

REPUBLIC OF KENYA
IN THE MATTER OF THE ESTATE OF NDEGWA GATOME NJANGO alias NDEGWA
GATUME JANGO (DECEASED)

AND

WAMUYU NGETHA

HERINA WACHUKA MBUTHIA.....APPLICANTS

VERSUS

JOSEPH KAMONI NDEGWA.....RESPONDENT

RULING

The applicant filed in court a Chamber Summons dated 13th march 2007. In that Chamber Summons the applicant seeks the order that the respondent himself or his agent be restrained from interfering with the applicant occupation of Land Parcel NO. **KONYU/GACHIKU /291**. The applicant also seeks that the respondent be prohibited from wasting Land Parcel No. KONYU/GACHIKU 291/. When that application came for hearing the respondent advocate raised the following preliminary objection.

- 1. The applicants seek permanent orders vide an interlocutory application contrary to the law.**
- 2. The application is incompetent and as it purports to seek orders under order XXXIX of the Civil Procedure Rules, which is not applicable in succession proceedings under rule 63 of the Probate and Administration Rules.**

In support of that objection the respondent advocate stated that in seeking permanent orders of injunction by interlocutory application the applicant application was a non starter. Further he submitted that in bringing the application under order 39 of the Civil Procedure Rules the application was misconceived since that rule under the Civil Procedure Rules was not applicable for succession matters. He therefore submitted the application should be struck out. In opposing the objection counsel for the applicant submitted that rule 73 of The Probate and Administration Rules gives the court power to make such orders as the end of justice requires. Counsel therefore submitted that since the application was also based on Rule 73 the same should not be dismissed instead she prayed that the preliminary objection be dismissed.

In order to understand what is a proper preliminary objection I shall refer to the case of **MIKISA BISCUIT MANUFACTURING CO. LTD. V. WEST END DISTRIBUTORS LTD. (1969) E.A. 696**.

In that case law J.A. stated as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as preliminary points may dispose of the suit.”

With that in mind the court will consider the first limb of the preliminary objection. In looking at the prayer of the Chamber Summons the applicant seeks an injunction without indicating the period that injunction will run. In considering that prayer I am of the view that it does not breach the rules of procedure since the court in granting the prayer would be in a position to limit the term of the injunction. I am therefore of the view that the first limb of that preliminary objection is misconceived and rejected. The second limb related to the applicant reliant on order 39 of the Civil Procedure Rules. As much as the applicant does indeed rely on that rule the applicant does also rely on rule 73 at The Probate and

Administration Rules. That Rule provides as follows:-

“Nothing in these Rule 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.”

The court in considering the application would not be bound by the reliance of Rule 39 since the applicant has in the alternative quoted the correct rule. I am therefore of the view that the second limb of the respondent objection is misconceived and is rejected. The court therefore does hereby dismiss the preliminary objection of the respondent dated 23rd march 2007 with costs to the applicant.

Before ending this ruling it ought to be noted that in the respondent raising that preliminary objection the applicant's application was not heard when it ought to have been and I am therefore of the view that it is in the interest of justice that the applicant be given another hearing date of that application at the reading of this ruling.

It is so ordered.

Dated and Delivered at Nyeri this 25th Day of May 2007.

MARY KASANGO

JUDGE