



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO. 1788 OF 2006

IN THE MATTER OF THE ESTATE OF: NJIRIRI MUKOMA (DEEASED)

**GEORGE MBURU NJIRIRI.....
.....1st OBJECTOR**

**SAMUEL MBURU NJIRIRI.....
.....2nd OBJECTOR**

AND

**PATRICK MUCHAI NJIRIRI.....1st
RESPONDENT**

**NDUNGU NJENGA NJIRIRI.....2nd
RESPONDENT**

**MORRIS MBURU NJIRIRI.....3rd
RESPONDENT**

**JAMES KIMUNYA NJIRIRI.....4th
RESPONDENT**

**STEPHEN KARANJA NJIRIRI.....5th
RESPONDENT**

**KENNETH MBURU NJIRIRI.....6th
RESPONDENT**

RULING

A perusal of the record reveals that the petitioner moved to this court and presented this cause with the will annexed. The first grant was issued on the 12th day of January 2007 to Patrick Muchai Njiriri and Ndungu Njenga Njiriri. Following the issuance of the temporary grant, an application for confirmation dated 5th day of December 2007 was filed on 6th December 2007 seeking to confirm the grant as per the distribution specified in the will. This attracted the filing of an affidavit of protest against confirmation filed by one Samuel Mburu Njiriri on his own behalf and on behalf of himself and George Mburu Njiriri, Josphat Kinuthia Njiriri and Christopher Wainaina Njiriri deponed on the 17th day of March 2008, and

filed on the 18th day of March 2008.

The Affidavit of protest was followed shortly by an application for revocation dated 14th day of April 2008 and filed on the 15th day of April 2008 filed by one Samuel Mburu Njiriri, George Mburu Njiriri, Josphat Kinuthia and Christopher Wainaina Njiriri.

A perusal of the record reveals that on 28th day of January 2009, Rawal J remarked that this matter was related to HCC Appeal number 32 of 2004 which was by then pending judgment before **Aluoch J** as she then was now Her Highness Judge of the ICC (International Criminal Court). on 24th day of April 2009 directions were taken to the effect that both this file and file number HCCA 32 of 2004 be placed before the Hon the Chief Justice for directions. The orders were made on the 27th day of April 2009 and 22nd day of July 2009, Although the court record herein does not bear the Hon the Chief Justice directions, the content of the grounds in the body of the application for stay of proceedings pending appeal reveals that HCC Appeal 32 of 2004 which was an appeal from Limuru SRMCC number 24 of 2002 was decided on 24th day of June 2010. The protestors from applicants were dissatisfied with that decision and then they filed Nairobi C. A. number 182 of 2010 which was still pending in the Court of Appeal.

In order to preserve the status quo, the said protestors for presented an application dated 26th day of July 2010, and filed on the 27th day of July 2010, seeking stay of proceedings herein pending determination of appeal number CA 182 of 2010. The Respondents responded to that application by way of grounds of opposition dated 10th day of August 2010. This application is yet to be heard on merit.

It is during the pendency of the hearing of the application for stay of proceedings that the protestors presented the application subject of this ruling. It is dated 24th day of September 2010 and filed on 27th day of September 2010. Three reliefs are sought namely:-

(i) Spent

(ii) An order that Morris Mburu Njiriri, Jams Kimunya Njiriri, Stephen Karanja Njiriri, Kenneth Mburu Njiriri and/or any other beneficiaries herein either by themselves and/or servants and/or any persons claiming under them be restrained from intermeddling and/or interfering and / or wasting the deceased's estate until the hearing and determination of this application, the cause herein and Court of Appeal Civil Appeal number 182 of 2010.

(iii) That cost of this application be provided for

The main ground in supporting affidavit are to the effect that the applicants herein have filed objection to the application for confirmation pending herein.

- **That side by side with these proceedings there was related proceedings concerning the same subject matter of the proceedings herein which had originated in Limuru vide Limuru SRMCC SUCCESSION CAUSE NO. 24 of 2002 relating to the same estate subject of these proceedings. Parties were heard therein and a ruling given. The current applicants became aggrieved with the decision by the lower court, which gave rise to Nairobi HCCA No. 32 of 2004 which was decided in June 2010. That decision too aggrieved, the applicants who have appealed against that decision vide appeal number 182 of 2010 in the Court of Appeal.**

- **That for the reasons given above, it is only proper that an injunctive relief be given to protect the property belonging to the estate pending the hearing of the appeal pending in the Court of Appeal.**

- **That the applicants have moved to seek these orders because the respondents have started felling trees and disposing them off to the detriment of the applicants.**

The applicants were granted interim orders on 27th day of September 2010, and this ruling is in respect of the inter-partes hearing. There is a replying affidavit in response to the application deponed by one Morris Mburu Njiriri deponed on the 13th day of October 2010, and filed on the 13th day of October 2010 and a summary of the same is as follows:-

