

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 708 OF 2008

IN THE MATTER OF THE ESTATE OF

MATHENGE NJUGUNADECEASED

AND

HELINA WANGARI MATHENGE.....PETITIONER

VERSUS

GRACE NJERI NJUGUNA..... OBJECTOR

RULING

Grace Njeri Njuguna, the Objector herein, took out the summons dated 13th July 2010 in which she sought for an order of injunction to restrain Helina Wangari Mathenge, the Petitioner herein together with her servants and or her sons Paul Maina Mathenge from damaging her crops, buildings threatening to evict her and her children from Loc.2/Kangari/284 pending the hearing and determination of the succession cause. The objector filed an affidavit she swore in support of the application. The petitioner filed a replying affidavit to resist the summons.

I have considered the oral submissions of Mr. Ondieki, learned advocate for the Petitioner and those of the Objector in person. I have further considered the grounds set out on the face of the application plus the facts deponed in the rival affidavits. Basically the objector is seeking for injunctive orders to restrain the petitioner and her children or servants from evicting the objector or destroying her property from Loc.2/Kangari/284 before the dispute is heard and determined. The objector alleged that the petitioner has taken steps to have her evicted from the suit land. She also claimed that her crops to wit nappier grass and tea bushes were damaged on her portion. The petitioner did not specifically deny that there were moves to evict the objector. She merely denied attempting to evict her nor destroy crops. She further denied the allegation that her son, Paul Maina Mathenge had entered the land in dispute. She claimed the objector does not have nappier grass nor tea bushes on the suit land. The petitioner's advocate raised a preliminary point of law which is to the effect that the application is based on the provisions of order XXXIX which is not imported to be used in succession matters under rule 63 of the probate and administration rules.

Let me begin with the preliminary issue. With respect, I agree with the submissions of Mr. Ondieki, that the application is based on provisions of the Civil Procedure Rules whose application is not recognized under rule 63 of the Probate and Administration Rules. However, the court cannot close its eyes and fail to look at the justice of the case. Under section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules, the court has inherent power to entertain any application and make a determination as may be expedient. The application is made by a lay person who has come to court to seek for the protection from court. I will therefore overlook the technicality.

Let me now consider the merits of the application. The Objector avers the petitioner and her son have threatened to evict her. It is said they also destroyed her crops. Though the petitioner denied the objector's allegations I am convinced her claim has merit. It is alleged that the objector does not have the locus standi to file the application. I do not think that is the correct position in law. The objector here is before this court as a protestor. She has filed an affidavit of protest to oppose the application for confirmation of grant in her capacity as widow of Samson Njuguna, deceased the son of Mathenge Njuguna deceased. Her capacity is in dispute hence a subject of the trial. That ground cannot be used to defeat the application. I am convinced the objector together with her children are in occupation of a portion in Loc.2/Kangari/284. They should not be disturbed until the succession cause is heard and

determined. I grant the objector the orders sought in the summons dated 13th July 2010 as prayed save that costs shall abide the outcome of the succession cause.

Dated and delivered this 21st day of October 2011.

J.K. SERGON
JUDGE

In open court in the presence of Mr. Kingori h/b for Kabiru for the Respondent and the Applicant in person.

J.K. SERGON
JUDGE