

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 447 of 2004

IN THE ESTATE OF JOSEPH M'IBURI (DECEASED)

REBECCA KAGWIRIA JOSEPH PETITIONER

RULING

The respondent has petitioned for the grant of representation for the estate of the deceased in her capacity as the daughter. The applicants have filed an objection to the making of grant as well as a cross-petition for grant. The applicants who describe themselves as widow and daughter of the deceased, have presently brought this application seeking substantive reliefs in the nature of injunction, basically to have the applicant reinstated to her matrimonial home.

The application is based on the grounds that the 1st applicant left her matrimonial home after her life and safety was threatened by the respondent, who is also her daughter and the respondent's son. She has been dispossessed of her houses and personal property and her attempt to return to her home frustrated by the respondent and her children. The 1st applicant has been forced to live with the 2nd applicant who is also her daughter.

In her reply to these allegations, the respondent states that on her own volition the 1st applicant left the suit property to go and live with the 2nd applicant. That before the 1st applicant left the suit property she shared the same house on the suit property with the respondent. As a result of this dispute, the respondent's son has been charged in court with a criminal case.

I have considered the unfortunate situation that the parties herein find themselves. The dispute clearly relates to the estate of the 1st applicant's deceased husband and the 2nd applicant's and respondent's father. The estate is pending distribution in this cause. The dispute has now divided the home with the 1st and 2nd applicants on the one hand and the respondent on the other.

I am convinced that due to the bad blood in the family the 1st applicant found herself out of the suit property. The orders sought as I have stated are injunctive in nature. They are specifically seeking mandatory injunction to compel the respondent to allow 1st applicant to return to her home pending the determination of the cause herein.

The respondent on her part prays that status quo be maintained until the determination of the issue of distribution of the estate.

It is now trite that mandatory injunction may be issued both at the interlocutory stage and after the hearing of a suit. However, interlocutory mandatory injunction will rarely be granted unless in very clear uncontroverted circumstances. See The Despina Panticcos (1975) EA 38 and Kenya Breweries V. Okeyo (2002) IEA citing Locaball International Finance Ltd V. Agro Export & Others (1986) IA11 ER 90. The latter case held that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.

It is not disputed that the 1st applicant is the widow of the late Joseph M'Iburi. It is further not controverted that the suit property was registered in the name of the 1st applicant's deceased husband.

Further, the respondent has conceded that the 1st applicant and her deceased husband lived in a separate room in the house on the suit property. It is indeed her matrimonial home. The respondent has deposed that she did not evict the 1st applicant. That she has no intention of disinheriting her.

At the same time, I am persuaded that due to hostilities emanating from the respondent and her children, the 1st applicant has been forced to move out of her matrimonial home. Strictly speaking and without preempting the outcome of this cause, the 1st applicant has the priority to inherit the suit property being her matrimonial home. I find that in this application exceptional circumstances exist to justify the grant of a mandatory injunction on an interlocutory application.

In the result it is ordered that pending the determination of this cause the 1st applicant shall return to her matrimonial home; the respondent is ordered to give the 1st applicant vacant possession of the room she occupied and grant her access to all the facilities in the suit property; the respondent, her servants, agents or assignees to cease threatening the 1st applicant and to allow her to have peaceful and quiet possession, use and enjoyment of the suit property.

I make no orders as to costs of this application.

Dated and delivered at Meru this 6thday of June.. 2008.

W. OUKO

JUDGE