



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

SUCCESSION CAUSE 1016 OF 1993

IN THE MATTER OF THE ESTATE OF NG'ANG'A NJOROGE NJUGUNA, DECEASED

AND

**JOSEPHINE WAMBUI WACHUKA.....1ST APPLICANT
AGNES WANJIRU KINYANJUI.....2ND APPLICANT
MARY NJOKI GITAU.....3RD APPLICANT**

VERSUS

MARGARET NJOKI NJOROGE.....RESPONDENT

RULING

The applicants came to court by way of Summons dated 10th September 2012 praying in the main for an order restraining the respondent from interfering or intermeddling with or trespassing on LR No. Kiambu/Ngoliba A/71 until this application and cause are determined. It also asks that costs of the application be provided for. The application is premised on **Section 45 of the Law of Succession Act** and **Rule 73 of the Probate and Administration Rules** and it is supported by the affidavit of Josephine Wambui Wachuka.

The application is grounded on the matters set out in the affidavit of Josephine Wambui Wachuka. The applicants allege that the respondent, who is a co-administrator of the estate, is committing acts of waste on the estate property. She is said to be cutting down trees and burning charcoal. She is also said to have allowed the Kenya Power & Lighting Company Limited to lay their power lines on the property. There is an affidavit of service showing that the respondent was served through counsel. She has however not replied to the application.

Several issues arise in this matter. The first issue relates to the competence of this Summons dated 10th September 2012. The second one is on the critical issue of jurisdiction; whether it is competent for a court exercising probate jurisdiction to grant the orders sought in this application.

The application before court is premised on **section 45 of the Law of Succession Act** and **rule 73 of the Probate and Administration Rules**. **Section 45 of the Law of Succession Act** falls in the division of the Law of Succession Act dealing with protection of estates. It specifically provides against intermeddling. It states as follows:

‘(1) except so far as expressly authorised 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 original 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.’

The provisions of **Section 45 of the Law of Succession Act** outlaw intermeddling with an estate by a person who has no authority to handle estate property. I see nothing in the provision which gives this probate court power to make orders of injunctions in probate matters. The provision merely defines intermeddling and criminalises it.

It will be noted that the respondent is one of the administrators of the estate. In that capacity the estate of the deceased vests in her jointly with the 1st applicant. This is by virtue of **Section 79 of the Law of Succession Act**. **Section 79** provides:

‘The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.’

LR No. Kiambu/Ngoliba A/71 vests in the respondent in much the same way it vests in the 1st applicant. The vesting of the property in the personal representative makes the latter the legal owner of the property. He can do anything with it that the owner himself would have done. It is trite law that an owner of property cannot be restrained from handling his property. In this case there is no legal basis upon which the respondent can be restrained from using property that vests in her. The only restraint against her is that set out in **Section 82(b) (ii) of the Law of Succession Act**: she cannot sell immovable property before confirmation of the grant. If the other administrator is of the view that the respondent is acting contrary to her duties as administrator, then her remedy lies, not in obtaining restraining orders against her co-administrator, but in calling upon her to account for her actions and activities. This is provided for in **Sections 45** and **83** of the Law of Succession Act.

Rule 73 is on the inherent powers of the court, it reads:

“Nothing in these Rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The inherent powers of the court are resorted to where there are no clear provisions. This point was made by Khamoni J in *In the Matter of the Estate of Erastus Njoroge Gitau (Deceased) Nairobi High Court succession cause number 1930 of 1997*, to the effect that **Rule 73** is to be used only in deserving cases where no specific provisions exist to deal with the situation in question. It is not an omnibus provision which allows the court to entertain all manner of applications. **Rule 73** only relates to gaps in the **Law of Succession Act** and the **Probate and Administration Rules**. In *In Re Estate of Kilungu (Deceased)* (2002) 2 KLR 136, Khamoni J observed that **Rule 73** cannot be used to do what the Law of Succession Act does not allow the court to do. The Law of Succession Act does not grant any powers to the court to grant injunctions, and therefore the court cannot resort to **Rule 73 of the Probate and Administration Rules** to grant injunctions. An injunction is a drastic order that should not be granted under the inherent powers. It should only be sought in a proper suit.

