



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
CIVIL CASE NO. 49 OF 2012

ABDUL AZIZ GACHAU.....PLAINTIFF

VERSUS

MARY WANJIRU MAJID & 6 OTHERS..... DEFENDANTS

RULING

The plaintiff Abdul Aziz Gachau and defendants are siblings being the children of the late Abdul Majid Gachau who died intestate in the year 1992.

At the time of his death the deceased left behind among other properties a piece of land measuring 5.05 acres known as **Muhito/Kariara/182** situated at his home area of Rutune location in Nyeri county.

The plaintiff claims that at the time of the death of their father he had already apportioned this piece of land to some of his children as follows:-

- a) **Abdul Aziz Gachau (son) - 1.05 acres**
- b) **A. Githinji (son) - 1.00 acres**
- c) **Frank Kanja Gachau (son) - 1.00 acres**
- d) **Sophia Wangeci (daughter) - 0.75 acres**
- e) **Mary Wanjiru (daughter) - 0.75 acres**

The plaintiff who is the first born in the home claims that in 1992, he renovated his father's semi permanent house so as to prevent the land from going into disuse and waste. He further claims that he put up permanent structures at great expense and is currently living in the compound.

He claims that on the 17th of February 2012 the defendants wrote to him declaring their intention to commence constructing works within the compound that the plaintiff has already developed which would have interfered with the plaintiff's quiet possession.

In a Notice of Motion dated 29th February 2012 he seeks for a temporary injunction against the defendants restraining them from developing, putting up structures, demolishing structures or in any way interfering with the portion of land that the plaintiff has developed within the piece of land known as **Muhito/Kariara/182** pending the hearing and determination of this suit. The plaintiff also prays that the

court orders that the estate of Abdul Majib Gachau be administered according to the Law of Succession Act.

The application is supported by the affidavit of Abdul Aziz Gachau, the plaintiff whose gist is that the plaintiff and defendants are siblings and children of the late Abdul Majib Gachau who died intestate in the year 1992. Before he met his death, he made his wishes on how his property would be apportioned to his children. He claims to have made substantial development to the father's homestead after his demise.

The defendants filed a memorandum of appearance accompanied with a replying affidavit of Frank Kanja Majib sworn on his behalf and on behalf of the other defendants. They have also filed a statement of defence.

The gist of the replying affidavit and defence is that their father died intestate living behind two administrable properties being plot No.1B Karuiruo market and a parcel of land known as title No.Muhito/Kariara/182 measuring approximately, 5.2 acres. Paragraph 10 of the affidavit indicates that the property was distributed as follows;

- a) Abdul Azil Gachau - 1.05 acres
- b) Ali Githinji Majid (*now deceased*) - 1.00 acres
- c) Frank Kanja Muriithi - 1.00 acres
- d) Sophia Wangeci Muthama - 0.75 acres
- e) Mary Wanjiru Gachau - 0.75 acres
- f) Communal Homestead area - 0.50 acres
- g) Access road(s) - 0.15 acres

I have read the plaint notice of motion, supporting affidavit, defence and replying affidavit and do find that the suit before court is premature as the dispute revolves on ownership of the developed homestead of the deceased.

Section 45 (1) of the Law of Succession prohibits inter meddling with the property of a deceased person. It provides as follows:-

“Except so far as expressly authorized by this Act or by any other written law.....no person shall, for any purpose, take possession or dispose of ,or otherwise inter-meddle with, any free property of a deceased person”

I do find that both the plaintiff and defendants are inter meddling with the property of the deceased by attempting to distribute the same contrary to the provisions of the law. The parties should file a succession cause in court promptly to determine the administrator of the estate and finally distribution of the property.

I do find that the plaintiff applicant has not established a ***prima facie*** case with a probability of success as he has not shown any right to the property he claims. The same still belongs to his father who is deceased. All parties in this suit are beneficiaries to the estate of the deceased and none has a right superior to the right of the others. This court finds that the plaintiff has failed to satisfy the ***1st principle in Giella -VS- Cassman Brown & Co. Ltd (1973) E.A. Pg.358***. Under this principle the plaintiff is required to satisfy the court that the facts of the case establish a ***prima facie*** case with a likelihood of success. The plaintiff in essence is seeking the court to allocate him a portion of his late father's property without following the right procedure.

On the issue of ***irreparable injury***, this court finds that the court dealing with the succession cause will consider the investments carried on by the plaintiff on the disputed portion and make a formal decision.

Since the court is not in doubt, it will not consider the issue of ***balance of convenience***. Ultimately the application is dismissed with no orders as to costs.

Dated, signed and delivered at Nyeri this 28th day of June 2013.

A. OMBWAYO

JUDGE