



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 836 OF 2013

IN THE MATTER OF THE ESTATE OF ERASTUS GACHACHA MBANU (DECEASED)

SAMUEL NJOROGE GACHACHA (suing as the Legal Representative of the Estate of the late

ERASTUS GACHACHA MBANU (DECEASED).....APPLICANT

VERSUS

JOYCE WANJIRU MATEGA *alias* MARY WANJIRU GACHACHA.....RESPONDENT

AND

JOHN IRUNGU MAINA

HENRY KIMANI THAIRU

JOSEPH MBURU NDUNGU

SAMUEL MITJAMO KIBUEDE

PHILIPS NYAMBURA MITHAMO

DUNCAN KIBUE MITHAMO

JOHN NJAGI MUYACUKA

JIRANI MWEMA NURSERY SCHOOL.....INTERESTED PARTIES

RULING

This ruling is in respect of the amended chamber summons by Samuel Njoroge Gachacha amended on 24th November, 2014.

The orders sought are

a) Spent

b) Spent

c) That this honourable court be pleased to issue restraining orders against the Respondent, her children, her servants, agents and/or employees from intermeddling and/or interfering with the land parcel SHAWA/GICHEHA BLOCK 3 (JIRANI MWEMA) being part of the deceased's estate the following properties:

- i. SHAWA/GICHEHA BLOCK 3/42 (JIRANI MWEMA)
- ii. SHAWA/GICHEHA BLOCK 3/43 (JIRANI MWEMA)
- iii. SHAWA/GICHEHA BLOCK 3/44 (JIRANI MWEMA)
- iv. SHAWA/GICHEHA BLOCK 3/45 (JIRANI MWEMA)
- v. SHAWA/GICHEHA BLOCK 3/46 (JIRANI MWEMA)
- vi. SHAWA/GICHEHA BLOCK 3/47 (JIRANI MWEMA)
- vii. SHAWA/GICHEHA BLOCK 3/48 (JIRANI MWEMA)
- viii. SHAWA/GICHEHA BLOCK 3/49 (JIRANI MWEMA)
- ix. SHAWA/GICHEHA BLOCK 3/50 (JIRANI MWEMA)
- x. SHAWA/GICHEHA BLOCK 3/51 (JIRANI MWEMA)
- xi. SHAWA/GICHEHA BLOCK 3/52 (JIRANI MWEMA)
- xii. SHAWA/GICHEHA BLOCK 3/53 (JIRANI MWEMA)
- xiii. SHAWA/GICHEHA BLOCK 3/54 (JIRANI MWEMA)
- xiv. SHAWA/GICHEHA BLOCK 3/55 (JIRANI MWEMA)
- xv. SHAWA/GICHEHA BLOCK 3/56 (JIRANI MWEMA)
- xvi. SHAWA/GICHEHA BLOCK 3/57 (JIRANI MWEMA)
- xvii. SHAWA/GICHEHA BLOCK 3/58 (JIRANI MWEMA)
- xviii. SHAWA/GICHEHA BLOCK 3/59 (JIRANI MWEMA)
- xix. SHAWA/GICHEHA BLOCK 3/67 (JIRANI MWEMA)
- xx. SHAWA/GICHEHA BLOCK 3/68 (JIRANI MWEMA)

d) That the costs of this application be provided for.

The same is premised on the affidavit of the Applicant and grounds as seen on the face of the application namely:

- (a) That the Applicant is the legal representative of the estate of the deceased.
- (b) That the Respondent, her servants, agents and/or employees are dealing with the estate of the deceased without taking out any grant under the Law of Succession Act.
- (c) That the Respondent and her children together with other intruders have taken out title deeds

fraudulently and leased the deceased's land in disobedience of a court order in Nakuru HCCC No.127 of 2008 (OS).

(d) That the Respondent her servants, agents and/or employees are harvesting hay from the estate of deceased without any legal justification.

(e) That the actions are adverse to the interest of the beneficiaries of the estate.

(f) That unless restraining orders are made, the beneficiaries of the estate of deceased will suffer irreparable harm.

The gist of the grounds and the affidavit in support is that the applicant is the legal representative of the estate of the deceased. It is asserted that the Respondent, her servants, agents and/or employees are dealing with the estate of the deceased without taking out any grant under the Law of Succession.

It is urged that the Respondent and her children have fraudulently taken out titles in disobedience of a court order in Nakuru HCCC No.127 of 2008 (O.S).

