



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 532 OF 2015
IN THE MATTER OF THE ESTATE OF ELIUD NDAMBUKI (DECEASED)
JACKSON KILUNGYA NDAMBUKI
WILLIAM MUTISYA NDAMBUKI.....PETITIONERS
VERSUS
AGNETA KAVINDU NDONYEOBJECTOR
RULING

The Application

Agneta Kavindu Ndongye, the Objector herein, has filed an application by way of Summons dated 14th November 2016 seeking an order to restrain the Petitioners, the beneficiaries to the Estate, their servants and/or agents and anyone acting under them from trespassing, entering upon and from the continued construction or intended occupation of Plot Number 2623 in the Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited, pending the hearing of the Petition and confirmation of grant of letters of administration to the deceased's Estate.

The subject property is registered in the name of the Eliud Ndambuki, (hereinafter referred to as the Deceased), and the Petitioners, who are the Deceased's sons, have petitioned to be administrators of the Deceased's estate. The Objector claims to have bought the said property, which she claims was matrimonial property, from Susan Nthambi Ndambuki, the deceased's wife who was also the Petitioners' mother. However, that the Petitioners started interfering with her right to occupy the said property in February 2015 after the death of their mother. She attached a copy of the sale agreement entered into with the said Susan Nthambi Ndambuki, as well as notice to vacate dated 19th October 2016 issued to her by the Petitioners' Advocate.

The Petitioners in response filed a Notice of Preliminary Objection dated 16th December 2016 and a replying affidavit sworn on the same date by the 1st Petitioner. The grounds for the Preliminary Objection are firstly, that the Objector is an intermeddler and a stranger to the Estate of the deceased, and has no cause of action neither audience before this Court; and secondly, that this Court has no jurisdiction to issue orders of injunction in a succession cause.

The Petitioners further averred that the Deceased was the legal and registered proprietor of all that parcel of land known as Plot Number 2623 in the Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited which is not part of the matrimonial property, and that the same never vested in Susan Nthambu Ndambuki who had no right or capacity to sell the property to the Objector.

It was also alleged that the sale agreement attached by the Objector was a forgery, and the Petitioners attached a copy of the confirmation letter from Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited dated 31st October 2016, indicating that the deceased is still the owner of the said property.

The Issues and Determination

This Court on 21st December 2016 directed that the Objector's application and Petitioners' Preliminary Objection be heard and determined together by way of written submissions. The Objector's Advocates, Kanui & Company Advocates filed submissions dated 7th March 2017, while B.M. Mung'ata & Company Advocates for the Petitioners filed submissions dated 28th April 2017.

I have read and carefully considered the pleadings and submissions made by the Objector and Petitioners. The issues to be decided are firstly, whether the Petitioners' preliminary objection has merit and should be upheld, and secondly whether the orders of injunction sought herein are available to the Objector.

On the first issue, the Objector submitted that the Petitioners' Preliminary Objection does not raise pure points of law, and regard will have to be made to the facts of the case to determine whether or not the Objector is indeed an intermeddler. Further, that it is fallacious to state that this Court does not have the jurisdiction to issue injunctive orders in succession causes, as it is presumed wrongfully, that the equitable remedy of injunction is only available to a litigant appearing before a civil court and not a succession court.

Reliance was in this regard placed on section 47 of the Law of Succession Act, and Rules 49, 63 and 73 of the Probate and Administration Rules as giving this Court jurisdiction.

The Petitioners on the other hand submitted that the law defines intermeddling to include sale, taking possession, transfer, use on in any other way using the property of the deceased, and that the Objector allegedly bought the property of the deceased from a person who did not have authority of the court or confirmed grant to sell it. Further, that the Objector admitted that she has been interfering with the said land on the strength of the alleged sale agreement.

On the jurisdiction of this Court to issue injunctions in succession causes, the Petitioners submitted that the Law of Succession provides for the provisions of the Civil Procedure Act and Rules which have been incorporated into the Law of Succession, and that orders of injunction are issued under Order 40 of Civil Procedure Rules which is not one of the provisions imported into the Law of Succession. The Petitioners cited various judicial authorities in support of this position including **In Re Estate of Ng'ang'a Njoroge Njuguna, Nairobi Succ Cause Number 1016 of 1993.**

The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696,** as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1 KLR 141,** the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

Section 45 of the Law of Succession Act addresses intermeddling with a deceased's estate, and provides that other than instances expressly authorized by the Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

The preliminary objection raised by the Petitioners as to the Objector being an intermeddler will therefore require the establishment of certain facts before it can be upheld, and particularly the particulars of the land that the Objector is claiming, and the nature of the Petitioners' and Objector's interest and occupation of the said land. This ground cannot therefore be raised as a preliminary point of law and is dismissed.

The preliminary objection raised by the Petitioners on this Court's jurisdiction can only be decided by looking at the applicable law, and is therefore a pure point of law and is legitimately raised. It is in this regard notable that in addition to injunctions being issued under Order 40 of the Civil Procedure Act, they are essentially equitable remedies, that can be issued by any Court of equity such as this Court. In addition, the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules give wide discretion to the Court as to the orders it can make, and the objection is therefore not found to have merit.

Coming to the second issue as to whether the injunction sought can issue, the Objector submitted that she has an interest in the subject land, having bought the parcel of land in 1998 and has since been in possession of it for the last 18 years. The Petitioners on their part urged the Court to find that the parcel of land in issue belongs to the estate of the deceased, which fact is not contested by the Objector.

Further, that there is no evidence that the deceased sold it or parted with ownership through any other means, and that this Court has never issued a confirmed grant authorizing any sale or any transaction in these succession proceedings with respect to any property of the deceased. It was further submitted that the Objector has no interest in, or locus to raise a claim to the matrimonial property of the deceased, and the only person capable of raising that issue was the wife of the deceased and in different proceedings.

I am alive to the equitable principles that are applicable for the grant of a temporary injunction as stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, which are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The question I must therefore answer is whether the Objector has met this threshold for the grant of an injunction. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR stated as follows as to what constitutes a *prima facie* case:

“a prima facie case in a civil application includes but is not confined to a “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 the opposite party as to call for an explanation or rebuttal from the latter.”

Applying these principles to the instant application, I note that both the Objector and Petitioners have stated that the parcel of land known as Plot Number 2623 in the Katelembo Athiani Muputi Farming and Ranching Co - operative Society Limited is registered in the Deceased's name, and they both provided evidence to this effect.

The Objector however did not provide evidence of her allegation that the said property was matrimonial property. In addition, the Objector did not provide any evidence of a sale agreement entered with the deceased, or any confirmed grant with respect to the Deceased's estate issued to Susan Nthambi Ndambuki with whom she entered into a sale agreement, authorizing her to distribute or sell the subject land.

In the circumstances, I find that the Objector has not established a *prima facie* case, and her application must fail. The Summons dated 14th November 2016 is accordingly dismissed, and each party shall meet their respective costs of the said Summons .

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 27th day of July 2017.

P. NYAMWEYA

JUDGE