- **That the trees cut down belonged to the deceaseds estate.**
- **That the deceased died testate.**
- **That applicants have been opposing the testate proceeding but have been losing all along.**
- **Concede trees were cut but not unlawfully because beneficiaries agreed to have them cut disposed off and proceeds used to meet surveyors costs for the deceased's properties which required subdivision to pave the way for distribution in accordance with the will.**
- **That the application has been over taken by events.**
- **That trees were cut down on plots L. R. LIMURU / KAMIRITHU/606 and LR NO. LIMURU / KAMIRITHU / 501.**
- **That there has been no demonstration of any loss that is likely to be suffered by the applicants if an injunctive relief is not granted.**
- **Contend the land from which the trees were cut had been bequeathed to other beneficiaries and not the applicants.**
- **Contend the applicant stand to lose nothing as he does not reside in any of the properties of the deceased but resides at Huruma and is also known to have no wife and children.**
- **The court to note that applicants have engaged the respondents in litigation which they have lost all along.**
- **Contend that this was not the first time they have cut down trees on the deceased parcels of land. They had cut down trees previously, sold them to raise funds to meet indebtedness owed by the estate to 3rd parties.**
- **The court is invited to note that most of the deceased's beneficiaries are aged and it is only proper that subdivision and distribution be effected to enable them benefit from the deceased's estate.**
- **The court is urged not to issue the relief sought as it will in the process stifle the process of distribution in accordance with the deceaseds will.**

A further affidavit is deponed by Samuel Mburu Njiriri on 15th day of October and filed the same date stressed the following:-

- **That appeal number 182 of 2010 has already been filed and served.**
- **There is no proof that applicants were invited to the meeting which approved the cutting down of the trees as no such invitation has been exhibited to the said Replying Affidavit.**
- **Maintains that this court cannot ignore the causes which are pending at Limuru and Court of appeal.**

Parties elected to go by way of submissions. Those for the applicant objectors are dated 15th November

2010, and filed on the 3rd of November 2010. A perusal of the same reveals a reiteration of the deponements filed by the applicants and for purposes of the record the following have been

stressed:-

— **The applicants filed a petition with regard to the estate subject of these proceedings intestate vide Limuru SRM CC No. 249 of 2002 to which the 1st and 2nd respondent filed an objection, which objection was heard and the same was upheld to the effect that the deceased had left a will in a ruling delivered on the 5th day of May 2004.**

- **The applicants became aggrieved by that ruling and filed HCCA 32 of 2004 and during the pendance of the hearing of the said appeal is when the current proceedings were filed, a grant issued, followed by an application for confirmation which the current applicants have filed an affidavit of protest as well as an application by way of summons for revocation of a grant.**

- **That a judgment was given in HCCA 32 of 2004 in June 2010 which aggrieved the current applicants who have moved to the court of appeal vide appeal number 182 of 2011.**

- **There is an application for stay of proceedings pending herein.**

- **That they have taken this procedural step because of the respondents move to intermeddle with estate affairs.**

- **They have a genuine complaint because there is no jurisdiction to cut down trees on the grant has not been confirmed and estate distributed.**

In response the Respondents filed their written submissions dated 7th day of December 2010, and the following have been stressed:-

— **Since there are no grounds in the body of the application, it means that the application is anchored on the supporting further affidavit.**

They have accepted felling trees and have given valid reasons for the same.

- **One of the applicants Samuel Mburu has passed on and buried.**

- **Maintains they have been felling trees whenever need arises.**

- **Deny interference with the properties and maintain that they are only waiting for the matter to be finalized so that the estate can be distributed in accordance with the will.**

- **Applicants have no right to complain because the land from which the trees were felled had not been bequeathed to the applicants and so they stand to suffer no loss.**

- **The court is invited to note that since the death of the deceased the beneficiaries have been living and using the deceased's property for their benefit.**

- **Contend the applicants have not shown justification for the relief sought as what they are complaining about does not fall within the ambit of Section 45 of the Law of Succession Act and the principles governing the granting of an injunctive relief.**

This court has given due consideration of the above rival arguments and in this courts opinion the following are the undisputed facts of the application.

(1) **That the applicants seek an injunctive relief to protect property belonging to an estate by a**

deceased person.

(2) That by reason of what has been stated in number (1) above the applicants are required to bring themselves within the ambit of the principles governing the granting of an injunctive relief as established by the court of appeal in the case of GIELLA VERSUS CASSMAN BROWN [1973] EA 358 namely:-

(a) Establishment of a prima facie case with a probability of success.

(b) Demonstration that if the injunctive relief is not granted the applicant will suffer irreparable loss which cannot be compensated for by way of damages.

(c) That where (a) and (b) do not apply the court has a discretion to decide the matter on a balance of convenience.

Additional ingredients also developed by case law are that.

