



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 159 OF 2001

In the Matter of the Estate of Dedan Kithinji M' Mugwika (Deceased)

JULIUS KINYUAMUGWIKA.....OBJECTOR/APPLICANT

Versus

DOMINIC MEME MUGWIKA.....PETITIONER/RESPONDENT

RULING

Injunction available in succession cause

[1] The significant orders sought in the Summons dated 23rd February, 2016 is:

- 1. An inhibition inhibiting any land dealings over land parcel Nos. Igoji/Kianjogu/2504, 2505, 2506 and 2507 till summons for revocation of grant dated 27th December 2012 is heard and determined.**
- 2. A temporary injunction to restrain the Respondent either by himself, his agents, assigns or employees from transferring, selling or disposing the said parcels Nos. Igoji/Kianjogu/2504, 2505, 2506 and 2507 until this cause is heard and determined; and**
- 3. Costs of the application.**

[2] The said application is expressed to be brought pursuant to Rules 47 and 78 of the Probate and Administration Rules. It is supported by the affidavit sworn by the Applicant who deposed inter alia that the deceased as well as the Respondent were his step brothers. He averred that he had filed a land dispute tribunal case No. 34 of 2004 at the Meru Central District Land Dispute Tribunal in relation to the suit property against the Respondent in which the Tribunal read its award on 19th May 2004 directing the Applicant and the Respondent to share the land equally. He further deposed that the Respondent had secretly and without his knowledge filed this succession cause through which the Respondent inherited land parcel No. Igoji/Kianjogu/172. The Applicant did not stop there. He stated that in furtherance of his ill motives, the Respondent subdivided land parcel Numbers Igoji/Kianjogu 172 into four other portions and disposed of two portions to James Bundi and Isabella Maiga who are his son and wife respectively. The Applicant lamented that, by these actions, the Respondent has disinherited the Applicant and has also rendered award by the tribunal nugatory.

[3] The Applicant submitted in support of his above positions and more specifically that he had clearly demonstrated a prima facie case by producing proceedings in Meru District Tribunal Case No. 34 of 2004 in which he was awarded LRNO. Igoji/Kianjogu/172 together with Francis Mbae except the Petitioner has

disinherited him of the said land through this cause which he filed secretly without informing him. Accordingly, the Applicant stated that he stands to suffer irreparable damage unless an injunction is issued. Consequently, the Applicant urged the court to find that the balance of convenience favours grant of the prayers sought while this case is pending hearing and determination.

[4] The application was opposed by the Respondent through a Replying Affidavit filed in court on 17th March 2016 where the Respondent deposed inter alia that the deceased herein was a party to the land dispute proceedings and therefore; the land dispute proceedings were null and void and the Applicant's reliance on them is fraudulent. Further, the Respondent averred that, the two could not co-exist on the suit land, and in order to ease tension between the two, the Applicant exchanged his share in L.R NO Igoji/Kianjogu/174 with one acre that was bought for him by Basilio Murungi.

[5] The Respondent also submitted in support of his avowed positions and argued that the Applicant's claim was based on an award that was issued without jurisdiction as the tribunal did not have jurisdiction to adjudicate over a parcel of land registered in the name of a person who was deceased. Again, it was submitted that one of the objectors in the land dispute was Dedan Kithinji and had passed away 15 years before the award, thus, the award was a nullity; it cannot be a basis for any claim whatsoever. More was submitted by the Respondent to the effect that the Applicant sought an order of temporary injunction yet he anchored the application on Rules 47 and 78 of the Probate and Administration Rules which do not provide for such relief. To him, an injunction is ordinarily sought under order 40 of the Civil Procedure Rules 2010. Therefore, the application should fail.

DETERMINATION

Charting the path

[6] Before discussing the merit of the application before me, I wish to set my path straight. There are two matters which bear preliminary significance and I wish to determine them in limine. This application is founded on Rules 47 and 78 of the Probate and Administration Rules. First, looking at the contents, Rule 47 of the Probate and Administration Rules is clearly not relevant to this case. Second, my frantic effort to locate rule 78 of the Probate and Administration Rules seems not to bear any fruit since the last rule in the Probate and Administration Rules is rule 74. But, be that as it may, I remind myself of the elegant provisions of Article 159(2) (d) of the Constitution of Kenya as well as Rule 73 of the Probate and Administration Rules which enjoin the courts to administer substantive justice without undue regard to procedural technicalities. Therefore, the citing of wrong rules or enabling provision in an application does not *ipso facto* invalidate the proceeding, or deny the party remedy or the court the power to give appropriate remedy in a succession cause. Similarly and contrary to the Respondent's submissions, an injunction may be granted under Rule 73 of the Probate and Administration Rules if it is necessary for or appropriate to meet the ends of justice and prevent abuse of court process. See a work of court in the case of **TABITHA NTIBUKAMBOROKI vs. JULIUS GITONGA M' MARETE [2016] eKLR** that:-

