



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 418 of 2007

DOUGLAS GITONGA KIARA 1ST PETITIONER

JUSTER MWARI 2ND PETITIONER

VERSUS

ALICE KARIMI 1ST RESPONDENT

STEPHEN MBAE 2ND RESPONDENT

KENNETH GIKUNDA 3RD RESPONDENT

RULING

The two applicants, Douglas Gitonga Kiara and Juster Mwari petitioned for a grant of representation in respect of the estate of Justus Ikiara Twanthuku (the deceased). The petition is pending. They have now filed summons “for restraining orders” under rules 49 and 73 of the Probate and Administration Rules.

In the application they are seeking that the respondents, their agents, servants or employees be restrained from:-

“entering, utilizing, using, threatening, evicting and/or in any other manner whatsoever interfering with the applicant’s person, her home, rental houses, land parcel No. ABOGETA/U-CHURE/809 (corrected to read L-CHURE for Lower Chure instead of U-Chure for Upper Chure) until further orders of this court or until the final determination of this cause.”

They also sought that the respondents be restrained from withdrawing from or interfering with the deceased’s accounts Nos. 185000014 with Kenya Commercial Bank, 0820-00-00265 with Meru Central Farmers and KPSF – 013465-2 at Post Bank until further orders.

Both applicants have sworn two separate affidavits in support of their application to the effect that the 1st applicant is the son of the deceased with the 1st respondent while the 2nd applicant was the deceased’s wife. That the deceased was also married to the 1st respondent and established their matrimonial home at ABOGETA/U-CHURE/2448. That when the deceased separated with the 1st respondent he moved and settled at ABOGETA/L-CHURE/809 (the suit land), that he married the 2nd applicant in 1997 and lived

with her on the suit land. That the deceased built rental houses on the suit land and also have bank accounts as set out earlier.

The applicants further aver that the respondents have threatened the 2nd applicant with eviction from the suit land. It is further alleged that the respondents are in the process of accessing the deceased's bank accounts. These averments have been denied by the respondents in replying affidavits sworn by the 1st and 2nd respondents. The 3rd respondent has not responded to the application.

The respondents contend that the 1st respondent and the deceased never separated. That the suit land was acquired jointly by the 1st respondent and the deceased. They maintain that the 2nd applicant was never married to the deceased but was only a farm hand employed by the deceased as a caretaker for the rental houses and the cows on the suit land. That the 1st applicant is opposed to the demand by the respondents that the proceeds from the rental houses be accounted for and has ganged up with the 2nd applicant to frustrate the proper administration of the deceased's estate.

I have considered these ritual averments and a further affidavit sworn by the 1st applicant as well as submissions by counsel. The dispute revolves around the estate of the deceased who passed away on 10th August 2007. The 2nd applicant maintains that she was married to the deceased and now lives on the suit land which was their matrimonial home. Constructed on the suit land are rental houses. She has, together with the 1st applicant, petitioned this court for a grant to administer the estate of the deceased which comprise four (4) parcels of land, three bank accounts and several shares in various companies.

The petition is still pending. The applicants want the respondents restrained from threatening the 2nd applicant with eviction and from dealing with the bank accounts. Although the application is brought under the inherent provisions of the court under the Probate and Administration Rules, it is my understanding that since the relief sought is in the form of an injunctive order the usual conditions for the grant of an injunction are applicable. They are, *prima facie* case to be established by the applicant, damages may not be adequate if orders sought are not granted and a balance of convenience where the court is not certain.

In considering the applicants' case the court is not expected at all to make any final or definite finding of fact or law at this stage as that is left to the trial court. At this stage the applicants are only required to demonstrate that they have a *prima facie* case with a probability of success at the trial as defined in the case of **Mrao Ltd V. First American Bank of Kenya** (2003) KLR 125. Have the applicants demonstrated that their rights are about to be violated by the respondents?

This question rests first and foremost with the determination of the status of the 1st applicant; whether or not she was married to the deceased or whether she is entitled to any claim in the estate under the provisions of the Law of Succession Act. This is a matter that cannot be satisfactorily addressed by way of affidavit evidence. Oral evidence must be called by both parties at the trial. But at this stage suffice to observe that the chief of Igoki Location in his letter to this court dated 1st October 2007 confirmed the 1st respondent as the widow of the deceased and the 2nd, 3rd respondents and 1st applicant, among others as sons and daughters of the deceased. The chief has stated as follows with regard to the 2nd applicant:-

“For the last 9 years the deceased has been living with Juster Mwari who also depended on him.”

That does not specifically say anything about the relationship of the deceased and the 2nd applicant. It does not elaborate on the nature of dependency. However, it points to the existence of some form of a relationship that can only be ascertained when the matter is finally heard. But at this stage, given the fact that the deceased also entrusted the 2nd applicant with documents of title to the suit land, I am persuaded that if a restraining order is not issued, her rights, (whatever they are) may be infringed by the threatened eviction, which rights and interests may not adequately be compensated by an award of damages.

There is no dispute that she is in occupation of the suit land. The balance of convenience tilts in her favour. The bank accounts and even the shares in question are in the name of the deceased and can only be dealt with in accordance with the provisions of the Law of Succession Act.

For these reasons and in exercise of this court's inherent jurisdiction the respondents will be restrained from evicting the 2nd applicant from the suit land and also from withdrawing any money from the two accounts in question. It is further directed that the proceeds from the rental houses be banked intact in A/C No. 185000014, Kenya Commercial Bank, Meru Branch, pending the determination of this cause. Costs will be in the cause.

Dated and delivered at Meru this ...6th ...day of June..... 2008.

W. OUKO

JUDGE