



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.1358 OF 1998**

**IN THE MATTER OF THE ESTATE OF EDWARD KIARIE MUTHAMA
(DECEASED)**

APOLONIA WANJIKU KIARIE..... APPLICANT

VERSUS

JOHN MUTHAMA KIARIE..... 1ST RESPONDENT

MICHAEL KINYANJUI KIARIE..... 2ND RESPONDENT

DAVID KARANJA KIARIE..... 3RD RESPONDENT

SAMUEL MIRIE KIARIE 4TH RESPONDENT

RULING

By summons filed on 26.03.04 for a restraining order stated to have been taken out under sections 45 and 83 of the Law of Succession Act (Cap.160) and rule 49 of the Probate and Administration Rules, the applicant herein prayed for the following substantive Orders:-

1. That an order do issue restraining the respondents by themselves their agents or any one claiming through them or either of them from collecting the rental income from the premises known as L.R. DAGORETTI/WAITHAKA T 648 or in any way howsoever from interfering with the tenants therein.
2. That an order do issue restraining Michael Kinyanjui by himself or his agent or any one else claiming through him from in any manner howsoever dealing with the land parcel known as L.R. DAGORETTI/WAITHAKA T648 and more specifically from collecting in building material or in any way interfering with the building on the land parcel known as L.R. DAGORETTI/WAITHAKA T 648 or putting up any building on the said land parcel.
3. That an order do issue restraining John Muthama Kiarie by himself or his agent or any one else claiming through him from in any manner howsoever dealing with the land parcel known as L.R. DAGORETTI/WAITHAKA T648 and more specifically from collecting in building material or in any way interfering with the building on the land parcel known as L.R. DAGORETTI/WAITHAKA T 648 or putting up any building on the said land parcel.
4. That this court do appoint M/S Njoka & Njoka (K) Limited as the Estate Agents to collect the said rental income from land parcel known as L.R. DAGORETTI/WAITHAKA T 648 and bank the same in an Account in the names of the Administrators pending confirmation of grant and distribution of the deceased's estate.

5. That out of the rental income the court be pleased to order that a sum of Kshs.60,000/= be released monthly to the deceased's wife Appolonia Wanjiku Kiarie for her upkeep.

6. That the respondents pay the costs of this application.

The applicant's summons is based on grounds of fraud ascribed to the respondents and it (summons) is supported by the affidavit sworn by the applicant on 25.03.04.

It is the applicant's case that she is the surviving widow of the deceased and that the respondents are her sons. The rest of her complaint may be summarized as follows. On 22.09.98 the 1st respondent John Muthama, the 2nd respondent Michael Kinyanjui and the 3rd respondent David Karanja obtained letters of administration intestate of all the estate of the applicant's late husband Edward Kiarie Muthama the deceased herein. On 06.02.03 the applicant herein filed summons for revocation of the grant of 22.09.98 on grounds that the grant was obtained fraudulently by making a false statement or by concealment from the court of something material to the case. The fraud pleaded by the applicant revolved around non-disclosure by the said John Muthama, Michael Kinyanjui and David Karanja of the facts that the applicant was a surviving widow of the deceased and that, in addition to the persons cited by them, there were three other people also entitled to claim a share in the deceased's estate. Those three others were daughters of the deceased called Christine Wambui Kiarie, Lucy Nyathira Kiarie and Julia Kiarie but who were also excluded from the list of beneficiaries. The applicant persuaded the High Court of the existence of the fraud she pleaded and the grant issued to John Muthama, Michael Kinyanjui and David Karanja on 22.09.98 was revoked and a new grant issued in its place on 01.07.03 to Apolonia Wanjiru Kiarie (applicant herein) and John Muthama Kiarie (1st respondent herein).

