



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. NO. 30 OF 2016**

**DANIEL KARIUKI KAMAU.....APPELLANT**

**-VERSUS-**

**HANNAH WANJIRU KAMAU.....1<sup>ST</sup> RESPONDENT**

**MARY WANGUI KINYUA.....2<sup>ND</sup> RESPONDENT**

**MOSES KAMAU NJUGUNA.....3<sup>RD</sup> RESPONDENT**

**CYRUS M. MAINGI A. P. NGUCU.....4<sup>TH</sup> RESPONDENT**

**EDWARD GITARI A.P. NGUCU.....5<sup>TH</sup> RESPONDENT**

**JOHN GATUNE KIMANI.....6<sup>TH</sup> RESPONDENT**

**WILSON MWANGI WILLIUM.....7<sup>TH</sup> RESPONDENT**

**GACU MURIITHI JEREMIAH.....8<sup>TH</sup> RESPONDENT**

**JOSEPH MURIMI NGEKA.....9<sup>TH</sup> RESPONDENT**

**RULING**

1. The appellant **Daniel Kariuki Kamau** filed an application dated 2<sup>nd</sup> March, 2017 seeking orders of a permanent injunction to restrain the Respondents from interfering with the quiet possession, occupation and enjoying of holding **No. 155 Tebere Section Unit 7 2 extra acres and ¼ acre plot** all attached with the said holding. He further seeks orders that 1730 bags x 90 Kilos Bichori rice be paid at the current market value to compensate the five years season interrupted by the Respondents herein. He also asks for costs.
2. The application is based on various grounds on the face of the application and is supported by the affidavit of the applicant.
3. The Respondents though duly served did not oppose the application.
4. The background of this matter is that the Appellant's father Joseph Kamau Kariuki was the registered holder of the suit land and after his death, his mother the 1<sup>st</sup> respondent and brother the 2<sup>nd</sup> interested party together with himself filed succession proceedings whereby he was nominated to succeed the holding. The succession proceedings are still pending in Wanguru Law Court but the three of them continued to cultivate the suit land. That the 1<sup>st</sup> respondent (who passed away on 2<sup>nd</sup> February, 2015) jointly with the 8 other respondents illegally and forcefully denied him entry to the land, they beat him and had him arrested and arraigned under Wanguru Criminal Case 487 of 2012. The Court established that the land belonged to the deceased and there was a pending succession suit.
5. The applicant filed Wanguru No. 158 of 2012 seeking permanent injunction whereby interlocutory judgment was entered for failure to enter appearance. When the matter went for formal proof the court held that by an amended plaint the appellant struck out all the respondents except the 1<sup>st</sup> respondent. That by his submission filed on 3<sup>rd</sup> November, 2015, the appellant informed the court that the 1<sup>st</sup> respondent had since passed away. Therefore the court held that with the death of the 1<sup>st</sup> respondent there was no other respondent remaining in the suit and the suit was dismissed.
6. The appellant filed an appeal on 6<sup>th</sup> June, 2016 seeking that the judgment be set aside. He also filed an application seeking to enjoin the

interested parties which application was allowed on 19<sup>th</sup> September, 2016.

7. The appellant also filed application dated 14<sup>th</sup> October, 2016 seeking temporary injunction to restrain the respondents from entering, remaining on or in any way interfering with his quiet possession, occupation and enjoyment of **Holding No. 155 Tebere Section Unit 7, 2 extra acres and ¼ acre plot** attached to the Holding pending hearing and determination of the appeal therefore the application has been spent.

8. The Court cannot issue a permanent injunction in an interlocutory application. The applicant ought to have applied for a temporary injunction pending the hearing and determination of the application and a 2<sup>nd</sup> prayer for a temporary injunction pending the hearing and determination of the appeal. The order of a permanent injunction cannot be granted as prayed. An injunction is applied for in an interlocutory application to restrain a party pending the happening of a future event, for example pending interpartes hearing and pending the determination of an appeal like in the present case. The prayer in the application cannot be granted in as far as it is seeking a permanent injunction if granted, there would be nothing left for determination.

9. In **Re Estate of Bakari Marakweli Mwakwisha (deceased) (2008) eKLR** it was held:

*“I am afraid the applicant did not seek any orders which may be granted. His only substantive prayer was for the grant of an interlocutory injunction pending the hearing and determination of this application. That order was granted at the time when the application was certified urgent. It was to be in force pending the hearing and determination of the application. Once the application is heard and determined, that order will have served its purpose, and there will be nothing more to be done. Strictly speaking, indeed, there is no prayer to be heard. The applicant ought to have included a prayer for an injunction pending the hearing and determination of the petition for the grant of letters of administration intestate. But such injunction was not applied for, and the court cannot grant an order which is not prayed for.”*

10. The appeal is pending determination. The holding **No. 155 Tebere Section Unit 7, 2 extra acres and a ¼ acre plot** attached to the land belongs to the estate of the deceased since the succession cause is pending determination. **Section 45** of the **Law of Succession Act** provides:

*“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”*

11. The applicant has filed an appeal arising from proceedings in the Magistrate’s Court but the succession cause is still pending. In the matter of the estate of **Veronica Njoki Wakagoto (deceased) Nairobi High Court Succession Cause No. 1974 of 2008** it was stated:

*“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”*

I entirely agree with this finding. The succession cause is still pending, there is nothing much this Court can do until the succession cause is determined and the shares of the rightful beneficiaries/dependants are identified and distributed. It is only then that the applicant can have a lawful claim on the property that legally devolves to him.

12. In conclusion I find that though the application is not opposed, the prayers sought are not capable of being granted. The application is without merits and is dismissed.

**Dated and delivered at Kerugoya this 8<sup>th</sup> day of December, 2017.**

**L. W. GITARI**

**JUDGE**

**Read out in open Court, applicant present, court assistant Naomi Murage this 8<sup>th</sup> day of December, 2017.**

**L. W. GITARI**

**JUDGE**

**8.12.2017**