



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL 32 OF 2002
(From the Original Succession Cause No. 102 of 1999 of

Senior Resident Magistrate's Court at Githunguri : S.B.A. Mukabwa)

MICHEAL NGIGE NJOROGE APPELLANT

VERSUS

KARIUKI WAIREGI RESPONDENT

R U L I N G

In this Chamber Summons dated 11th September 2001 the Applicant, Michael Ngigi Njoroge, in the first prayer, wants a stay of execution of the decree issued by the Senior Resident Magistrate's Court at Githunguri in that court's Succession Cause No. 102 of 1999, pending the hearing and final determination of the appeal in this file being original Civil Appeal No. 501 of 2001 and now Civil Appeal No. 32 of 2002

. In prayer number two the Applicant wants a restraining order against the Respondent, Kariuki Wairegi, his servants and or agents more particularly members of Global Gospel center Church, from trespassing, alienating, wasting, transferring and or interfering with all that parcel of land known as Githunguri/Kanjai/1719 pending the hearing and final determination of the appeal.

The Chamber Summons is filed in an appeal in this court challenging the decision of Senior Resident magistrate, Mr. S.N.A. Mukabwa, in Succession Cause No. 102 of 1999 Githunguri Court aforesaid. The Chamber Summons is stated filed under Order XLI Rule 4 (1) of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. Knowing that those provisions are not among the provisions of the Civil Procedure Act and Rules allowed by rule 63 or rule 41 and perhaps rule 73 of the Probate and Administration Rules, to apply in proceedings under the Law of Succession Act, I was a little apprehensive at the beginning whether the chamber summons is entertainable. Later, however, it settled upon my mind that the chamber summons is entertainable because from the law as it stands to-day, appeals from Kadhi's courts and magistrate's courts to the High Court and appeals from the High Court to the Court of Appeal provide another occasion, apart from rules 63, 41 and perhaps 73 of the Probate and Administration Rules, when provisions of the Civil Procedure Act and Rules apply in proceedings under the Law of Succession Act.

Section 50 subsections (1) and (2) provide for such appeals but there are no enabling rules under the Probate and Administration Rules. It means that relevant provisions of the Civil Procedure Act and Rules come in to fill the gap.

I have said this chamber summons is filed in an appeal from a magistrate's court to the High Court.

Being in an appeal, it is maintainable on the basis of Order XLI as the Law of Succession Act and Rules have no provisions for a stay of execution in such an appeal.

On the other hand, section 3 A of the Civil Procedure Act is not applicable in this chamber summons. It is because rule 73 of the Probate and Administration Rules is handy applying in the matter and following the restriction in rule 63 of the Probate and Administration Rules, section 3 A of the Civil Procedure Act is not applicable in proceedings under the Law of Succession Act.

From the foregoing therefore, I hold the view that while the first prayer in the chamber summons is maintainable, the second prayer is not maintainable for the following reasons:

Firstly, a restraining order is normally

made under Order XXXIX

of the Civil Procedure Rules.

Order XXXIX is excluded from Rule 63 of the Probate and Administration Rules. The court should not therefore go round that clear intention of the Legislature to use Rule 73 of the probate and Administration Rules or any other provisions of the law outside the provisions of the Law of Succession Act to grant an injunction or restraining order.

Secondly,

Global Gospel Centre Church having not been made a party to this chamber summons, should not be restrained by a court order in that www.kenyalawreports.or.ke 5 church's absence and without having been given the opportunity to be heard.

Thirdly,

there are two co-Administrators, namely, Kariuki Wairegi and Eliud Kiburi Wairgei. The restraining order is sought against Kariuki Wairegi only. What can he lawfully do alone among the activities to be stopped?

Moreover neither Kariuki Wairegi nor the the Global Gospel Centre Church is registered proprietor of parcel of land Githunguri/Kanjai/1719 still in the name of the deceased. Neither of them can therefore lawfully alienate or transfer that parcel of land.

On the whole therefore, this chamber summons is hereby granted in terms of the first prayer, the appeal case number to be used being 32 of 2002.

The second prayer is dismissed.

Costs of this chamber summons be in the cause.

Dated this 27th Day of January 2003.

J.M. KHAMONI

JUDGE

Present:

Mr. Kamau for Mr. Mbigi for the Respondent.

Mrs. Kinuthia for the Applicant.

