REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 89 OF 2003

IN THE MATTER OF THE ESTATE OF MWANGI NGANGA – DECEASED

BETWEEN

JOHN NGANGA MWANGI ……...…… PETITIONER/APPLICANT

JOSEPH NJUGUNA MWANGI …….…… PETITIONER/APPLICANT

-VERSUS

SAMWEL K. MWANGI …… OBJECTOR/RESPONDENT

PETER M. MWANGI …… OBJECTOR/RESPONDENT

RULING

This is an application by way of Chamber Summons said to have been brought under Section 45 of the Law of Succession Act and Rule 49 and 73 of the Probate and Administration Rules. It is dated 25th January 2005. It was brought under certificate of urgency. The applicants are the petitioners in the main succession cause. It seeks for orders that: -

1. An interlocutory injunction do issue to restrain the objectors, their agents and/or servants from dealing, taking possession, disposing of or otherwise intermeddling with the free property of the Estate of Mwangi Nganga, more particularly Titles No. Kaptagat/Kaptagat/Block 1 (Uasin Gishu)/4 and Uasin Gishu/Illula/159, and commercial plot – Kamukunji(jointly owned with Kamau Mungiri)/106.

2. Costs of the application be provided for. The application has grounds on the face of the Chamber Summons and is supported by a joint affidavit of John Nganga Mwangi and Joseph Njuguna Mwangi the applicants. The application is opposed and both respondents Samuel K. Mwangi and Peter M. Mwangi swore and filed replying affidavits in opposition to the application. At the hearing of the application Mr. Ngigi Mbugua for the applicants submitted that the applicants were seeking for orders of injunction against the objectors, their servants or agents. He submitted that the objectors had appropriated the property of the estate in such a manner that amounted to intermeddling with the property of the estate. That unless the court granted the orders sought, the estate would be subjected to waste. That the intermeddling constituted of cultivation and leasing which ordinarily ought to be gainful to the estate. That the applicants and objectors were both beneficiaries to the estate. That the objectors had taken action on the use of the land without being accountable to the estate as was required. Under section 45 of the Law of Succession Act (Cap.160) Rule 49 and 73 of the Probate and Administration Rules, the court has unfettered discretion and jurisdiction to make orders to meet the ends of justice and prevent an abuse of the process of the court. He submitted that the applicants had locus standi to prosecute the application, and that as heirs, the applicants had a prima facie case and were entitled to the orders sought.

Mr. Kigamwa for the objectors opposed the application. He submitted that the application was bad in law. That the court could not grant injunctive orders within a succession cause. A succession cause was not a suit and order 39 of the Civil Procedure Rules was not applicable in Succession Causes. He sought to rely on Rule 63 of the Probate and Administration Rules.

Secondly Rule 49 of the Probate and Administration rules required that applications to court have to be by Summons under Form 104. That Summons had to be signed by the Deputy Registrar, which had not been done in this case. Rule 59 of the Probate and Administration Rules required that applications be made under the gazetted forms. This Chamber Summons was not made under gazetted forms and was therefore defective. Also Order 18 rule 5 of the Civil Procedure Rules required an affidavit to be in the first person. It should be made by one person. A joint affidavit was not in the first person and was therefore defective. The affidavit in support of the application was a joint affidavit and was therefore defective.

On the merits of the application, he submitted that the applicants and respondents had equal rights as beneficiaries. Section 69 of the Law of Succession Act (Cap.160) gave locus standi only to personal representatives. The applicants had come to court in this application as beneficiaries. Therefore they did not have locus standi. They should have obtained a special grant of letters of administration before making the application.

Also the applicants did not have a prima facie case. There was no proof by affidavit that the property in question formed part of the estate. No certificate of title was annexed. The subject property was said to be jointly owned with one Kamau Mungiri who had not come to court to complain. It was not free property in terms of section 3 of the Law of Succession Act (Cap.160). The remedy sought by the applicants was in any case provided for under section 45 of the Law of Succession Act (Cap.160). The court was being asked to grant interlocutory injunction when in the petition there was no prayer for an injunction. The applicants had come to court with unclean hands as they had already started distributing the estate. He referred to minutes of 9/4/2004 annexed to the supporting affidavit. He also challenged annexure 2 of the supporting affidavit of the applicants, which he stated was not in the language of the court and no translation was made of the same.

He further submitted that the inherent powers of the court under section 73 of the Law of Succession Act (Cap.60) can be used only when there are no specific provisions for legal recourse. This application was brought by two petitioners against the two objectors. It is admitted by both parties that both the two petitioners and the two respondents are beneficiaries to the estate. The application has been attacked on several grounds by the counsel for the respondents (objectors).

The application is said to have been brought under section 45 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules. Section 45 of the Succession Act provides that: -

“45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (2) Any person who contravenes the provisions of this section shall: (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

The terms “free property” are defined in the Law of Succession Act (Cap.160). Under section 3 of the Act. “Free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

The complaint in the application is about intermeddling with assets of the estate. The word “intermeddle” was not defined in the Act. However in the Concise English Dictionary Eighth Edition, the word “meddle” is defined as interfering with others concerns. I take it that intermeddle with the estate is to interfere in the estate or the assets of the estate, when it is not your concern to do so.

