



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 1217 OF 2015
IN THE MATTER OF THE ESTATE OF
HENRY ROY WAKHISI (DECEASED)

ZURAH WASHIALA SHIBWABO.....APPLICANT

VERSUS

ANTONY ARTHUR SITUMA WAKHISI.....1ST RESPONDENT

DORCAS KAVEZA WAKHISI.....2ND RESPONDENT

RULING

1. Henry Roy Wakhisi died intestate on 19th February 2015. The applicant petitioned this Court for a grant of letters of administration on 20th May 2015 saying that she was the widow of the deceased. She stated that the deceased was survived by one widow, herself, and six children, including the 1st respondent. She listed the following assets as forming the estate of the deceased – Post Bank Account No. KAACBSG0010765, Nairobi/Block 72/1422 and Butsotso/Indangalasi/1127, all valued at twenty million Kenya shillings.
2. The 1st respondent is a son of the deceased by the 2nd respondent. The 2nd respondent divorced the deceased on 21st December 2012. The 1st respondent filed objection to the petition by the applicant. His case was that the applicant was neither the widow nor the beneficiary of the deceased. He denied that the applicant was ever married to the deceased under any system of law. He further denied that her children were the children of the deceased. It was the 1st respondent's case that the deceased was at all material times married to the 2nd respondent under the now repealed **African Christian Marriage and Divorce Act Cap 151** and thus lacked capacity to contract another marriage. He also contended that the copy of the certificate of death attached by the applicant in her petition was not genuine and he presented a different copy which he stated was the genuine one. Lastly, he stated that the properties listed by the applicant do not form part of the estate of the deceased and reiterated that he together with his siblings would adduce evidence to prove that the applicant was a mere imposter with no legal capacity to present this petition.

3. The applicant swore replying affidavit dated 20th July 2015 in response to the objection, reiterating that she was a wife of the deceased having been married to him under Luhya customary law. She averred that the deceased and the 2nd respondent were divorced vide Divorce Cause No. 469 of 2011 where a *decree absolute* was issued and as such she was the only widow of the deceased. She also annexed copies of emails between the deceased and his lawyer in which she was referred to as the wife of the deceased. The applicant also referred to two cases pending in various courts as between the deceased and the respondents. They are Civil Suit No. 47 of 2012 (OS) High Court at Nairobi and Civil Case No. 32 of 2012 (OS) High Court Kakamega. Both are pending. She stated that a court order was still in place prohibiting the respondents from dealing whatsoever with the properties pending hearing and determination of the cases. She also denied that the death certificate she annexed to her petition was a forgery stating that she obtained the same procedurally. Lastly, she prayed that the objection be dismissed and her petition be heard.
4. Before the objection could be heard, the applicant filed the current application dated 30th September 2015 under certificate of urgency seeking temporary injunction orders to issue against the 1st respondent restraining him and/or his agents from transferring or in any way interfering with the property Nairobi/Block 72/1422. She also sought orders that the 1st respondent be ordered to stop all dealings with the aforementioned property and that all rents collected from the said property be deposited into a joint account in order to preserve the estate pending the determination of her petition. She, lastly, sought orders that the monies collected in the joint account be used in part for maintenance and upkeep of the estate including payment of land rates and rents.
5. In the affidavit sworn in support of the summons, the applicant stated that during the course of her marriage to the deceased, they cohabited as husband and wife in LR NO. Nairobi/Block 72/1422 which was jointly owned by the deceased and the 2nd respondent, but moved out after the death of the deceased due to harassment from the 1st respondent. She further stated that she had received reliable information that the respondents were renovating the said property with the aim of disposing it. It is for this reason that she sought an injunction restraining them from dealing with the property in whatever manner.
6. The 1st respondent in response stated that since the property was not registered in his name or in the name of his siblings they did not have capacity to deal with it in any way or dispose of the same as such the applicant's fears were unfounded. He further stated that since the property was registered jointly in the name of the deceased and the 2nd respondent the same should revert to the name of the respondent upon the death of the deceased, and was thus not subject of the succession proceedings. He prayed that the summons be dismissed with costs.
7. Parties filed their respective submissions in support of their cases. The applicant submitted that the 1st respondent's actions of commencing renovations in the property and collecting rents before a grant is issued in the estate of the deceased amounted to intermeddling under **section 45** of the **Law of Succession Act Cap 160** and has resulted in wastage of the estate thus the need for a temporary injunction pending the determination of the petition. The 1st respondent on his part submitted that the applicant's notice of motion referred to property known as Nairobi/Block 72/144 which he states was never owned by the deceased and the 2nd respondent. He instead submitted that the deceased together with the 2nd respondent were joint owners of the property known as LR No. Nairobi/Block 72/1422 and in the absence of a clarification on which property was in issue in the applicant's summons the court could not grant the orders sought. The applicant submitted that he was not legally capable of transferring the property in issue as he was not the registered owner thus issuing an injunction against him would be an exercise in futility. Further, that the applicant had failed to demonstrate in which way the 1st respondent had intermeddled with the property and neither nor had she demonstrated what rental income had been collected by the respondent.

8. The conditions to be considered in an application for injunction are, first, an applicant must show a *prima facie* case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and, thirdly, if the court is in doubt, it will decide the application on the balance of probabilities (**Giella –v- Cassman Brown & Company Ltd [1973]EA 358**). A temporary injunction is issued in a suit to preserve the property in dispute or the rights of parties under determination in the suit pending the disposal of the suit (**Exclusive Estates Ltd – v- Kenya Posts and Telecommunications Corporation and another, Civil Application No. Nairobi 62 of 2004 [2004]LLR 5917 (CAK)**).
9. The application sought to restrain 1st respondent from dealing with or transferring parcel Nairobi/Block 72/1422 which was alleged to belong to the estate of the deceased. Rents were allegedly being collected by the 1st respondent on the property. It was sought that the monies be put into a joint account to be operated by the two. It does not appear to be in dispute that the property was jointly owned by the deceased and the 2nd respondent. Legally, the 1st respondent cannot dispose of the property as he does not own it. Secondly, there was no evidence to support the fears by the applicant that the respondent was planning to sell the property. This is because the applicant only relied on:-

“.....I have received reliable information.....”

and

“.....I am apprehensive.....”

The basis of the apprehension was not indicated, and she did not disclose the informant. There was therefore no reasonable basis for the apprehension or fear.

10. Secondly, there will be the question whether the parcel is one of the properties of the estate. This is because of the 1st respondent's contention that the joint registration left the property in the absolute ownership of the 2nd respondent after the demise of the deceased. The less one discusses this issue the better, at this stage. Further, no evidence was tendered to show how much rent accrues from the property, who is the tenant and whether it goes into the hands of the 1st respondent. Lastly, it was indicated that, in another court, the applicant has obtained an injunction against the respondents over the same property. The property is therefore protected. Why would a similar order be necessary?
11. In conclusion, I find that the applicant has not laid a basis for the grant of any of the orders sought in this application. I consequently dismiss the application with costs.

DATED and DELIVERED at NAIROBI this 14TH day of APRIL, 2016.

A.O. MUCHELULE

JUDGE