



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 303 of 2004

IN THE MATTER OF THE ESTATE OF KAURA KAURA.....DECEASED
SAMUEL KABERIA.....PETITIONER

V E R S U S

HELLEN NAMUNYA.....OBJECTOR

LAW OF SUCCESSION

- q **Intermeddling with estate of deceased - The law of Succession Act (Cap 160) s. 45**
- q **Law of Succession Act – jurisdiction to issue orders in the nature of injunction, not subject to order XXXIX of Civil Procedure Rules**
- q **Law of Succession Act - power to issue such orders inherent under Section 47 of Act and Rule 73, Probate and Administration Rules.**

RULING

By a Chamber Summons dated 29th November 2007 and filed on 4.12.2007, the Petitioner Samuel Kaberia sought two principal orders-

- (a) To stop the objector/respondent Hellen Namunya from intermeddling with the estate of the deceased the late KAURA KAURA till this cause is heard and determined;
- (b) The orders be served upon the OCS Laare Police Station for compliance and Penal Notice to issue thereto.

The application was supported by the Applicant's Affidavit sworn on 5th December 2007, and the grounds as follows:-

- i) The objector has continuously intermeddled with the estate of the deceased,
- ii) The Applicant is the legal administrator of the estate of the deceased,

iii) The Respondent (objector) has been threatening and harassing the Applicant by reporting to Laare Police Station and the Applicant has been charged with non-existent offences and the Police are threatening him with arrest yet again on the instigation of the Respondent,

iv) That it is necessary that the Respondent (objector) be summoned to court and she be estopped from such further acts till this cause is heard and determined.

On her part the Objector/Respondent by her Replying Affidavit sworn on 23rd January 2008, denies all the Applicant's contentions and declares that she is the person in occupation of LR. NO. ITHIMA/ANTUAMBUI/2008 and she and her late brother SILAS M'TUERURI planted miraa, bananas and trees and the Applicant has no properties on the suit land, (paras 3&6), that the Petitioner has sought to enter and occupy by force the said land and that she resisted the Applicant's attempts with reports to the Laare Police (paras 4 &5), that the Petitioner's intention is to sell the suit land like he has sold his LR.No. Ithima/Antuambui/3996 as she had deponed also in her affidavit of 20.3.2006 (para.7), that she has cultivated the land since her childhood and the Applicant was now late in the day to dispute her claims (para.8), and that the application (has not been brought in good faith.(Para.8), and that the Applicant lives at a place called Muuri village, a distance of two kilometers from the suit land, and that his desire is to enter the suit land before the matter is heard and determined by the court.

There has been no response by the Petitioner/Applicant to these averments by the Objector/Protestor.

Miss Kianji counsel who argued the Summons before me for the Petitioner/Applicant, and indeed her colleague Mr. Kiogora, counsel for the Objector/Respondent urged it on the basis of whether a court in a Succession Cause may issue restraining orders such as injunctions, temporary or permanent. That was the basis of reliance by Miss Kianji on my brother Hon. Ouko J's ruling in DOLLY WANJA NGITI in the estate of GEORGE M'MBOROKI (deceased), Succession Cause No. 537 of 2007) in which the learned Judge granted orders restraining one party from interfering with the estate until the determination of the cause.

In the other decision of my brother Ouko J. the learned Judge found on the balance of convenience that the Respondents stood to suffer most should the (restraining) orders sought be granted, as their averments that they were in physical occupation of the suit land had not been controverted. That was the decision relied upon by Mr. Kiogora, counsel for the objector/respondent.

Reverting to the question whether the court may in a Succession Cause issue restraining orders, Section 45 of the Law of Succession Act (which provision merely criminalizes intermeddling with estate property), is of no help to the Applicant as a basis of an argument whether or not a court has authority under the Law of Succession Act to issue such restraining orders. Hon. Ouko J. set out lucidly the provisions of the Civil Procedure Rules which are incorporated expressly under Rule 63 of the Probate and Administration Rules into the Law of Succession. Order XXXIX (Temporary Injunction and Interlocutory Orders) of the Civil Procedure Rules is not one of the Rules incorporated or imported into the law of Succession. This does not however mean that a court dealing on matters of Succession is prohibited from giving restraining orders, temporary or otherwise. This view is founded upon the provisions of section 47 of the Law of Succession Act, and rule 73 of the Probate and Administration Rules, which were indeed considered by Hon. Ouko J. in DOLLY WANJA NGITI (supra). I set out these provisions here again-

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.

Provided that the High Court may for the purpose of this section be represented by Resident Magistrate appointed by the Chief Justice.

Rule 73 says;

“73 Nothing in these Rules shall limit or otherwise affect the inherent power 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”

Section 47 of the Law of Succession Act donotes to the High Court and to the Court of the Resident Magistrate where a magistrate has been appointed by the Chief Justice under the said section to entertain any application and determine any dispute under the Act, and pronounce decrees and orders as may be expedient. Rule 73 of the Probate and Administration Rules reiterates the Court’s inherent power to make such orders, as may be necessary for the ends of justice or to prevent abuse of he process of the court.

The discussion whether or not the court can or cannot grant restraining orders in the nature of injunctions under Order XXXIX of the Civil Procedure Rules is somewhat misplaced. The jurisdiction to entertain any application and determine any dispute and therefore make any orders for the ends of justice or to prevent abuse of the process of the court is not derived from Order XXXIX of the Civil Procedure Rules. The jurisdiction and procedural power is derived from the said Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

Turning to the Application at hand, is there cause for making such orders as would meet the ends of justice, or prevent the abuse of the process of court? Having perused the entire proceedings in this matter and not just the subject application, I am persuaded beyond peradventure that there is no cause for making or granting of the prayers sought in the Petitioner’s application of 29th November 2007. It is clear to me that the objector being the person in occupation of the suit land has of necessity carried out on the land economic activities generally common in the area, planting and tending miraa and other trees, and which must include harvesting and selling them to earn a livelihood. That is what the Objector has sworn she has always done since her childhood. There was no affidavit in Reply to contradict the Objector’s averments. A court of law would be both cautious and reluctant to grant the prayers sought by the Petitioner. It is not the Petitioner’s but the objector’s plants which are being harvested and sold. Until the distribution of the estate is done, the objector must earn a livelihood from the sweat of her two brows granting the prayers sought by the petitioner would cut off the Objector from her livelihood; it would not serve the ends of justice.

For those reasons I decline to grant the prayers and dismiss the Chamber summons aforesaid with a direction that each party bears his/her own costs.

Dated and delivered at Meru this 25th of April 2008.

M.J. Anyara Emukule

JUDGE