



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 691 OF 2012

IN THE MATTER OF THE ESTATE OF EUNICE WAMBUI KIBUNJA – (DECEASED)

PAUL GEOFFREY KIBUNJA.....OBJECTOR

VERSUS

JOSEPH KANG'ETHE KIBUNJA.....RESPONDENT

RULING

The applicant before court is the one dated 24th July, 2015.

By way of Notice of Motion, Paul Geoffrey Kibunja (hereinafter the objector) moved the court for orders:

- (a) That the application herein be certified as urgent and the same be heard on a priority basis.
- (b) That the honourable court do grant leave for the Applicant to institute contempt proceedings against the Respondent.
- (c) That the Respondent do give an account of the proceeds of all the rental houses and the slaughter house since the death of the deceased on 30th May, 2012.
- (d) That all the rents relating to the deceased estate be collected by Transmax Enterprises Company and to be deposited in a joint account opened and operated by all the beneficiaries.
- (e) That costs of this application be provided for.

The application is based on grounds as seen on the face thereof namely:

- i. That the Respondent is in contempt of the court orders issued on 27th November, 2014
- ii. That due to the Respondent's behaviour the authority of this court stand to be eroded.
- iii. That the Respondent has gone against the orders of the court and ploughed and planted on LR MAU NAROK/SIEPEI BLOCK 485.
- iv. That in the interest of justice the application be allowed with costs.

It is supported by the affidavit of the objector sworn on 24th July, 2015.

The gist of the grounds and the supporting affidavit in that despite a court order dated 27th November, 2014, the Respondent has gone ahead to plough and plant on LR MAU NAROK/SIEPEI BLOCK 485. Photographs showing the activity are exhibited.

The Respondent is also accused together with 2 other brothers, Joseph Kang'ethe Kibunja and James Mathew Ngige of collecting house rent and fees from a slaughter house which forms part of the estate.

It is proposed that the said rent should be collected by an independent agent namely Transmax Enterprises Company.

The Respondent did not file a response to the application. However, counsel for the Respondent Mr. Chege indicated that they were not opposed to prayer (b) of the application seeking leave to institute counterpart proceedings. He argued that the issued of collection of cash from Equity Bank has been overtaken by events. There is a confirmed grant. The application dated 27th November, 2013 sought to revoke grant. Money had already been withdrawn. It is urged that the application is brought under the wrong provisions of law as the applicable law is the Law of Succession Act. Counsel stated he would be relying on **Section 573** of the **Probate and Administration Rules**.

In rejoinder, Ms. Njoroge for the applicant told the court that the court is enjoined to do substantive justice to the parties. The Law of Succession Act does not cover everything.

I have had occasion to consider the application, the grounds in support and the supporting affidavit. I have had regard to the submissions by counsel.

The issues of fact raised by the applicant remain uncontroverted as the Respondents did not give a formal response to them.

The chronology of events in this matter shows that the Applicant moved the court vide an application dated 19th November, 2014. That application was certified urgent and interim orders issued by way of an injunction restraining the Respondent from fencing off, depositing building materials or in any other way interfering with parcel title Nos. LR MAU NAROK/SIEPEI BLOCK 3/330 and LR MAU NAROK/SIEPEI BLOCK 485.

The said orders were extended on 18th December, 2014. The matter was again in court on 19th December, 2015. During that day, counsel present being Mr. Mbiyu holding brief and Mr. Chege for the Respondent informed the court that the matter was before court to confirm typing of proceedings. Of note is that none of the parties brought it to the attention of the court that there were interim orders. Indeed there was no mention of the pending application.

The matter was in court on the 27th July, 2015 for the hearing of the current application under a certificate of urgency. The same was certified urgent and was to be heard on 30th July, 2015 but again the Respondent was not ready and the matter was adjourned.

Subsequently, the matter was in court on the 19th August, 2015 and on the 26th August, 2015 and in both instances, no interim orders were issued. The same case applies to the appearances on 2nd September, 2015 and 29th September, 2015.

I have deliberately given this detailed background of the case herein to first and foremost address the prayer for leave for the Applicant to institute contempt proceedings. It is clear from the record that in the absence of an extension of the interim orders on the 19th February, 2015, the subsisting orders lapsed. I am in that regard therefore, inclined to deny the Applicant leave to institute contempt proceedings based on the fact that the record shows that as at the time of filing the current application, there were no interim orders in existence.

I note that in addition to the present application, the application dated 19th November, 2014 was never set down/or never proceeded for hearing.

I have perused the record. I note from the proceedings that the objector has already closed his case. It is the Respondent's case that awaits hearing.

In the meantime, this court is alive to the fact that before this cause is finally determined, the estate must be preserved for the benefit of all beneficiaries. None of the beneficiaries should appear to be benefiting from the estate at the expense of other beneficiaries.

In order to achieved substantive justice in this matter and in exercise of the Judicial authority bestowed upon this court by the Constitution and specifically in ignoring procedural technicalities as mandated by **Article 159(d)** of the **Constitution**, I proceed to make orders in the following terms:

1. That pending the determination of this matter, there be an injunction restraining the Respondent from fencing off, depositing building materials or in any other way interfering with parcels of land number LR MAU NAROK/SIEPEI BLOCK 485 and LR MAU NAROK/SIEPEI BLOCK 3/330.
2. That within the next thirty (30) days, the Respondent gives an account of all the rental houses and the slaughter house since 30th May, 2012.
3. That the parties herein do engage with a view to reaching an agreement on a mutually acceptable way to utilise the estate in productive activities including farming.
4. That the application for revocation of grant made on 26th day of November, 2014 be set down for hearing on a priority basis.

Again there should not be any other meddling through transfer or waste of all or part of the estate. Failure to conserve the estate would render the hearing of this application and the outcome nugatory. This would occasion untold injustice to the affected parties.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 25th day of November, 2015.

A. K. NDUNG'U

JUDGE