



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. SUCCESSION CAUSE NO. 16 OF 2015

IN THE MATTER OF THE ESTATE OF NGUBU KIRAGU DECEASED

SUSANA WAMBURA PETER.....1ST APPLICANT

MARGARET WANJA GACHOKI2ND APPLICANT

VERSUS

NDUGO KARUI.....1ST RESPONDENT

EVANS MURAGE NJUE.....2ND RESPONDENT

RULING

1. **SUSANA WAMBURA PETER and MARGARET WANJA GACHOKI** the applicants herein have taken out summons under **Section 49** of the **Law of Succession Act** and **Rule 73** of **Probate and Administration Rules** for the following orders;
 - i. *That this application be certified urgent and be heard on priority basis.*
 - ii. *That this hon. Court be pleased to issue a temporary injunction against the respondents by themselves, their agents, servants and/or employees from alienating, transferring, cultivating, subdividing, picking the applicants tea or otherwise interfering in any way on land parcels Nos. INOI/KIAMBURI/651 AND 652 or any part thereof until the hearing and determination of the application herein.*
 - iii. *That this honourable court be pleased to issue a temporary injunction against the respondents by themselves, their agents, servants and/or employees from alienating, transferring, cultivating, subdividing, picking the applicants' tea or otherwise interfering in any way on land parcel number INOI/KIAMBURI/651 AND 652 or any part thereof until the hearing and determination of the main suit herein.*
 - iv. *That an inhibition order be issued on land parcel number INOI/KIAMBURI/651 AND 652 until the hearing and determination of the main suit herein.*
 - v. *That costs of this application be provided for.*
2. The Applicants sought the above reliefs on the grounds that the respondents concealed material facts when they petitioned for letters of administration in the estate of the late Ngubu Kiragu particularly the fact that the deceased had other children including the applicants herein. They

accused the respondents for fraud and attempting to dispose off the estate to circumvent the wheels of justice.

3. The applicants have sworn an affidavit deposing that the respondents kept them in the dark despite the fact that as the children to the deceased they were entitled to be involved in the administration and distribution of the estate vide Kerugoya Resident Magistrate's Court Succession Cause No. 194 of 1991.
4. According to the applicants the deceased herein married to two wives namely:
 - i. Ngunyo Ngubu (deceased) and

(ii) Joyce Wairimu (deceased).

In addition to this fact, they have deposed that the deceased left behind the following dependants:

- a. Susana Wambura Peter - daughter
- b. Jacinta Wamarwa Njangitu - daughter
- c. Margaret Wanja Gachoki - daughter
- d. John Muthike Ngubu - son (deceased)

5. They have accused the respondents for misrepresenting facts that they were children to the deceased when they were not related in any way. They have further deposed that the 1st respondent upon getting a grant issued and confirmed, subdivided **INOI/KIAMBURI/102** into 2 portions **INOI/KIAMBURI/651** and **652** respectively and annexed a copy of the register and marked it as "SPW2" to demonstrate their assertions. They have therefore sought to restrain the respondents from alienating land parcel Nos. **INOI/KIAMBURI/651** and **652** pending the determination of the Summons for Revocation of Grant dated 20th April, 2015.
6. The applicants have further expressed fears that the respondents could dispose of the two parcels to defeat the course of justice and sought prohibitory order against the two parcels to forestall any such attempts by the respondents.
7. In their written submissions however, the applicants claimed that they are actually daughters to the late Ngubu Ndugo who had a legitimate claim of ownership on land parcel No. **INOI/KIAMBURI/102**. The said property, according to them was erroneously registered in the name of the late Ndubu Kiragu (deceased) and that the mistake or the anomaly had not been rectified by the time the late Ngubu Ndugo died.
8. The respondents have sworn separate affidavits in opposition to the applicants' summons to restrain them. The 1st respondent, Ndugo Karui has deposed that he petitioned for letters of administration in the estate of Ngubu Kiragu (deceased) as the late Ngubu Kiragu was unmarried and did not have any children. According to him, he was the closest relative to the deceased as his late father KARUI NDUGO and the deceased herein (NGUBU KIRAGU) were half brothers.
9. The first respondent has further denied that Succession cause No. 194/91 was done secretly stating that Jacinta Wamarwa Njangitu one of the applicants herein participated in the said proceedings by filing a protest. He however, failed to give the details of the protest or the decision the lower court made over it. He further admitted that the applicants' late father – Ndubo Ndugo came to live on **INOI/KIAMBURI/102** after disposing his own land No. **INOI/KIAMBURI/227**.
10. The 1st respondent has further denied on oath that the applicants have tea on his parcel No. **INOI/KIAMBURI/651** or that they are in occupation of any part of his parcel No. **INOI/KIAMBURI/651** which is a resultant subdivision of **INOI/KIAMBURI/102**. He has further deposed that he has planted crops on the parcel and if he is enjoined from utilizing the land he would suffer loss as the crops will go to waste.
11. The 2nd respondent on his part has deposed that he is registered proprietor of **INOI/KIAMBURI/652** which also resulted from subdivision of **INOI/KIAMBURI/102**. He further deposed that he is the grandson to Ngubu Kiragu who he stated was a brother to his late father Njue Kiragu. He reiterated the depositions made by the 1st respondent saying that the applicants do not merit the orders sought.
12. In their submissions made through their learned counsel Mr. P. M. Muchira, the respondents have

