



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE 5 OF 2018

IN THE MATTER OF THE ESTATE OF GEORGE MUNYAKA KAVULU (DECEASED)

OLIVER NZEKI MUNYAKA &

CHRISTOPHER KENYATTA MUNYAKA.....ADMINISTRATORS

VERSUS

ANNE NZAUMI MUNYAKA.....OBJECTOR

AND

JOHN KITHUKU MUTUNE.....INTERESTED PARTY

RULING

1. On 12th April, 2018, the Administrators made an application where they sought leave of court to demolish a house located on land parcel **Mitaboni/ Kathiani 390** as the same was on the brink of collapsing and by a ruling delivered on 4th May, 2018, this court granted the order with a rider that an inventory be taken and the crops on the farm be taken care of and that the property be fenced and the proceeds of the farm be deposited in a bank account pending distribution of the estate. Being aggrieved with the order, the instant application was filed by the Objector/Applicant.
2. The Applicant/ Objector, filed the application under Rule 73 of the Probate and Administration Rules seeking that the orders of demolition issued on 4th May 2018 be declared null and void and/or be set aside. The Applicant sought that Court issues a mandatory injunction and restoration of occupation and possession of **LR Title Number Mitaboni/ Kathiani 390** to the applicants compensation for loss incurred in the course of eviction and a restraining order against the administrators pending hearing and determination of the objection.
3. The application was grounded on the following facts; That the Applicant is a second wife and surviving spouse of the deceased and the application by the administrators was grounded on an incorrect information regarding the structural condition assessment report that was obtained so as to demolish the house that the applicant was living in with her children and grandchild and that the demolition was carried out without the requisite three month notice in accordance with the Land Act and as a result the applicant was deprived of her property that was in the house.
4. In reply to the application, the administrators vide affidavit dated 15th October, 2018 opposed the application. They deponed that the prayers have been overtaken by events as the demolition has long taken place three months ago. Further that the objector is not a spouse of the deceased and is infact married elsewhere and her husband is alive. Further that the application is misplaced in a succession court for it seeks remedies that befit a constitutional court.
5. The interested party filed a replying affidavit on 31.12.2018 wherein he deponed that he had married the objector herein in 1994 and they have 3 children. He deponed that though they were never divorced, the objector deserted the matrimonial home and claimed that she was married to the deceased in 2009. The interested party deponed that the matrimonial home is not the suit property but it is situated in Kawethei, Kangundo. He further deponed that the objector is referring to his children using the surname Munyaka, without his consent yet he is their biological father.
6. The applicant vide a further affidavit filed on 31.10.2018 deponed that she is a surviving wife of the deceased and lived on the suit property with the deceased as husband and wife.

7. Counsel for the Applicant submitted that the administrators conspired with the Sub-County Works officer to prepare a report to justify the demolition of the matrimonial house that had occupants and thus the orders should be set aside. With regard to an injunction, he submitted that the court should rely on its inherent jurisdiction under rule 73 of the Probate and Administration Rules and Article 159 of the Constitution to grant the orders. With regard to compensation and special damages thereof, the applicant submitted that she relies on the list of household goods and the prices derived from Tusky's Supermarket to guide the court on the amount to award. She relied on the case of **Francis Muringu Mureu v John Muranguri Karuga, Nakuru HCC 119 of 1995**. It was finally submitted that the applicant incurred injuries and loss and sought Kshs 3,200,000/- as punitive damages.

8. Counsel for the petitioners vide written submissions filed on 18.12.2018 submitted that the orders sought are pending an application for objection that is not properly before the court. They submit that the remedies ought to have been sought via plaint and not via the instant application. With regard to the injunction sought, counsel submitted that the applicant has not satisfied the requirements for grant of an interlocutory injunction and cited the case of **Kenya Breweries Ltd & Another v Washington O. Okeyo (2002) eKLR**. With regard to the damages sought, counsel submitted that the applicant has not demonstrated loss suffered. On locus standi to institute the application, counsel submitted that the applicant cannot establish that she is a wife to the deceased and in any event the applicant is still married to the interested party. On the validity of the orders issued, counsel submitted that the same were issued by a court of competent jurisdiction and that the applicant has not demonstrated the fraud or conspiracy that she alleges was used to obtain the orders. He cited the case of **R.G. Patel v Lalji Makani (1957) EA 314** that observed that allegations of fraud require a high standard of proof and mere allegations will not avail the applicant any remedy. Counsel concluded by submitting that the application should be dismissed with costs.

9. Learned Counsel for the interested party Nzaku & Nzaku Advocates framed two issues for determination. Firstly, whether the objector was married to the interested party, and secondly, whether the objector is a beneficiary to the estate of the deceased. In addressing the first issue, learned counsel submitted that the interested party got married customarily to the objector and they are still married; on the other hand the objector had not demonstrated that she was married to the deceased. On the second issue, counsel submitted that the objector has not demonstrated that she is a wife to the deceased and therefore ought not to take advantage of the estate of the deceased. He relied on the case of **Estate of Giovanni Gremmo, Malindi Succession Cause no 78 of 2010** and urged court to dismiss the application.