The rest of the applicant's complaint is that on 22.10.03 she caused to be sent to her co-administrator John Muthama Kiarie (1st respondent herein) summons for confirmation of the grant of 01.07.03 plus the requisite consent to such confirmation through the said John Muthama Kiarie's advocates but John Muthama Kiarie declined to sign both documents, which were returned to the applicant without endorsement. This blocked the applicant's efforts to have the grant of 01.07.03 to her and John Muthama confirmed. In the meantime, adds the applicant, the respondents, led by John Muthama, have been interfering with the deceased's property land parcel L.R. DAGORETTI/WAITHAKA T648 in a manner tantamount to intermeddling with the deceased's estate before the mode of distribution of the said deceased's estate has been agreed upon or resolved, which is a pre-requisite to confirmation of the grant of 01,07.03, hence the present application for the restraining orders enumerated above.

On 12.05.04 the 1st respondent John Muthama Kiarie filed a replying affidavit to the applicant's summons for restraining orders. The first respondent said he had been authorized to file the replying affidavit by the 2nd respondent Michael Kinyanjui Kiarie and the 3rd respondent David Karanja Kiarie. The 1st respondent made no reference to the position taken by the 4th respondent Samuel Mirie Kiarie in the family dispute. In his replying affidavit the 1st respondent acknowledges that the applicant is his mother, which means she is the mother of all the respondents as deponed by her. The 1st respondent also acknowledges that on 01.07.03 the grant of 22.09.98 issued to him, Michael Kinyanjui and David Karanja was revoked by consent and a new one issued to the applicant and himself and that the new grant has not been confirmed because the family has been unable to agree on a suitable mode of distribution. According to the applicant, the deceased's property now under dispute is land parcel L.R. DAGORETTI/WAITHAKA T 648. The 1st respondent does not specifically deny the 1st applicants' averment but talks generally about the family not having agreed on a suitable mode of distribution of the deceased's estate. Having so said, the 1st respondent proceeds to attach a document dated 25.11.98 ("DKG 2") described by him as an agreement by members of the family on how shops at Muthama Shopping Centre were to be distributed between David Karanja, Samuel Mirie, John Muthama, Michael Kinyanjui and Nicholas Ndungu. The document concludes as follows:

"All other premises (Njeri Exotic café, Executive Beauty Links and other houses behind the shops are mother's – Apolonia Wanjiku Kiarie."

The applicant denies having been a party to the mode of distribution of the deceased's property alluded

to in the document described by the 1st respondent as a family agreement of 25.11.98, pointing out that she had no capacity to enter into such agreement before confirmation of the subject grant. She could have added that she was not even a party to the grant of 22.09.98, while the new grant of 01.07.03 to which she is a party had not come into being. She also observes, correctly, that the premises listed in the alleged family agreement has not been linked to the land parcel under dispute, i.e. **L.R. DAGORETTI/WAITHAKA T648**.

In his same replying affidavit of 11.05.04, the 1st respondent brings in another property **DAGORETTI/WAITHAKA/1081** which he says also belongs to the deceased and that it has been fraudulently transferred to third parties. The applicant's quick rejoinder is that this property has no relevance to the family dispute over land parcel **L.R. DAGORETTI/WAITHAKA T648**. She says, firstly, that the deceased gave away **DAGORETTI/WAITHAKA/1081** during his lifetime and, secondly, that the issue of fraud or no fraud or relating to the said plot is the subject of High Court Civil Case No.37 of 2003 between the same parties and it cannot be mixed up with the family dispute over **DAGORETTI/WAITHAKA T 648**.

The applicant is said to be 73 years old and ailing. Annexures to her summons for restraining orders include documents from Mater Misericordiae Hospital, Nairobi showing that she was admitted there on 25.01.99 and discharged on 04.02.99. The Clinical Summary on her states that she had high blood sugar and hypertension and the hospital recommended that she should continue attending Diabetic Clinic.

The applicant was represented in this application by Mrs. Ndungu while the respondents were represented by Mr. Kamango. Both counsel put up a valiant fight for their respective clients.

