



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 92 of 2012

MARY WANJIRU WAWERU..... APPLICANT

VERSUS

STANLEY IKUURO MBUGUA1ST RESPONDENT

DAVID NJOROGE MBUGUA2ND RESPONDENT

RULING

This ruling relates to the Notice of Motion dated 16.07.2012 made by Mary Wanjiru Waweru, the applicant. It seeks the following orders:

- 1.The application be certified urgent and its service in the first instance be dispensed with. (spent)*
- 2.Respondents, their servants, agents, and any other person at all be restrained from interfering with the quiet possession and occupation of the applicant's house on land KIAMBAA/KIHARA/68.*
- 3.The estate of JOSEPHINE WAIRIMU MBUGUA be preserved until the interested parties have filed a Succession Cause and obtained grant of letters of administration over the said estate.*
- 4.The Respondents be ordered to pay the applicant for the iron sheets and roof of the applicant for the iron sheets and roof of the applicant's house which the respondents have willfully destroyed.*
- 5.The applicant be given leave to apply for letters of administration of the estate of JOSEPHINE WAIRIMU MBUGUA.*
- 6.The cost of this motion be provided for.*

The application appears to have been served on the respondents on 4th October 2012 by Joseph K. Kangethe a Process Server. Neither respondent entered appearance or filed replying affidavit. The application came up for hearing on 17.10.2012. Mr. E. M. Mugu, advocate, appeared for the applicant. The respondents did not attend court.

Mr. Mugu drew the attention of the court to the fact that a limited Grant *ad litem* in the Estate of Josephine Wairimu Mbugua (deceased) was made to the applicant on 25.06.2012. He told the court that the applicant is a daughter-in-law to the late Josephine Wairimu Mbugua. He further told the court that the applicant had been chased away from the land known as Kiambaa/Kihara/68 by the respondents and required to be restored back onto the land. He relied in his submissions on the affidavit of the applicant

sworn on 16.07.2012. He sought the orders set out in the Notice of Motion.

There is no suit by the applicant and the Notice of Motion appears to be made in a vacuum not least because it is not a petition or a summons and cannot originate or give rise to a suit. For that reason, I would strike it out.

But even if the Notice of Motion was not strike out, I would still dismiss it for want of merit for the following reasons:-

1. The land title No.Kiambaa/Kihara/68 in respect of which the applicant seeks injunction and which the applicant says belonged to her late husband, Edwin Waweru Mbugua, was never the property of the latter. The green-card furnished on the court by the applicant in her application shows that the land was registered in the name of Mbugua Muguiyu on 10.06.1958 and was later on 17.07.1972 transferred to Mbugua Kiboro to whom a land certificate was issued on 24.01.1972. On 28.04.2009 the land was transferred to Josephine Wairimu Mbugua through Succession (in Cause No.341 of 2006 in the High Court at Nairobi). At no time was the said land the property of the applicant's late husband.

2. Succession proceedings appear to have been instituted in the Estate of the applicant's late husband (Edwin Waweru Mbugua (deceased)) in Succession Cause No.459 of 1988 in which the applicant sought to lay a claim on the said land. On 14.03.2011, the Honourable Justice L. Kimaru delivered a ruling in relation to the Applicant's claim for the said land and dismissed the applicant's application. In his determination the learned Judge stated, inter alia, as follows:

“This court is of the considered view that if the applicant wants to lay claim to the property of Mbugua Kiboro (deceased) on the basis that she was married to Edwin Waweru Mbugua (deceased) the son of the said Mbugua Kiboro (deceased), she should do so in the succession proceedings relating to Estate of the said Mbugua Kiboro (deceased) and not in the Estate of the deceased in these proceedings. This is because the estate of the deceased in these proceedings does not own the property that is the subject of the dispute. In the premises therefore, this court holds that the application lacks merit and is hereby dismissed with costs.”

3. If this application had been made in Succession Cause No.459 of 1988, it would have been *res judicata*. The applicant did not take the cue from the ruling of Justice L. Kimaru because, if she had, she would have pursued her claim in succession proceedings relating to the Estate of Mbugua Kiboro, deceased. At any rate, the respondents neither own the land nor are they or any of them the administrators of the Estate of the late Mbugua Kiboro. It is Josephine Wairimu Mbugua, the widow of Mbugua Kiboro, deceased, who was appointed the administratrix of the Estate of the latter. She was not joined as a respondent in the Notice of Motion but this appears to be because she died on 30th January 2012. In the circumstances, the prayer for injunction against the respondents is misplaced.

4. The applicant seeks an order that the Estate of Josephine Wairimu Mbugua “*be preserved until the interested parties have filed a succession cause and obtained grant of letters of administration over the said estate.*” The provisions of Section 45(1) of the Law of Succession Act, Cap 160, are elaborate on the issue of protection of estates of deceased persons. The provisions of Section 46(1) of the said Act, vest powers in police officers and administrative officers in relation to protection of free property of deceased persons. The court assumes jurisdiction over such estates upon institution of succession proceedings. This application is not brought in succession proceedings relating to Josephine Wairimu Mbugua (deceased) or any other deceased person. Consequently, the application is incompetent. The prayer for an order for preservation of the Estate of the late Josephine Wairimu Mbugua is misplaced.

5. Finally, although the applicant has counsel, it is not clear why she seeks leave of this court to apply for letters of administration in the Estate of Josephine Wairimu (deceased). The provisions of the Law of Succession Act relating to the filing of petitions for grant of letters of administration are clear and elaborate. The applicant should seek counsel on the problem she has. Her prayer for leave is misplaced.

For these reasons, I would dismiss the application if I had not struck it out. I make no orders as to costs.

G. B. M. KARIUKI, SC

JUDGE

Dated and delivered at Milimani Law Courts, Nairobi, on this 25th day of April 2013 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.

W. MUSYOKA

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JUDGE