



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

SUCC. CAUSE NO. 116 OF 2004

In the Matter of the Estate of James Kaunyangi alias James Kaunyangi (Deceased)

SALOME NKATHA JAMESPETITIONER/RESPONDENT

Versus

NIMROD KIMATHI JAMES 1ST OBJECTOR

ELIZABETH NKATHA JAPHET on behalf of

ALEXANDER MWITI JAMES2ND OBJECTOR/APPLICANT

RULING

Proservation of estate property

[1] Before me is a Summons dated 11th November, 2013 which is expressed to be brought under Rule 73 of the Probate and Administration Rules in which the court has been requested to issue a temporary injunction to restrain the petitioner, her agents and servants from selling, apportioning, leasing and or in any intermeddling or interfering with the estate of the deceased comprised in **URINGU 1 NO.3513, URINGU 1 No. 3482** and **TIMAU /MUMUI/844** until this cause is determined. The application is supported by the affidavit of **ELIZABETH NKATHA JAPHET**.

[2] The major reason for applying is that the petitioner/respondent is intermeddling with the property of the estate. According to the Applicant, intermeddling is in the fact that the petitioner is apportioning land to her own children to the exclusion of one Alexander Mwiti James, who she says is the petitioner's step son. She stated further that the petitioner is in the process of selling portions of the estate property before this cause is finalized. She averred that these acts will prejudice and pre-empt fair distribution of the estate; and may render the said Alexander Mwiti landless and destitute. On those reasons she applied for an injunction against the Petitioner. The above grounds were fortified in the submission filed on 30th July, 14 by Ndubi Advocate on behalf of the Applicant. The submissions, however, emphasized that the said Alexander is an equal beneficiary to the deceased's estate, thus, the estate should be protected by the court for his sake. She cited article 159 (2) (d) of the Constitution and asked the court not to be beholden to technicalities but rather should serve substantive justice in this matter. In all, she believes that the balance of convenience tilted in favour of granting an injunction and so she prayed.

Petitioner opposed application

[3] The petitioner opposed the application dated 11th November, 2013 through a replying affidavit sworn on 28th January 2014. She also filed submission as was directed by the court. The petitioner described the Applicant as “*Just a trouble*” who “*is brewing up trouble into the family of the deceased*”. She also stated that she is the only wife of the deceased and denied being a step mother to **ALEXANDER MWITI** for whose benefit and behalf Elizabeth purports to act. She stated further that Alexander is an adult and a total stranger to the estate of the deceased. Thus, according to her, Elizabeth is merely out to frustrate the petitioner’s peace as she had vowed to do. But, the fundamental objection to granting of an injunction is on the basis that after confirmation of the grant herein on 9th December 2005 she thereafter distributed the estate in accordance with the grant.

[4] The competence of the application was also challenged. It was submitted that Elizabeth is purporting to act for one Alexander Mwititi as his next friend without disclosing the basis of her representation. They argued that Alexander is an adult and that the Applicant has not disclosed the incapacity Alexander is suffering as to need a next friend to apply for orders on his behalf. The petitioner, therefore, regarded this application as incompetent and urged the court to dismiss it. For the above reasons, the petitioner beseeched the court to dismiss the application.

DETERMINATION

Competence of application

[5] Challenge on the competence of the application dated 11.11.2013 was raised. I consider such objection to be of preliminary significance and I shall determine it as such. I note that the Applicant together with the 1st Objector filed an application for revocation of grant on 20th July, 2007. In that application, the Applicant sued as the next friend of, and on behalf of Alexander Mwititi James, who was said to be a minor at the time. Although the Petitioner claims that Alexander is an adult, there is no evidence tendered to support that position. Therefore, in the circumstances, the application is in order and I will determine it on its merits. I will, however, revisit this issue of age of Alexander and make appropriate order thereto.

