



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2283 OF 2006

IN THE MATTER OF THE ESTATE OF PRISCILLA WAMBUI MESHACK NGÁNGÁ (DECEASED)

THOMAS MBUTHIA KIHARA.....1ST PETITIONER

FAITH WANGUI MBUTHIA.....2ND PETITIONER

VERSUS

SAMUEL THATA NGÁNGÁ.....1ST OBJECTOR

ROSE MUKUHI NGÁNGÁ.....2ND OBJECTOR

MARY WANJIRU MUIGAI.....3RD OBJECTOR

GEORGE NDICHU NJENGA.....4TH OBJECTOR

AND

DAMARIS EVA WANGUI

BERNARD MIGWI

JESSE RAYMOND NJENGA.....INTERESTED PARTIES/BENEFICIARIES

RULING

1. By way of summons dated 20th May, 2020 filed on even date under Certificate of Urgency and brought under **section 47 and 76** of the **Law of Succession Act** and **rule 44(1)** of the **Probate and Administration Rules** the Objector/Applicant George Muigai Ngángá, seeks for orders that the Petitioners be restrained from evicting, harassing, and/or maintaining L.R. No. Kiambaa/Thimbigua/2630, 2632 and 3115 currently being cultivated and maintained by himself. He has filed the application in place of the 3rd Objector Mary Wanjiru Muigai who has since died.

2. The application is supported by an affidavit sworn by the Objector/Applicant on 20th May, 2020. It is premised on the ground that the court had on 30th August, 2017 directed that the properties of the estate shall not be sold or otherwise alienated until the dispute is heard and determined but that the Petitioners have nonetheless intruded on the property claiming to be owners thereof.

3. The Objector/Applicant deposed that he had already planted maize and beans crops on the properties and employed workers to tend to the crops. He asserted that in May 2020, despite the fact that the cause is yet to be determined, the Petitioners chased his workers from the properties claiming to be the owners thereof. He reported the matter to the area chief and the district officer who advised him to obtain a further court order stating that the earlier orders were unclear to them.

4. It was the contention of the Objector/Applicant that the orders sought in the instant application are to ensure a peaceful co-existence between the parties in the intervening period pending the finalization of the dispute herein. He accused the Petitioners of being selfish, insensitive and unreasonable and asserted that contrary to their actions, he had not on his part interfered with the Petitioners' usage or occupation of the other properties of the estate.

5. In response to the application, Thomas M. Kihara, the 1st Petitioner swore an affidavit on 25th June, 2020 on behalf of himself and his co-

Petitioner Faith Wangui Mbuthia. In it, he deposed that the application is pegged on misinformation and is an abuse of court process as it seeks the court to sanction the Applicant's admitted intermeddling in the deceased's properties. He urged that the injunctive reliefs sought in the application are fashioned to disinherit and disenfranchise the Petitioners and the other beneficiaries of the deceased's estate.

6. Mr. Kihara contended that at the time of filing this cause, the properties comprising the deceased's estate were registered in the deceased's name. Further that at the date of her demise, the deceased owned and exclusively occupied the subject properties. He asserted that the deceased died testate leaving a written will dated 6th March, 2006 in which she bequeathed her properties to the beneficiaries denoted thereunder, none of whom include the Objector/Applicant herein. That to allow the application as prayed would therefore be tantamount to an interlocutory determination of the issues pending hereto with the effect of disinheriting the deceased's beneficiaries and disregarding the deceased's wishes.

7. According to Mr. Kihara, at no time during and after the deceased's lifetime had the Objector lived on, cultivated or otherwise been in occupation of the deceased's properties. He asserted that the court had on 30th August, 2017 directed that the status quo be maintained but that the Objector had nonetheless encroached on the properties. He urged the court to find that the Objector, by admitting to cultivating crops thereon, is in contempt. Further that the application is an abuse of court process as it seeks to enforce the Objector's intermeddling in the deceased's estate.

8. On 29th July, 2020, the court directed that the application be disposed of by way of written submissions. Learned Counsel Mr. Nduati Muchangi filed written submissions dated 24th September, 2020 on behalf of the Objector/Applicant in which he asked the court to allow the application as prayed in the interest of justice.

