



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 203 OF 1987

IN THE MATTER OF THE ESTATE OF THE LATE JUSTUS EZEKIEL MBOGO
(DECEASED)

RULING ON THE 1ST APPLCIATION DATED 19TH NOVEMBER 2010 AND FILED ON 19TH NOVEMBER 2010.

RULING NO. 1

There is in place an application by the applicant Ann Micare Mugo dated 19th day of November 2010. It is brought under Rule 49 and 73 of the probate and administrations rules and all the enabling provisions of the law. Three reliefs are sought:-

1. Spent
2. That this Honourable court be pleased to grant the applicant an order restraining Thomas Kanake Gwandaru from constructing and or interfering with LR. NO. 4418/2 Karen Nairobi in any way pending the hearing and determination of the application dated 2/7/2010.
3. That the costs of this application be provided for”

The grounds in support are that:-

- There is an application on the record where the Respondent herein is also the Respondent dated 2/7/2010 which is pending hearing.
- That the Respondent has responded to the said application.
- A grievance has arisen because in the wake of the impending hearing of the said application of 2/7/2010 the Respondent has moved on to the land, placed beacons and other markings across a residential house occupied by the applicant and her siblings.
- That in addition to the afore said, the Respondent moved on to the site with A group of people who started digging trenches and scooping soil with a view to start construction.
- That this construction is likely to demolish the house in which the applicant and her siblings reside and in the process alter the character of LR. NO. 4418/2 which is the subject of the pending application.
- That in the premises, the applicant has placed sufficient material before the court to enable the court grant a restraint order sought.

Interim orders pending hearing interpartes of the application were granted on the same 19/1/2010 and are still in force to the present day. The Respondent filed a reply to the said application, vide a replying affidavit deposed by one Thomas Kanake Gwandaru on the 25th November 2010 and filed the same date. The salient features of the same are as follows:-

- The Respondent is aware of the existence of the applicants application dated 2/7/2010.
- Contends that the said application of 2/7/2010 is a non starter and an abuse of the due process of the court.
- Contends that the applicant and the Respondent have their own respective portions.
- That parcel number LR. 4418/2 belongs to the Respondent having been acquired by the Respondent following an assent signed by executed by the Registrar after the administratrix refused and or neglected to execute the assent in the Respondents favour.
- Reliance is placed on the order issued by this court on the 28th day of November 1994 authorizing the Registrar to sign the said documents.

No submissions were filed by either side. This court has given due consideration to the rival arguments set out above and this court's opinion, the following are the undisputed facts:-

- (i) That there is an application dated 2/7/2010 pending disposal.
- (ii) The contention of the Respondent is that the application is anon starter and in consequential whereas the applicants says that the application has merit.
- (iii) That if this court were to interrogate the issue of the application of 2/7/2010 being a nonstarter, then the court would be preempting the outcome of the said application dated 2/7/2010.
- (iv) That the issue herein involves succession issues.
- (v) It appears the administrator appears to have been reluctant to yield to the interests of the Respondent and that is why the Deputy Registrar of the court was mandated by the court to sign the assent in the Respondents favour.
- (vi) It is however clear from the deponements of both sides that there is no mention that after the execution of the asset, by the Deputy Registrar survey was done and the Respondents share excised off on the ground and a title duly registered in his favour . This is evidenced by the fact that no title document has been annexed to the supporting affidavit.

These undisputed facts have to be considered in the light of the ingredients required to be established before one earns the relief being sought. These principles have now been crystallized by the decision in the land mark case of **GIELLA VERSUS CASMON BROWN (1978) EA 358**. These principles are:-

- (a) There has to be a demonstration of the existence of a prima facie case with a probability of success.
- (b) Demonstration that damages will not be an adequate compensation.
- (c) Where the court is in doubt about (a) and (b) above then it will be decided on a balance of commences.

When these ingredients are applied to the undisputed facts above, it is clear that this is proper case where a restraint order should be granted because although the Respondent has an assent in his favour , this appears not to have been translated on the ground hence the dispute.

- (b) That in the absence of an order striking out of the application pending of 2/7/2010 or its dismissal, it is

the business of this court to ensure that the same is not preempted and or rendered nugatory. It is therefore necessary for a status quo to be maintained to await the disposal of the application of 2/7/2010 on its merits. However considering that the assent order was made way back in 1994, and since then the Respondent appears not to have benefited from the fruits of that order, the court can grant a conditional restraint order to ensure that the beneficiary does not use it both as a sword and a shield at the same time.

For the reasons given in the assessment:-

1. Prayer 2 of the application dated 19/11/2010 and filed on the same date is granted pending the hearing and disposal of the application dated 2/7/2010 on condition that the applicant proceeds to list the said application of 2/7/2010 for hearing and disposal within 90 days from the date of the reading of this ruling.
2. In default of compliance with the condition in number 1 above, the restraint order will lapse.
3. The Respondent will have costs of the application.
4. There will be liberty to apply to either party.

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

R.N. NAMBUYE

JUDGE