



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
P & A APPEAL CASE NO. 2B OF 2010

SUSAN NJERI NGUNJIRI.....APPLICANT

VERSUS

BETH WANJIKU NGUNJIRI.....RESPONDENT

(Being appeal from the judgment of M. W. Mutuku, Senior Resident Magistrate in Senior Resident Magistrate's

Succession Cause NO. 42 of 2007 dated 5th February 2009 at Kigumo)

RULING

SUSAN NJERI NGUNJIRI, the applicant herein, took out the Summons dated 17th November 2010 pursuant to *rule 73* of the Probate and Administration Rules and *Order XXXIX rules 1(a), 2 and 9* of the Civil Procedure Rules in which she applied for the following orders:

- (1) Pending the hearing and determination of this suit, the Respondent, her servants and/or agents or otherwise howsoever be restrained from disposing, selling and/or transferring all that piece of property situate in Kangari and known as LOC 2/KANGARI/4379 (“the suit property”).***

- (2) Pending the hearing and determination of the Appeal, the Respondent, her servants and/or agents or otherwise howsoever be restrained from interfering howsoever with the Applicant's quiet enjoyment, use and cultivation of the tea planted by the Applicant on the suit property.***

- (3) IN THE ALTERNATIVE pending the hearing and determination of this Appeal, the Respondent, her servants and/or agents or otherwise howsoever be restrained from misusing, damaging, wasting, destroying, polluting or in any other manner howsoever, degrading the suit property.***

(4) The cost of this Application be awarded to the Applicant.

The Summons is supported by the affidavit the Applicant swore on the same date. Beth Wanjiku Ngunjiri, the respondent herein, filed a replying affidavit she swore on 30th November 2010 to oppose the Summons.

Before considering the merits or demerits of the summons, let me set out the brief history leading to the summons. When the late Ngunjiri Kageni Muturi, passed away sometimes in the year 1995, the applicant and the Respondent successfully applied to be given a Grant of Letters of Administration intestate vide Kigumo Senior Resident Magistrate Court's Succession Cause No. 42 of 2007. It would appear from the record that the Respondent applied for the confirmation of grant and the Applicant protested. The dispute was heard by Mutuku, learned Senior Resident Magistrate, who in the end confirmed the grant on condition that the only asset of the deceased's Estate available for distribution i.e.

LOC.2/KANGARI/2029 be shared in equal portion between the Applicant and the Respondent. The Applicant was not satisfied with the aforesaid decision hence this appeal. While the appeal is pending, the Respondent herein applied for execution of the judgment and or order. The execution of that decree and or order led to the parcel of land known as **LOC.2/KANGARI/2020** being subdivided into two portions i.e. **LOC.2/KANGARI/4378** and **LOC.2/KANGARI/4379**. The record shows that **LOC.2/KANGARI/4378** was registered and title issued in the name of Susan Njeri Ngunjiri while **LOC.2/KANGARI/4379** was registered and title issues in the name of Beth Wanjiku Ngunjiri. The Applicant avers that the Respondent should be restrained to prevent her from disposing of the property transmitted to her pending appeal. It is alleged that the Respondent has entered into negotiations with third parties with a view of selling the property thus rendering her appeal useless. The Applicant further complained that the Respondent has used the area chief to harass her with the sole intention of having her vacate the suit land. The Respondent opposed the application for various reasons. It is argued that the provisions of *Order XXXIX* of the Civil Procedure Rules do not apply since its application is not imported to apply to succession proceedings under *rule 63* of the Probate and Administration Rules. The Respondent further accused the Applicant of having been motivated by malice in filing the application. It is said her intention is to prevent the Respondent from utilizing her land.

I have considered the oral submissions of learned counsels from both sides. I have also considered the grounds set out on the face of the Summons plus the facts deponed in the affidavits filed for and against the application. Let me start with the preliminary issue as to whether or not the provisions of *Order XXXIX* (now order 40) of the Civil Procedure Rules is applicable in these proceedings. With respect, I agree with the submissions of the Respondent's Advocate that the provisions of *Order XXXIX* do not apply since the same was not imported under *rule 63* of the Probate and Administration Rules. The objection will not however, determine the application. The Applicant has cited the inherent power of this court saved under *rule 73* of the Probate and Administration Rules where this Court can issue any orders to safeguard the interest of justice. In any case *Section 47* of the Law of Succession gives this Court wide powers to issue such orders.

Having come to the conclusion that the application will survive the objection, let me now consider the merits or otherwise of the Summons. This Court has been urged to issue various orders but I think the most important in this dispute is that of injunction to restrain the Respondent from disposing of, selling and or transferring **LOC.2/KANGARI/4379** pending appeal. The Applicant has alleged that the Respondent is in the process of selling the land to third parties. This allegation has not been specifically denied in the replying affidavit nor by the oral submissions of her learned counsel. It is therefore possible that the Respondent intends to sell the property which has been transmitted to her to third parties. I am satisfied that if the Respondent does that, the Applicant will suffer irreparable loss in that the suit property will be out of her reach should the appeal succeed. I am fortified in this finding by *Section 93* of the Law

of Succession Act which protects the property acquired by third parties. It is therefore obvious that the appeal will be rendered nugatory in the circumstances.

In the end, I find the Summons dated 17th November 2010 to be well founded. It is allowed in terms of prayers 1 and 2. Costs of the application to abide the outcome of the appeal.

Dated and delivered at Nyeri this 11th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mrs Kinyanjui for the Applicant. No appearance for Mwangi.