



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 537 of 2004

IN THE ESTATE OF GEORGE M'MBOROKI (DECEASED)

DOLLY WANJA NGITI PETITIONER

RULING

There are two succession matters involving the same parties and the same properties. In this cause No. 537 of 2004 the petitioner, who is also the applicant in the present application, Dolly Wanja Ngiti, petitioned for grant of representation in respect of the estate of the deceased, George Gatobu M'Mboroki (the deceased) as the widow. A grant was issued on 10th February 2005 to her.

Zipporah Juda, the mother of the deceased, Irene Gakii Mbijiwe, a girlfriend to the deceased with whom she had a daughter, Barbara Mwenda and Winlore Kamana, the deceased's daughter with another lady, objected to the making of the grant.

The main contention in the objections is that this cause was not filed with the concurrence of the members of the family. That it was filed secretly in order to disinherit the other dependants of the deceased. Another contention is that the applicant was not entitled to file a succession cause in respect of the deceased as she was not married to him. There was also a dispute as to the ownership of plot No. 22 at Nkubu Market.

The objections are part-heard. While the hearing was adjourned on 8th May 2006, the applicant brought the present application on 16th October 2007. In it she seeks an order to reinstate her to plot No. 22, Nkubu Market and another order to restrain the respondents from unlawfully interfering with her quiet possession of the said plot No.22, Nkubu Market pending the determination of this cause.

It is her argument that she has been residing in plot No. 22 Nkubu Market with the deceased's children where she has been running a hotel business while living in one room at the back of the hotel. That on 3rd October 2007 the 1st and 2nd respondents, in the company of about 15 men forcefully evicted her and her two daughters from the suit premises. The group removed their personal effects and chased away hotel workers and finally locked the doors to the premises.

The applicant reported the matter to the police who have taken no action. The 1st respondent filed a replying affidavit on his behalf and on behalf of the 2nd respondent in which they state that the suit premises is registered in their late father's name and is not therefore part of the late George Gatobu's estate. That the late George Gatobu lived with his family until his death on L.R. No. Abothuguchi/Kariene/1813 at Kiria. They have also denied that the applicant is the widow or dependant of the late George Gatobu and cannot lay a claim to any property belonging to either him or his late

father. They have also denied evicting the applicant and her children from the subject property.

These are the issues in this cause. There is yet another cause, being High Court Succession Cause No. 1 of 2003. The file relating to that cause cannot be traced in the Probate and Administration Registry, Meru High Court. I have already indicated that the objection hearing is pending where the main bone of contention is whether or not the applicant was married to George Gatobu and hence entitled to inherit his estate.

As that question remains unanswered the issue before me is whether the applicant is entitled to be reinstated into the suit property and whether the court can issue orders restraining the respondents or their agents from interfering with the applicant's quiet possession of the suit property. The application is expressed to be brought under section 47 of the Law of Succession Act, Cap 160 (L.O.K.) and Rule 73 of the Probate and Administration Rules. The prayers are, by their very nature, injunctive although deliberately and carefully framed omitting the word "injunction." The first prayer is in fact injunction of a mandatory nature while the second relief is a prohibitory injunction. Again, the provisions of the Civil Procedure Rules are not cited.

On 24th October 2007 this court (Lenaola, J) granted the order seeking reinstatement on a temporary basis. The application raises interesting matters of interpretation. There has been no unanimity in the decisions of the High Court whether restraining orders of injunctive nature are available in succession proceedings. This question springs from the provisions of Rule 63 of the Probate and Administration Rules which provides:-

"63 (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with High Court (Practice and Procedure) rules, shall apply so far as relevant to proceedings under these rules."

While it has been held in some cases that the High Court is precluded by the above provision from entertaining any application based on the provisions of the Civil Procedure Rules outside those specified in Rule 63 aforesaid, there are decisions of the High Court where orders of injunction and prohibition have been issued in succession causes. In the former category there are cases such as In The Matter of the Estate of Muthini Muu John and Gabriel Mtwara Muthini, HC P& A Cause No. Mks, 234 of 2002, where an application seeking injunction under Order 39 of the Civil Procedure Rules was struck out as being incompetent. A similar decision is found in Re. Estate of Kulungu (Deceased) (2002) 2KLR 136. It has also been held that Order 21 of the Civil Procedure Rules is inapplicable in succession proceedings as it is not one of those imported into Law of Succession Act. That was in the case of In the Estate of Joram Waweru Mogondu (Deceased) H.C. Succ. Cause No. Nai. 2721 of 2002.

