



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.48 OF 2014

In the Matter of the Estate of M' Mukira Mwaganu Alias Mukira S/O Mwaganu (Deceased)

TABITHA NTIBUKA MBOROKI.....1ST PETITIONER/APPLICANT

Versus

JULIUS GITONGA M' MARETE.....2ND PETITIONER/RESPONDENT

RULING

[1] By Summons brought pursuant to Section 45 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, the Applicant has sought the following orders:

1.*spent*

2.*spent*

3. ***That this honourable court be pleased to issue restraining orders against the respondent, his agents, servants and/or employees restraining them from interfering, dealing or entering or in any other way dealing with part of L.R Abothuguchi/Katheri/857 occupied by the applicant pending the determination of this cause.***

4. ***Costs of the application [to] be provided for.***

[2] The said application is premised on the following grounds:

1. That the applicant is in occupation of L.R Abothuguchi/Katheri 857 measuring 2.6 acres or thereabout together with Co-Administrator Julius Gitonga M' Marete.

2. That the said Julius Gitonga has already forcibly entered into the part of the land occupied by the Applicant and started cultivating the said parcel of land.

3. That the applicant has tried all methods to resolve this with the Respondent to no avail.

4. That it is only just, fair and equitable that this honourable court grants the prayers sought.

[3] In brief, the Applicant's case is that her father was the registered owner of L.R Abothuguchi/Katheri/857 which she occupies together with her Co-Administrator. But, the Respondent had evicted her from the part of the land which she was cultivating measuring approximately 1.5 acres. Consequently, she urged the court to allow her prayers as sought.

Application was opposed

[4] The Respondent did not concede to the application. He filed a Replying Affidavit sworn by him in opposition to the application. He deposed to *inter alia* that he was currently living on L.R Abothuguchi/Katheri 787; that even the Applicant was living thereon but she no longer lives there as she is now living in Githongo. He also averred further that the Applicant does not live on L.R Abothuguchi/Katheri 857 as alleged as she had rented part of the land and that the other part was occupied with his coffee, gravellia trees, Napier grass and cabbages.

Submissions

[5] The Applicant filed submissions in support of her case. She argued that the Respondent had contrary to the provisions of the Law of Succession Act CAP 160 of the Laws of Kenya unilaterally and without lawful cause or justifiable reason forcibly entered into the suit property occupied by the Applicant and commenced cultivation thereof with clear intent of evicting the Applicant from, and disinheriting her of the deceased estate to which, as a daughter of the deceased, she is entitled to a share thereof. It was further submitted for the Applicant that the Replying Affidavit filed by the Respondent does not recognize the Applicant's interest in the estate of her deceased father and it was only intended to disinherit and evict the Applicant from her deceased father's property. She submitted that she is well aware that at an interlocutory stage as this, where the grant is yet to be confirmed and actual distribution of the deceased's estate done, the court may not go into the issues of distribution of the deceased estate, except, it is empowered by law to make orders that will secure and preserve the deceased's estate as well as the rights and interest of the beneficiaries of the deceased estate.

[6] The Respondent also submitted but took a contrary view. The Respondent submitted on section 45 of the Law of Succession Act which he stated cannot apply to a person who is lawfully allowed to deal with the affairs of the estate and does not contain any provision that grants the court powers to make orders of injunction. He also posits that the application is defective in form especially on the law upon which it is premised.

DETERMINATION

[7] Upon careful consideration of this application, the rival submissions by the parties and the authorities relied upon by the parties; I am of the following persuasion. The application before me is expressed to be brought under Section 45 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. From the arguments of the parties, these two provisions are relevant. I will consider those arguments.

[8] The Respondent argued that Section 45 of the Law of Succession Act CAP 160 of the Laws of Kenya does not apply to a person who is lawfully allowed to deal with the affairs of the estate. But, I should state clearly that the administrator should only do those things he is lawfully authorized to do by the grant and the law. If, therefore, he does things which are not permitted in or are prohibited by the law and the grant, he has violated his duties and powers as an administrator and he will be accordingly indicted and where appropriate, the grant should be revoked. In such circumstances, the court should fashion such relief which it considers appropriate. To advance this argument further; Section 79 of the Law of Succession Act is clear that exercise of power by the administrator upon the estate property is subject to limitations imposed by the grant and the law. Again, section 55 and 82 of the Law of Succession Act also recognize certain limitations upon the power of the administrator especially before confirmation of the grant. In this case, it is of great significance to note that the both the Applicant and Respondent are joint administrators of the estate of the deceased. Under section 79 of the Law of Succession Act, the joint administrators are the personal representatives of the deceased and all the property of the deceased vests in them as personal representatives. All the powers and duties of personal representatives vest in the two administrators and should be exercised collegially. As such administrators, none is authorized to act unilaterally or deal with the estate property in a manner that is prejudicial to the beneficiaries or the estate. Worth of note; in this case the grant is yet to be confirmed. Therefore, any dealings in the estate property especially real property will require consultation of joint administrators, consent of the beneficiaries and the authority of

