



REPUBLIC OF KENYA

High Court at Nakuru

Environmental & Land Case 99 of 2012

JOSEPH KAMAU NGIGE1ST PLAINTIFF
PETER GITONGA KAMAU.....2ND PLAINTIFF

VERSUS

NYAGUTHIE KAMAU & 4 OTHERS.....DEFENDANTS

RULING

By a plaint dated 25th May 2012, the plaintiffs brought the suit seeking judgment against the Defendants for orders of temporary/permanent injunction restraining the 2nd, 3rd, 4th and 5th Defendants their servants, agents from interfering with the plaintiffs quiet possession and enjoyment of parcel of land **No.Nakuru/Rare/Kiriri/639**(herein after referred to as the suit land) and costs, interest and damages of trespass of the suit.

Simultaneously with the plaint the applicant brought a Notice of Motion dated 25th May 2012 seeking a temporary injunction against the respondents restraining them from entering, Subdividing ,selling, transferring, alienating, disposing, tilling, cultivating, leasing, cutting trees, erecting structures or in any way interfering with the suit property pending the hearing and determination of the application.

After being served with summons to enter appearance the Defendants on 6th July 2012 filed their defense and replying affidavit to the application dated 25th May 2012.

The plaintiffs case is supported by the affidavit of Joseph Ngige Kamau. In the said affidavit he depones that he and the 2nd defendant are children of the late Kamau Thuku, the legal owner of the suit land measuring approximately 2.0 Hectares and the 1st Defendant is their mother and wife of the late Kamau Thuku: That the 1st defendant has never taken out letters of administration to her late husband's estate but has gone ahead and sold portions of the suit land to the 2nd 3rd, 4th and 5th Defendants without their consent: that the defendants are now cultivating and erecting beacons on the suit property and thus depriving the plaintiffs the use and enjoyment of the suit land: That despite the plaintiffs involving the local administration they have been unsuccessful and thus the filing of this suit.

The 1st defendant did not enter Appearance.

The 2nd and 5th Defendants filed their defence and replying affidavit sworn by Francis Kimani on 6th July 2012 and strenuously opposed the application. In his affidavit Francis Kimani depones that he is a

neighbour to the applicants : That the 1st plaintiff in January 2012, personally informed him that his family intended to sell a portion of the suit land which information was confirmed by the 1st defendant: That based on this information, he and the 2nd Defendant entered into sale agreements with the 1st Defendant: That the plaintiffs lack capacity to institute this suit as they have not obtained letters of administration and therefore not legal representatives of the estate of Kamau Thuku.

Simultaneously with their Defence and application dated 25th May 2012 the defendants also filed a notice of preliminary objection which was disposed of by way of written submissions. It sought for the dismissal of the plaintiffs suit and application dated 25th May 2012 on the grounds:

1. That the plaintiffs have pleaded that the suit land forms part of the estate of the late Kamau Thuku.
2. That the plaintiffs have not taken out letters of administration in respect of Kamau Thuku alleged to be deceased.
3. That the plaintiffs have no capacity to sue on behalf of the estate of the deceased.
4. That the suit is incurably defective, legally crippled and should be dismissed instantly.

Mr Karanja learned counsel for the defendant submitted that the plaintiffs lacked the legal authority to institute proceedings in respect of the suit land Nakuru/Rare/Kiriri/639 as failure to take out letters of administration made the plaintiffs lack *locus standi* to bring out the proceedings against the defendants making the plaint and Notice of motion a nullity.

Mr Mongeri learned counsel for the plaintiffs submitted that the 1st Defendant had not taken out letters of Administration and therefore lacked the capacity to sell the suit land and any transactions entered into by her were illegal abinitio.

The situation in the instant case is provided for under Section 45 of the Law of Succession Act which provides:-

“45 (1) Except so far as expressly authorized by this Act, or any other written law, or by 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.

**** 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 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 due course of administration.”

From the affidavit evidence presented in this case, it is clear that the 1st defendant has intermeddled and is intermeddling with the estate of the deceased.

Although none of the parties to this suit have *locus* to prosecute the application herein, Article 159 of the Constitution, section 1A, 3A and Rule 73 of the Probate and Administration Rules allows this court the power to make such orders as may be necessary for the ends of justice.

As this is a clear case of breach of law, particularly by the 1st defendant, dismissing the applicants suit and application would compound the illegality being meted on the estate of the deceased.

Under Section 100 of the Civil Procedure Act as read with Order 2 Rule 15(1) of the Civil Procedure

Rules, this court, for the purpose of determining the real question or issue raised or depending on the proceedings has power to order for amendment of pleadings.

In **DT Dobie & Company (Kenya) Ltd** V. **Muchina** the Court of Appeal held:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

There is no doubt that the case before me is not for dismissal merely because the parties are not the legal representatives of the estate of the deceased. No doubt the applicants and the 1st respondent have sufficient interests in the estate of the deceased.

Under Section 46 of the law of Succession Act, the applicants and the 1st respondent are entitled to request the administrative officers in their area (the Chief or assistant chief)to take all necessary steps for the protection of the free property of the deceased found in their area of jurisdiction or even apply for letters of administration.

Consequently in accordance with the powers conferred on this Court under Section 100 of the Civil Procedure Act, I order that parties herein do obtain the necessary legal documents (letters of Administration) and amend their pleadings within 60 days.

I dismiss the preliminary objection dated 6th July 2012 with no orders made as to costs.

Dated, signed and delivered this 19th day of April 2013.

**L N WAITHAKA
JUDGE**

PRESENT

Mr Simiyu holding brief for Mr Mongeri for Applicants

N/A for Respondents

Stephen Mwangi - Court Clerk