



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

FAMILY CIVIL APPEAL NO. 2 OF 2020

MNW.....APPELLANT

VERSUS

HNW.....RESPONDENT

[Appeal from the order of E. M. Nyagah, Principal Magistrate in Murang'a PMSC No. 408 of 2019 delivered on 25th February 2020]

RULING

1. This interlocutory appeal turns on one issue: Whether the learned magistrate erred by injuncting the appellant from entering into the deceased's properties known as Loc. 2/Mairi/*** and Plot No. ** and a bank account held at Unaitas Sacco (hereafter *the suit properties*)
2. The brief background is that the deceased, SNM, died intestate on 19th May 2019. He was married to the respondent but they separated in 1990 or thereabouts. The appellant claimed that she started cohabiting with the deceased from the year 2001; and, that they lived on the suit properties until his demise.
3. The respondent petitioned for a grant in the lower court. The appellant contested it through an objection dated 2nd October 2019. However, she subsequently withdrew her objection. A grant was thus issued to the respondent by the lower court on 23rd June 2020.
4. Earlier on 27th November 2019, the lower court granted a temporary injunction restraining the appellant from intermeddling with the estate. After hearing both parties, the order was confirmed by the lower court on 25th February 2020 and is now the subject of this appeal.
5. Pending the hearing of the appeal, the appellant has presented a Notice of Motion dated 28th February 2020 to discharge a part of the order. The appellant's case is that the order restraining her from *entering* the two pieces of land amounts to an *eviction* and runs counter to the interests of justice. Those matters are detailed at length in her deposition sworn on even date.
6. The application is contested by the respondent through a replying affidavit sworn on 3rd July 2020. The retort is that the appellant was not married to the deceased; and, that it is a misnomer to claim she has a matrimonial home on the suit properties. The respondent avers that she is the only lawful widow by virtue of the certificate of marriage marked *HWM4*.
7. The appellant on the other hand stated that the respondent and the deceased separated way back in 1990. The respondent concedes that fact. Her position however is that the appellant is a contemnor who is intermeddling in the estate. The impugned conduct includes cutting down trees; and, picking and selling tea whose proceeds are paid through the Sacco account above. Although the appellant claims to have planted the tea bushes and trees, the respondent denies it.
8. In the end, the respondent submitted that the motion is belated, lacks merit and is an abuse of the court process.
9. On 6th July 2020 I heard brief submissions from counsel for both parties.
10. This is an interlocutory appeal. It would thus be prejudicial to comment on the merits of the succession cause pending in the lower court. That will be the true province of the trial court. See *Lifico Trust Registered v Patel* [1985] KLR 538.
11. But I readily find that the respondent had priority to apply for a grant by virtue of her marriage to the deceased. It is thus not surprising that the respondent withdrew her objection. However, the summons for confirmation of grant have not been heard or a final order on distribution made. Whether or not the appellant will be entitled to a share of the estate will be a matter of evidence in the lower court.
12. But it is not lost to me that the respondent separated from the deceased in 1990 or thereabouts. Doubt is removed by a copy of a judgment in *Nairobi HCCC 23 of 2002 (O.S)* produced by the appellant in the proceedings in the lower court (annexture *MWN3*). The

respondent had sought for division of matrimonial properties between her and the deceased. The learned judge, *Rawal J*, as she then was, dismissed the summons except for Plot/Shop No. 11 at Mairi which the court found belonged to both parties in equal shares.

13. It is not seriously contested that the deceased and the appellant cohabited from 2001, though the respondent contends that the appellant “*was employed in the neighbourhood as a casual labourer to pick tea*”. But from the materials before me, it appears that the appellant resided on the suit property with the deceased for about 18 years. They jointly held an account at the Sacco. She deposes that they have children who live on the property. I say that very carefully and without making a finding.

14. That explains why the respondent was constrained to seek an order in *Kigumo PMCC 118 of 2019* to be allowed to participate in the funeral of the deceased on the suit land. The respondent also concedes at paragraph 5 of her replying affidavit in this court that “*neither before or [sic] since the issuance of the grant have I evicted the applicant as she puts it in the application*”.

15. I thus find that it will defeat the ends of justice to prevent the appellant from entering into the two suit properties until the succession cause in the lower court is determined. The respondent does not seriously contest that the account at the Sacco was jointly held by the appellant and the deceased. But her present Notice of Motion does not seek any relief on the account. The less I say, the better.

16. The upshot is that the appellant’s notice of motion succeeds. I make the following final orders-

a) That pending the hearing and determination of the appeal, that *part* of the order of the lower court dated 25th February 2020 restraining the appellant from *entering* into the deceased’s properties known as Loc. 2/Mairi/** and Plot No.197/** Mairi is hereby *stayed*.

b) That for the avoidance of doubt, the succession cause in the lower court shall proceed for hearing and determination.

c) That costs shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 21st day of July 2020

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:-

Mr. Mwaniki for the appellant instructed by Mwaniki Warima & Company Advocates.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.