REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Succession Case 326 of 2001

ERASTUS GITONGA ………………………………. PETITIONER/RESPONDENT

VERSUS

DAVID KIMATHI …………………………….......……… OBJECTOR/APPLICANT

RULING

This is an application shown to be brought under sections 3 and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya by way of Chamber Summons seeking the following:-

a) An order that the application is urgent.

b) An order by court requiring the respondent/petitioner to keep the status quo that prevailed before the filling of the Petition and the objection, till the objection is heard and determined;

c) That costs be in the cause

The application is based on the grounds that the objector/applicant has been living on the parcel of land known as NYAKI/MULATHANKARI/440 since was as born; that his late father and grandfather died while he was living on the said land and that he has a beneficial interest in his late father's share and finally that the petitioner/respondent has chased away the applicant/objector from the suit land and that as a result the applicant/objector is now a destitute.

The application is supported by an affidavit sworn by the applicant on 14.10.2003 in which the applicant has deponed to the fact that the deceased to whose estate the succession cause refers was his grandfather. That both his father and mother died and that throughout his life, he has lived on the suit land where he was also born. That sometime in early October 2003, the petitioner/respondent chased the applicant away from his home on the suit land and that consequently, the applicant has objected to the granting of letters of representation to the petitioner/respondent. The applicant seeks interim orders barring the petitioner/respondent from chasing him away from his home on parcel number NYAKI/MULATHANKARI/440 pending the outcome of the objection proceedings.

The petitioner/respondent opposes the application on the grounds that the applicant has never at any time occupied the suit land from which he claims a share as he (applicant) was born elsewhere contrary to what he (applicant) claims. That in any event, before the deceased died, he had shown the applicant the piece of land that applicant was to occupy but that the applicant and his sister sold the very portion of land and squandered the money instead of re-investing it in another piece of land. That further, the applicant is living on another parcel of land that was owned by the petitioner's late brother, one John Mwenda, who was the applicant's father. In the same breath, the petitioner/respondent said that he was opposing the application on the further ground that the applicant now had another parcel of land measuring two acres and that the applicant should develop that parcel of land and live on it.

The issue for the court's decision is whether the application is meritorious so as to warrant the granting of the orders being sought by the applicant. It is to be noted that though the application is said to be brought under sections 3 and 3A of the Civil Procedure Rules, the orders that the applicant seeks are in the form of an injunction under Order 39 of the Civil Procedure Rules. The question that arises at this initial stage is whether because the application lacks form having been brought under the wrong or inappropriate

provisions of the law, whether the same should be struck out. The answer is no. Under Order 6 Rule 12 of the civil Procedure Rules, the law provides that "12 – No technical objection may be raised to any pleading on the ground of any want of form."

On the basis of that provision, I shall deal with the application on its own merit. Assuming therefore that this is an application under order 39 of the Civil Procedure Rules, has the applicant fulfilled the basic principles for the granting of an injunction? The nature of the injunction being sought in this application is a mandatory injunction where the applicant seeks to have an order of this court requiring the respondent/petitioner to put back the applicant onto the land and his dwelling until the objection proceedings are heard and determined. The questions that the court has to find answers to are whether the applicant has presented an arguable case that what the respondent/petitioner has done of evicting the applicant from the suit land is wrongful.

Two, the court has to determine whether as a result of the respondent'/petitioner's actions the applicant is likely to suffer damage between now and the time for the hearing of the objection proceedings and whether the damage that may be suffered by the applicant is such that it is irredressable by damages. The applicant having assumed that this was a simple matter only requiring the respondent/petitioner to maintain the "status quo" that existed prior to the filing of the petition for grant of letters of administration intestate and the objection thereto, did not supply the court with any authority to support his case. The court has therefore had to fish in deep waters to find relevant authorities and/or guidelines on the matter. The applicant has stated that the respondent/petitioner has omitted to include him as a beneficiary in the deceased's estate, a portion of which the applicant says devolves to him by reason of the death of the applicant's father, one John Mwenda who was a brother of the respondent/petitioner and that as a result of the eviction, the applicant has become homeless and that unless some relief is granted to him by this court, he will be completely dispossessed of his beneficial interest in the land since the respondent/petitioner has thrown him out of his (applicant's) home.

After considering the submissions made by both the applicant and the respondent, the court is satisfied that the applicant has presented an arguable case that what the defendant has done, namely evicting the applicant from both the home and the land of the deceased is wrongful. Although the respondent purports to deny that the applicant is a grandson of the deceased, he admits that indeed the applicant is a son of the respondent's brother, one John Mwenda who is now deceased. It is therefore arguable that both the applicant and the respondent are each entitled to a beneficial interest in the deceased's estate. It is therefore wrongful for the respondent to purport to deny the applicant that beneficial interest by evicting the applicant from the deceased's land. The court is satisfied that because of what the respondent ha done, there exist reasonable grounds for doubting the legality of the respondent's acts. The court is also satisfied that if the respondent is let free to continue with his illegal acts of evicting the applicant, the applicant is likely to suffer irreparable damage in the period between now and the time of the hearing and determination of this matter. The applicant has submitted that he has a family which has been thrown out of their home and if this situation is allowed to persist, a whole family is exposed to unnecessary suffering. It is therefore the duty of this court, during this intervening period to prevent further possible harm and prejudice to the applicant. The court also notes that in view of the uniqueness of land in the lives of the Kenyan people and the people of Meru in particular, the applicant is quite justified in having the apprehension that he has.

For the reasons that I have given above, the applicant's application succeeds. The respondent/petitioner is ordered to restore the applicant to his home on the deceased's land forthwith and to let him peaceably enjoy the same until the hearing and final determination of the objection. The court also orders the applicant to ensure that a date for the hearing of the objection is fixed without undue delay. Costs of this application shall be in the cause.

Dated and delivered at Meru this 21st day of June 2004 in the presence of Mr. Mwanzi h/b for Mr. Ondari advocate for the applicant.

RUTH N. SITATI

JUDGE

21.6.2004