



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Case 239 of 2005

IN THE MATTER OF THE ESTATE OF THE LATE M'MUGAMBI BAIGUAMBA

M'MURIITHI M'MUGAMBI PETITIONER

VERSUS

HARRIET KINYA OBJECTOR

RULING

This is a Succession Cause in which the applicant was initially issued with a grant of representation before the respondent protested.

After her protest the respondent was appointed a co-administrator with the applicant. The property in question – No.Ntima/Ntakira/1100 (suit property) was the only property of the late M'Mugambi Baiguamba (the deceased). The deceased had two sons, the applicant and the respondent's husband, M'Marete M'Mugambi, also now deceased.

Both the applicant and the respondent occupy the suit property. While the protest and summons for confirmation are pending, the applicant has brought the instant application in which he is seeking, in the main, an order of temporary injunction to restrain the respondent from interfering with the applicant's possession of part of the suit property pending the hearing and determination of this cause. It is the applicant's contention that the respondent following the decision of the clan members, it was agreed that the suit property be divided into two equal parts between the applicant and the respondent. After this both occupied their respective portions and each has extensively developed their portions.

The applicant further states that on 15th April, 2007 the respondent went to his portion of land and destroyed the barbed wire fence, coffee and potatoes while at the same time deposited building material on his said portion of land. That if the respondent is not restrained the applicant will suffer irreparable loss and damage.

These allegations have been denied by the respondent who has, on her part, maintained that she has not at all interfered with the suit property. She confirms that they live on the same compound without any distinct boundary between their houses. That she has no intention of constructing any structure on the suit property. She has invited the court to verify the status on the ground.

I have already pointed out that the parties are joint administrators of the suit property. I have also said

that the applicant's summons for confirmation has not been heard and that indeed there is a protest by the respondent which similarly has not been disposed of. That being so can the applicant claim any portion of the land? But before I answer that question I wish to declare that it is, in my view, doubtful if an order of injunction can be issued in Succession matters in view of the very clear provisions of Rule 63 of the Probate and Administration Rules. That rule specifies Orders V, X, XI, XV, XVIII, XLIV and XLIX as well as the High Court (Practice and Procedure) Rules as the only provisions in the Civil Procedure Rules which are applicable in matters of Probate and Administration. Order XXXIX is clearly not one of those provisions. I believe by leaving out certain provisions of the Civil Procedure Rules and including others in Rule 63, the framers of the Rules had certain mischief in mind. Note that the Rules Committee is empowered to make rules other than those specified in Section 97 of the Act.

The Law of Succession Act is a self-regulating legislation with its own elaborate rules of procedure under the Probate and Administration Rules, the Construction Wills, General Rules (in the First Schedule) and Second Schedule dealing with Failure of Testamentary Dispositions, Elections (in the Third Schedule), Perpetuities, Remoteness and Accommodations (in the Fourth Schedule, Forms of Limited Grant (Fifth Schedule), Abatement and Refund of Legacies (Sixth Schedule), Investment of Funds to Provide for Legacies and Interest on Legacies (Seventh Schedule) etc.

The estate of a deceased person is protected from waste, alienation or damage before distribution under Section 45 of the Laws of Succession Act, which makes it an offence to intermeddle with the property of a deceased person.

Secondly under Section 46, the area Chief, Assistant Chief, Police Officer and Administrative Officer are vested with powers to protect the property of a deceased person before grant of administration is issued. In my view, therefore, there are sufficient safeguards.

So, although the application is expressed to be brought under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, the net effect is to restrain the respondent by means of an injunction. That, as I have observed is not tenable.

However, should I be wrong on this point, then I hold that the applicant has not demonstrated that he has a *prima facie* case with a probability of success. He has also not shown that the kind of loss and damage he is likely to suffer if the orders he is seeking are not granted cannot be compensated by an award of damages.

The balance of convenience also tilts in favour of the respondent who has averred that she has lived on the suit property for over 40 years.

See Giella V Cassman Brown & Co.Ltd(1973) EA 358. The applicant's case is that he has a distinct portion of the suit property independent of that occupied by the respondent. This is denied by the latter. The applicant further contends that the clan elders divided the suit property between them.

The suit property has not been distributed. The clan elders have no powers to allocate land in the manner alluded to. Indeed their action amounts to intermeddling.

The respondent has also denied doing any of the acts alleged. If in fact she did then the law allows the applicant to make a report to the police. This has not been done.

The respondent has invited the court to visit the *locus in quo* to confirm the status. All I am saying is that the applicant has failed to show the existence of a *prima facie* case. The suit property is held by both of them jointly and restricting the respondent by restraining orders would amount to holding that he has a superior title.

The damage allegedly caused, namely barbed wire and crops can be quantified and appropriate compensation made.

For these reasons, this application must fail. It is dismissed with costs to the respondent.

DATED AND DELIVERED AT MERU THIS 8TH DAY OF JUNE 2007

W. OUKO

JUDGE