



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 2327 of 1999

IN THE MATTER OF THE ESTATE OF KUNG'U GATHIRWA (DECEASED)

RULING

By summons dated 12.05.06 and filed on 17.05.06 brought under rule 49 of the Probate and Administration Rules, Muiga Kung'u applied for the following orders:-

- a) That this honourable court be pleased to restrain the respondent, his agent and/or servants from destroying the applicant's crops, encroaching upon his respective portion(s) of land parcel NDARUGU/KARATU/211 or interfere with their possession of the said portions in any other way until the hearing and determination of the cause herein.
- b) That in the alternative and without prejudice to (a) above, status quo be maintained in respect to land parcel NDARUGU/KARATU/211.
- c) That cots be provided for.

The grounds upon which the application is based are:-

- i) That the respondents has (sic) encroached upon the applicant's portion of land parcel NDARUGU/KARATU/211 and he is with impunity and wantonly destroying subsistence and cash crops growing thereon.
- ii) That the applicant has suffered loss and continues to suffer irreparable loss unless the respondent is restrained from his said unlawful acts.
- iii) That the respondent is preparing to uproot the tea bushes growing on the applicant's portion and exhume bodies buried on the said land parcel NDARUGU/KARATU/211.

The application is supported by the applicant's affidavit sworn on 12.05.06.

The firm of Waithira Mwangi & Co. Advocates acts for the applicant in this matter.

On 14.06.06 the firm of Kiarie, Mwangi & Co. Advocates filed grounds of opposition dated 13.06.06 as follows:-

- a) That the orders sought do not lie in a matter such as this and the application is misconceived and an abuse of the court process.

- b) That the subject land has not been sub-divided and/or shared out precisely because of the applicant's own objection and the caution placed by one Joseph Gathirwa Kung'u now deceased and a brother of the applicant.
- c) That no evidence has been presented that the respondent uprooted the alleged bushes, threatened or to exhume (sic) graves.
- d) That the respondent is a stranger to the allegations contained in the application.
- e) That the application is devoid of merit.

The application came up for hearing before me on 20.09.06 whereat learned counsel Miss W. Mwangi appeared and said she was acting for the applicant while learned counsel, Mr J.K. Njuguna said he was acting for the petitioner/respondent.

The thrust of the applicant's case was that the parties are step-brothers; that the deceased had shown the parties their respective portions of the subject land; and that the applicant had his homestead on the subject land; that the respondent had moved onto the applicant's portion. Applicant's counsel urged that the status quo as at the time the deceased died should be maintained pending the hearing and determination of the proceedings herein.

Counsel for respondent opposed the application principally on the basis of the grounds of opposition dated 13.06.06 and filed on 14.06.06 already alluded to. He informed the court that the matter was initially commenced before the High Court by chamber summons dated 14.10.99 filed on behalf of Joseph Gathirwa Kung'u, who died in the cause of the proceedings. Respondents counsel submitted that the subsequent summons filed by the applicant Muigai Kung'u on 16.11.05, seeking revocation or annulment of grant issued to Peter Waweru Kung'u on 30.01.95 and confirmed on 22.01.99 be revoked, is incompetent in that there is still pending chamber summons dated 14.10.99 by Joseph Gathirwa Kung'u seeking similar prayers. According to counsel for respondent herein, the present applicant should have either withdrawn the previous summons for revocation or substituted the objector therein. He (respondent's counsel) submitted that no prima facie case has been made out to entitle the applicant to the injunction sought, contending that since rule 63 of the Probate and Administration Rules omits operation or application of Order XXXIX of the Civil Procedure Rules, the Family Court has no jurisdiction under the Probate and Administration Rules to issue injunctive orders.

Counsel pointed out that the body of the application does not name the culprit and that in the applicant's advocates letter of 09.02.06 to the Officer-in-Charge Gatundu Police Station relating to the alleged damage subject matter of the current proceedings, the said advocates alluded to Nancy Wahu Muiga's husband's step-brothers as having maliciously damaged banana plants belonging to her. Respondents' counsel pointed out that in his notice of appointment there were five respondent's whom he represents. He made the point that injunctive orders can only issue against a particular named person and that if the applicant cannot point to a particular respondent (or respondents), he is not entitled to the injunctive orders sought.

Respondents' counsel urged the court to dismiss the application.

In reply, applicant's counsel maintained that there is no law providing that only one person can apply for revocation of grant. Any person can so apply. He pointed out that in the body of the present application, it was stated that an application had been made by Stephen (sic) Gathirwa Kung'u but he died and that his family has failed to agree on a legal representative. Counsel reiterated that there is no bar to the application now before court on account of the unwithdrawn previous application by the late Joseph Gathirwa Kung'u. He submitted that rule 63 of the Probate and Administration Rules has not included Order XXXIX as applicable to succession matters because the Law of Succession Act has covered the subject in the context of intermeddling (section 45). In applicants' counsel's view, that is why rule 63 is there.

Responding to the criticism that the present application does not name the culprit, applicant's counsel countered that the present application is interlocutory; that it is not the primary document; and, in essence, that since the summons for revocation names all the respondents, who are known, omission in the present application to name respondents is of no consequence.

I have given due consideration to the arguments and counter-arguments of the parties.

Rule 49 of the Probate and Administration Rules under which the present application was brought provides as under:

'49. A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.'

This is a very general rule. It does not deal specifically with issues of injunctive orders. Be that as it may, one of the issues arising in the present summons application relates to the identity of the respondent or respondents. At ground (i) of the grounds upon which the summons is based, the applicant, Muigai Kung'u complains of encroachment upon his portion of the subject land by 'the Respondents', in plural. Subsequently, 'respondent' is referred to in singular. The 'respondent' or respondents has/have not been named in the application and supporting affidavit. When the omission was criticized by the opposing side, applicant's counsel answered, in essence, that since the summons for revocation itself names the respondents, the omission to name them in the present summons which is interlocutory is of no consequence. This is a strange stance to assume as the omission in the application to name the respondent makes the application incomplete.

I suppose 'summons for revocation' in this context refers to the summons for revocation by the present applicant, Muigai Kung'u dated 16.11.05 made under the umbrella of the present High Court Succession Cause No. 2327 of 1999. I note that the initiator of the succession cause was Joseph Gathirwa Kung'u who subsequently died before the proceedings were concluded. No application for his substitution was made. The present applicant, Muigai Kung'u acknowledges the lack of substitution vide paragraph 5 of his affidavit sworn on 11.11.05 in the undermentioned terms:

'5 ... Joseph Gathirwa Kung'u ... died before the matter was determined and our family has not agreed on who should substitute him in this matter and or administer his estate.'

The initial application in this case for revocation of grant is stated to have been made by Joseph Gathirwa Kung'u singly, as a beneficiary of the estate of Kung'u Gathirwa (Deceased). If the present applicant, Muigai Kung'u is not a substitute for the late Joseph Gathirwa Kung'u, how can he bring the present application under the umbrella of the case filed by the said Joseph Gathirwa Kung'u alone? In my view the applicant, Muigai Kung'u is a stranger to this case and has no *locus standi* to bring the present application thereunder. In the premise, I find that the summons dated 12.05.06 and filed on 17.05.06 by Muigai Kung'u is incompetent, the same is hereby struck out and the orders sought thereunder are refused.

Orders accordingly.

Delivered at Nairobi this 4th day of October, 2006.

B.P. KUBO

JUDGE