



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 1120 OF 2012
IN THE MATTER OF THE ESTATE OF KAMOTA MBILA
NZAU.....DECEASED

MUTIO KAMOTA MBILA.....1ST PETITIONER
MUIA KAMOTA.....2ND PETITIONER

VERSUS

MUTIE MUTUA.....RESPONDENT

RULING

The Summons

The Applicants are the Petitioners herein and are the widow and son of the deceased Kamota Mbila Nzau. They petitioned for letters of administration for the estate of the deceased but the grant is yet to be issued. The Petitioners have filed an application by way of summons dated 29th July 2015 pursuant to the provisions of section 45 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules, and are seeking the following orders therein:

- a. That execution do issue against the Respondent by way of forceful eviction from land title number Muputi/Kiima-Kimwe/1102 (hereinafter referred to as “the suit land”).
- b. That the OCS Machakos police station do forcibly evict the Respondent from and put the administrators of the estate of Kamota Mbila into possession of the suit land.

The grounds for the application are that the Respondent is not likely to give up possession of the suit land unless forcibly evicted, and that there is a ruling given on 5th February 2015 and an order issued on 9th March 2015 which barred the Respondent from intermeddling with the deceased’s estate by way of evicting, trespassing, constructing and or interfering with the suit land in any manner howsoever.

The 1st Petitioner in a supporting affidavit sworn on 29th July 2015 averred that the title to the suit land is still in the name of the deceased and has not been transferred to any other person, but that the Respondent has wrongfully taken occupation of the land and has constructed a permanent structure and embarked on cultivating upon the suit land. Further, that it is necessary to forcibly evict the Respondent from the suit land as he has not complied with the aforementioned Court orders, that were granted upon the Petitioner

filing a chamber summons application dated 30th November 2012. Lastly, that such eviction can only be effectively carried out by the OCS Machakos police station.

The Response

The Respondent filed a replying affidavit sworn on 2nd October 2015 in opposition to the Applicant's application. The Respondent stated that he was put into possession of the subject property by the Petitioners, and denied that he trespassed into parcel number Muputi/Kiima-Kimwe/1102 as alleged by the Petitioner. According to the Respondent, the Petitioners are still retaining his money with no indication of refunding the same, which is a sign that there is no intention on their part to take away the said land which he purchased from them. He also contended that the prayer for eviction is legally unsustainable, in that this Court is divested of jurisdiction to grant such a prayer.

The Issues and Determination

The parties were directed by the Court to file and serve submissions on the Applicant's summons. The submissions by the Petitioners' counsel, F.Mulwa & Company Advocates are dated 26th October 2015, and the averments hereinabove by the Petitioners were reiterated therein. It was further submitted that the Respondent has exhibited disregard of the court orders and has not given up possession of the suit land.

The Respondent's counsel, L. N. Ngolya & Company Advocates, filed submissions dated 16th November 2015, wherein it was argued that the provisions of section 45 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules do not cloth this Court with jurisdiction to issue eviction orders, and that the Petitioners ought to have filed a substantive suit for eviction. Further, that the Petitioners ought to have brought an action for contempt of court as there are existing orders against the Respondent.

I have read and carefully considered the pleadings and submissions made herein. The issue to be decided is whether the mandatory injunction orders sought herein are available to the Applicant. The section of the law relied on by the Applicant in this regard is section 45 of the Law of Succession Act, which 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 Applicant also relied on Rule 49 of the Probate and Administration Rules which states that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file a summons supported if necessary by affidavit. Rule 73 of the Rules on the other hand saves the inherent powers of this Court, and provides that nothing in the Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

These provisions give wide discretion to the Court as to the orders it can make, including eviction orders if the circumstances of the case warrant it. However, the Court is still obliged to observe settled principles of law and equity that may be applicable. In the present application the orders sought are in the nature of final orders seeking to evict the Respondent from the suit land. They are essentially therefore orders for mandatory injunctions.

The principles that are applicable for the grant of such mandatory injunctions were set out by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109**, wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

As to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** stated as follows:

“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, after perusal of the record of the Court proceedings, I note that the Petitioners have not yet been appointed as the Administrators of the estate of the deceased and a grant of letters of administration has not been issued to them. It is not disputed that the deceased died on 11th October 2010, and that the property known as Muputi/Kiima-Kimwei/1102 is registered in the deceased name as shown in the title deed produced as evidence by the Petitioners.

I am mindful that the legal position as stated in sections 45 and 80 of the Law of Succession Act, and as held in **Troustik Union International & Another vs Mrs Alice Mbeyu & Another, Nairobi Civil Appeal Number 145 of 1990**, that nobody has capacity to act with regard to a deceased’s estate including getting any substantive orders in relation to the property of a deceased person or enforcing a cause of action arising out of a deceased’s death, without a grant of representation. The Petitioners have not brought any evidence of such a grant, and in the circumstances it is my view that they have not shown a *prima facie* case, neither is this a clear case which merits the final orders they seek.

In the premises the prayers sought in the Petitioners’ summons dated 29th July 2015 are denied for the foregoing reasons. The Petitioners are however at liberty to apply for the said orders upon a grant of representation with respect to the deceased’s estate

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 23rd day of February 2016.

P. NYAMWEYA

JUDGE