



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 60 OF 2015

IN THE MATTER OF THE ESTATE OF GEDION KILONZO NDUKI (DECEASED)

JACQUES KILONZO

NORAH NDUNGE KILONZO

CAROLINE MUENI KILONZO.....APPLICANTS

VERSUS

STEPHEN MUISYO KILONZO RESPONDENT

RULING

The Summons

The Applicants herein are a son and daughters of Gedion Kilonzo Nduki, (hereinafter referred to as “the Deceased”), who died on 25th June 1990. The Applicants have petitioned for a special limited grant *ad colligenda bona* over the estate of the Deceased to collect and preserve the same while awaiting issuance of a Grant of letters of Administration Intestate. Their petition is dated 10th March 2015, and filed in Court on 12th March 2015. A Notice of Objection to the said Petition dated 24th April 2015 was filed by some of the Applicants’ siblings on the said date. Neither the Petition nor Notice of Objection have been heard or determined.

The Applicants subsequently filed a Summons dated 1st December 2015 pursuant to the provisions of Rule 45, 46 and 47 of the Probate and Administration Rules, seeking the following outstanding substantive orders:

1. A temporary injunction to restrain Steven Muisyo Kilonzo , his agents, servant, personal representatives or assigns , and any other person from interfering or intermeddling with the estate of the Deceased in any way pending hearing and determination of this succession cause .
2. A temporary injunction to restrain Steven Muisyo Kilonzo from constructing , erecting or continuing with the construction ,or erection of any fence, wall or any other development or to deal with the property Title Number Kawethei/Kathaana/2523 in any other manner prejudicial to the interest of the applicants and other beneficiaries of the Estate of the Deceased.
3. An order to compel Steven Muisyo Kilonzo to remove any fencing, walls or any other development he, his agents, servants , personal representatives or assigns have put up over Property Title Number Kawethei/Kathaana/2523 pending the hearing and determination of this succession cause.

4. An order to require the Officer Commanding KANGUNDO Police Station to assist in the removal of any fencing, walls or any other development constructed by Steven Muisyo Kilonzo on property Title Number Kawethei/Kathaana/2523
5. Any other order as the Court may deem fit in the circumstances of this case .

The grounds for the application as stated in the Summons and in the supporting affidavit sworn by the 3rd Applicant on 1st December 2015, are that said Steven Muisyo Kilonzo has unlawfully entered into the property title number Kawethei/Kathaana/2523 and begun the process of fencing off the said property without any authority and or grant of letter of administration intestate. Further, that the said actions will render the property uninhabitable to its present occupants by separating them from essential facilities necessary for a dignified standard of living and amount to intermeddling in contravention to the law of succession. The Applicants attached a death certificate of the deceased, and of the title to the disputed property that showed that the same is registered in the name of the deceased.

The Response

The Respondent who is also a son of the deceased, filed a replying affidavit he swore on 23rd February 2016 in opposition to the Applicants' application. He stated therein that there are three homesteads that have been in existence for more than 28 years on the parcel of land known as Kawethei 2523, that are occupied by George Gideon Kilonzo, Stephen Muisyo Kilonzo and Mrs. Agnes Nzioki -wife to the late Mr. Charles Nzioki Kilonzo. Further, that there are permanent structures on the said land and a perimeter fence which was put up by George Gideon demarcating his homestead from that of Mrs. Agnes Nzioki, before he travelled to the USA where he is currently based, and after fencing he left sufficient opening to allow Mrs. Nzioki and her family access to the latrine. It was also averred that it is not Mrs. Nzioki's right to use that latrine since she can construct one in her compound.

The Respondent stated that the other sections of the said land has fences dating back to 1974 or 1975 while the deceased was still alive, and which show the boundaries between his home and that of Mrs. Agnes Nzioki and Jacques Mutuku Kilonzos as had been apportioned by the deceased. Further, that some of the said fences were erected by the deceased when he was subdividing his land among his children, and reinforcement was later done by the individual owners whenever there was need to do so. Therefore, that the Applicants have no right to compel him to remove his part of the fence.

The Issues and Determination

The Court directed that the Applicant's application be heard by way of affidavit evidence and written submissions. Nyauchi & Co Advocates, the Applicants' learned counsel, filed submissions dated 18th May 2016, while J. Muoki & Co. Advocates, the learned counsel for the Respondent, filed submissions dated 24th June 2016 which I have read and considered.

The issue to be decided is whether the injunction orders sought herein are available to the Applicant. The Applicants submitted in this respect that the Respondent does not refute the fact that he has put up structures on the suit property; and that he further stated that he has been living in the said property for over 28 years now. However, that this fact does not negate the fact that the letters of administration are yet to be taken out, and proves the fact that the Respondent has been intermeddling with the deceased's estate for a long time.

The Respondent on the other hand denied that he was intermeddling with the deceased's property, and reiterated that the parcels where he and his brothers put up their residences were allocated and pointed out by their late father in the presence of the clan, and village elders, who shall be called as witnesses.

I note in this regard that section 45 of the Law of Succession Act is the operative law when seeking to stop intermeddling with a deceased's estate, and provides that other than instances expressly authorized by the Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased

person.

The provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules in addition give wide discretion to the Court as to the orders it can make, and it is my view that this discretion notwithstanding this Court is still obliged to observe settled principles of law and equity that may be applicable to any order sought. 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 Applicants have 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, I note that both the Applicants and the Respondent are children and beneficiaries of the deceased, and are therefore all entitled to a share of Kawethei/Kathaana/2523 . Secondly, the Applicants and Respondent do not dispute that the said land belonged to the deceased, and the Applicants also did not dispute that the Respondent averments that he has been resident thereon from the time the deceased was alive. I also note that neither the Applicants and Respondent have been appointed as the Administrators of the estate of the deceased, and a grant of letters of administration has not been issued to them. Lastly, no decision has been made as to the distribution of the deceased’s estate.

In the circumstances, I cannot make a finding that the Respondent is an intermeddler, as being a beneficiary, he has an interest in the land owned by the deceased known Kawethei/Kathaana/2523, which interest is awaiting crystallization through the process of administration and distribution. The Applicants cannot therefore claim a better interest in the said property as they have the same status as the Respondent. The overriding and common interest of all the parties herein therefore is to protect the deceased’s estate pending distribution. This Court in this regard accordingly orders as follows:

1. The *status quo* that shall obtain as regards all the properties and assets belonging to the estate of the deceased and particularly Kawethei/Kathaana/2523 pending the application for and confirmation of grant of administration shall be that the Applicants, Respondent and Beneficiaries of the deceased shall continue to be in possession and occupation of the properties and assets they currently occupy, and the said Applicants, Respondent and Beneficiaries shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by any beneficiary.
2. Each party shall meet their respective costs of the Summons dated 1st December 2015 .

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 14th day of December 2016.

P. NYAMWEYA

JUDGE