



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 627 OF 2013**

***In the matter of the Estate of JASON NJERERA KAVANGUA (Deceased)***

**SAMMY MWIRIA NJERERA.....PETITIONER/APPLICANT**

**VERSUS**

**LUCA NYAGA NJERERA..... OBJECTOR/RESPONDENT**

**RULING**

1. This is a ruling on the application dated 27/2/2015 seeking for orders for interim injunction to be issued restraining the objector/respondent, his agents, servants, employees from inter meddling with the estate of the deceased pending interpartes hearing of the application and of the suit. The applicant also prays for an order to issue vacating the distribution of the estate by the area Chief Kyeni Central and that the status quo be maintained. The application is supported by the affidavit of Sammy Mwiria Njerera.
2. In the affidavit, it is stated that the applicant is a son of the deceased who died intestate on 28/1/2009 leaving behind seven children. The assets of the estate are Kyeni /Mufu/1350 and money in account BC 92 at Embu Coffee Cooperative Union. The estate has a liability of KShs.217,000/=. The applicant used his own title deed to secure the outstanding medical bill. The other beneficiaries were reluctant to petition for letters of administration prompting the applicant to apply for them after the hospital threatened to dispose of the asset he offered as security for the medical bill.
3. The respondent was joined as a co-administrator after he filed an objection. One Christabel Giciku Wanyoike cut down about 30 trees from the estate for her personal use and also took four debes of coffee berries for her use and carried away a poultry cage. The applicant states that the area Chief Kyeni Central distributed the estate of the deceased on 9/2/2015 despite lacking jurisdiction to do so. The applicant argues that there is a risk of the estate being alienated if the orders sought are not granted.
4. The respondent in her replying affidavit stated that the hospital bill was cleared by the applicant/petitioner's siblings and the title deed was released to the applicant. The applicant with the intent of benefiting from the estate opened a new coffee cooperative society coffee account in his name without involving other family members. The applicant has taken over cultivation of the deceased's land and the houses therein locking out the other siblings.
5. After letters of administration were issued to the applicant, the family members held a meeting on 22/12/2014 together in order to agree on a mode of distribution but the applicant was very rude and uncooperative and later made threats to Christabel Giciku.
6. This prompted the other members to report the matter to the area chief who summoned the applicant and his siblings. It was resolved that the coffee bushes be divided between Christabel and the applicant

pending the court's determination on the mode of distribution. The chief did not distribute the estate but only resolved a dispute. It is contended that the applicant is the one inter-meddling with the state.

7. In another replying affidavit of one of the beneficiaries Leah Ndia Njerera stated that she is a beneficiary of the estate and that the estate of the deceased does not have liabilities as his daughters and son offset the hospital bill at MP Shah and that the applicant's title was also released on 8/8/2014.

8. The applicant negotiated the salary of the shamba boy alone without involving anyone. The applicant secretly petitioned for the letters of administration after fraudulently obtaining a death permit and death certificate as the original documents are still with the family members. The trees cut by Christabel who is a widow of one of the beneficiaries were for purposes of raising school fees for her two daughters at the university with permission of the other family members.

9. It is alleged that the applicant also cut down trees without consulting anyone in October/November 2014. On 20/12/2014 the family held a meeting where Christabel was allowed to harvest the coffee she had been tending but the applicant was not agreeable to this. The petitioner was summoned by the chief due to the threats he gave Christabel on 22/12/2014. On 9/2/2015 the Assistant Chief was present to witness the subdivision of the coffee plantation into two equal portions in favour of the applicant and Christabel. The applicant also destroyed a cattle shed belonging to the deceased.

10. In a further affidavit, the applicant stated that after the deceased died, the family agreed that the respondent would initiate the succession process and he was mandated to use the money held in the deceased account BC 92 at Kyeni Coffee Cooperative Union to settle the outstanding medical bill for the deceased. The respondent however failed to initiate the proceedings.

11. The applicant legally used the due process to obtain the death certificate and burial permit for purposes of petitioning for letters of administration. The other siblings filed an objection and Susan Wanja Ngochi was appointed as a co-administrator. The parties consented that the money in the deceased's bank account be used to settle the hospital bill.

12. The applicant in his submissions stated that the provisions of section 45 of the Law of Succession Act provide that the court can make an order for the preservation of the state of the deceased. The applicant cited and attached the case **LUCY WAIRIMU MBUTHIA VS RUTH WANJIRU MBUTHIA & ANOTHER [2015] eKLR** where the court held that injunctions are not available in probate proceedings as the provisions governing injunctions in the Civil Procedure Act were not imported into the probate practice. The provisions of Section 45 of the LSA provide that the probate court has jurisdiction to make orders for the preservation and protection of the estate. Such orders are made under Rule 73 of the Probate and Administration Rules.

13. The applicant submitted on the principles of granting an injunction and stated that he had proved that he had established a prima facie case, the estate would suffer irreparable damages if the injunction was not granted and that the balance of convenience lay in favour of the estate. The Chief Kyeni Central acted *ultra vires* as his duties are clearly stated under Section 46 of the Law of Succession Act.

