



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CAUSE NO: 19 OF 2013

G N K.....PLAINTIFF

VERSUS

J M K.....DEFENDANT

RULING

1. The application that I am tasked with determining is the Amended Notice of Motion dated 18th June 2013 filed in court on 20th June 2013. The initial Notice of Motion dated 30th May 2013, was filed in court on 30th May 2013 and interim orders granted.

2. The principal order sought in the Motion is a temporary injunction to prevent the defendant or his agents or servants from blocking, locking, interfering in anyway with the peaceful and quiet possession of the plaintiff's enjoyment of the premises or matrimonial home standing on **LR NO. [Particulars withheld] South "C" Nairobi** pending the hearing and determination of the instant suit. There are also secondary prayers. One seeks that a government valuer be permitted to enter the said premises to assess the damage done at the said premises. There is also prayer for orders to compel the defendant to repair that said premises in order to restore them to the state prior to the damage occasioned to them by the defendant. There is a further prayer that the police be authorized to enter the premises to collect evidence necessary for bringing criminal proceedings against the defendant. There is also a prayer that the defendant be compelled to return to the applicant all the property belonging to her and which was taken by the defendant from the said premises.

3. The affidavits in support the application sworn on 30th May 2013 and 18th June 2013 respectively, reveal that the plaintiff was a widow of one J K N who died on 7th August 2013, while the defendant is a son of the said deceased person. The deceased and the plaintiff lived in **LR NO: [particulars withheld] South "C" Nairobi** during the deceased's lifetime, but the plaintiff was evicted from the said premises on 28th May 2013 by the defendant who carted her belongings out of the said premises and thereafter destroyed the premises in order to make it inhabitable. She would like to be restored to the premises, her belongings (which include a sum of Kshs.400,000.00) restrained to her and the defendant restored from interfering with her quiet possession of the said property.

3. The defendant has filed two affidavits sworn on 18th June 2013 and 22nd July 2013 in reply to the said application. There are also affidavits sworn by his siblings, N N K and T K, and another by J K C, on 22nd July 2013. What comes out of these affidavits is that the plaintiff was indeed a widow of the deceased father of the defendant, and that she had resided with the deceased in **LR No: [particulars withheld] South "C" Nairobi**. It is conceded that on 28th May 2013 the defendant and his siblings removed the plaintiff's belongings for the said premises. The defendant asserts that he was entitled to do

so as a beneficiary of the estate of the deceased. He further states that he has not denied the plaintiff access to the said property.

4. I have carefully gone through the record. I have seen the lease document dated 31st October 2005 showing that **LR NO. [Particulars withheld]** was acquired by the deceased. This document has not been contested by the plaintiff. I have also noted that the deceased died on 7th August 2012, and was survived by the plaintiff, as his widow, and the defendant, as one of his children. It would appear that representation to the estate has not been obtained.

5. The suit before me relates to **LR No. [Particulars withheld] South “C” Nairobi**, property which belongs to a dead person. The said property forms part of the estate of the late J N K and is therefore subject to the Law of Succession Act, Cap 160, Laws of Kenya.

6. According to **Section 45** of the Law of Succession Act:

“45(1). Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2). Any person who contravenes the provisions of this section shall –

a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

7. Under the above provision, the estate of a dead person can only be lawfully handled by a person who has a grant of representation or who is authorized by the Law of Succession Act to take possession or otherwise handle any such property. Under these provisions such property can only be handled by a grant holder or by the officers mentioned in **Section 46** of the Law of Succession Act.

8. The parties to this suit are neither the officers envisaged in **Section 46** of the Act nor have they obtained representation to the estate of the deceased. Both the plaintiff and the defendant are not authorized under the Law of Succession Act to handle the property of the deceased, consequently both are intermeddlers. They are therefore not justified to take the actions that they took with respect to the **LR NO. [particulars withheld] South “C” Nairobi**. It was held in *John Kasyoki Kieti –vs- Tabitha Nzivulu Kieti and another* Machakos High Court civil suit number 95 of 2001 that commencing action with respect to estate property before obtaining representation amounted intermeddling.

9. In view of the above this suit is incompetent and the orders sought therein are not available. The plaintiff has no capacity to commence the suit for the orders sought in the suit. Restraining orders with respect to property can only be sought by a legal or equitable owner of the property. The plaintiff in this suit is neither a legal nor equitable owner of **LR NO: [particulars withheld] South “C” Nairobi**, since the said property is registered in the name of a dead person, and the plaintiff is not the administrator of the estate of the said dead owner of the property.

10. According to **Section 79** of the Law of Succession Act, “all the property of the deceased shall vest in” the administrator of the estate as personal representative. It is such grant holder who may be sued and be sued under **Section 82** of the Law of Succession Act. Injunctive orders in the nature of those sought in the application dated 18th June 2013 can only be sought by a grant holder, and not by an intermeddler.

11. To the extent that the suit before me relates to the estate of a dead person, and has been commenced by an intermeddler, the same is incompetent *ab initio*. There is a long line of cases where this position was stated by the Court of Appeal – such as *Troustik Union International and another –vs- Mrs. Jane*

Mbeyu and Another Nairobi Court of Appeal civil appeal number 145 of 1992 and *Coast Bus Services Ltd –vs- Samuel Mbuvi Lai* Nairobi Court of Appeal civil appeal number 8 of 1996 – that a person is not entitled to bring an action as administrator before he had taken out letters of administration, such suit would be incompetent as at the date of inception.

12. In view of the above, I will strike out the suit herein. I will make no order as to costs given that the defendant has also intermeddled with the estate. The Deputy Registrar shall avail a copy of this ruling to the Director of Public Prosecutions to consider initiating criminal proceedings against the parties hereto for contravening **Section 45(1)** of the Law of Succession Act.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF March, 2014.

W. M. MUSYOKA

JUDGE