the court where those acts are substantial in that they will affect the estate property or waste the estate property or dissipate the estate property or affect the right or share of a beneficiary. These restrictions are manifest in the Law of Succession Act. Within that purview, the major quarrel by the Applicant is that the Respondent has evicted her from and leased out that part of the estate property which she occupied and cultivated. The fact of leasing out part of the estate property has been admitted by the Respondent in paragraph 7 of his Replying Affidavit as follows:

“That the Petitioner does not occupy any part of L.R No. Abothuguchi/Katheri/857 as alleged as I have rented part of the land and the other part of the land is occupied with my coffee, gravellia tress, Napier grass and cabbage.”

In the above averment it seems that the Respondent has already distributed part of the estate property to himself before confirmation of the grant- an act which is totally prohibited by the grant and sections 55 and 82 of the Law of Succession Act. Similarly, in law, leasing of the estate property or part thereof by the administrators before confirmation of the grant, unless it had been leased out by the deceased is a substantial act which will require the consent of joint administrators and the beneficiaries. But, if the lease is for a long tenure as to postpone distribution of the estate for a considerable period or it is one which will affect the particular property, for the acts permitted in the lease will or are likely to waste or diminish or dissipate the estate property, the authority of the court in addition to that of the beneficiaries will be a necessary pre-condition to the creation of such lease. I say these things for obvious reasons. I have had to deal with cases where the administrators have leased out estate land for quarry excavation or mining and others for periods of over 10 years without the consent of the beneficiaries. These kinds of leases would affect the land itself, the distribution of the estate as well as the respective shares of the beneficiaries. If, therefore, the grant is not yet confirmed, one of the administrators cannot lease out the estate property without the consent of the other and the beneficiaries, and the court in appropriate cases. I do not, therefore, acceded to any argument which tend to suggest that a holder of unconfirmed grant has licence to do anything he wishes and howsoever he deems fit in relation to the estate property without recourse to what the law permits him or her to do. Such acts shall be done contrary to the law and the court will fashion a remedy to the situation. And in answer to the arguments by the Respondent, 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. It bears repeating that **the administrator should only act in accordance with the law, distributes the estate in accordance with the confirmed grant or in the manner authorized by written law or by the court; that is the express authority talked of in the Law of Succession Act. Before confirmation, the administrator can only lawfully do those things permitted in the law of succession Act which relate to collection, preservation, gathering of the estate property, and paying just debts and funeral expenses for the estate. To hold otherwise would be suicidal to estates of deceased persons if a grant is issued to unscrupulous administrators.**

[9] Now, therefore, as long as the Respondent acted alone to lease out the estate property herein, and as long as the effect of the lease is to affect the beneficial interest of the Applicant, he has committed acts which violates his obligations as an administrator of the estate. He has committed acts for which remedy would issue. I so hold.

[10] I now turn to the other argument by the 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.

The facts of this case show violation of the law and abuse of the process of the court by the Respondent; this is a perfect candidate for the invocation of Rule 73 of the Probate and Administration Rules. Accordingly, a restraining order or preservation order or a remedy by whatever name called is a relief that is available within a succession cause to do justice, prevent abuse of the process of the court and preserve the estate property. In any case, a right and violation thereof is being asserted by the Applicant and as such an injunction would be granted if it is the appropriate remedy herein. See article 23(3) of the Constitution.

[11] For the foregoing reasons I find the application dated 19th October, 2015 to be meritorious and I accordingly allow it. More specifically,

1. I hereby restrain the Respondent, his agents, servants and/or employees from interfering, dealing or entering or in any other way dealing with part of L.R Abothuguchi/Katheri/857 occupied by the applicant pending the determination of this cause.

2. This being a succession matter involving close family members, there will be no order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 26th day of September, 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Kimaita advocate for 1ST petitioner/applicant

Mr. Munene advocate for Mr. Kiogora advocate for 2nd petitioner/respondent

F. GIKONYO

JUDGE