



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 512 OF 2013

IN THE MATTER OF THE ESTATE OF JERUSHA MUTHAMBI WARAGA (DECEASED)

AND

LUKAS MUCHIRA GITHAE.....PROTESTOR/APPLICANT

VERSUS

LUKAS MUKONO KARANJA.....PETITIONER/ RESPONDENT

JANE WANDAMA MUGO.....PETITIONER/RESPONDENT

RULING

1. LUKAS MUCHIRA GITHAE, the applicant herein has brought in an amended Notice of Motion dated 18th June, 2014 under *Order 1 rule 10(2)* of the *Civil Procedure Rules* and *Section 45* of the *Law of Succession Act* and *Rule 49* of *Probate and Administration Rules* for the following orders:

i. That Henry Njine Ndinwa, Anthony Chomba Njega, James Gachoki Njau, Jerusha Matandi Njogu be made parties in this cause.

ii. That the respondents Jane Wandama Mugo, Henry Njine Ndinwa, Antony Chomba Njega, James Gachoki Njau and Jerusha Matandi Njogu be restrained from utilizing or in any way dealing or working on land parcel No. Baragwi/Kariru/463 until this cause is heard and determined.

iii. That Succession cause No. 382 of 2008 Embu be marked as having abated since the petitioner passed on in the year 2010.

iv. The Embu Succession cause No. 237 and 382/08 be consolidated and be given a new number at this court.

v. That costs be provided.

2. The application is made on the following grounds namely:

a. That the respondents, agents dependants and assigns have unlawfully rented out the land forming the estate herein to strangers to the detriment of other persons who are entitled.

b. That Lukas Mukono Karanja the petitioner herein passed away two years ago and no

substitution has been undertaken causing a lot of anguish and inconvenience to other parties in this cause.

3. The applicant in his supporting affidavit sworn on 18th June, 2014 added that since the demise of the petitioner herein, the relatives have failed to apply for substitution and has applied that the orders issued vide **Succession Cause No. 382 of 2008** do abate. He further submitted that under **Section 35(2)** of the **Law of Succession Act** the deceased being a widow could not dispose off her property (which she inherited from a deceased person) through a will and that the alleged will by Jerusha Matandi Waraga was invalid *abinitio*.

4. The applicant has submitted that he should be issued with letters of administration as he is the only person who should be made the administrator as he is paternal nephew of the deceased herein. It is submitted that the deceased herein Jerusha Matandi Waraga was a widow of Karigi Ngari and got registered as the owner of the property now forming the estate herein through transmission after the demise of her late husband Karigi Ngari.

5. The applicant has for the above reason submitted that the cause herein is unsustainable and urged this Court to instead proceed with Succession Cause No. 287 of 2008 filed at Embu High Court.

6. The Respondent Jane Wandama Mugo has opposed the application through a replying affidavit sworn on 28th September, 2015. She has deposed that the Applicant has no known relationship with the deceased. She has further stated that she is a granddaughter to the deceased – Jerusha Matandi Waraga who was a mother to Gladys Wathoni – her mother. According to the Respondent her grandmother had 3 other daughters but all of them are now deceased.

7. The Respondent's contention is that she is settled on the land with her siblings namely; Jane Wandama, Charity Wagatu, Jerusha Waruguru, Susan Wathitha, Mary Wanjiku, Peter Njogu, Andrew Karigi and Antony Chomba.

8. The Respondent's view is that administrators of the estate should be appointed as per the gazette notice dated 15th June, 2007 so that the matter can be finalized.

9. This Court has considered the application, the affidavit in support plus submissions made by Applicant's counsel. I have also considered the opposition to the application made by Jane Wandama Mugo the Respondent herein.

10. To begin with prayer 1 of the application, the Applicant seeks to bring in parties named as Njine Ndinwa, Antony Chomba Njega, James Gacoki and Jerusha Matandi Njogu. However, looking at the gazettment of the cause exhibited as exhibit 1 by the Respondent, the gazette Notice names Antony Chomba as a co-petitioner together with Jane Wandama the Respondent herein. Antony Chomba is therefore a party to this proceedings. I do find that the Applicant's affidavit does not disclose the relationship or the nexus of this matter with the other named persons. If the parties named are interested in the estate herein, they will obviously be involved in the administration of the estate without necessarily being made parties to the suit. The named persons would then come in either as beneficiaries or interested parties depending on the nature of their claim if any. At this stage it is a bit premature to grant that prayer (one) in the application. I also find the prayer incompetent and defective in law for reasons which I will point out later in this ruling.