[6] The Applicant argued that although the petitioner stated that the estate has been distributed to the respective beneficiaries, there is no proof of distribution of the estate. I have perused the record and I have not seen any formal documents to show that the estate has been distributed. The only information on distribution is the averments by the petitioner. I may not doubt her averments because I suspect the two properties namely, **URINGU 1 No 3513 and URINGU 1 No. 3482** may not have been formally registered. But, I have not seen the record of **TIMAU /MUMUI/844** which seems to have a formal registration number. Of significance to note; the confirmed grant was that the Petitioner shall hold the estate property in trust for Nimrod, Fridah and Kevin James. It could be true that each of the named beneficiaries of the estate is in occupation of their respective shares because upon perusal of the record, I can discern that the petitioner had complained bitterly in the affidavit sworn on 2nd October, 2009 that both objectors were at the time in exclusive control, use and enjoyment of the deceased estate, while she and her two children Fridah Kawira and Kevin Gukundi languished in poverty. Again, the 1st Objector has stated that her Mother, the Petitioner, had left the matrimonial home and eloped with some other man after the death of his father. He stated that the Petitioner left him at their home without any assistance and remained in the care of his grandmother i.e. Elizabeth Nkatha, the Applicant herein. Notably, however, the 1st Objector has now changed his earlier position and is no longer supporting the application for revocation. The reason emerging from his averments is that he later found out that he has already been provided for in the confirmed grant. The foregoing notwithstanding, I am concerned that Alexander Mwititi James is listed as one of the children of the deceased in the application for revocation, which is yet to be heard and determined. Therefore, I ask myself whether there could be any expectation in those proceedings which would justify issuance of some remedy.

Ends of justice

[7] This court is acutely aware that as a court of law it should always ensure that the ends of justice are

met in every case. See the Constitution, the entire corpus of the Law of Succession Act and rule 73 of the Probate and Administration Rules. Ordinarily, orders of preservation of the estate in instances where there is a valid challenge to the grant would be deserved unless they would result into injustice. An injunction could be one such relief, for it is a discretionary remedy created by equity to meet the ends of justice and to prevent the defendant from dissipating assets of the estate. The Applicant claims that Alexander is a son of the Deceased. This is a substantial claim which will need evaluation by the court on merit. I will, therefore, hate a situation where a party in a proceeding becomes merely a holder of barren result because the suit property has dissipated or moved to third parties to an extent that it may be impossible to enforce a decree that he may have on it. Such would be irreparable damage. I think a *prima facie* case has been made out which requires a very delicate balancing act; I will therefore resort to the balance of convenience and make an order that is apt. The traditional elements for the issuance of a temporary injunction in the case of **GIELLA vs. CASSMAN BROWN** have been met. In consideration of the entire circumstances of this case, I will not disturb the occupation of the land by the beneficiaries because they occupied the estate property in accordance with the grant of representation issued herein. The said grant has not been revoked or annulled. Accordingly, parties shall remain in the land under their occupation at the moment. Except, in the interest of justice, I hereby stop any sale, transfer, exchange or mortgage of any of the estate property to any third party for three (3) months within which time the Applicant must ensure the application for revocation filed herein is set down for hearing. If the Applicant does not set down for hearing the application for revocation within the time allowed, the preservation order herein shall automatically lapse without the need of applying to that effect. I have issued time-bound order in order to avoid manoeuvres by the parties herein whom the record paints as quite feuding; who makes accusations and counter-accusations against each other; changes positions as and when it suits the particular party etc. I also order Alexander Mwitwi James to appear before me on a date I shall appoint in order to determine whether he is of majority age and fashion appropriate directions on the matter. As may be necessary, any party may apply for further or other orders. The application dated 11.11.2013 has succeeded to the extent which is specifically granted above. Given that this is family dispute, each party shall bear own costs. It is so ordered.

Dated, Signed and Delivered in open court at Meru this 26th day of April, 2016

F.GIKONYO

JUDGE

In the presence of:

Mrs. Ntarangwi advocate for Mr.Thangicia advocate for petitioner.

No appearance for Objector.

F.GIKONYO

JUDGE