



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 390 OF 2008

EVANS MWITI1ST APPLICANT

DAVID KIRINYA MUGAMBI.....2ND APPLICANT

VERSUS

MARTIN BUNDI MAITIMA.....1ST RESPONDENT

DAVID KIMATHI MAITIMA.....2ND RESPONDENT

JOHN MUTURI MAITIMA.....3RD RESPONDENT

RULING

The applicants pursuant to Chamber Summons dated 6th December, 2013 brought under Rule 73 and 63 of the Probate and Administration Rules, Order 40 Rule 7 of the Civil Procedure Rules and Article 40 of the Constitution of Kenya sought that the applicants be joined as interested parties in this cause, that the court do discharge and/or vary the injunction orders issued on 20th November, 2013 pending inter partes hearing and determination of this cause, that court do order that all rent collected from the premises standing on parcels No.NTIMA/IGOKI/8370 and NTIMA/IGOKI/8451 be deposited in court and/or in the alternative the court do order the respondents to pay rent in respect of premises standing on the aforesaid parcels at the current market value or vacate the same. The grounds in support of the application are stated on the face of the application. The applicants are contending that they are absolute registered proprietors of land parcel NTIMA/IGOKI/8370 and NTIMA/IGOKI/8451 together with all developments thereon, and that the respondents are misusing the injunctive orders to continue occupying, using, and utilizing the commercial premises belonging to the applicants. The applicants further in their grounds in support of the application contents that they are innocent purchasers for value and the orders of injunction issued are oppressive and against the grounds of the Constitution.

The applicants through an affidavit by the 1st applicant deponed that they bought parcel No.NTIMA/IGOKI/8370 and NTIMA/IGOKI/8451 respectively from the petitioner after the confirmation of the grant and annexed sale agreements as annexure “EMI” and “EM2”. That the parcel of lands were sold together with all developments thereon. The 1st applicant further deponed that the 1st and 2nd respondents who are the sons to the petitioner reside in the houses that are sitting on NTIMA/IGOKI/8367 and NTIMA/IGOKI/8452.

The applicants deponed that they carried out renovation on plot No.8370 and 8451. That the 3rd

respondent was given notice by the 1st respondent to vacate for failure to pay rent but declined to do so leading the 1st applicant levying distress and had the premises closed. That the 3rd respondent challenged the levying of distress in Civil case No.287/2013 and upon getting injunctive orders, they occupied all the premises on the said plot. The applicants deponed that they are innocent purchasers for value and the respondents have no modicum of right and are illegally occupying the said parcel of lands. That the grant was confirmed in 2009 whereas they purchased the two parcels of land in 2013 and yet the respondents had not raised any finger for all the 3 years.

The application is opposed. The respondents filed Replying Affidavits through the 1st respondent. The respondents deponed that whatever properties that stand on land Parcel No.NTIMA/IGOKI/8370 and 8451 were left for the respondents by their father, the deceased herein, as part of their bequest for which they pay no rent. The respondent further deponed that their mother Beatrice Maitima the petitioner, secretly filed this succession cause and forged their signatures purporting that they had consented to the filing of this succession cause and subsequent distribution. The respondents further depone that the applicants are not innocent purchasers for value as they knew the properties belonged to the deceased. The respondents denied the applicants having taken possession of parcel No/8370 and 8451.

It is imperative to note prior to filing of this application, the respondents had through an application dated 18th November, 2013 sought revocation of the grant issued to the petitioner on 27th November, 2009.

That when this matter came up for hearing on 18th December, 2013 the court directed that the instant application be heard first and only with regard to prayer "b" which reads as follows:-"That the applicants be joined as interested parties in this cause" That the other prayers depending on the outcome to be heard together with an application dated 18th November, 2013.

The Counsel for the applicants Mr. Muriuki sought to rely on Rule 73 and 63 of the Probate and Administration Rules and Article 40 of the Constitution of Kenya. Rule 73 of the Probate and Administration Rules 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."

On the other hand Rule 63 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.

Similarly Article 40(1),(a) and (b) of the Constitution 2010 which the applicants relied upon inter alia provides:-

"Subject to Article 65, every person has the right, either individually or in association with others to acquire and own property.

(a) if any description, and

(b) in any part of Kenya....."

Mr. Kiautha Ariithi Counsel for the respondents on the other hand does not dispute the provisions of the Constitution alluded to by the applicants but has instead submitted that the applicants have used the wrong forum as the applicants are purchasers from the petitioner and not from the deceased and this matter is dealing with succession cause in respect of a matter between the dependants and/or beneficiaries

in respect of the deceased estate.