9. Mr. Nduati asserted that the earlier grant issued in this matter was revoked and set aside pursuant to a consent order recorded in Succession Appeal No. 111 of 2014. That the matter is therefore due for a fresh hearing with both the Petitioners and Objectors staking a claim in the deceased's estate as dependants/beneficiaries with equal entitlement.

10. It was Mr. Nduati's submission that whereas the Petitioners purport to have in their possession a will in their favour, and on which they have based their arguments, unless and until the matter is heard and determined, the existence and the validity of the said will cannot be ascertained. That as such, none of the parties can purport to have a greater right to the estate.

11. Mr. Nduati submitted that the instant application was necessitated by the Petitioners' act of harassing the Objector through violent confrontations and forcible evictions. This, he stated, was so even though the Objector had been in continued possession of the subject properties and was cultivating the land thereon even before the deceased's demise.

12. It was Mr. Nduati's submission that in terms of **section 29 of the Law of Succession Act**, the Petitioners rank lower in priority to the Objector. That the Objector is the deceased's brother while the Petitioners are the deceased's niece and nephew. He asserted that in the current stalemate, the court should first determine whether the deceased died testate or intestate before any of the parties can lay claim to the properties comprising the deceased's estate. That it therefore behoves the parties herein to co-exist in peace as they await the determination of the matter.

13. In Mr. Nduati's view, during the pendency of a matter in which there are competing interests, as in this Cause, all the court can do is preserve the status quo. He contended that while there is an order of 30th August, 2017, the order did not stop the Objector from cultivating the subject properties but rather had the effect of restraining the Petitioners/Respondents from selling or alienating the estate properties pending the determination of this Cause. Counsel urged that by denying the Objector access, the Petitioners are in effect assuming ownership rights over the subject properties, an act which amounts to alienation and is in contempt of the court order.

14. To buttress the Objector's case, Mr. Nduati Muchangi cited the decisions in **Succession Cause No. 103 of 2017 In the matter of the estate of Mathew Mulavu Musyimi (deceased)** and **Succession Cause No. 21 of 2013 (Kerugoya) In the matter of the estate of Kamugere Rubari Ileri (deceased)**.

15. The Objector's case was supported by the Interested Parties who filed written submissions dated 31st August, 2020 through learned Counsel Mr. Kahuthu.

16. It was Mr. Nduati's submission that the orders sought are necessary to issue in this cause as the Petitioners, through their previous and current actions of intermeddling, are wasting the deceased's estate. Further that it was curious that the Petitioners only started interfering with the estate after the death of the 4th Objector, who died in 2019 in a hit and run accident. The 4th Objector did not have any children.

17. In opposition, learned Counsel Mr. Ndirangu filed written submissions dated 25th September, 2020 on behalf of the Petitioners/Respondents in which he asked the court to dismiss the application with costs.

18. Mr. Ndirangu submitted that the Petitioners/Respondents are the Personal representatives and executors of the deceased's estate having taken out letters of Grant of Probate of Written Will dated 5th September, 2008. Counsel asserted that contrary to the Objector's claims, the Grant of Probate has not been revoked. That what is pending hearing and determination by the court is the proof of the deceased's written will dated 6th March, 2006.

19. Mr. Ndirangu asked the court to apply the test in **Giella vs. Cassman Brown [1973] EA 358** in determining whether the injunctive relief sought should issue against the Petitioners. He urged that in so doing, the court ought also to examine the merit of the Objector's case together with any evidence adduced thereto against the applicable law.

20. Mr. Ndirangu submitted that **section 45** of the **Law of Succession Act** strictly prohibits intermeddling in the property of a deceased person. That the prohibition is so grave that it makes such an act criminal. Counsel urged that the **Act**, as provided under **section 79** thereof, only allows conduct taken against a deceased's property within the context and under the authority of a duly appointed executor or administrator to whom representation has been granted.

21. Mr. Ndirangu contended that the duty to preserve and maintain the estate of a deceased person is the preserve of the personal representatives. That the Objector/Applicant is not, by dint of any grant, a personal representative of the deceased and cultivating the deceased's properties, therefore amounts to intermeddling. He urged the court to deny the injunctive orders sought and instead direct for the prompt hearing of the pending issues towards the substantive conclusion of the case.

