondent requested the applicants to allow her to open a pharmacy in the premises. They rejected the request. Nonetheless, the respondents, using thugs and goons, forcefully entered the premises and in the process caused damage and injury. The respondents had in the past forcefully occupied two other properties of the estate, 3M Bata shop on plot No. 18B Maua and slaughter house on Plot No. 142 Maua. The deceased left 15 other beneficiaries and well over 60 grandchildren, it was said, and therefore it was unfair for the respondents to be behaving in this manner regarding the estate.

2. On 5<sup>th</sup> December 2016 the applicants filed another application by way of motion against the 1<sup>st</sup> respondent (the Director of Lands Adjudication and settlement) and 2<sup>nd</sup> respondent (Catherine Kanario Ithula) seeking an interlocutory injunction to issue to restrain the 1<sup>st</sup> respondent from processing and issuing a title document for Maua/Amwathi/451 in favour of the late Robert Mugambi Mbaabu, and that the 2<sup>nd</sup> respondent be restrained from transferring and/or alienating the said plot to 3<sup>rd</sup> parties. It was further sought that the 1<sup>st</sup> respondent does furnish documents to show the status of Maua Amwathi/451 to the court and the court declares the 2<sup>nd</sup> respondent an intermeddler of the estate of the deceased. In the affidavit sworn to support the application it was stated that the 1<sup>st</sup> respondent was in charge of adjudication and settlement in the Ministry of Lands, Housing and Urban Development whose duty was to adjudicate and issue title documents to land; the deceased was the owner of the piece of land that measured about 8 acres; the title to it was about to be illegally issued to the late Robert Mugambi Mbaabu; that when they checked the offices of the 1<sup>st</sup> respondent at Ruaraka in Nairobi they were informed that the computer records of the parcel had been altered from the deceased to the late Robert Mugambi Mbaabu without their knowledge or authority; that the title was going to be issued to the late Robert Mugambi Mbaabu, which was fraudulent; and they had further learnt that the 2<sup>nd</sup> respondent had either disposed or was in the process of disposing it to 3<sup>rd</sup> parties.

3. The 2<sup>nd</sup> respondent (Maureen Kinya Mugambi) in the application dated 29<sup>th</sup> November 2016 swore a replying affidavit to say that upon the winding up of the practice of the late Robert Mugambi Mbaabu, plot 19B in which he practiced became vacant, and that was why they decided to utilise it as a store for pharmaceutical products. She stated that the plot, just like plots 18B and 142, was always in the control of the late Robert Mugambi Mbaabu; the court had allowed them to continue doing business in plots 18B and 142, and they believed the same applied to Plot 19B; that the applicants had obtained an injunction in regard to plot 19B but a settlement had been negotiated to let the use of the plot; the applicants had done nothing to complete the succession of the estate of the deceased; were being discriminatory and were being pushed by the deceased's brother Stephen Gitonga Mbaabu who had appropriated to himself most of the estate of the deceased; she denied that the 1<sup>st</sup> respondent had at any time ceased to be the wife of the late Robert Mugambi Mbaabu; and that if plot 19B is taken away from them they stood to lose their

inheritance.

4. On 14<sup>th</sup> December 2016 it was directed that these two applications be heard together and that counsel for the parties do file written submissions. That was done. Mr Mbaabu was for the applicants and Mr Onyango was for the respondents.

5. There is no dispute that Plot No. 19B is part of the estate of the deceased Erastus Kirimanga Mbaabu. Under **section 79** of the **Laws of Succession Act (Cap.100)** the applicants are the administrators of the estate of the deceased. The grant has vested in them all the properties of the deceased. Under **section 82(a)** they have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any claim, survive the deceased or arise out of his death for his estate. The deceased left many beneficiaries who included Robert Mugambi Mbaabu who subsequently died leaving a widow (the 1<sup>st</sup> respondent) and two daughters (the 2<sup>nd</sup> and 3<sup>rd</sup> respondents). There is no dispute that until the late Robert Mugambi Mbaabu died in 2015 he had a law firm which was housed in plot 19B. The Law Society of Kenya approved M/s Kevin Nyanyire & Co. Advocates who wound up the legal practice. The applicants stated that following the winding up all the furniture and files were removed. In November 2016 the respondents asked the applicants to be allowed to open a pharmacy therein. They refused. It is at that point that the respondents forcefully entered the premises. The respondents stated that when the premises became vacant they moved in to store pharmaceutical products there.

