



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Succession Cause 411 of 2005
IN THE ESTATE OF M'ANANJA M'IMARIA (DECEASED)

AKOS JACOB M'ANANJAPETITIONER

RULING

This is an application brought under the provisions of Rules 49 and 73 of the Probate and Administration Rules seeking an order of injunction. It also seeks a stranger order namely, that:-

“The objector do maintain the status quo by staying, cultivating, occupying or harvesting the miraa plants growing in his portion of land in parcel number Ithima/Ntunene/734 and Ithima/Ntunene/1224.”

The relief sought is not clear and there are no grounds in the supporting affidavit to back it. The application is based on the grounds that the respondent has forcefully entered upon parcel of land No. Ithima/Ntunene/1309, beaten the applicant, taken over the miraa plants on the suit land and threatened the applicant never to step on the suit land.

The applicant maintains that the suit land was given to her by her deceased husband in whose name the property is registered. These averments have been denied by the respondent who is categorical that the suit land was given to him by the deceased when he got married and that he has occupied it since then. He has also deposed that the applicant has her portion on Ithima/Ntunene/734.

I have considered the arguments by both sides. The applicant is the mother of the respondent. The suit land is registered in the name of M'Ananja M'Imaria (the deceased) who was the husband of the applicant and father to the respondent. The applicant has filed a petition for a grant of representation to which the respondent has objected. The estate of the deceased including the suit land has not been distributed. Learned counsel for the respondent has argued very strongly that an injunction cannot be issued in a succession cause citing the provisions of Rule 63 of the Probate and Administration Rules. On her part learned counsel for the applicant submitted that the court has inherent powers under Rule 49 to grant the orders sought.

The only question therefore falling for determination is whether the applicant is entitled to injunctive relief sought in this application. Rule 63 of the Probate and Administration Rules provides that the following provisions of the Civil Procedure Rules shall apply to proceedings under the Probate and Administration Rules, namely Orders V, X, XI, XV, XVII, XXV, XLIV and XLIX. Clearly an injunction under Order 39 is not provided for. This application as I have already observed is not brought under Order 39, but under Rules 49 and 73 of the Probate and Administration Rules. Rule 49 above provides:-

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary, by affidavit.”

That Rule envisages and appreciates that the Probate and Administration Rules does not and was not expected to make express provisions against all inconveniences. Rule 73 is the saving provision for the exercise by the court of its inherent powers. Then, of course, there is the substantive law in section 47 of the Law of Succession Act which provides as follows:-

‘47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees therein as may be expedient.’ (emphasis mine).

This section gives the court an unlimited jurisdiction to entertain any dispute arising under the Law of Succession Act. It has been held in numerous High Court decisions that the High Court, by dint of Rule 63 of the Probate and Administration Rules, does not have jurisdiction to issue restraining orders or any other order not covered by Rule 63. That interpretation would be contrary to section 47 of the Act as it tend to limit the court’s inherent powers, and in turn violate section 31 (b) of the Interpretation and General Provision Act – Cap 2 which provides that:-

“31. (b) No subsidiary legislation shall be inconsistent with the provisions of an Act.”

In my view, Rule 63 is not inconsistent with section 47 as the former does not state that the High Court shall not entertain any application other than those specified in that rule.

I have held in **In The Estate of George M'Mboroki (Deceased)**, HC. Succ. Cause No. 537 of 2004 that restraining orders can be issued by the court in a succession case in the exercise of its court’s inherent powers to act *ex debito justitiae* and to do real and substantial justice, so long as the application is not grounded on Order 39 of the Civil Procedure Rules, and each case being considered in its unique circumstances and facts.

The undisputed facts in the instant application is that the suit land is at this stage the property of a deceased person.

The applicant has only petitioned for letters of administration and the respondent objected. No order can be issued against or in favour of either part in respect of the suit land before a grant of representation is issued. Furthermore, in the light of averments by the respondent, that he has been living on the suit land since he got married, the orders sought would have the effect of determining with finality the cause at an interlocutory stage and distributing the estate prematurely.

For these reasons, I decline to exercise the court’s inherent jurisdiction in this matter. Probably this

would be an appropriate case to be dealt with under section 45 of the Law of Succession Act. The application is dismissed. I make no orders as to costs as this is a family matter.

Dated and delivered at Meru this 15th.day of February. 2008.

W. OUKO

JUDGE