



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO.144 OF 2010

PATRICK GACHOKI KARERU.....PLAINTIFF/RESPONDENT

VERSUS

NANCY WAMBUI MUGO.....DEFENDANT/APPLICANT

R U L I N G

1. By a chamber summons dated 25th November, 2010, Nancy Wambui Mugo the defendant/applicant herein seeks to have the following orders:

- (i) That the entire suit be struck off with costs.
- (ii) That costs of this application be provided for.

2. The application is supported by an affidavit sworn by the defendant/applicant. It is also anchored on the grounds that the entire suit is frivolous, vexatious and a gross abuse of the due process of the court, as there is another matter pending between the parties herein being Embu High Court Succession Cause No.569 of 2009.

3. In her affidavit, the applicant has deponed that an order was issued in Embu High Court Succession Cause No.569 of 2009 for preservation of status quo. That order enabled her to continue staying and working on the property pending the hearing and determination of the Embu Succession Cause. The applicant further deponed that an attempt by the plaintiff herein Patrick Gachoki Kareru to have the applicant restrained from interfering in land parcel Baragwi/Thumaita/417 and Kirinyaga District SACCO Farmer Account No.TMO120348 was unsuccessful as an order was made that the applicant should continue staying and working on the land.

4. The applicant maintains that she is no longer bound by an agreement entered into between her and the plaintiff for the transfer of 0.385 hectares out of Mbaragwi/Kariru/2315 because the plaintiff failed to obtain the relevant consent of the Land Control Board and the agreement has therefore become null and void by virtue of Section 6(1(a) and 8(1) of the Land Control Act. Counsel for the applicant urged the court that the plaintiff suit should be struck out as the entire suit was vexatious and an abuse of the court process.

5. It was pointed out that the orders sought in the plaint which was a permanent injunction restraining the applicant and her children from dealing with the estate of the late Simon Kareru Ikindu and an order for the eviction of the applicant and her children from the estate are issues which have been dealt

with in Succession Cause No.569 of 2009. In view of the orders already issued in the Succession Cause this court cannot issue the orders sought by the plaintiff in this suit.

6. The application was opposed through a replying affidavit sworn by the plaintiff. The plaintiff that the orders of 3rd December, 2009 and 18th December, 2010, issued in Succession Cause No.569 of 2009 were issued before the court identified an administrator for the estate of the late Simon Kareru Ikindu. The plaintiff maintained that letters of administration to the estate of the late Simon Kareru Ikindu were issued to him on 1st July, 2010.

7. The plaintiff contends that the defendant is bound by the agreement entered into on 24th April, 2009 and her cause of action is only to challenge the grant of the letter to the plaintiff and demonstrate her interest in the estate of the deceased. The plaintiff argues that the orders issued before the letters of administration to him have now been overtaken by events.

8. Counsel for the plaintiff argued that the present case has no bearing with Succession Cause No.569 of 2009. It was argued that the plaintiff's suit was not hopeless but raised triable issues.

9. I have carefully considered the application, the affidavit in support and in reply as well as the annexures thereto. I have also considered the submissions made by counsel. It is not disputed that there is a Succession Cause No.569 of 2009. It is also evident that the suit property Baragwi/Thumaita/417 forms part of the estate of the late Simon Kareru Ikindu. The distribution of the estate and the identification of the rightful heirs to the suit property can only be done in the succession cause. Therefore, the agreement between the applicant and the plaintiff providing *inter alia* that she shall not be a beneficiary in the estate of the late Simon Kareru Ikindu is one to be proved and adopted in the Succession Cause. Further, since interlocutory orders have been issued in the Succession Cause regarding the occupation of the suit property by the applicant this court cannot ignore the orders. The mere appointment of the plaintiff as an administrator of the estate of the deceased has no bearing on the interlocutory orders issued by the court. Those orders can only be overtaken by confirmation of the letters of administration and distribution of the estate.

10. For the above reasons, I will concur with the applicant that the plaintiff's suit is frivolous and an abuse of the process of the court. It is accordingly struck out. I award costs to the defendant/applicant.

Signed this 11th day of March 2011

H. M. OKWENGU
JUDGE

Dated and delivered this 28th day of March 2011

M. WARSAME
JUDGE

In the presence of: -

.....for the plaintiff/respondent
.....for the defendant/applicant
.....Court clerk