Rule 63 of the Probate and Administration Rules imports several provisions of the **Civil Procedure Rules**. The provisions imported do not include those that provide for injunctions. If it was intended that the probate court be given jurisdiction to grant injunctions nothing would have been easier than importing **Order XXXIX (now Order 40) of the Civil Procedure Rules**. The fact that **Order 40** was not imported into probate practice means that there was no intent at all to empower the court to entertain injunctions in probate and succession matters. In *In Re Estate of Kilungu (Deceased)* (2002) 2 KLR 136 it held that an injunction could not be granted in a probate matter, as **Order XXXIX (Order 40) of the Civil Procedure Rules** had not been imported into probate practice by **Rule 63 of the Probate and Administration Rules**.

Let it be assumed for a moment that this court had jurisdiction to entertain the application, does the current application merit the exercising of jurisdiction in favour of the applicants?

The order sought is that of an injunction; restraining dealings in LR No. Kiambu/Ngoliba A/71 until this cause is determined. It is a prayer for an interlocutory order. The order sought is a temporary injunction of the sort envisaged under **Order 40 of the Civil Procedure Rules** although it is not stated as being premised on that provision. **Order 40** provides for temporary injunctions to restrain acts that are likely to expose the suit property to injury, wastage, damage, alienation, sale, removal or disposition pending the hearing and disposal of the suit. In determining whether or not to grant the said order the court has to consider whether the application satisfies the conditions set out in the notorious case of *Giella vs. Cassman Brown & Co. Ltd* (1973) EA 358 for grant of injunctions. The criteria for grant of the temporary relief of injunction set out in that case is that the applicant must show that they have a *prima facie* case with a probability of success, that they are likely to suffer irreparable loss or damage should the relief sought be not granted and that in the event of doubt balance of convenience should tilt in favour of the applicant.

Order 40 of the Civil Procedure Rules requires that the application for the temporary relief by way of injunction be filed in a ‘suit.’ This means that the application for injunction must be interlocutory; it must be filed in a pending suit. The application in this matter is brought in a succession cause. It rides effectively on an application for confirmation of grant. Is a Summons for Confirmation of Grant a suit? The proceedings envisaged under the **Law of Succession Act** and the **Probate and Administration Rules** are not suits. Succession causes are not about one party suing another, they are about administration of estates of deceased persons. The rationale is that they are not intended to be contentious, and even where they become contentious, they are not as highly contentious as the proceedings envisaged under the **Civil Procedure Act and the Civil Procedure Rules**. The ‘suit’ in **Order 40 of the Civil Procedure Rules** refers to a suit commenced under the provisions of the **Civil Procedure Act** and the **Civil Procedure Rules**. Probate or succession proceedings are not commenced under the **Civil Procedure Act** and the **Civil Procedure Rules** and therefore they are not suits, and consequently **Order 40 of the Civil Procedure Rules** does not apply to such proceedings. Khamoni J held in *In Re Kilungu (deceased)* (2002) 2 KLR 136, that an injunction under **Order XXXIX of the Civil Procedure Rules in the Civil Procedure Act** is not available in probate and administration proceedings under the **Law of Succession Act** and the **Probate and Administration Rules**. The application for injunction is therefore not anchored on a suit as required by **Order 40 of the Civil Procedure Rules** and it is therefore incompetent.

If it were to be assumed that probate and administration proceedings are suits within the meaning of the **Civil Procedure Act** and the **Civil**

Procedure Rules, the question would then be: does the applicant in this application demonstrate that she has a *prima facie* case with probability of success? Following the criteria in ***Giella vs. Cassman Brown & Co. Ltd (1973) EA 358***, the applicant in this case is required to show that she has an arguable Summons for Confirmation of Grant. It is quite difficult to apply the principles on injunctions to a matter of this nature, as the Summons for Confirmation of Grant is not usually a contentious application where the issue of probability of success would arise. It is not a disputious application between the applicants and the respondent. During argument, Mr Opundo for the applicant did not address himself to these principles. He did not set out to demonstrate that the applicant has an arguable Summons for Confirmation. He merely urged that the respondent be restrained with respect to to **LR No. Kiambu/Ngoliba A/71** pending the determination of the Summons for Confirmation.

For the foregoing reasons, I find that the application before me is not merited and I dismiss it with costs.

W MUSYOKA

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 10th DAY OF May, 2013.