- submitted that they have been in occupation of their respective parcels (No. 651 and 652) since they were registered in 1994. They submitted that an injunction being sought will make their crops go to waste.
13. It is further submitted that the applicants have deposed that they are children to Ngubu Ndugo who died in 1973 while the succession proceedings they have challenged refers to the estate of Ngubu Kiragu who died in 1962. The respondents have contended that the late Ngubu Ndugo had his own separate property known as **INOI/KIAMBURI/227** which was separate and distinct from the property comprised in the estate of Ngubu Kiragu which then was known as **INOI/KIAMBURI/102**.
 14. The respondents have accused the applicants for approaching this court with unclean hands by concealing the fact that Ngubu Kiragu was unmarried and that they were children of the late Ngubu Ndugo who was proprietor of land parcel No. **INOI/KIAMBURI/227**. According to the respondents the applicants have no valid interests on the estate of Ngubu Kiragu (deceased) because their valid interests lay on **INOI/KIAMBURI/227** – a property they claim was sold to a 3rd party.
 15. The respondents have further submitted that the applicants lack *locus standi* to challenge the succession proceedings in respect to the estate of Ngubu Kiragu and that if they have any claim their claim should be ventilated in another court other than a succession court. In their view the applicants have not established that they have letters of administration to the estate of Ngubu Ndugo to sue on behalf of the estate as provided by the law. They cited the case of **FRANCIS KAMAU MBUGUA & NGUGI MBUGWA –VS- JAMES KINYANJUI (NAIROBI H.C.C. NO. 111 OF 2004** (O.S.) Unreported) where Nyamu J., (as he then was) held that the applicants in an originating summons could not mount a competent suit on behalf of a deceased person in the absence of letters of administration.
 16. The respondents have further faulted the merit of the application stating that the applicants' father did not take any action during his lifetime to challenge proprietorship of the land in dispute by the late Ngubu Kiragu. They have also accused the applicants of laches submitting that they have come to court 23 years after the grant was issued. In their view the applicants have no chance of success in the pending summons for revocation of grant given the circumstances obtaining in this case.
 17. I have considered both the application and the response made. I have further considered the submissions made by both counsels for the applicants and the respondents. I must say from the onset that though I find the submissions made quite substantive, the issue at hand really is an application for injunction and prohibition pending the hearing and determination of the Summons for Revocation of Grant dated 20th April, 2015.
 18. The application being injunctive in nature is governed by three principles that ordinarily govern the grant of the injunctive reliefs in Kenya since the celebrated case of **GIELLA -VS CASSMAN BROWN & CO. LTD (1973) E.A. 358**. The conditions for granting an injunction are:
 - i. ***Where an applicant establishes a prima facie case with a probability of success.***
 - ii. ***If the applicant shows that unless the relief is granted, he/she otherwise suffer irreparable injury which cannot be compensated by damages.***
 - iii. ***If the court is in doubt, a decision is made based on balance of convenience.***
 19. This Court has considered the main application for Summons for Revocation of Grant and based on the strong opposition made both on matters of law and fact without necessarily going into details in order not to pre-empt the main application itself, this Court reserves its comments on the chances of success of the summons for revocation of grant pending in this cause.
 20. The applicants have submitted that they will suffer irreparable loss if the respondents dispose the disputed parcels but they have not stated where they have been for over 20 years and what they could have done had the respondents disposed of their respective parcels. No evidence has been placed before this Court to show that the applicants are or have been in occupation of the two parcels in dispute.

I am nonetheless persuaded to preserve the subject matters in this cause for the interest of justice. The respondents have been in occupation of their respective portions and this Court does not see how a

prohibitory order can prejudice them. The applicants, despite the misgivings expressed by the respondents which I have deliberately remained guarded without addressing them for now, deserve to have their day in court without apparently engaging in an exercise in futility. It is on this basis alone that I hereby issue a prohibitory order on land parcel No. **INOI/KIAMBURI/651** and **652** respectively pending the hearing and determination of the main Summons for Revocation of Grant dated 20th April, 2015. I shall however, direct that the matter be expeditiously heard. In that regard directions on the said summons shall be taken on priority so that the matter can be heard and determined with a finality owing to its age. It is so ordered.

Dated and delivered at Kerugoya this 27th day of October, 2015.

R. K. LIMO

JUDGE

27.10.2015

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Muchira for Respondents present

Ngigi for Applicants present

COURT: Ruling signed, dated and delivered in the open court in the presence of Muchira for Respondents and Ngigi advocate for the applicants.

R. K. LIMO

JUDGE