14. The respondent in his submissions restated what is in the replying affidavit and added that the applicant has been occupying the house of the deceased which was built by the daughters of the deceased. The applicant is the one who has been inter-meddling with the estate by obtaining a court order barring the other beneficiaries from accessing the estate, cutting and selling trees to enrich himself, cultivating the entire 5 acres property of the estate and selling the proceeds thereof to enrich himself, destroying a cattle shed and building another one, leveling a graveyard for one of the beneficiaries, misusing funds entrusted to him by other family members which was a balance of funeral funds of Kshs.72,000/=.

15. Section 45 of the Law of Succession deals with inter-meddling with property of deceased person. It provides:-

*Except so far as expressly authorized by this Act, or by any other written law, or by a grant of*

*representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise inter-meddle with, any free property of a deceased person.*

*Any person who contravenes the provisions of this section shall—*

*be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and be answerable to the rightful executor or administrator, to the extent of the assets with which he has inter-meddled after deducting any payments made in the due course of administration.*

16. Rule 63 of the Probate and Administration Rules provides that

*Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.*

*Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising there under in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.*

17. Rule 73 of the Probate and Administration Rules provides that;

*Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court*

18. In view of the provisions of section 63 of the Probate and Administration Rules, the principles of injunction in the case of **GIELLA VS CASSMAN BROWN** cited by the applicant, are not applicable in succession matters.

19. In the case of Priscilla **VUGUTSA KAMALIKI VS MARY RUNYANYI OCHIENG [2016] eKLR** the court held that the bringing the application under the Civil Procedure Rule while the Law of Succession Act was a self contained Act was a fatal defect. Seeking refuge under the provisions of Article 159 (2) of the Constitution was also not helpful as there were specific laws to be applied. The applicant should have brought the application under Rule 73 of the Probate and Administration Rules which clothed the court to make orders similar to the ones under Sections 1A, B and 3A of the Civil Procedure Rules.

20. In the case of **BELINDA JERUTO CHESIRE VS KIPTOO CHESIRE & 4 OTHERS [2015] eKLR** the court held that the provisions of the Civil P[rocedure Rules were not applicable in matters arising under the Law of Succession Act.

21. The respondent and Leah Ndia Njerera who are beneficiaries of the estate have admitted in their affidavits that Christabel Giciku Njerera who is a widow of the beneficiary of the estate was allowed by the family members to cut and sell trees for purposes of raising school fees for her children who are in the university.

22. It was also admitted that the applicant and Christabel Giciku were allocated coffee plantations forming part of the estate in a meeting held on 9/2/2015. This in my view amounts to inter-meddling of the estate of the deceased. The chief has no jurisdiction to distribute any property of a deceased person.

23. The applicant has also not come to court with clean hands as he alleges that the estate has a liability of Kshs.217,000/= owed to MP Shah Hospital. He has annexed an invoice issued by MP Shah hospital in 2009. the other beneficiaries have given evidence on oath that the hospital bill is fully paid.

24. This cause was filed by the objector Luca Nyaga Njerera. The applicant objected to the issuing of the grant to Luca Nyaga. It is said that the family later agreed to have the applicant Sammy Mutira and his sister Susan Wanja Njogu be appointed joint administrators. The letters of administration intestate was issued to the two on 23/09/2014. The second administrator is not a party to this application.

25. However, one of the deceased's daughters Leah Wandia Njerera has sworn an affidavit that the hospital bill was fully settled by the daughters of the deceased. The invoices and receipts of 2014 are annexed to her affidavit. This was not denied by the applicant.

26. The evidence of Leah is supported by documentary evidence to the effect that the bill is fully settled. In his further affidavit the applicant did not annex any documentary evidence of post 2014 to show that the estate of the deceased has any pending hospital bill.

27. It was also deponed by the respondent which was not denied that the applicant has opened a new coffee account in his name No. New Kyeni 4458 after closing the deceased's account No. 92. He has continued harvesting coffee and delivering to his account.

28. He has not accounted the proceeds in this case which he has a duty to do. The applicant is said to have taken over the entire home of the deceased including a house built by the respondent. The actions amount to serious inter-meddling with the deceased's estate.

29. The applicant now seeks to restrain the respondent from inter-meddling with the estate. The area chief and the widow Christabel have not been joined as parties although their alleged actions form the basis of this application.

30. The Chief acted *ultra vires* but this does not give the applicant the licence to disturb the *status quo*. The solution lies in the determination of this case. I find no merit in this application and it is hereby dismissed.

31. However, Rule 73 of the Probate and Administration Rules provides that;

*Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

32. I hereby invoke Rule 73 of the Probate and Administration Rules and make the following orders for the preservation of the estate pending confirmation of the grant:-

*The original coffee account number 92 in the name of the deceased be reinstated and the newly opened one New Kyeni 4458 be closed forthwith and any proceeds therein be deposited in deceased's account No. 92 to be operated by the two administrators jointly.*

*(ii) That the proceeds of the coffee be included in the distribution of the estate.*

*(iii) That the administrators or any other beneficiary are hereby restrained from cutting any trees on the deceased's land or to destroy any property therein.*

*(iv) That the administrators or any of them do file an application for confirmation of grant within 30 days.*

*(v) That there is no orders as to costs.*

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JULY, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Madoyo for Guserwa for objector/respondent**

**Mr. Kathungu for Njau for petitioner**