



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 409 OF 2007

IN THE MATTER OF THE ESTATE OF SEBASTIAN MBIWI KIENE-.....DECEASED

LYDIAH KARIMI.....1ST APPLICANT

EDWARD MWIRIGI MBWIRI.....2ND APPLICANT

VERSUS

JOANINA KAIMURI MBWIRIA.....1ST PETITIONER/RESPONDENT

JULIA MUGURE MBWIRIA.....2ND PETITIONER/RESPONDENT

CHRISTINE MUKIRI.....3RD PETITIONER/RESPONDENT

R U L I N G

1. The applicants through summons dated 22nd July, 2011 against the 1st and 2nd respondents only sought the grant of letters of administration issued to the 1st and 2nd respondents on 10th March, 2008 and confirmed on 16th September, 2009 revoked or annulled on the grounds set out on the face of the application.
2. That by application dated 10th September, 2013 the applicants introduced 3rd respondents in this cause in an application brought under Section 47 of the Law of Succession Act, Rules 49 and 73 of the Probate and Administration Rules and Section 68 of the Land Registration Act No. 3 of 2012 seeking restraining orders against the respondents, their agents, servants, and/or employees or whomsoever else acting on their behalf or instructions from distressing for rent, evicting, disposing, trespassing into and/or in any other manner whatsoever dealing and/or interfering with the 1st applicant's possession, occupation, and use of L.R. No. Nkuene/Taita/2772 and all the houses being on the said land. The applicant also sought orders of inhibition prohibiting the registration of any dealings, disposition on or entering over L.R. Nkuene/Taita/2772 until further orders of the court as well as lifting or setting aside proclamation of 1st applicant's household properties.
3. That before the application could be heard counsel sought that HCSC 4841/2007 be consolidated with this cause as the two causes related to estate of one person the deceased herein Sebastian Mbwiri Kieni and the petitioners being wives of the deceased. The two causes were consequently consolidated and HCSC No.409/2007 became lead file. The counsel agreed that status quo

meanwhile be maintained.

4. On 29th October, 2013 the 3rd respondent through the firm of M/S Charles Kariuki & Co. Advocates filed a preliminary point of law setting out eight(8) objections being as follows:-
 - i. **The application is frivolous, vexatious and an abuse of the court process.**
 - ii. **That the applicant has not been enjoined as a party in the matter herein.**
 - iii. **The issue between applicant and 3rd respondent is distress for rent which cannot be adjudicated herein.**
 - iv. **The court cannot issue injunctions under the provisions cited.**
 - v. **The property is registered in respondent No. 3 who is nonparty in the matter herein.**
 - vi. **The applicant is impinging on 3rd respondent right to property under Article 40 of the Constitution thus application and orders thereof unconstitutional.**
 - vii. **The applicant cannot continue to enjoy injunction orders without paying rent while 3rd respondent continues to own the same and not enjoy the same property as she paid Kshs.2.5 million for its purchase.**
 - viii. **The application has no merit at all and does not meet the threshold for issuance of an injunction.**
5. The court directed that the preliminary point of law be determined by way of written submissions.
6. The submissions on behalf of the 3rd respondent were filed on 6th February, 2014, for applicants on 12th February, 2014 and for 1st and 2nd respondents were filed on 7th July, 2014. The counsel in their written submissions combined all the eight grounds of objection to one and dealt with them as one ground and the court shall consider the 8 grounds all together in arriving at its own decision.
7. The 3rd respondent's submissions are that the applicants' application is frivolous, vexatious, and an abuse of the court process and above all incompetent ab initio. He argued the applicant's have not been enjoined as party in this cause as the matter has been concluded in terms of distribution and the property has passed to a bonafide purchaser for value without notice, the 3rd respondent herein. The 3rd respondent further urged that this court cannot issue injunction orders under the provisions cited in the application. He submitted that the applicant ought to have moved the court by suing the legal administration of the estate as provided by law referring to Order 37 of Civil Procedure Act by way of originating summons. The 3rd respondent submitted further that the applicants are impinging on his right to property under Article 40 of the Constitution, thus urging the applicants' application is unconstitutional.
8. The 3rd respondent further raised objection on a point of law in so far as injunction cannot be granted in the Probate and Administration Causes as Probate and Administration proceedings are not suits perse urging therefore Order 40 does not apply. He further urged the Law of Succession Act does not in any way grant powers to court to entertain injunctions and that court cannot as such rely on Rule 73 of the Probate and Administration Rules to grant the applicant injunction orders being sought referring to the case of **IN RESTATE OF KULINGU(DECEASED) 2002 eKLR 136** where Hon. J. Khamoni,J(as he then was) held:-

“While Section 47 of the LSA and Rule 73 P&A rules gives the High Court inherent powers to make such orders as may be necessary for the ends of justice to prevent abuse of court. In the same way as Section 3A CPA CAP 21 Laws of Kenya. However cautioned that Rule 73 cannot be used to do what the LSA does not allow the court to do.....that it has to be used to do what is lawful only and thus cannot be invoked to apply for temporary injunctions and interlocutory orders of the CPR in probate matters”

9. The 3rd respondent added that Rule 63 of the Probate and Administration Rules imports several provisions of Civil Procedure Rules which do not include Order 40 of the Civil Procedure Rules

and as such he urged there was no intention to empower court in a Succession Cause to entertain injunction. On Rule 73 of the Probate and Administration Rules the 3rd respondent submitted that the Rule is not omnibus provisions which gives authority and power to entertain all forms and manner of applications.

