



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1372 OF 2013

IN THE MATTER OF THE ESTATE OF JULIA WAITHIRA KARATU (DECEASED)

MARGRET NJERI KAMAU1ST APPLICANT/OBJECTOR

MARY WANGARI KIMEMIA.....2ND APPLICANT/OBJECTOR

VERSUS

JOSEPH NG'ANG'A MURURI.....RESPONDENT/ADMINISTRATOR

RULING

1. Before this Court for determination is the Notice of Motion Application dated **7th July 2021** by which the Applicant namely **MARY NJERI KAMAU** and **MARY WANGARI KIMEMIA** seek the following orders:-

“1. Spent.

2. Spent

3. That pending the hearing and determination of the suit herein and or the affidavit of protest in this suit the respondent/administrator his associates, servants, agents, employees and or anyone acting or claiming under him to be restrained by an order of this Honourable court from transferring, leasing, subdividing, dealing, entering, selling, charging, destroying property and or crops, committing any acts of waste, cultivating or in any manner dealing with Loc.2/Kangari/2886.

4. Spent

5. that any transaction entered into by the administrator/respondent herein with third parties after the demise of the deceased herein pertaining to land parcel known as Loc.2/Kangari/2886 be rescinded, stayed, revoked and or annulled pending the hearing and determination of the suit herein and or the affidavit of protest.

6. That any such other orders as this Honourable court may find necessary to preserve the suit property.

7. That the Officer Commanding the Station Kigumo Police Station do enforce the orders granted herein by the Honourble Court.

8. That the costs be provided for.

2. The application was premised upon **section 47, Law of Succession Act, Rule 73 Probate and Administration Rules** and all other enabling provisions of the law and was supported by the Affidavit of even date as well as the Further Supporting Affidavit dated **3rd September 2021** sworn by the **2nd** Applicant.

3. The Respondent/Administrator **JOSEPH NG'ANG'A MURURI** opposed the Application through the Grounds of opposition dated **3rd August 2021** and the Replying Affidavit of even date sworn by the Respondent. The Application was canvassed by way of written

submissions. The Applicants filed their written submissions dated **27th September 2021** while the Respondent relied upon his written submissions dated **29th September 2021**.

BACKGROUND

4. This Succession Cause revolves around the estate of **Julia Waithira Karatu** (hereinafter 'the **Deceased**') who died intestate on **12th May 1999**. At the time of her death, the Deceased was unmarried and had no children.

5. Vide Succession Cause No. **3098 of 2007**, the Applicants herein presented themselves as cousins to the Deceased. They relied on a letter dated **17th May 2007** written by one **Ephantus M. Gichimu, Ag. Chief of Kangari Location** in which letter the Applicants were described as the '**rightful heirs**' to succeed the Deceased. On the basis of this letter the Applicants on **30th July 2012** petitioned the Court for Grant of Letters of Administration to the estate of the Deceased. A grant was duly issued to the two on **6th March 2008** which Grant was confirmed on **30th July 2012**.

6. Upon being issued with the Confirmed Grant the Applicants agreed that the sole asset of the Deceased's estate being the parcel of land known as **L.R. Loc. 2/Kangari/2886** would be divided into **two** whereby **Mary Wangari Kimemia** (1st Applicant) get **0.2 hectares**. The said Agreement on the mode of distribution of the estate was effected and the sub-divisions were carried out.

7. On **30th May 2016** the Respondent **Joseph Ng'ang'a** who was a nephew to the Deceased filed a summons seeking the revocation of the Grant which had been issued to the Applicants. By her Ruling dated **11th June 2020** **Hon Lady Justice Ali-Aroni** revoked the Grant that had earlier been issued to the Applicants and directed the **Land Registrar Murang'a** to cancel subdivisions **Loc. 2/Kangari/4784** and **Loc 2/Kangari/4785** and to restore the original Title being **Loc. 2/Kangari 2886** to the name of the original owner **Julia Waithira Karatu** (the Deceased).

