



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 276 OF 2007

IN THE MATTER OF THE ESTATE OF SERAH SOLOMON MAGAMBO (DECEASED)

KIRIMI SOLOMON MAGAMBO 1ST PETITIONER/OBJECTOR

CHARITY KANINI GATOBU 2ND PETITIONER/OBJECTOR

STEPHEN GICHURU MAGAMBO 3RD PETITIONER/OBJECTOR

-VERSUS-

MUTUMA SOLOMON MAGAMBO 1ST RESPONDENT

EPHANTUS MURANI MAGAMBO 2ND RESPONDENT

RULING

1. The Applicants/Petitioners through summons dated 3rd June 2015 pursuant to section 46 of the Law of Succession Act and Rule 49 and 73 of the Probate and Administration Rules sought orders to restrain the 2nd respondent and any other person whatsoever from digging a grave, and/or burying the remains/body of MUTUMA SOLOMON MAGAMBO (deceased) on Land Parcel No. Abothuguchi/Katheri/368 until this application is heard and determined; that the remains/body of MUTUMA SOLOMON MAGAMBO (deceased) be not be buried on the suit land parcel no. Abothuguchi/Katheri/368 till the distribution thereof is made to the beneficiaries and that this order be served upon OCS Githongo Police Station to ensure compliance and costs of the application be provided for.

2. The application is supported by affidavit of KIRIMI SOLOMON MAGAMBO and on the grounds on the face of the application inter alia; that the suit land Abothuguchi/Katheri/368 is awaiting distribution; that there has been a deadlock on distribution due to the land extending from a main road on a flat area extending downwards a river frontage or a valley; that the respondents main aim is to wrongfully, unfairly and forcefully take the flat area bordering the main road and leave other beneficiaries to share the valley; that the 1st respondent died on 28th June 2015 and has all along lived in Isiolo county with his family where they have/own another parcel of land; that the 2nd respondent and the sons of the 1st respondent intends to forcefully and wrongfully bury the body/remains of the 1st respondent on the suit land on 5th or 6th June 2015 in a bid to steal a match from the applicants; that the situation on the ground is tense, emotive and volatile, hence the need for this order to preserve peace and in the interest of justice and fairness the application ought to be granted.

3. The applicants in their supporting affidavit have deponed that they are sister and brothers who are

also beneficiaries to the deceased estate which is Abothuguchi/Katheri/368 which is pending distribution and have pointed the extension of the land as stated in the grounds in support. The applicant have also admitted that the respondents are also beneficiaries who they accuse intending to get the flat part and frontage of the road and force other beneficiaries to the valley and that the respondents intend to bury the deceased on the suit land forcefully and wrongfully.

4. The respondents filed a replying affidavit dated 10th June 2015 denying inter alia; that by the time the application and order was served upon the 2nd respondent the grave had already been dug and remains brought from mortuary in readiness for burial and the body had to be taken back to the morgue in obedience of the court's order; that the deceased died on 28th May 2015; that the deceased was in occupation of portion of suit land and on 26th June 2014 court ordered that each of the beneficiaries including the deceased do continue occupying the portion he/she occupied then; and annexed a copy of the court's order as annexure "EM1"; that since then the deceased and his family continue to occupy its portion fronting the Meru-Githongo highway; that there is no dispute that the deceased is not an entitled beneficiary to suit property; that the applicant's application is indeed malafide, malicious and greedy; that the said 2nd applicant lost her son barely two months ago and freely buried his remains on the portion of the same family land under her occupation without any interruption and notwithstanding the subject land is yet to be distributed; that the remains of the 2nd applicant's husband was also buried on the portion occupied by the 2nd applicant while this cause was still pending before court and neither the deceased nor 2nd respondent interrupted the said burial; that the two applicants as well as other beneficiaries have lost their loved ones and had their remains interred in the respective portions of the family land under their occupation notwithstanding the existence of this cause; that the 1st applicant has all along been opposed to occupation of the family land by the deceased for no plausible reason as per annexure "EM2" in which the 1st applicant was seeking to injunct the deceased from occupying a portion of family land.

5. The respondent further deponed that they would have no objection to any of their deceased relative from being buried on the suit land terming the applicants action of denying the deceased to be buried on the suit land as inhuman, unjust and indeed agonizing to the deceased's family; that it is their desire for the deceased who educated both the applicants and the respondents to get a decent burial; that the 1st petitioner in collusion with other applicants have been fighting the deceased and the 2nd respondent since he first got grant in 2008 instead of distributing the estate; that the 2nd respondent and the applicants are not persuaded by his sentiments and offers part of his portion of family land fronting the tarmac attaching copy of Deputy Registrars report dated 11th November, 2014 marked "EM3" which shows the applicants did not dispute the 2nd respondents exclusive occupation of the said portion fronting the tarmac; that there is no law providing that burial of family members should always await distribution of estates of deceased persons; that the summons as drawn and presented are totally defective and ought to be struck out.