10. The 1st and 2nd respondents through their counsel Mr. Mutwiri Arimi, learned Advocate in their submissions dated 7th July, 2014 fully associated themselves with the submissions by Counsel for the 3rd respondent. They argued that the 3rd respondent is introduced in those proceedings irregularly and very late in the day. They further urged that the prayers sought by the applicants are prayers under Order 40 of the Civil Procedure Rules which cannot be canvassed in Succession Cause. On the issue of proclamation on rent the respondents submitted that these are issues of evidence and foremost issues of forum.

11. The applicants countered that the submissions by the respondents through their written submissions dated 11th February, 2014 by the firm of M/s Mwirigi Kaburu & Co. Advocates. The applicants averred that they did not invoke the provisions of Order 40 of the Civil Procedure Rules 2010 which governs the issuance of injunction in civil matters but Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules which they argued empowers court to “entertain any application and determine any dispute under this act and to pronounce such decree and make such orders therein as may be expedient.” The applicants urged the reasons why the summons dated 10/9/2013 was filed in court is explained by the fact that the 1st applicant is 3rd wife to the deceased and 1st and 2nd respondents are also wives of the deceased. The applicant averred the 1st and 2nd respondents petitioned for this grant secretly hence she filed application for revocation of the grant on 22/7/2011 as the suit property was transferred to 3rd respondent the applicant argued that the court has power to prevent the 1st applicant from being evicted from the suit land. Referring to the case of **MERU HCSC NO. 537 of 2004 in the Estate of George M’Mboroki(deceased) Dolly Wanja Ngiti where Hon. Justice Ouko**, as he then was, granted restraining orders in the interest of justice pending determination of the cause of the suit property.

12. I have purposely reproduced the submissions by all parties in the preliminary objection which I have carefully considered. The applicants in their application dated 22nd July, 2011 are seeking revocation of the grant issued to the 1st and 2nd respondents in which the 3rd respondent was not and is not a party. The applicants are by virtue of Section 76 of the Law of Succession Act interested parties. The 1st applicant is wife whereas the 2nd applicant is son of the deceased whose estate is subject of this cause. The two applicants are by virtue of Section 29 of the Law of Succession Act entitled as dependants to the deceased estate. Section 29(a) of the Law of Succession Act provides:

“29 For the purposes of this part “dependent” means:

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death,”

13. I therefore find that the applicants are not only by virtue of being wife and son to the deceased entitled to deceased estate but interested parties. Section 76(1) of the Law of Succession Act provides:-

“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-“

14. The applicants being interested parties were and are entitled to have filed the application before this court. They did not need to be enjoined to file an application for revocation of the grant and

even the present application as aggrieved parties. A grant can be subjected to revocation or annulment whether confirmed or not as per provisions of Section 76 of the Law of Succession.

15. The proceedings envisaged under the Law of Succession Act and the Probate and Administration Rules are not suits and are not for every person. They are not meant for parties to bring on board any party who is not one of dependants or beneficiaries or who the administrators feel aggrieved with. The proceedings are about administration of the estates of the deceased persons and are usually not supposed to be highly contentious. The 3rd respondent is not involved in any way with administration of the deceased estate nor is the 3rd respondent a dependant or beneficiary or a creditor to the deceased estate. It is not clear how the applicants brought up the 3rd respondent into these proceedings. In a succession cause which is not a suit, a party cannot go about enjoining strangers to the deceased estate if aggrieved by their actions or omissions, but a party can file a separate suit seeking appropriate orders in such a suit.

16. A quick perusal of the applicants' application though brought under Section 47, of the Law of Succession Act, Rule 49 and 73 of the Probate and Administration Rules reveals that the prayers sought are prayers which can be granted in a suit and are prayers usually sought under Order 40 of the Civil Procedures. In addition to that each prayer is coined in such a manner that it seeks several different orders in one prayer. The issue raised rank from restraining respondents from distressing for rent, evicting, disposing, trespassing into L.R. No.Nkuene/Taita/2772. These prayers are not amenable in a Succession Cause but in a different forum.

17. The applicants in their application are seeking injunction orders but not preservative or conservatory orders to preserve the estate. Rule 63 of the Probate and Administration Rules imports several provisions of Civil Procedure which can be applied in succession causes, however order 40 of the Civil Procedure Rules which provides for injunction is not one of such orders and as such it can rightly be concluded it was not intention of the legislatures to empower courts to entertain injunctions in the Probate and Administration matters. **IN RE ESTATE OF KILUNGU(DECEASED) 2002 EKLK(Supra)**

I am entirely in agreement with the holding by Hon. Justice Khamoni as he then was in the above mentioned case.

18. As regards the provisions of Rule 73 of the Probate and Administration Rules I do not agree with the applicants counsel that it gives court powers to entertain any application and determine any dispute under the Act however irrelevant it may be. The inherent powers of the court are resorted to only in those circumstances where there are no clear provisions. The Rule cannot be used to do what the Law of Succession Act does not allow. The said Rule can only be used to do what is provided for and what is lawful and as such it cannot be used to apply for temporary injunctions and/or entertain any application nor does it give court powers to deal with any matter simply because it is brought in a succession cause. The issue of distress for rent is not one of the issues that can be canvassed in Succession Cause; it is a matter as submitted by 1st and 2nd respondent's counsel for another forum other than in a succession cause.

19. In view of the foregoing the preliminary objection is upheld. The applicants' application dated 10th September, 2013 is fatally defective and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF SEPTEMBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. MR. Mwirigi for applicants
2. Mr. Mutwiri Arimi for 1st and 2nd respondents
3. Miss Kiome for 3rd respondent.

J. A. MAKAU

JUDGE