



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1866 OF 1998

IN THE MATTER OF THE ESTATE OF KAMUYU NJIRI (DECEASED)

RULING

1. I am called upon to decide an application dated 6th March 2014. It seeks orders for the restraint of the 1st respondent from burying the remains of one Robert Kibatha Huho on land parcels number Dagoretti/Riruta/5865 and 5866 being subdivisions of Dagoretti/Riruta/3099, pending hearing and determination of the succession cause herein.
2. The application is brought at the instance of Peter Kamuyu Njoroge. The subject parcels of land, significantly Dagoretti/Riruta/3099, form part of the estate of Kamuyu Njiiri. It is said that the said Kamuyu Njiiri died single, without spouse or children. The applicant, Peter Kamuyu Njoroge, is a nephew of the deceased. He claims that representation to the estate of the deceased was sought by a step brother of the deceased, one Chege Gatauwa, who after confirmation of the grant had the land, Dagoretti/Riruta/3099, subdivided into parcels numbers 5865 and 5866. His entitlement to the estate is the subject of proceedings that are ongoing before me. Robert Huho whose remains are to be laid to rest in the subject property had also staked a claim to the estate as a son of the deceased. His proposed burial on the suit land is founded on that claim.
3. Upon being served with the application, the respondents filed a replying affidavit sworn on 10th March 2014, by Lucy Wambui Kibatha who is named as the 1st respondent. She asserts that she is the widow of Robert Kibatha Huho, who was a son of the deceased. She accuses the applicant of failing to disclose to the court that there has been previous litigation on the same parcel of land. One case being Nairobi **CMCC NO. 4977 OF 2011** between a company which had allegedly bought a portion of Dagoretti/Riruta/5866 seeking to have Robert Kibatha Huho exhume the remains of his mother buried on the said land. The said suit is alleged to have been dismissed, although no order or ruling was placed before me to attest to that fact. There is also **HCCC ELC NO. 635 of 2011** where Robert Kibatha Huho sought injunctive orders against the administrator of the estate and a buyer, James Kabugi. The orders sought were granted on 27th September 2012 by Kimondo J on the basis that the applicant had established a *prima facie* case with probability of success as the administrator, being a step brother of the deceased, did not have priority to the estate over the widow and children of the deceased.
4. There is also an affidavit sworn on 11th March 2014 by James Kabugi who had purportedly bought Dagoretti/Riruta/5865 from the administrator. He is the 1st defendant in **HCCC ELC NO. 635 of 2011**. He argues that the injunctive orders made in the said case, **ELC NO. 635 of 2011**, have lapsed.
5. The application was argued orally on 13th March 2014. Mr. Mutiso urged the case for the applicant, while Mr. Kimani appeared for the respondents. They presented arguments that gave

vent to the averments in the affidavits filed in the matter.

6. I have anxiously gone through the affidavits filed in the matter and the submissions by learned counsel. I have particularly given careful attention to the findings made by Kimondo J in **HCCC ELC NO. 635 OF 2011**. The administrator of the estate does not rank higher in priority over the children of the deceased.
7. The orders sought are injunctive in nature. The principles set out in ***Giella –vs- Cassman Brown (1973) EA 358***, ought to be satisfied. The applicant must establish a *prima facie* case with probability of succession, show that he stands to suffer irreparable loss and that in doubt the court must weigh the balance of convenience.
8. I am not satisfied that the applicant has reached the threshold set in ***Giella –vs- Cassman Brown***. He is a nephew of the deceased, the late Robert Kibatha Huho claims to be a child of the deceased. As between the two, Robert Kibatha Huho would have priority with respect to entitlement to the estate over the applicant. These are however matters that are the subject of the ongoing proceedings, both sides have to prove their respective claims and allegations before me in those proceedings.
9. In any event, the applicant's claim to the estate has not crystallised. He is not the administrator of the estate, nor is he named in the certificate of confirmation of grant as a beneficiary. His claim to locus to bring this application is that he had lodged a revocation application to challenge the making of the grant herein to the administrator. The property in question does not vest in the applicant, and therefore he has no legal basis whatsoever to seek the orders that he has sought in this application. Under **Section 79** of the Law of Succession Act, the property of the deceased vests in the administrator, and under **Section 82** of the Act it is the administrator who can sue over the estate property.
10. The applicant has not made out a case for grant of injunctive orders in view of the above. I decline to grant him the orders sought and I hereby dismiss his application dated 6th March 2014. He shall bear the costs of the application. He shall also settle the mortuary charges incurred by the respondents between the 6th March 2014 and the 26th March 2014.

Dated and delivered at Nairobi this 26th day of March 2014.

W. MUSYOKA

JUDGE

Ruling read in open court in the presence of

Mr. Mutiso for the applicant.

Mr. Kimani for the 1st respondent.

No appearance for the 2nd respondent

No appearance for the 3rd respondent.

Mr. Kuleiko for interested party.