(d) Although compensation is available the opponent has acted in a high handed and oppressive manner and for this reason the action should not be protected because in doing so the court would be allowing the opponent to trample on the rights of the applicant at the pain of paying damages.

(3) That indeed there exists LIMURU SRMCC SUCCESSION CAUSE NUMBER 24 OF 2002 relating to the estate of the deceased subject of these proceedings. This is the case in which gave rise to appeal number 32 of 2004 which has in turn given birth to the Court of Appeal, Appeal number 182 of 2010.

(4) That there is no dispute that from the deponements of the supporting affidavit and further affidavit the injunctive relief sought herein is also meant to cater for the proceedings pending in the Court of Appeal.

(5) That there is in place a grant issued herein to persons other than the applicants though the same is certified to be upset by an application for revocation which is pending hearing.

(6) That prayer 2 of the application subject of these proceeding has not specified the particular properties which are being intermeddled with and by reason of this what is being sought is in the nature of a blanket order.

(7) That the application for stay of proceedings herein is yet to be heard.

(8) That the particular acts of inter meddling have not been specified.

(9) That one of the co-applicant is said to be deceased a matter not disputed by the surviving co-applicant.

(10) That it has not been disputed by the applicants that the beneficiaries live and have been making use of the estate property since the deceased's death.

(11) That what is sought to be protected is estate property.

This court has given due consideration to the rival arguments herein in the light of the principles of law applicable on the subject and it proceeds to make the following findings on the same.

(a) That the current proceedings as well as the ones which were originated by Limuru SRMCC P & A 24 of 2002 which gave birth to Nairobi HCC 32 of 2004 and Court of Appeal 182 of 2010 but the two have not been consolidated together.

(b) Being evident that property sought to be protected is estate property it means that in order to succeed, the applicant has to have locus standi to seek a protective order to protect an estate property. By reason of this, it means that the applicant must be a person falling within the category of persons referred to in Section 45, 79, 80, 81 82 and 83 of the law of Succession Act. The person authorized to protect the estate property are those authorized by the law of Succession Act.

(i) Those authorized by any other written law

(ii) Those holding a grant of representation.

These requirements have been applied to the supporting documents as well as the deponements of the applicants other than saying that, they are beneficiaries, they have not demonstrated that they have any authority either by this Succession Act , or any written law or a grant of representation to protect the deceaseds' estate.

(c) Besides what has been stated in (b) above, the applicants have to bring themselves within the ambit of the ingredients set for the granting of a restraint order, it is on record that there is a will in place which is being contested by the applicants. The trees are being cut on property belonging to the estate. It has not been demonstrated that the applicants are the ones who were earmarked as beneficiaries of the land as well as the trees which are being felled or alternative that if the will were to be upset ,then the particular properties affected would be available for the applicants. In the absence of that, the justification for specific protection does not exist.

(d) It is evident from the uncontroverted assertion by the respondents that trees had been cut and disposed off before for the benefit of the estate. This means that what is being sought to be fore told has already taken place and/an interim relief will not help the applicant. It is only a mandatory injunction which can reverse the situation.

(e) Further, it is now trite law that an injunctive relief has to be clear and it has to specify clearly what the addressee of the order needs to do or to abstain from doing. In the absence of such specifications an injunctive relief will not serve any purposes.

For the reasons given in (a) – (d) above the applicants

application dated 24th September 2010 and filed on 27th September 2010 is dismissed for the following reasons:-

(i) The injunctive order sought to be granted cannot last pending the hearing of Court of Appeal CA 182 of 2010 because that appeal does not arise from these proceeding, it arose from Limuru SRM CC 24 of 2002 and HCCA 32 of 2004 which have not been consolidated with these proceedings. A stay order on account of Court of Appeal 182 of 2010 can only be validity sought in HCCA 32 of 2004 and Court of Appeal 182 of 2010 itself.

(ii) Granting prayer 2 in the blanket form in the manner sought will compromise the application for stay which is pending disposal.

(iii) Since the protective order sought is meant to protect estate property it can only be sought by and granted to a person who is authorized by the law of Succession Act or any written law or by a grant of representation the applicants do not fall into that category of authorized person.

(iv) It has not been demonstrated that the felling of trees in the said plots directly affects the beneficial interest of the applicants in the said estate both under testate and intestate.

(v) Issuing of the order in the blanket form sought will affect other activities being carried on by the Respondents whose deponement is that they are using the estate property for their beneficial benefits pending distribution has not been countered.

- (vi) It has not been demonstrated that applicants have a prima facie case with a probability of success in that they are entitled to the portions from which the trees are being felled.**
- (vii) There has not been demonstration that damages will not be adequate compensation.**
- (viii) The applicants should have obtained even a limited grant before moving the court to seek to protect the estate property in the manner sought.**
- (ix) This being a succession matter, each party will bear own costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OCTOBER, 2011

**ROSELYN N. NAMBUYE
JUDGE**