6. I have carefully considered the application and the reply to the application and counsel varying submissions and the issue for consideration arising out of the parties affidavits and submissions are as follows:-

- (a) whether the application is competent as drawn and presented?**
- (b) whether injunctions can issue under the provisions of the Law of Succession Act barring the burial of a deceased beneficiary pending distribution?**
- (c) Whether the applicants have satisfied conditions for granting that application?**

7. The applicants, the deceased and the 2nd respondent are brothers and all beneficiaries to the estate of Sarah Solomon Magambo (deceased) who is their mother. The grant in this cause was issued to petitioners on 21st February, 2008 but the same has not been confirmed to date due to various disputes between the applicants and the respondents. The 1st respondent passed on, on 28th May 2015 before the

distribution of the estate.

8. The applicants through their application dated 3rd June 2015 sued MUTUMA SOLOMON MAGAMBO (DECEASED) together with Ephantus Mukari Magambo. The 1st respondent as pointed out died on 28th May 2015 and as such when the application was filed he was already dead and there is no indication in the application as drawn that the 1st respondent is dead. In view of the 1st respondent having died before the filing of this application, I find that a deceased person is incapable of being sued as is the case in this cause as a respondent. The applicants ought to have filed an application for substitution. Secondly the 2nd respondent has been sued without having obtained letters of administration to represent the deceased estate. I therefore agree with the respondent counsel that the application as drawn and filed is totally defective and incompetent.

9. The Applicants in their application are seeking orders of injunction against the respondents. The issue for consideration is whether orders of injunction can issue in a succession cause. **Rule 63 (1) of the Probate and Administration Rules** provides:

“63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”

10. In view of **Rule 63 (1) of the Probate and Administration Rules Order 40** (formerly Order XXXIX) of the Civil Procedure Rules is not one of the provisions of Civil Procedure Rules that is applicable in succession matters. I note the applicants are not seeking orders for preservation of the deceased estate or claiming that there is intermeddling with the deceased estate by interested parties. It is therefore my view that orders of injunctions are not amenable in Succession Cause matters.

11. The applicants in seeking orders to stop burial of the 1st respondent relied on provisions of **section 47 of the Laws of Succession Act**. The said provision provides:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

12. They also relied on **Rule 73 of the Probate and Administration Rules** which provides:-

“73. 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.”

13. I have very carefully examined **Section 47 of the Laws of Succession Act and Rule 73 of the Probate and Administration Rules**. The two provisions refer to matters which the Law of Succession Act deals with but not any other matter outside the provisions of the Law of Succession Act. There is no single provision under the aforesaid Act barring burial of a beneficiary to the deceased estate or his family member on the deceased property that is subject of a succession cause pending distribution.

14. In this cause there is undisputed evidence from the respondents affidavit that since deceased died on 25th February, 2005 and whose estate is subject of the present application, the family members including the applicants, and the respondents have since been burying their loved ones on various portions of the disputed property and which portions have been and is still under their occupation but there has been no common graveyard. That no evidence was called to the contrary and pointing to a fact that there has been a common graveyard on the suit land. The deceased, the 1st respondent during his life time was in occupation and use of the deceased estate. That there is no dispute that the 1st respondent, deceased was a beneficiary to the deceased estate and entitled to the estate herein. That his family is in occupation of the

suit property. That as other deceased member of family has peacefully been buried on the suit land without the applicants raising any objection and even the 2nd applicant's son was buried two months ago without any problem as well as her husband on the portion occupied by the 2nd applicant. That the other applicants also buried their deceased on the respective portion of family land under their occupation. I see no basis of denying the burial of the 1st respondent deceased, on the portion he had been in occupation and using as by doing so, this would be discrimination against the deceased family by treating them differently from other family members on issue relating to burial of their loved one.

15. That the other question to consider is whether the applicants have satisfied the conditions for granting orders of injunction. Assuming that this court has jurisdiction to grant order of injunction, I have then to consider whether the applicants have satisfied conditions for granting of orders of injunction. The applicants in this cause are not owners of any portion of the deceased estate nor is there any claim that a certain portion of the deceased property had been gifted or bequeathed to them. The applicants and the respondents as sons and daughters or children of the deceased are equal beneficiaries in respect of the deceased estate. The applicants have not demonstrated that they have a prima facie case with probability of success. They have not further demonstrated that if injunction is not granted they would suffer irreparable loss which cannot be compensated by way of damages nor have they demonstrated that the balance of convenience tilts in their favour so as to merit the orders for injunction to be granted in their favour. As earlier on pointed out, an order of injunction cannot be issued in succession cause matter but in civil matters, I find therefore the application is misplaced and bad in law.

16. The upshot is that the applicants' application of 3rd June 2015 is without merits and I proceed to make the following orders:-

- (a) **The applicant's application is fatally defective and incompetent and is struck out.**
- (b) **The orders restraining the burial of MUTUMA SOLOMON MAGAMBO (deceased) at Abothuguchi/Katheri/368 is vacated forthwith.**
- (c) **The deceased MUTUMA SOLOMON MAGAMBO be buried on parcel of land Abothuguchi/Katheri/368 on the portion on which he had occupied and/or used or where his family occupies pending distribution of Abothuguchi/Katheri/368.**
- (d) **The applicants to bear costs of the application.**

DATED at Meru this 17th day of September, 2015.

J.A. MAKAU

JUDGE

17.9.2015

Delivered in open court in the presence of:-

Ms. Thiberu advocate for applicants

Mr. Kimathi Kiara advocate holding brief for Mr. Ndubi advocate for respondents

Court clerks – Faith/Ibrahim

R.V.P. WENDOH

JUDGE

17.9.2015