6. The application dated 29<sup>th</sup> May 2016 sought an interlocutory injunction to restrain the respondents from entering and remaining in the premises. The object of granting a temporary injunction is to preserve the *status quo* while the rights are being litigated, and the onus is on the applicant to prove the need for the injunction. The applicant has to show a probability and success, the damages would not be sufficient, and where there is doubt the balance of convenience should be sought (**Guella –v-s Cassman Brown [1973]EA 358**). If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appears to be at that stage (**American Cyanamid Company –v- Ethyron Ltd [1975]AK ER 504**). It is also a well settled principle that an injunction sought in an interlocutory proceedings must bear some relationship to the cause of action in the proceedings initiated (**Shah –v- Shah [1981] KLR 374**).

7. What the applicants sought in the application dated 29<sup>th</sup> May 2016 was basically a prohibitory injunction; a preliminary injunction issued before or during trial to prevent irreparable injury from occurring before the court has a chance to decide the case. However, from the application and supporting affidavit, the respondents forcefully entered the premises and are now in occupation. The effect of the application is to have them removed from the premises; to have their pharmacy shop and business removed from the premises. To remove them from the premises, quite unfortunately, what was required was an application for a mandatory injunction. This is an injunction that orders an affirmative act or mandates a specified course of action. It is trite that a mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thinks that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which can easily be remedied (**Malindi Air Services –v- Halima Abdinoor Hassan, Civil Appeal No. NAI 202 of 1998 (CAK)**). It follows that the application cannot be allowed.

8. The other reason why the application cannot be allowed is that, when the deceased died in 2005 the late Robert Mugambi Mbaabu had his legal practice in this plot. He must have been allowed to operate herein by the deceased. The applicants state that when the late Robert Mugambi Mbaabu was alive they sought an injunction to restrain him from operating in the premises. The application was, following negotiation, compromised. He was allowed to continue occupying the premises but pay reasonable rent. There was no evidence that the rent was sought and was not paid. In short, they allowed the late Robert Mugambi Mbaabu to operate from there. What has changed? The applicants are the administrators and managers of the estate of the deceased. The estate includes Plot No. 19B. However, where the respondents were in occupation of the plot it would not be fair, nor right, for them to be asked to vacate until the estate has been distributed and the grant confirmed. It may very well turn out that this plot will, during distribution,

go to another beneficiary. Before that happens, however, the applicants will continue to operate from the plot. If the compromise between the applicants and the late Robert Mugambi Mbaabu was that reasonable rent be levied, the same can be demanded and paid.

9. It follows that the allegation that the respondents are intermeddling with Plot No. 19B, or any part of the estate of the deceased, has no factual basis.

10. In respect of the application dated 5<sup>th</sup> December 2016, there was no document or title annexed to show that the ownership of Plot No. Maua/Amwathi/451 has passed from the deceased to the late Robert Mugambi Mbaabu. There was no evidence of any search to support the allegation. There would be no basis, or reason, to issue any orders against the 1<sup>st</sup> respondent in the application. It has to be pointed out that, for the 2<sup>nd</sup> respondent, nothing was said, or shown, to demonstrate that she wants to alienate and/or dispose of the property. There was, for instance, no agreement to sell that was annexed. There was no application to the Land Control Board showing that she seeks to sell the parcel.

11. In conclusion, the applications dated 29<sup>th</sup> November 2016 and 5<sup>th</sup> December 2016 are dismissed with costs for want of merits.

**DATED and DELIVERED at NAIROBI this 24<sup>TH</sup> day of MAY, 2017**

**A.O. MUCHELULE**

**JUDGE**