



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 345 OF 1998

IN THE MATTER OF THE ESTATE OF THE LATE KIHARA THATU GATU (DECEASED)

LUCY WANJIRU KIHARA.....BENEFICIARY/APPELLANT

VERSUS

ROSE WAMBUI.....RESPONDENT

RULING

The Summons dated 4/4/2011 was filed by Lucy Wanjiru Kihara against the respondent, Rose Wambui. Lucy Wanjiru deponed that she is the 3rd wife of the deceased, Kihara Thatu Gat, who died on 26/9/1997. She avers that before the deceased's demise, he had settled her with their 9 children on Plots Subukia/Subukia Block 4/47 and 48 (Ngamini) which she has cultivated since 1972. She prepared the land in March 2011 ready for planting but the respondent forcefully started planting on it. A report was made to the District Officer to arbitrate. The applicant contends that although the respondent claims Plot 48 to be hers, the original parcel L.R. 2846/28 has never been subdivided, and twice, she has lodged cautions on the plot but the cautions are mysteriously removed (LWK2). It is the applicant's contention that the title Block 4/48 was obtained fraudulently and that the court is yet to determine the issue of ownership of the said plot which she has occupied since 1972. She avers that the respondent occupies Plot 15 Subukia where she collects rents from and she has not been interfering with it. In her further affidavit dated 13/6/2011, the applicant deponed that title to Block 4/48 was obtained on 8/9/1997, 18 days before the demise of the deceased who died on 26/9/1997 and no Land Control Board consent was ever obtained making the whole transaction a nullity; that in any event the deceased who had suffered a stroke was incapable of transferring land and to date the original parcel 2846/28 has never been subdivided. Mr. Mwangi, counsel for the applicant added that there is need to grant the orders because there are criminal proceedings pending over the same issue and the court should stop any interference with the suit land.

The application was opposed and Mr. Kahiga submitted that the respondent is the registered owner of Plot 4/48 as evidenced by the copy of the title and that it does not form part of the deceased's estate; that it was obtained before the deceased's death and there is no evidence of fraud and that the issue of fraud will be determined at the full hearing. Counsel also urged that the applicant is in use of Plot 47 which belongs to the deceased and wants to use Plot 48 too. It was urged that it is the respondent who has been in use of Plot 48.

It is the respondent who filed this Succession Cause in court. I have seen Form P & A5 and Plot 4/48; the subject of this application was not listed as part of the deceased's estate. Later the applicant came into these proceedings and does claim that the said Plot 48 should form part of the deceased's estate for reasons that it was fraudulently acquired when the deceased was too sick to be able to make a transfer. That is an issue for determination at the full hearing.

The fact, however, is that the said land is registered in the names of the respondent although the applicant contends that the land has never been subdivided and is still Plot 2848/28. That is also an issue for determination at the full hearing.

Both the applicant and the respondent claim to be in possession of Plot 48. That is also an issue that requires the calling of evidence since the court gave directions that this matter be heard and determined to establish ownership, and it is not easy to determine at this stage who is in actual possession. Mr. Mwangi also submitted that there are criminal proceedings in respect of the same plot and hence the need to preserve it. Several triable issues arise in this matter and hence the need to preserve the substratum. The court therefore directs that neither of the parties should intermeddle with the said Plot 48 in any way by tilling it or selling or transferring it pending the hearing and determination of this matter. In light of this order, the parties to this suit should try to have this matter heard and determined expeditiously.

DATED and DELIVERED this 7th day of October, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Wanjiru for the objector/applicant.

Mr. Mukira for the petitioner/respondent.

Kennedy – Court Clerk.