"...invocation of section 45 of the Law off Succession Act is not fatal as it has been suggested by the Respondent especially after the enactment of the elegant provisions of article 159(2) (d) of the Constitution and the entry of the principle of overriding objective into our law which favours substantive justice....I now turn to the other argument bythe Respondent that the Law of Succession Act does not give the court powers to grant injunctions. He cited an authority to that effect. The said authority is only persuasive and was decided before the Constitution of Kenya, 2010. On that basis, it is distinguishable from the current circumstances. As I stated earlier, I will follow after the dictates of the Constitution and Rule 73 of the Probate and Administration Rules which gives the court wide and unfettered powers to give orders as may be necessary to meet the ends of justice and to prevent abuse of court process; this is what many call substantive justice and which overrides technical considerations in adjudication of disputes. Rule 73 of the Probate and Administration Rules provides as follows:

Saving of inherent powers of court 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.

[7] Now the preliminary hurdle has been surmounted. I will proceed on the above precincts of the law. Upon meticulous consideration of this application and the rival submissions by the parties; I take this view of the matter. Undeniably, the record shows that the Applicant had sued the Respondent among others in Meru Central Land Disputes Tribunal case number 34 of 2004 in which the tribunal directed that the suit land be shared equally between the Applicant and the Respondent. The important consideration here is that the award has never been appealed against or set aside; except I am careful not intensely to interrogate the legal probity of the said proceedings at this stage. Again, on the facts of this case, there are other important considerations, to wit: The Respondent has admitted that the Applicant was entitled to a share in L.R NO Igoji/Kianjogu/174 except he alleged that the Applicant exchanged his said share with one acre that was bought for him by Basilio Murungi. The reason he gave was that the two could not co-exist in the same land. Except, however, with these admissions, the Respondent did not make provision for the Applicant in the confirmed grant. To make matters worse, the Respondent has averred and admitted that he subdivided the original suit land into several portions which he transferred to different persons and to himself. He also confidently- albeit mistakenly- averred that all beneficiaries of the estate of the deceased have received their respective shares. At least, at this stage of the proceedings, there is absolutely nothing to prove the alleged exchange of the estate property- that fact was also not captured in the petition for letters of administration. Therefore, on prima facie basis, the Applicant has established an enforceable interest in the original suit land which deserves resolution in a more intense manner between the parties in a trial. There is also possibility of abuse of the process of the court through these proceedings. Accordingly, I will fall back to Rule 73 of the Probate and Administration Rules which allows the court to tap from its inherent jurisdiction and issue orders which are necessary for the ends of justice and to prevent abuse of the process of the court; in my view such orders do not exclude injunctions and other Preservatory orders if they are the most apt. As I have already stated earlier, these issues raised by the Applicant are substantial issues as they hinge on possible disinheritance of one party; an act that may lead to irreparable damage not compensable in damages and thus, they merit protection of the law. Accordingly, I find the application to be meritorious and I allow it. More specifically, I order:-

- 1. An inhibition inhibiting all dealings over land parcel Nos. Igoji/Kianjogu/2504, 2505, 2506 and 2507 until summons for revocation of grant dated 27th December 2012 is heard and determined;***
- 2. A temporary injunction to restrain the Respondent either by himself, his agents, assigns or employees from transferring, selling or disposing the said parcels Nos. Igoji/Kianjogu/2504, 2505, 2506 and 2507 until this cause is heard and determined; and***
- 3. This being a succession cause involving close family members there will be no orders as to costs.***

Dated, signed and delivered in open court at Meru this 27th day of September, 2016

F. GIKONYO

JUDGE

In the presence of:

M/s. Nyangau advocate for the petitioner/respondent

Mr. Mutegi advocate for Objector/applicant

F. GIKONYO

JUDGE