From the provisions of Section 45 of the Act, it is my view that the section prohibits the taking of possession of property of a deceased person contrary to the provisions of the Act. Taking possession obviously means that at the time of death of the deceased, the person who is taking possession was not already in possession. A person who is in possession at the time of death of the deceased cannot be accused of taking possession. It also prohibits the disposal of the deceased's property contrary to the provisions of the Act and also intermeddling with any free property of the deceased. It makes any action contrary to the provisions of the Act a crime punishable by a fine or imprisonment or both. It also makes the person contravening the law liable to account to the executor or administrator.

Rule 49 of the Probate and Administration Rules provides that any person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in the rules should file a summons supported, if necessary, by affidavit. Rule 73 provides that the rules shall not limit or otherwise affect the inherent powers 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.

Since the above rules were cited in the application, it is obvious that the applicants consider that this is a summons brought where there are no specific provisions in the rules for bringing such a summons. They are seeking the exercise of inherent powers of this court. As I have stated earlier, this application has been strongly opposed by the respondents.

The first issue that arises in the application is whether the applicants can seek an injunction in a succession cause. The application is obviously seeking for injunctive orders. Mr. Kigamwa submitted that rule 63 of the Probate and Administration Rules does not recognize the application of Order 39 of the Civil Procedure Rules to succession causes.

This application does not cite Order 39 of the Civil Procedure Rules. I have perused rule 63 of the Probate and Administration Rules. Under Rule 63 of the Probate and Administration Rules, Orders 5, 10, 11, 15, 18, 2, 44 and 49 of the Civil Procedure Rules are made applicable in succession causes. No mention is made of Order 39. Order 39 of the Civil Procedure Rules is the Order that is applicable in applications for injunctions, such as the orders sought in this application. In my view, Order 39 of the Civil Procedure Rules is not applicable to succession causes and the reliefs provided therein in the form of injunctions are not applicable to succession causes. I therefore find that this court cannot give injunctive orders as sought because that would be applying the provisions of Order 39 of the Civil Procedure Rules to succession causes.

The second issue is whether the Chamber Summons has been brought under the proper format. Mr. Kigamwa argues that the application should have complied with the requirements of rule 49 of the Probate and Administration Rules. That it should have been brought under Form 104 and signed by the Deputy Registrar. Mr. Mbugua argues that they brought the application under the proper format. That this is a special application not provided for in the rules.

I have perused rule 49 of the Probate and Administration rules. The rule states: - "49. Any 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 the Rules shall file a summons supported if necessary by affidavit." Under the Act specific forms are provided for filing applications for specific reliefs. There are several types of summons forms provided for under the Schedules to the Act. The general form of summons is provided for as Form 104. It is based on the provisions of rule 59 of the Probate and Administration Rules. The relevant parts of the rule provide that: -

"59 (1) Save where otherwise provided in these rules every application to the court or to a registry shall be brought in the form of a petition, caveat or summons as may be appropriate.

(5) A summons shall be in one of Forms 104 to 110 as appropriate and be signed by the applicant or his advocate.

(6) Save where it is otherwise provided in these rules there shall be filed with every application such

affidavits (if any) setting out such material facts and exhibiting such documents as the applicant may think fit."

As can be deduced from the above provisions of law, it is mandatory to bring any application in probate and administration causes in compliance with the forms provided. This application was brought by way of Chamber Summons which is not provided for under the rules. The format of the application does not comply with the format of Form 104. This is the general form of summons, where there is no specific form. It was not singed by the Registrar as required. Therefore the application does not comply with the mandatory requirements of the Law of Succession Act and is therefore fatally defective and has to be struck out on that account.

The next issue is whether the supporting affidavit to the application should have been drafted in the first person. Mr. Kigamwa argued that a joint affidavit does not comply with the requirements of Order 18 rule 5 of the Civil Procedure Rules as it is not worded in the first person. In my understanding first person refers to a situation where a person describes himself or herself as "I so and so". In that event, if the persons are more than one person describing themselves as "we" does not change the first person. The difference is just that one is first person singular, the other one is first person plural. The supporting affidavit sworn jointly by John Nganga Mwangi and Joseph Njuguna Mwangi is not defective on that account. I dismiss this objection as it has no merits.

As to whether the applicants have locus standi in the matter Mr. Kigamwa referred to section 69 of the Law of Succession Act and submitted that only personal representatives can litigate on behalf of an estate. That the applicants have not obtained a special grant, so they have no locus standi to bring this application. It is true that under section 82 of the Act, personal representatives are the ones to generally take action to enforce, by suit or otherwise all causes of action which by virtue of any law survive the deceased or arise out of his death for his estate. Section 45 of the Act, under which the application was brought, provides for protection of the assets of the estate. Both applicants were gazetted as administrators under Gazette Notice No. 6581 dated 13th September, 2003 and published in the Kenya of 19th September, 2003. Objections were later filed and therefore no letters of administration have been issued to them by the court. Section 47 f the Act grants this court power to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient. Other than the form of application that the applicants used, which is not in conformity with Form 104, and their request for injunctive orders, this court can entertain an application by the applicants for the preservation of the assets of the estate. They have sufficient interest as petitioners to make the application. Therefore that objection fails. I will not go into deciding on the merits of the application for interlocutory injunctive orders per the parameters set out in the case of Geilla –vs- Cassman Brown [1973] EA 358, as I have found the application to be technically defective.

For the above reasons, I find the application of the applicants to be fatally defective and dismiss it with costs to the respondent/objectors. Dated and delivered at Eldoret this 31st Day of May 2005.

George Dulu

Ag. Judge

In presence of: Mr. Ngigi Mbugua for Applicants

Mr. Kigamwa for respondents/objectors