

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 103 OF 2005

IN THE MATTER OF THE ESTATE OF JAMLICK KIVUTI NDWIGA (DECEASED)

EDDA WANGU.....APPLICANT

VERSUS

GEOFFREY PHENEAS NDWIGA.....RESPONDENT

RULING

1. This is an application brought under a certificate of urgency seeking restraining orders against the respondent either by himself, servant or any person acting on his behalf from intermeddling in the estate of the deceased in respect of constructing or continuing to construct on land ref No. Kyeni/Kigumo/675. Additionally, the applicant also seeks costs of this application to be provided for. The application is brought under summons in terms of sections 45 (which is in relation to intermeddling) and 47 (which is in relation to the jurisdiction of the High Court in succession causes) of the Laws of Succession Act (Cap 160) Laws of Kenya and under Rules 49 (which is in relation to filing of applications in succession matters by way of summons in court) and 73 ((which is in relation to the saving of the inherent powers of the court to do justice) of the Probate and Administration Rules. The application is based on the supporting affidavit of the applicant.
2. The applicant has stated that she is an interested party because she is the daughter in law of the deceased, having been married to the late Aloise Ireri. This Aloise Ireri is also deceased. That is the basis of describing herself as an interested party in the estate of the deceased. She has further stated that they have five children, who are adults and are in occupation of the suit land. Furthermore, she has stated that since her marriage to the late Aloise Ireri, she has occupied the suit land with the full approval of the deceased before he died and has continued to occupy it. It is on that piece of land that her children and herself do carry on cultivating subsistence crops. More importantly, she has stated that the respondent has dropped building materials on the suit land and is bent on constructing a permanent structure, a matter which she terms illegal because the respondent did not acquire the suit land lawfully.
3. The respondent through his counsel has filed grounds of opposition in which he has stated that Succession Cause No. 103 of 2005 is *res judicata*. He has further stated that the applicant has no locus stadi to file this application, because she is a stranger to the estate of the deceased and for that reason she is not entitled to the reliefs sought. Counsel has also stated that the application is frivolous, vexatious, lacks merit and is otherwise an abuse of the court process. He has urged the court to dismiss it.
4. Counsel for the respondent has filed written submissions, in which he has submitted that the probate and administration rules do not provide for injunctive relief and therefore Order 40 of the Civil Procedure Rules is inapplicable. He has also submitted that the applicant is not a proper party to this matter. He relied on the case of ***Teresia Wairimu Kirima v. Father Romeo and another, being Nairobi High Court ELC Case No. 585 of 2013***, where it was held that a widow of a deceased person cannot competently bring a claim on behalf of a deceased's estate without first obtaining a grant of representation to the estate.
5. I have considered the affidavit evidence of the applicant. I find from that evidence that she has not obtained a grant of representation to the estate of the deceased as required by section 51 of the Succession Act. And for this reason, I find that she is a stranger to the estate of the deceased. In the circumstances, I uphold the preliminary objection raised by counsel for the respondent that the applicant is a stranger to the estate of the deceased. She lacks capacity or *locus standi* to bring this application. The obtainment of letters of administration intestate by an intended administrator is

essential to enable the orderly transmission of the estate to the rightful heirs or beneficiaries. This requirement is necessary to stop persons who might intermeddle with the estate of the deceased person, which is an offence under section 45 of the Succession Act. It is not a procedural technicality. It is a fundamental requirement for the protection of the estate of a deceased person.

6. In the circumstances, I hereby dismiss the application with no orders to costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **8th** day of **JUNE 2016**

In the presence of both parties and in the absence of both counsel.

Court clerk **R. Njue**

J.M. BWONWONGA

JUDGE

08.06.16