8. For clarity the orders made by **Hon. Ali-Aroni** in her Ruling of **11th June 2020** were as follows:-

1. **THAT the Grant issued on 6th March 2018 and confirmed on 30th July 2012 be and is hereby revoked.**

2. **THAT the Registrar Murang'a will cancel/subdivisions Loc.2/Kangari/4784 and Loc.2/Kangari/4785 and restore the original title Loc. 2/Kangari/2886 to the name of the original owner Julia Waithira Karatu deceased pending further order of the court.**

3. **THAT Joseph Ng'ang'a Mururi as appointed in Succession Cause No. 1372 of 2013 will remain the administrator of the estate of Julia Waithira Kiratu.**

4. **Costs to the Applicant.**

9. The Respondent **Joseph Ng'ang'a Mururi** then petitioned for the Grant of Letters of Administration to the estate of the Deceased vide this cause being **Succession Cause No. 1372 of 2013**. The Respondent was appointed as Administrator of the Deceased's estate in **Succession Cause No. 1372 of 2013**.

10. The Respondent thereafter filed a Summons dated **21st July 2020** seeking to have the Grant which had been issued to himself on **30th July 2013** confirmed. The 1st Applicant filed an undated Affidavit of Protest claiming to be a Creditor to the estate of the Deceased. The Applicants aver that the Respondent has twice invaded the suit land with hired gang uprooted their tea and destroyed property all in attempt to evict them therefrom.

11. The Applicants then filed the application dated **10th December 2020** seeking interim interlocutory orders to restrain the Respondent from interfering with their possession, use and occupation of the suit land pending the hearing and determination of the suit.

12. The Application of **10th December 2020** was heard by this court and a Ruling was delivered on **11th June 2021**. In said Ruling, the court found that the Applicants had failed to establish a *prima facie* case and declined to grant the interim interlocutory orders sought. The Applicants then filed the present application seeking interim orders to restrain any dealings with the suit land pending the hearing and determination of their Protest.

13. As stated earlier the application was opposed by the Respondent who claimed that the Applicants were nothing more than vexatious litigants. That the present application is '**Res judicata**' given the court's Ruling on the Notice of Motion dated **10th December 2020**. That to date no appeal has been preferred against the Ruling of **11th June 2021**.

ANALYSIS AND DETERMINATION

14. I have carefully considered this application, the Affidavits in support, the Replies filed by the Respondent as well as the written submissions filed by both parties. The two issues which arise for determination are-

(i) **Whether the instant application is 'Res Judicata'**

(ii) Whether the prayers sought are merited

(i) Res Judicata

15. The Respondent submits that the present application is a non-starter as the issues raised therein are ‘**Res Judicata**’ having been determined by the this court in its Ruling of **11th June 2021**. The Applicants counter that their application is **not Res Judicata** as the issues raised therein were not dealt with and/or determined by the court in its previous Ruling.

16. The doctrine of *res judicata* is set out in **Section 7 of the Civil Procedure Act** which provides:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

17 Therefore in order to satisfy the principle of *Res Judicata* it must be shown that:-

i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.

ii) The issued in dispute was directly or substantially in issue in the former suit.

iii) That a court with competent jurisdiction had heard the matter and finally determined it.

18. I have carefully perused the Notice of Motion dated **10th December 2020** as well as the Ruling which was delivered on **11th June 2021**. In the Notice of Motion of **10th December 2020** the Applicants made *inter alia* the following prayers-

“THAT pending the hearing and determination of this suit, the Respondent, his associates, servants, agents and or anyone acting under him be restrained by an order of this court from uprooting tea bushes, trees and or destroying the same or interfering with the Applicants peaceful possession and occupation of Land Title Loc. 2/Kangari/2886 by uprooting plants thereon and or putting up boundaries and or demarcating the same whatsoever and or framing up malicious complaints and summons through the police against the Applicants/Objectors”. (own emphasis).

19. In other words the Applicants were seeking interim orders to **restrain** the Respondent from uprooting tea bushes, trees etc. and in any other way interfering with their peaceful possession of **Title Loc 2/Kangari/2886** (the ‘**suit land**’).

20. In declining to grant said orders the court found and held that the Applicants had failed to prove their entitlement to the suit land as beneficiaries of the estate or as creditors to the same.

21. However in the present application the Applicants seek orders to prevent any sale, leasing, charging and/or transfer of the suit land pending the hearing and determination of their claim as ‘**purchasers**’ of said land. Therefore, the present application is not identical to the application of **10th December 2020**. It is wider in scope and is based upon the claim of the Applicants to the suit land as “**purchasers**” of the same.