11. The 2nd prayer seeks to injunct the Respondent and the named persons from utilizing or dealing with that property known as **BARAGWI/KARIRU/467** that comprises the estate herein. In the first place the Applicant is seeking to injunct some parties who are not parties to the application and who have not been served. In essence the Applicant is seeking to have some people condemned without being heard. This is against the rules of natural justice and untenable. Secondly, being an injunctive remedy, the applicant must satisfy the principles that govern the granting of interlocutory injunction as enumerated in the celebrated case of **GIELLA –VS- CASSMAN BROWN (1973) E.A. 358**, which are as follows:

i. He must show a prima facie case with a probability of success.

ii. He must show that unless the remedy is granted he/she will otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.

iii. He must show that the balance of convenience tilts in his favour so that if the court is in doubt, the decision is made in his/her favour.

12. This Court has looked at the application and the affidavit and it is not satisfied that the above elementary conditions have been met by the Applicant. The claims made by the Applicant require a full trial to be established. At this stage the Court is unable to find that the Applicant does have *prima facie* case or a claim on the estate of the late Jerusha Matandi Waraga. The injunctive remedy sought at this stage therefore is unavailable to the applicant for the above reasons.

13. I have also considered the relief sought under prayer 3 of the application and with due respect to the Applicant's counsel, the relief is not available to him in a succession matter. A cause does not abate under **Law of Succession Act Cap 160 Laws of Kenya**. When a petitioner or administrator dies there are adequate provisions in the Act to cover substitution or where a grant has been issued, annulment due to the fact that either the grant has become inoperative or useless for various reasons including death of an administrator or a petitioner. The law also provides for citations where a party is reluctant to apply for a grant of letters of administration. The Applicant cannot wallow in anguish or pain as he has put it when the law clearly provides for solutions.

14. I have perused through the file and it is apparent that the deceased's estate was gazetted twice vide gazette No. 1305 of 13th February, 2009 and gazette No. 5498 of 2007. I was however unable to locate the Kenya Gazette Notice No. 1305 of 13th February, 2009 in the court records and I have assumed that the gazette Notice No. 5498 of 15th June, 2007 in Succession No. 287 of 2008 which have been exhibited by the Respondent is the valid gazettement. If that is the case, the Respondent and Antony Chomba should apply for issuance of grant of letters of administration in the normal way and in default, the Applicant herein is at liberty to apply for citation under **rule 21** of **Part VI** of **Probate and Administration Rules** against them in order to bring this matter to an end. He is also at liberty to in the alternative cross petition for letters of administration pursuant to **Rule 17** of **Probate & Administration Rules**.

15. This Court has also noted that prayer 4 of the application is overtaken by events as already the 2 files **Succession Cause No. 287/08 and 512/13 (formerly Embu 382/08)** are consolidated.

16. Finally I wish to comment on the competency of the entire application which I have done deliberately at the end of the ruling for obvious reasons which was give directions to parties in this cause for the interest of justice. The application before Court must as a matter of practice comply with **rule 59(1)** of the **Probate and Administration Rules**. Secondly I find that the application has invoked the provisions of **Order 1 rule 10** of the **Civil Procedure Rules** which deals with substitution and addition of parties in civil matters. The same rules do not apply under **rule 63 (1)** of **Probate and Administration Rules** which gives exceptions of where Civil Procedure rule can be invoked. It is therefore important to note that prayer 1 of the application has failed largely due to procedural defects.

17. In the end I find no merit in the amended Summons dated 3rd September, 2015 for the reasons given above. The same is dismissed with costs.

Dated and delivered at Kerugoya this 19th day of February, 2016.

R. K. LIMO

JUDGE

19.02.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Macharia holding brief for Maina for Petitioner

Kareithi on record for protestor absent

Lukas Mchira Githae present

COURT: Ruling singed, dated and delivered in the presence of Macharia holding brief for Maina for 1st and 2nd petitioner and in the presence of Lukas Muchira Githae.

R. K. LIMO

JUDGE