The other category of decisions include In the matter of the Estate of Macharia Gaituru (Deceased), H.C. Succ. Cause No. Mombasa 145 of 1998 the High Court granted an injunctive relief under the court's inherent jurisdiction. The above analysis reveals an unhealthy state of affairs in the interpretation of the law. Yet one of the most fundamental doctrines of the Common Law is the doctrine of precedent which is translated in the *Latin Maxim Stare decisis*. It is well known that by the doctrine of horizontal *Stare decisis* the decisions of High Court Judges are not binding on other High Court Judges: They are merely persuasive. But the importance of this doctrine is that it promotes uniformity, certainty and consistency. So that cases presenting similar issues and circumstances should be decided by the application of similar principles of law. That is how jurisprudence is evolved. There is no doubt in my mind that the Law of Succession Act is a special legislation with its own comprehensive rules and regulations. It declares in the preamble that it is

"An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto,"

The statute is specific as to what laws are to be imported into it. It follows that the jurisdiction exercised

by a Probate and Administration court is strictly confined to the Law of Succession Act together with the rules and regulations made thereunder. The first category of cases cited above hold that it is inappropriate and incompetent to bring an application based on the provisions of the Civil Procedure Rules, other than those, specified in Rule 63 aforesaid, in succession proceedings. The decisions in the second category do not, in some, specify under what provisions of the law certain orders have been issued even though they are not covered by Rule 63.

However, and this is the most important aspect of this issue, in my view, the Law of Succession Act like section 3 of Civil Procedure Act has a saving provision as to the court's inherent jurisdiction. Section 47 of the Law of Succession Act provides:-

“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

Rule 73 of the Probate and Administration Rules goes further to affirm the court's powers in the following words:-

“Nothing in these Rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.

Inherent jurisdiction cannot, however be invoked in matters regulated by express provision of the law. The court thus has no inherent powers to do that which is prohibited by the law or to entertain matters over which its jurisdiction is excluded, or even where the party invoking the inherent jurisdiction has his remedy elsewhere. Finally, I must make it clear that the mere absence of a remedy *per se* does not entitle a party to seek the application of the court's inherent jurisdiction. The Law of Succession Act and the Probate and Administration Rules make provision for the exercise of the court's inherent jurisdiction, which must be approached within the above parameters.

Therefore, depending on the circumstances of each cause and its peculiarity a Probate and Administration court, in my view, and for the reasons I have stated, can issue restraining orders. My own interpretation of Rule 63 of the Probate and Administration Rules is that the court or the Registrar may, for reasons to be recorded, allow an application based on the Civil Procedure Rules outside those specifically provided for in Rule 63 aforesaid.

I am fortified in my thinking of this matter by several Court of Appeal decisions, which, although have not addressed Rule 63 of the Probate and Administration Rules, are to the effect that the court can import into the Law of Succession Act provisions of the Civil Procedure Rules not specified in Rule 63. See, for instance, **Macharia V. Wanjohi and Another**, (2004), 1 EA III, which was an appeal regarding an order of the High Court under Order 45 (reference to arbitration) in a succession cause, in which the Court of Appeal was satisfied that Order 45 was complied with, even though it is not one of those provisions specified in rule 63. In another case, **Makhanga V. Kibwana**, (1995 – 1998) IEA 175, the Court of Appeal, in an appeal based under section 76 of the Law of Succession Act, considered whether an appeal lay to the Court of Appeal from the High Court from an order dismissing an application for revocation or annulment of a grant of representation. In considering this question the court relied on the provisions of sections 66 and 75 of the Civil Procedure Rules.

Turning to the matter before me, I have already observed that the prayers sought herein are carefully drafted and the use of the word injunction avoided. Similarly no reference to Order 39 of the Civil Procedure Rules has been made. The applicant has invoked the inherent jurisdiction of the court via section 47 of the Law of Succession Act as well as Rule 73 of the Probate and Administration Rules.

I am alive to the provisions of sections 45 and 46 of the Law of Succession Act which, apart from criminalizing any acts of intermeddling, gives the police and administrative officers the mandate to protect the estate of a person in their local areas who has died intestate. The applicant and Eunice Muthoni Gatobu have averred that they reported the matter to both the OCPD Meru Central Division and OCS Nkubu Police Station to no avail, hence this application.

The applicant, I have stated earlier was reinstated to the suit property on 24th October 2007. That order, which was by its very nature mandatory is indeed final pending the hearing and determination of this cause. The applicant's case is that she is the lawful wife of the deceased George Gatobu. The respondents have refuted that assertion. That is the main dispute in this cause. It is in the interest of justice that pending determination of this cause the suit property be preserved.

I need only add that since the property is a business venture (hotel), it will be expedient, depending on whether or not it is running that parties consider how the proceeds should be invested. In the result I grant prayers sought in paragraph 3 of the motion dated 16th October 2007 and order that the respondents or their agents will not interfere with the quiet possession of the suit property until this cause is heard and determined.

I make no orders as to costs.

Dated and delivered at Meru this 13th Day of February 2008.

W. OUKO

JUDGE