22. The court in its Ruling of **11th June 2021** **did not** consider and/or reach any determination regarding the claim of the Applicants as purchasers of the land. Accordingly, I find that the principle of *Res Judicata* is not applicable as the two applications raise different issues.

(ii) Merit of the Application

23. The Applicants submit that their interest in the property belonging to estate is that of ‘**purchasers**’. They have sought interim interlocutory orders to prevent the Administrator/Respondent from selling, leasing, charging or in any manner whatsoever disposing of the land in question until the suit is heard.

24. The principles upon which a temporary injunction may be granted were set out in the celebrated case of **Giella – vs Cassman Brown & Co [1973] EA** as follows:-

(i) The Applicant must establish a *prima facie* case with a probability of success.

(ii) The Applicant must show that he is likely to suffer irreparable loss or damage if the relief being sought is not granted.

(iii) In case of any doubt the balance of convenience should tilt in favour of the Applicant.

25. The definition of a ‘*prima facie*’ case was given in the case of **MRAO LTD – VS – FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003 eKLR]** as follows:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. The Applicants are not amongst the survivors of the Deceased nor are they beneficiaries to the estate of the Deceased. The Applicants claim to the suit land which forms part of the estate is as *bona fide* purchasers of the same from the Deceased.

27. The Applicants submit that if the interim orders sought are not granted then they stand to suffer irreparable loss. They state that they have all along been in occupation of the suit land which is their sole source of livelihood.

28. The Respondent in his written submissions has challenged the Applicants’ claim that they purchased the suit land from the Deceased and has sought to controvert documents annexed as proof of sale and payment. However, there are issues which cannot be determined at this interlocutory stage. There are issues which can only be determined at a full hearing of the suit when parties will be at liberty to call evidence and to cross-examine witnesses.

29. It is clear that the dispute between the parties herein revolves around ownership of the suit land. This is a Family Court whose primary jurisdiction is probate of the distribution of an estate amongst the genuine heirs.

30. As stated earlier the Applicants are not beneficiaries to the estate of the Deceased. Pursuant to **Article 162** of the **Constitution of Kenya 2010**, their claim ought properly to be ventilated in the **Environment and Land Court** which court has the sole mandate to determine disputes relating to the ownership, use and occupation of land.

31. **Section 13(2) (d)** of the **Environment and Land Court Act** provides that the **Environment and Land Court** shall have powers to hear and determine disputes.

“(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and

(e) any other dispute relating to Environment and Land”.

32. As things stand the Applicants have not presented to this court any evidence of a decree from the **ELC Court** confirming their claim to ownership of the suit land. By virtue of a Ruling delivered on **11th June 2020**, **Hon Lady Justice Ali-Aroni** directed the **Land Registrar Murang’a** to restore the original title to **LR. Loc 2/Kangari/2886** to the name of the original owner **Julia Waithira Karatu** (the Deceased herein). That Ruling has not been set aside or reviewed neither have the Applicants appealed against the said Ruling.

33. Accordingly, the suit land belongs to the Deceased and is subject to distribution amongst the genuine beneficiaries to the estate. As such, I find that the Applicants have not established a *prima facie* case as required in the **Giella case**.

34. In **RE ESTATE OF STONE KATHULI MUIINDE (Deceased)[2016] eKLR Hon Justice William Musyoka** observed as follows: -

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

35. The Applicants having not proved their claim to the suit land in the requisite forum, i.e., the **ELC court** are not entitled to the temporary orders they now seek. By **prayer (5)** of the notice of motion dated **7th July 2021** the Applicants have sought to have all transactions conducted by the Respondent in respect of the suit land “rescinded stayed, revoked and/or annulled” pending the hearing of the suit. This prayer is premature as the applicants are yet to prove their claim as purchasers of the suit land. Accordingly, I decline to grant **prayer (5)** of the application.

36. Finally, I find no merit in the present application. The same is dismissed in its entirety. Each party to bear its own costs.

Dated in **Nairobi** this **11th** day of **February 2022**.

.....

MAUREEN A. ODERO

JUDGE