In the instant application and a careful perusal of the application would reveal that the application is pursuant to Rule 73 and 63 of the Probate and Administration Rules and Article 40 of the Constitution. I have deliberately reproduced the above-mentioned provisions of Probate and Administration Rules and Article 40 of the Constitution.

Rule 73 of the Probate and Administration Rules gives the court general powers to make orders necessary for the ends of justice to be met, while Rule 63 of the Probate and Administration Rules provides specific orders that shall be applicable in succession proceedings so long as they are relevant. None of those orders that are contemplated by Rule 63 of the Probate and Administration Rules which are relevant has been cited by the applicants.

As regards Article 40 of the Constitution that has been sought to be relied upon by the applicants, I find that the same is not relevant in the instant application since the same deals with the protection of right to property and the applicants are not alleging that their right to own property has been infringed upon. It is imperative to note there is a suit pending before the lower court between the 3rd respondent on one hand and the 1st applicant on the other hand and other parties. In view of the foregoing Article 40 of the Constitution is not relevant to this application.

The issue for determination by this court in this application is whether the applicants have established sufficient grounds to enable this court grant prayer "b" in the application to enjoin the applicants to this succession cause. It is deponed by the applicants that they purchased NTIMA/IGOKI/8370 and NTIMA/IGOKI/8451 from BEATRICE NAITORE MAITIMA who is a petitioner and a beneficiary to the estate of the deceased after the grant has been confirmed and that she effected transfer of the said properties to the applicants. The deceased who was the proprietor of the two properties passed on 3rd September, 2008. The Sale Agreement between the petitioner and the applicants are dated 27th April, 2012 in respect of annexure "EMI" and 7th January 2013 in respect of annexure "EM2". It is therefore clear that the applicants did not in any way deal with the deceased prior to his death. The applicants in their affidavits have deponed that they bought the parcel of land between 4 and 5 years after the death of the deceased herein. There is therefore no way they can claim not be considered as creditors to the deceased's estate as envisaged by Section 66 of the Law of Succession Act.

Further in their application dated December, 2013 the applicants did not include the petitioner in the application they are seeking to be joined. It would be against the rules of natural justice to join the applicants as interested parties in a cause in which the petitioner has not been afforded an opportunity to be heard and where she was not mentioned as a party.

In view of the foregoing I am in agreement with the respondents that the applicants have no claim directly against the estate of the deceased. The applicants purchased the two parcels of land from the petitioner who is a party in the application for revocation. Their interest if any can be ventilated through the said petitioner. In view of the foregoing the applicants if aggrieved by any decision of this court once it makes an adverse determination against their interest, is to file a separate suit against BEATRICE NAITORE MAITIMA. I agree the applicants have no business in this succession cause. They are intermeddlers or strangers to the deceased estate. They can pursue their claim if any upon determination on who is to inherit the suit lands. Their cause of action can only arise after determination of this cause if any and against BEATRICE NAITORE MAITIMA.

The applicants cannot therefore be allowed to burge into these proceedings and seek court to determine their interest as to whether BEATRICE NAITORE MAITIMA had obtained grant secretly or not and whether she had capacity to sell the land to them or not.

The issues in this matter are clear that they are issues on success of the deceased estate. That the High Court in hearing succession cases, its role is to determine who are the administrators and beneficiaries of the deceased estate, the properties, that comprise the deceased's estate and the mode of the distribution

when distributing the properties that comprise the estate of the deceased to the dependants of the deceased estate.

In the instant application and having considered the applicants' affidavits and grounds in support, it is not disputed that the applicants are not claiming either as dependants or direct creditors of the deceased estate before his death. They claim to be purchasers of a property that has been identified to comprise part of the deceased's estate from the petitioner and whose grant of letters of administration and confirmation of the grant is challenged by the respondents who are seeking the grant to be revoked.

I therefore find that the Law of Succession Act does not envisaged a situation where claimants or parties who do not fall within the category of persons mentioned in the said Act to apply to be enjoined as parties to the proceedings.

Having stated that much and having found the applicant are strangers to the succession cause proceedings, I decline to grant the application for them to be enjoined as parties. They have to wait for the outcome of the respondents' application for revocation of the grant pending between the petitioner and the other beneficiaries of the deceased's estate. In any event the vendor of the two parcels of land to the applicant's BEATRICE NAITORE MAITIMA is a party to the pending application and she will be interested in the outcome in her favour so as to legitimize her transfer of the two parcels of lands to the applicants.

The upshot is that the application is found to be unmerited and is hereby dismissed with costs.

DATED AT MERU THIS 25TH DAY OF FEBRUARY, 2014.

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

1. Mr. Muriuki for the applicant

Mr. K. Arithi for the respondent

J. A. MAKAU

JUDGE