



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 49 OF 2009

IN THE MATTER OF THE ESTATE OF MBITHI MUU ENGOLI (DECEASED)

MBULWA MUIVA

JOSEPH MUIVA.....PETITIONERS/RESPONDENT

VERSUS

PETER MUIA

NATHAN MUIA.....OBJECTORS

JAMES MUTUA PETER.....APPLICANT

RULING

The Summons

James Mutua Peter, the Applicant herein, is the son of one of the Objectors namely Peter Muia who is since deceased, and he has filed an application by way of Summons dated 24th February 2016 pursuant to the provisions of Rule 45 of the Probate and Administration Rules, seeking the following outstanding substantive orders:

1. That pending hearing and determination of this succession cause, the Respondents and their agents be restrained from evicting the beneficiaries and tenants of the estate from Plot 21 Mutituni.
2. That leave do issue to the Applicant to substitute Peter Muia – Deceased with James Mutua Peter.

The grounds for the application as stated in the Summons and in the supporting and further affidavit sworn by the Applicant on 24th February 2016 and 10th May 2016 respectively, are that 1st Objector Peter Muia died on 10th September 2015, and that there is need for substitution to enable the Applicant prosecute the current suit. Further, that on 27th February 2012, Peter Muia, Nathan Muia, Mbulwa Muia and Joseph Muia were made joint Administrators, and that the 1st and 2nd Administrator have issued notices to all tenants and beneficiaries in occupation to vacate the estate and more specifically Plot No. 21 Mutituni, without the consent of the Co-administrators and other beneficiaries. The Applicant annexed copies of the said notices.

It was further alleged that the Objectors are the sons of the late Muia Manda and Philea Ndoti and are entitled to benefit from Plot No. 21 Mutituni, and that the 2nd Petitioner has never developed the said Plot

21 at Mutituni and has not exhibited in any manner how he has developed the said Plot, or any evidence of having transferred the said Plot No. 21 to himself or of having collected rent proceeds from the Plot. In the premises, that the said Plot No. 21 Mutituni be preserved awaiting determination as to who is to benefit from the said plot.

The Response

The Petitioners are the administrators of the estate of Philea Ndoti Muia, pursuant to a grant of letters of administration intestate issued to them on 23rd March 2009. The 2nd Petitioner filed a replying affidavit he swore on 19th April 2016 in response to the Applicant's application. He stated therein that whereas he is not objecting to the application for substitution of Peter Muia with the Applicant, he is however opposed to the prayer sought with regard to plot 21 Mutituni.

The 2nd Petitioner averred that he is the sole beneficiary of Plot No. 21 Mutituni, which Plot is registered in the name of Muia Manda who is his late father, and having acquired the same as a gift from his deceased father. He annexed a copy of letter from the Town Clerk of the Municipal Council of Machakos dated 19th May 2010 showing that Plot No. 21 Mutituni is registered in the name of Muia Manda.

He further stated that he developed the said plot and left it under the control of his mother Philea Ndoti Muia, and that the estate of Philea Ndoti Muia is different from the estate of Muia Manda, and Plot No. 21 Mutituni is not available for distribution as it does not form part of the estate of Philea Ndoti Muia who is also deceased. The 2nd Petitioner admitted issuing notices to vacate to all tenants residing in Plot No. 21 Mutituni, a property which he stated belongs to him.

The Issues and Determination

The Court directed that the Applicant's application be heard by way of affidavit evidence and written submissions. B. M. Mungata & Co Advocates, the Applicant's learned counsel, filed submissions dated 10th May 2016 while Andrew Makundi & Co. Advocates, the learned counsel for the Petitioners, filed submissions dated 25th May 2016 which I have read and considered.

The issues to be decided are firstly, whether the orders of substitution of the 1st Objector can issue; and secondly, whether the injunction orders sought herein are available to the Applicant.

The first issue is not contested. I note that the Applicant is seeking substitution not joinder, and technically one is substituted by a personal or legal representative who stands the shoes of the person being substituted and takes over their case, and the Applicant did not bring any evidence of having been granted letters of representation with respect to the estate of the 1st Objector. I also note that the Applicant claims that the Objectors were joined as joint administrators by a consent entered on 27th February 2012, but there is no record of any such record having been adopted by the Court on that date.

The Objectors herein are parties in that capacity by virtue of an affidavit or protest to the confirmation of grant issued herein, that was sworn by the 2nd Objector on 2nd November 2015 and filed in Court on 3rd November 2015. I note that under Rule 40(6) of the Probate and Administration Rules, any person wishing to object to a proposed confirmation of a grant can file an affidavit of protest against such confirmation, stating the grounds of his objection. Therefore, the Applicant is entitled to be joined as an objector in his own right, and this Court is empowered to make such an order by section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. The Court will therefore join the Applicant as the 3rd Objector in this Succession Cause.

On the second issue as to whether the injunctions sought by the Petitioner can issue, while the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules give wide discretion to the Court as to the orders it can make, this Court is still obliged to observe settled

principles of law and equity that may be applicable. The principles that are applicable for the grant of a temporary injunction are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, which are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The question I must therefore answer is whether the Applicant has met the criteria for the grant of an injunction. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR stated as follows as to what constitutes a *prima facie* case:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Applying these principles to the instant application, the Applicant and Objectors are beneficiaries of the deceased being her sons and grandchild respectively. They do not dispute that the Plot 21 Mitutuni belonged to Muia Manda and not the deceased, but ask that the said plot be preserved pending the determination of their interest if any in the plot.

I note in this respect that firstly, the deceased was wife to Muia Manda and may well have been a beneficiary of his estate. Secondly, the 2nd Petitioner did not bring any evidence to show how the estate of Muia Manda was distributed and that he is registered owner of the said plot, and in any event his claim that he was gifted the said plot can only be determined after full hearing of the summons for confirmation and affidavit of protest filed by the Objectors. To this extent I find that the Objectors have established a *prima facie* case, and that if Plot 21 Mitutuni is disposed with or developed by the 2nd Petitioner they will suffer irreparable loss. In addition the 2nd Petitioner has not undertaken that he can compensate the Objectors in the event of such loss and this is thus an appropriate case for an injunction to issue.

This Court in this regard orders as follows pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules:

1. The Applicant herein James Mutua Peter is hereby joined in this Succession Cause as the 3rd Objector.
2. The *status quo* that shall obtain with respect to plot 21 Mitutuni pending the hearing of the summons for confirmation of grant filed herein dated 30th June 2015 and affidavit of protests to the summons for confirmation of grant by the 2nd Objector filed herein on 3rd November 2009, shall be that the Petitioners shall not evict or interfere with the occupation by the beneficiaries and tenants currently in occupation of the said plot as at the date of this ruling.
3. Each party shall meet their respective costs of the Summons dated 24th February 2016.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20th day of July 2016.

P. NYAMWEYA

JUDGE