It is the applicant's case that as the deceased's wife, she assisted the deceased in the development of **L.R. DAGORETTI/WAITHAKA T 648** and she was dependent on the deceased. She deposes in her affidavit of 25.03.04 that she is now 73 years old and suffering from diabetes and hypertension and is on drugs costing approximately Kshs.30,000/= per month. This testimony is in line with the medical evidence referred to earlier from Mater Hospital, Nairobi. She adds that land parcel **L.R.DAGORETTI/WAITHAKA T 648** fetches rental income of Kshs.160,750/= per month which the respondents have been collecting and putting to their own use to the exclusion of other family members including herself. While this may have been somewhat excusable before the grant of 22.09.98 was revoked, the practice totally lacked legality after revocation of that grant on 01.07.03. The applicant complains that in October, 2003, Michael Kinyanjui Kiarie (2nd respondent) started collecting building material on the subject plot. And she says in November, 2003, John Muthama Kiarie commenced construction of two self-contained units on the subject plot despite the fact that the grant of 01.07.03 has not been confirmed or the beneficiaries shares determined and distributed. The applicant adds that efforts to stop Michael Kinyanjui Kiarie and John Muthama Kiarie from interfering with land parcel **L.R. DAGORETTI/WAITHAKA T 648** have not only gone unheeded but the two respondents have also threatened the applicant (their elderly mother) with physical injury if she dares to stop them.

To crown it all, the applicant has deposed that the respondents have jointly and severally refused the agents she assigned the duty of collecting rent since her appointment as co-administrator of the deceased's estate and instead the said respondents continue collecting rent for the subject premises and threatening the applicant with dire consequences if they (respondents) are stopped from collecting rent. This chaotic situation must be a threat to peace and calls for the court's intervention. The respondents have basically denied being the ones responsible for the impasse in concluding the mode of distributing the deceased's estate and lay the blame at the applicant's doorstep. They say the applicant enjoys income from the premises ascribed to her in the document described by John Muthama Kiarie as the family agreement of 25.11.98, which the applicant denies.

Regarding the applicant's allusion to being diabetic and hypertensive, respondents' counsel submitted that the medical documents from Mater Hospital, Nairobi are old, being of 1999, and essentially urged that the court ignores her complaint of being diabetic and hypertensive and requiring to purchase expensive drugs for those ailments regularly.

I have given anxious consideration to the lengthy arguments by counsel for both parties. The applicant holds the grant of letters of administration intestate of 01.07.03 jointly with the 1st respondent John Muthama. Issuance of this grant followed revocation by consent of the parties of the grant of 22.09.98. John Muthama Kiarie seems to be in league with the other respondents in blocking the applicant's efforts to have the grant confirmed.

There is disagreement in the family on the mode of distributing land parcel L.R. DAGORETTI/WAITHAKA T 648. Various unhelpful accusations and counteraccusations have been traded between the parties and no mutual agreement seems to be in sight. The Court is forced to step in to stop the deceased's property L.R. DAGORETTI/WAITHAKA T 648 from going to waste, pending confirmation of the grant of 01.07.03. While the issue of confirmation of the grant remains unresolved, the subject property, i.e. L.R. DAGORETTI/WAITHAKA T 648 should be protected and preserved.

The other property, i.e. DAGORETTI/WAITHAKA/1081 which the 1st respondent attempted to drag into the dispute over L.R. DAGORETTI/WAITHAKA T648 must be kept out of the dispute over the latter property as the former is sub-judice, being the subject matter of High Court Civil Case No.37 of 2003 between the same parties.

Having given due and anxious consideration to the competing claims between the applicant and the respondents, I have come to the conclusion that the applicant's claims are the more likely to represent the truth and I believe and accept her claims.

Accordingly, I hereby grant the restraining orders as sought by the applicant at prayers

1 – 5 in the first paragraph hereinabove.

Costs in the cause.

Orders accordingly.

Delivered at Nairobi this 29th day of November, 2004.

B.P. KUBO

JUDGE