22. After a careful analysis of the pleadings, the rival submissions and authorities relied on by the parties hereto as well as the entire record, the sole issue that comes to the fore for determination is whether the Objector/Applicant has made out a case to warrant the grant of the injunctive orders sought.

23. In his affidavit of 20th May, 2020 filed in support of the instant application, the Objector/Applicant while advancing his case deposed that he has been cultivating the suit properties since 30th August, 2017 when the court issued directions to preserve the status quo. He averred that the orders of 30th August, 2017 did not stop him from cultivating upon the subject properties but was rather geared to restrain the Respondents from selling, or alienating the properties comprising the deceased's estate pending the determination of this cause.

24. On their part, the Petitioners/Respondents contend that at the date of her demise, the deceased owned and occupied the subject properties with full and exclusive possession. That at no time during the deceased's lifetime had the Objector cultivated or otherwise been in occupation of the subject properties and his use of the property is therefore tantamount to intermeddling in the deceased's estate.

25. There is on record a Memorandum of Appeal dated 13th May, 2014 and lodged in the Court of Appeal on even date by the Appellant Mary Wanjiru Muigai, who is the 3rd Objector herein. Mary had been dissatisfied by a ruling delivered by Musyoka, J in this cause on 16th May, 2013, wherein the learned Judge dismissed an application dated 11th February, 2009 that was filed seeking revocation of grant. The appeal was premised on the ground that the court had misdirected itself in finding that the will upon which the Petitioners relied to obtain the grant of letters of administration was not a forgery and was executed in accordance with the law.

26. On 11th October, 2016, the Court of Appeal, while disposing the appeal, endorsed a written consent by the parties and in effect allowed the appeal and referred the matter back to the trial court with directions that the matter be listed before the Judge on duty in the Family division. The matter was duly listed before Muchelule, J on 30th August, 2017 whereupon he directed that the matter be heard on 20th September, 2017 for proof of the will. The hearing did not, however, take off on the said date and to date the will is yet to be proved.

27. It is noteworthy that it is only upon proof of the will that the court can determine whether the deceased herein died testate or intestate. Thereafter the court can proceed to issue orders with respect to the administration and distribution of the deceased's estate.

28. The existence and validity or otherwise of the will is an issue that can only be put to rest once the main suit is set down for hearing during which time the parties can lead evidence in support of their respective cases. As such, I will not belabour this issue at this point in time.

29. Whereas the orders of 30th August, 2017 were with respect to the sale and alienation of the subject properties, I note that this does not in any way grant the parties liberty to take possession of and otherwise deal with the subject properties which comprise the deceased's estate. **Section 45(1)** of the **Law of Succession Act** is clear on this. It stipulates thus:

“Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

30. A reading of **section 45(1)** reveals that the fact that there is no express order prohibiting a party from taking possession of a deceased person's property and cultivating thereupon or otherwise dealing with it, does not in any way offer leeway for parties to do so. Any such act, without a grant of representation amounts to intermeddling.

31. In the instant case, the Objector/Applicant admitted to being in possession of the subject properties and cultivating thereupon despite the fact that he has no grant of representation of the deceased's estate. He however asserted that he has been in quiet use and possession of the properties since the commencement of these proceedings.

32. In order to protect the interests of the parties and the beneficiaries hereto in the interim period, the status quo and the subject properties must be preserved until this cause is finalized. This will serve to ensure that not only are the properties maintained, but also that none of the parties enjoy the benefit of the properties to the exclusion and detriment of the others. This is bearing in mind that there are several properties comprising the deceased's estate. It is noteworthy that this court has jurisdiction to grant injunctive orders in succession causes by dint of **section 47** of the **Law of Succession Act** and **rule 73** of the **Probate and Administration Rules**.

33. In the premise, the court allows the application dated 20th May, 2020 and makes the following orders:

a. The parties are hereby ordered to maintain the status quo prevailing at the moment to ensure that the estate of the deceased is not wasted pending the determination of this cause.

b. Order (a) above does not in any way grant the parties, either through themselves or their agents, the authority to sell, transfer,

lease, allocate, receive rent or otherwise deal with the property of the estate.

c. The main suit which is for proof of the deceased's written will shall be set down for hearing on priority basis.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 2ND DAY OF DECEMBER, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Objectors.

In the presence of.....Advocate for the Petitioners/Respondents.

In the presence of.....Advocate for the Interested Parties.