10. After perusing the pleadings and the submissions herein, the question that comes to mind is “**can a Court of Law and Justice countenance and enforce fraud and illegalities against interests of lawful beneficiaries?**” The issue to be determined is whether or not the applicant has raised sufficient grounds to warrant setting aside of orders of 4th May, 2018; whether the court may grant the order sought. In the instant case, the applicant has raised issues of fraud and I would have to consider whether or not the standard for fraud has been met. Referring to the case of **R.G. Patel v Lalji Makani (1957) EA 314** that was quoted by counsel, I ought to be satisfied that there was fraud on the part of the administrators in a bid to evict her from a house that was still occupied.

11. In **Rosemary Wanjiku Murithi v George Maina Ndinwa (2014) eKLR**, the Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud. From the application, I notice that the applicant has made mere allegations, and I would expect a report made to the CID, and investigation report implicating someone for fraud to be attached as annexures to the affidavit and in the absence of any, the court is not satisfied that the order was obtained through falsehoods or fraud. In any event the court had been persuaded by the letter dated 22/2/2018 by County Public Works and Housing which indicated that the premises were indeed visited and a recommendation that the same be demolished and reconstructed. Further it is noted that during the demolition of the structure the police officers present and indeed booked a report on the occurrence Book as Number 26/7/2018 at 1628 hours. The said OB extract does not indicate whether or not there were occupants in the said premises and hence the Respondents claim that the premises were vacant has not been challenged.

12. The Applicant has maintained that she is the surviving spouse of the deceased. Her brother and her three children including a pastor have sworn affidavits in support of her application. The Applicant claims that she was evicted from the premises by the Administrators and as a result she has suffered great loss and damage. She has clearly indicated that her constitutional rights have been violated by the Respondents and she now seeks to be reinstated into the suit property and be compensated for the loss suffered. Since the remedies sought appear to be constitutional in nature, the Applicant should file a separate suit in that regard. I am guided in this regard by the decision in **Meme vs Republic [2004] 1EA 124** where the court held as follows:-

“where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the Applicant’s instant application had not fully complied with the basic test of constitutional references as it was founded on generalized complaints without any focus on fact, law or constitution, hence it had nothing to do with the constitutions rights of the Appellants”.

Guided by the above authority, I find that the Applicant can still proceed to institute a constitutional petition for redress while at the same time participate in this cause regarding her objection to making of grant in order to establish her claim that she and her children were dependants of the deceased and therefore are to be regarded as beneficiaries to benefit from the estate of the deceased.

13. The Administrators have questioned the locus standi of the Applicant in this application. The Applicant claims to be a wife of the deceased which claim is vehemently denied by the administrators. An interested party was allowed by consent to be enjoined into this proceedings. He is John Kithuku Mutune who claims that the Applicant had been his lawful wife with whom they were blessed with three (3) children but later deserted the matrimonial home and has never returned back. It was the interested party’s case that the Applicant is a joyrider in the estate of the deceased and should be advised to return back with the children to her initial matrimonial home. The Applicant on her part dismissed the allegation by her former husband and maintains that after she left him she started cohabiting with the deceased who thereafter took her in with her children and took up permanent parental responsibilities and therefore as far as she is concerned the interested party is just a spoiler out to throw a spanner in her marriage to the deceased with the sole intention of getting at her. As to whether the applicant was a wife to the deceased, I find the said issue shall be determined during the determination of her objection to making of a grant dated 16/07/2018. The Applicant has staked a claim to the property namely **L.R. MITABONI/KATHIANI/390** on the grounds that the premises demolished were her matrimonial home which had been erected thereon. This property happens to form part of the estate of the deceased. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. Hence where issues

on the ownership of the property of the estate are raised in a Succession Cause, they must be resolved and hence the reason why Rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation. The same provides as follows:-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI Rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to Section 71 (2) of the Act, proceed to confirm the grant.”

Going by the above rule the Applicant’s claim to the suit property shall be deliberated upon once her objection to the making of a grant has been determined. Already the premises in question have been demolished but that notwithstanding there is no bar to the Applicant proceeding to canvass her objection to making of a grant dated 16/7/2018 in addition to pursuing other remedies as noted above. As the orders of 4/5/2018 have already been carried out I find the Applicant’s request for setting them aside not efficacious. The prudent thing to do is to proceed with the determination of the Applicant’s objection to making of grant dated 16/07/2018 so as to establish the issue of whether or not the Applicant is a beneficiary of the estate. While the same is being addressed, I find that conservatory orders pursuant to prayer (f) of the Applicant’s application herein may be granted in the circumstances.

14. In view of the foregoing observations, the Applicant’s application dated 25/07/2018 partly succeeds and that the following orders are made:

(a) An interlocutory injunction be and is hereby issued against the Petitioners herein by themselves, their siblings, servants, agents or otherwise howsoever from subjecting the Applicant and her family from further physical and psychological harm, threats, torture, harassment, cruelty and/or in any other degrading manner pending the determination of the objection to making of grant dated 16/07/2018.

(b) All other prayers in the Applicant’s application dated 25/7/2018 stand dismissed.

(c) Each party to bear their own costs.

It is so ordered

Dated and Delivered at Machakos this 7th day of February, 2019.

D.K.KEMEI

JUDGE