



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 3253 OF 2007**

**IN THE MATTER OF THE ESTATE OF DINESH ISHWARLAL MARU (DECEASED)**

**RULING**

1. The Summons dated 8<sup>th</sup> July 2013 is premised on Sections 47, 79 and 82 of the Law of Succession Act, Cap 160, Laws of Kenya, and Rules 49 and 73 of the Probate and Administration Rules. It seeks the setting aside of orders that were granted on 23<sup>rd</sup> May 2013.
2. The application is brought at the instance of Deepak Ashwinkumar Maru, the administrator of the estate of the deceased. It founded on the grounds set out on the face of the application, and on the facts deposed in the affidavit of the applicant sworn on 8<sup>th</sup> July 2013. The grounds are that the court had no jurisdiction to grant the orders made on 23<sup>rd</sup> May 2013, and that the application upon which it was founded was an abuse of the process of court.
3. The applicant deposes that the respondent, who is a beneficiary of the orders of 23<sup>rd</sup> May 2013, had been evicted from the premises in LR No. 209/3345 Parklands Nairobi on the basis of a court order made on 29<sup>th</sup> April 2013. Therefore as at the date the orders were made on 23<sup>rd</sup> May 2013 the respondent was not in possession and therefore the orders were granted in vain. He further deposes that the orders of 23<sup>rd</sup> May 2013 were not available for granting under Rule 63 of the Probate and Administration Rules. He deposes further that the respondent had obtained other orders in ELC 658 of 2011 just a week before he moved the family court for the orders made on 23<sup>rd</sup> May 2013. He complains that the respondent is running parallel proceedings.
4. The applicant herein has attached a number of documents to his affidavit. There is a copy of the eviction order made in ELC No. 658 of 2011, a suit between Deepak A. Ashwinkumar Maru, on the one hand, and Rahemat Essa Dosani and Benson Okumbi, on the other. Odunga J. had on 17<sup>th</sup> December 2012 issued an order requiring Rahemat Essa Dosani and Benson Okumbi to vacate and give vacant possession of the premises on LR No. 209/3345 to Deepak A. Ashwinkumar Maru. There is a default clause that the two be evicted if they do not comply with the order. The other order is dated 28<sup>th</sup> May 2013 and was made in the same cause by Nyamweya J. It is an order temporarily staying the orders made on 17<sup>th</sup> December 2012. There is also a further order restraining the applicant herein, Deepak Ashwinkumar Maru, from disposing of LR No. 209/3345 Parklands Nairobi, pending hearing and disposal of a pending hearing.
5. The respondent reacted to the application by filing Grounds of Objection dated 1<sup>st</sup> October 2013, a Notice of Preliminary Objection dated 4<sup>th</sup> October 2013 and a list and bundle of authorities dated 4<sup>th</sup> October 2013.
6. In the grounds of objection, he argues that the court had jurisdiction under Section 47 of the Law of Succession Act. He argues that the fact that Rule 63 of the Probate and Administration Rules does not expressly provide for the making of injunctive or restraining orders in probate matters does not mean that the court does not have jurisdiction to make such orders. He refers to Section 3(2) of the Judicature Act, Cap 8, Laws of Kenya, and submits that the court is enjoined to do substantial justice. He further refers to Article 159 of the Constitution to submit that the court was under obligation to ensure that justice was administered without undue regard to procedural technicalities.

7. In the preliminary objection, the respondent argues that the cause herein was founded on a petition that was filed by an advocate who never held a practicing certificate. The said petition was allegedly therefore filed in contravention of Section 34 of the Advocates Act, Cap 16, Laws of Kenya. It is further argued that the petition was not gazetted as required under Section 67 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules, and the court therefore had no jurisdiction to make the grant.
8. The application dated 8<sup>th</sup> July 2013 was argued orally on 4<sup>th</sup> October 2013. Mr. Ochola for the applicant submitted that the issues raised in the Preliminary Objection were not relevant to the application, and were meant to obfuscate the issues. He submitted that an injunctive order ought not to have been made in probate proceedings as there is no provision for it in the Law of Succession Act and the Probate and Administration Rules. He further submitted that even if there was inherent power to grant such order then the order made by the court exceeded what the court ought to have been granted in the circumstances; the certificate of confirmation of grant that the respondent sought to set aside had granted the applicant half share of LR No. 209/3345 Parklands Nairobi. The injunctive order ought not to have been to the extent of the entire property.
9. Mr. Ochola further submitted that the order of 23<sup>rd</sup> May 2013 was in conflict with the orders made in ELC No. 658 of 2011, where the land court had issued a permanent injunctive order against the respondent and another on 17<sup>th</sup> December 2012. He submitted that the said order conflicted with the order of this court made herein on 23<sup>rd</sup> May 2013. He argued that the respondent did not disclose to the court that injunctive orders had been made in the land court which would be inconsistent with the orders that he was seeking.
10. Mr. Muturi for the respondent on his part argued that that the cause was founded on a petition that was lodged in court by an advocate who had no practicing certificate. He cited a host of statutory provisions and court decisions on the point. On injunctions, he invited the court to take judicial notice of the fact that the courts have always granted injunctions in probate matters. He submitted that although the High Court is divided on the matter, there was no decision on the point from a higher court.
11. I will dispose of the matters raised in the preliminary objection first. I agree with the applicant that the issues raised therein are extraneous and have nothing to do with the application which I am now called upon to determine. What is for determination is a simple point, whether the orders made on 23<sup>rd</sup> May 2013 ought to be set aside. The issues raised in the Notice of Preliminary Objection can only be dealt with in a substantive application. After all, there is no evidence that the advocate who filed the petition herein had no practicing certificate. Whether or not there was a practicing certificate is matter of fact, and issues surrounding it cannot be disposed of in preliminary proceedings, but in substantive proceedings.
12. On whether a probate court can make injunctive orders, the position appears to be that the court has wide inherent and discretionary powers to do justice. For the purpose of probate proceedings those powers are saved in Rule 73 of the Probate and Administration Rules. The court can grant conservatory orders or one sort or other, but not injunctions as provided for in the Civil Procedure Rules, for the relevant provisions in those Civil Procedure Rules have not been expressly imported into probate practice.
13. On whether the temporary order of 23<sup>rd</sup> May 2013 ought to have been made, I hold the view that the said order could be made on the set of facts disclosed by the respondent then. However, in view of the facts now placed before court by the applicant the said order ought not to have been made. It was not disclosed before court that the same parties were litigating elsewhere over the same facts, and that similar orders had been made in those proceedings, in particular the orders of 17<sup>th</sup> December 2012 in ELC No. 658 of 2011. There was a material non-disclosure, that led the court to make orders that conflicted with a subsisting order of another court with respect to the same facts. The respondent's misconduct, of non-disclosure, can only be described as mischievous and dishonourable.

14. In view of what I have stated above, I have come to the conclusion that the orders sought in the application dated 8<sup>th</sup> July 2013 is merited. I do hereby allow the same. The orders granted on 23<sup>rd</sup> May 2013 are hereby vacated. The applicant shall have costs of the application.

15. I regret that there has been considerable delay in the delivery of the ruling herein. The court file had been misplaced within my chambers after it had been inadvertently placed inside another file.

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>TH</sup> DAY OF JUNE, 2016.**

**W. MUSYOKA**

**JUDGE**