



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 338 OF 2013

FORMERLY RUNYENJES SUCC 171 OF 2011

IN THE MATTER OF THE ESTATE PETER NJERU WAMICI alias NJERU WAMICI

ANN MUTHONI NJERU

LUCY RUGURU NJERU.....PETITIONERS

VERSUS

SILVANO MUNYI NJERU

MARTIN KARIUKI NJERU

JOSEPH MURATHI NJERU..... RESPONDENTS

RULING

This is an application by the two applicants under Orders 40 and 51 of the 2010 Civil Procedure Rules seeking a temporary injunction to restrain the three respondents from interfering with their peaceful cultivation and utilization of land parcel nos Gaturi/Nembure/2649, 8354, 8359 and 8364, in which they state they are harvesting macadamia nuts, bananas and other trees. They also seek an order of the court to direct the mode in which costs should be paid and by who. Annexed to the application is a supporting affidavit of the first applicant. She states that following the death of their father and during the lifetime of their mother, they peacefully cultivated the suit lands uninterrupted. Furthermore, she has stated that the respondents and other siblings have their own parcels of land on which they have settled with their families. She also states that the first respondent as the administrator of the estate should refrain from conduct that demeans the applicants who should be allowed to continue with their normal business.

During the interpartes hearing, the respondents argued with leave of the court the preliminary point of law which they had filed in opposition to the application. According to the respondents, the applicants lack *locus standi* in law to prosecute this application. They also state that the application is prematurely before the court and that the court lacks jurisdiction to entertain the application.

The applicants filed grounds of opposition to the preliminary objection. According to them, as children of the deceased, they have the *locus standi* to prosecute this application. They have also stated amongst other grounds that the preliminary objection is misconceived because the application at hand is not for the distribution of the estate but for the protection and use by the applicants of the suit parcels of land which now form part of the estate of their late father. Finally, they contend that the court has jurisdiction to entertain and determine this application.

The parties made oral submissions in court. Counsel for the respondents argued that the matter before the court is governed by the Succession Act (Cap 160 L.O.K). He further argued that the court's jurisdiction is drawn from that statute. In terms of Rule 59 of the Probate and Administration Rules, an applicant is required to file a complaint in court either by way of a petition, summons or a caveat. According to him, the filing of the application by the applicants under Order 40 of the 2010 Civil Procedure Rules as read with section 3A of the Civil Procedure Act is fundamentally defective. The reason being in his view that the provisions of the Civil Procedure Act and the rules made there under are inapplicable to disputes touching on matters of succession. He further submits that these errors on the part of the applicants are so fundamental to the extent that they cannot be cured. Finally, he pointed out that Article 159 of the 2010 Constitution of Kenya cannot be called in aid to cure the defects or errors committed by the applicants.

Furthermore, counsel for the respondents has also submitted that the court has not appointed any administrator for this estate, who should have been the proper respondent.

I have considered the submissions in relation to the preliminary objection and I find that it is well founded in law. I find that the two applicants have not applied for limited letters of administration of the estate of their late father. And for that reason alone, they lack *locus standi* to prosecute this application. I agree with counsel for the respondents that the applicants should have based their application under the Succession Act and Rules made thereunder. It was not proper to ground the application under the Civil Procedure Act and Rules made thereunder. In the circumstances, I uphold the preliminary objection and I therefore dismiss the applicants application for a temporary injunction.

As regards costs, I find that the applicants and respondents are members of the same family and for that reason I will not make an order in respect of costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this..27th .. day of **OCTOBER .2015**

In the.....

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Court clerk R. Njue

J. M. BWONWONGA

JUDGE

27.10.15.