It is the Applicant's case that the Respondent and her children have taken out the following title deeds out of the estate of Erastus Gachacha Mbanu paragraph 5 of the Supporting Affidavit:

- i. SHAWA/GICHEHA BLOCK 3/42 (JIRANI MWEMA)
- ii. SHAWA/GICHEHA BLOCK 3/43 (JIRANI MWEMA)
- iii. SHAWA/GICHEHA BLOCK 3/44 (JIRANI MWEMA)
- iv. SHAWA/GICHEHA BLOCK 3/45 (JIRANI MWEMA)
- v. SHAWA/GICHEHA BLOCK 3/46 (JIRANI MWEMA)
- vi. SHAWA/GICHEHA BLOCK 3/47 (JIRANI MWEMA)
- vii. SHAWA/GICHEHA BLOCK 3/48 (JIRANI MWEMA)
- viii. SHAWA/GICHEHA BLOCK 3/49 (JIRANI MWEMA)
- ix. SHAWA/GICHEHA BLOCK 3/50 (JIRANI MWEMA)
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- xv. SHAWA/GICHEHA BLOCK 3/56 (JIRANI MWEMA)
- xvi. SHAWA/GICHEHA BLOCK 3/57 (JIRANI MWEMA)
- xvii. SHAWA/GICHEHA BLOCK 3/58 (JIRANI MWEMA)
- xviii. SHAWA/GICHEHA BLOCK 3/59 (JIRANI MWEMA)

xix. SHAWA/GICHEHA BLOCK 3/67 (JIRANI MWEMA)

xx. SHAWA/GICHEHA BLOCK 3/68 (JIRANI MWEMA)

The Respondent, her servants, agents and/or employees are also harvesting hay from parcel SHAWA/GICHEHAS BLOCK 3/67 (JIRANI MWEMA) being part of the deceased's estate without any legal justification.

The application is opposed and in a replying affidavit, the Respondent has stated that the titles complained of were registered during the lifetime of the deceased herein to arrest any future conflict and to protect the children of the 2nd house. The persons in whose names the land was registered are absolute owners.

The Respondent challenges the capacity of the Applicant to bring the application in question. It is urged that the applicant holds letters of administration in respect of the estate of Mary Wanjiru Gachacha the first wife of the deceased.

In addition, counsel for the respondent has raised a preliminary objection to the application on grounds that the applicant has no capacity to filing the application at hand. He is not a legal representative of the deceased.

It is urged that a grant of letters *ad litem* provides for the institution of a suit while *grant pendente lite* provides for the prosecution of an already pending suit. It is urged that suit has abated for lack of proper substitution of the plaintiff in civil suit No.127 of 2008 (O.S.).

Along the way, the interested parties sought to be enjoined in these proceedings which prayer was allowed by consent.

Directions were given that this application be disposed by way of written submissions.

I have had occasion to consider the application the supporting grounds and affidavit, the replying affidavit and submissions on record. The issues for determination are two (2):

1. whether the applicant has capacity to bring the current application.
2. whether the applicant has established a *prima facie* case to warrant the grant of the orders sought.

I am inclined to deal with issue No.1 which if it answers in the negative determines this application. The applicant is a son of the deceased. At the time of filing the application, the applicant had not taken out letters of administration in respect of the estate of the deceased (I note those letters have now been applied for by the Respondent as a widow of the deceased).

He had no capacity to represent the interests of the estate. This is the position in law which has been enunciated in our case law including the decision in **Lydia Ntembi Kairanya & Fredrick Mugambi Dominic V. The Hon. Attorney General** (2009) Eklr. It was stated thereon that where a party purports to act on behalf of the estate of a deceased person he must be vested with the necessary authority. To suggest otherwise would in the view of the court be tantamount to proposing that the Law of Succession Act has force of law only as befits the exigencies of a party. That cannot be a reasonable lawful position.

Curiously, in our instant case, the applicant approached court by way of a citation against the respondent. He then proceeded to file the application for injunction even before the citation was settled. He did not obtain letter of administration. I am of the very strong view that the applicant, in addition to lacking capacity to sue to protect interests of the deceased estate approached the court irregularly.

The upshot is that the application herein was filed without the necessary capacity. The same in a non-starter and must fail.

I need to comment on the status of this succession cause now that letters of administration have been sought by the respondent and the applicant has filed objection.

It is imperative that for good order and expedition of this case, certain salient points be addressed by the parties going forward.

I gather from the material before me that title number Nakuru (Shawa/Gicheha Block 3/57 (Jirani Mwema) and (Shawa/Gicheha Block 3/59 (Jirani Mwema) are registered in the names of other persons and not the deceased. A question thus arises as to ownership and this issue must be resolved before such property can be listed as part of the assets of the estate. It is not lost on me that we have interested parties who have been enjoined in these proceedings and they have sworn individual affidavits stating that they are owners of title numbers Shawa/Gicheha Block 3/42-53 (Jirani Mwema). That Registration is shown to have happened between 2000 and 2012 prior to the demise of the deceased. Thus, unless the said titles are challenged in a proper suit before a court of competent jurisdiction, they cannot form part of the deceased's estate.

In a nutshell, this is an early warning for the parties to direct their arsenal to the right enemy if the claims raised are to be sustainable.

A last word on this matter. While it is not fatal nor is it irregular as to invalidate the proceedings herein, the application for letters of administration within the file where a citation was filed in my view just ends up convoluting issues. The citation should have a life of its own and once determined that file should be closed and letters applied for in a proper succession cause. It is not lost on me that at registration the court registry clearly registered a citation and serialised it giving it a number based on numbers already filed. The application for letters of administration in this file only ends up bringing confusion as a main succession cause ought to be registered as such. May the parties explore the possibility of taking this route in this matter.

With the result, that the application dated 24th November, 2014 is dismissed. The applicant and respondent are family. I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 17th day of March, 2016.

A. K. NDUNGU

JUDGE