

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO.83 OF 1994

MBUGUA WANGONYO KURIA - (DECEASED)

R U L I N G

Let me start by appending my apology for the delay in delivering this ruling. The delay was unprecedented and unavoidable and I do hope the parties will understand.

This Succession Cause was filed by the Petitioners on the March 3rd, 1994. Thereafter a caveat was filed by the Objector on May 30th, 1995 and on October 7th, 1997 she filed a Petition byway of Cross-Petition for a grant. Directions were taken by the parties on March,3rd 1999 to the effect that parties would give viva voce evidence. The matter is still pending and it is in those circumstances that the petitioners filed this application under certificate of urgency on 13th October, 2003, seeking in pertinent:-

1. That the Court be pleased to issue a temporary Injunction restraining the Objector/Respondent from intermeddling with the free property of the Estate of the deceased pending the hearing of the cause.

2. Costs of the application .

Grounds for the application are given on the face of the application and in the supporting affidavit and submissions by the petitioner. In brief they are that the Objector had constructed a semi-permanent house and proceeded to till parcel of land known as Milangine Scheme Plot No.320 Dundori Nyandarua. Further that the estate stands to suffer loss and damage due to the said intermeddling by the objector and it may go to waste unless an injunction is issued.

The 1st Petitioner argued the application on his own behalf and on behalf of the 2nd petitioner. The application was brought under Section 45(1) and (2) of the Law of Succession and Order XXXIX Rule (1)(2) and (3) of the Civil Procedure Rules.

The Objector through his advocate and by way of replying affidavit has vehemently opposed the application. The very first ground given is that the application is incompetent since under Section 45 of the Law of Succession Act, intermeddling is a criminal act which ought to have been reported to the police. Second ground cited is that in essence the application sought an eviction which could not be granted at an interlocutory stage. It was further argued that the Objector was living in the land in issue even before the deceased herein died. That since 1994 when the cause was filed, the application to evict her was only filed in 2003.

As correctly submitted by Respondent's advocate, this cause is still pending. I do concede that no permanent orders can be issued at this stage of the case. The applicant must show that the Respondent has intermeddled with the estate of the deceased. The applicant has failed to satisfy this court that there has been any intermeddling. It is the word of the applicant that the land in issue belonged to him while the word of the Respondent is two-fold. First that she has always lived on the land even before the deceased died. Secondly that it was registered in the name of the deceased, who is her father and that she too was a beneficiary. Given the two versions of the story and since none annexed any certificate of registration to the land, it is difficult to rule either way. What is clear however is that the applicant has not anywhere in his affidavits denied that the Respondent was living on the land even before the deceased's death.

The other issues raised by the applicant in his affidavit relate to issues which can only be determined after the viva voce hearing of this case. This includes the issue whether or not the Objector is entitled to

inherit any part of the estate of the deceased. Since this cause is still at its interlocutory stage and since prayers sought are permanent in nature I do not find it serves the justice of the case to grant them. For reasons given herein, I dismiss the application with orders that each party do bear its own costs of the application.

I give a further order to the Registry to give a hearing date for this cause on priority basis. Orders accordingly.

Dated this 11th day of February, 2004.

JESSIE LESIIT

JUDGE