



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CASE NO. 106 OF 2010

CONSOLIDATED WITH

SUCCESSION CAUSE NO. 319 OF 2009

IN THE MATTER OF THE ESTATE OF NICHOLAS KIPCHUMBA MBERIA (DECEASED)

RULING

1. Before court is the application dated 14th of August 2018. Vide this application Jennifer Chepkirui Mberia (applicant) seeks orders:

a. Spent

b. THAT Patrick Kimutai Chumba (son) & John Kipkorir Mberia (son) hereinafter referred to as the respondents by way of mandatory temporary injunction be restrained from selling, transferring, leasing or in any other way from dealing of all or any free properties of the deceased as listed in the Consolidated Nakuru Succession Cause No. 106 of 2010.

c. THAT the respondents by themselves, their agents or servants or whoever be restrained from continued occupation of the applicant's matrimonial home Parcel No. Nandi/Cheperit/1191 and the same be handed over for the occupation to the applicant together until the hearing ad determination of this succession cause.

d. That the respondents do give and file in court an accurate account of all the dealings and status of the immovable properties, moveable and other assets including shares as contained in the Nakuru Consolidated Succession cause No. 106 of 2010, proceeds of tea and sale of eucalyptus gravelia, cypress and other indigenous trees harvested from the parcel title no. Nandi/ Cheperit /446 since the demise of the deceased and current status report of motor vehicle registration number KWM 089, Land Rover 109 EX-GK KRB 914 and KAG 534J

e. That the respondents do disclose and produce to court all the documents, files and briefcase they seized away from the applicant house and are in their possession

f. That pending the hearing and determination of this succession cause the court do appoint responsible and accountable interim administrators to the estate of Nicholas Kipchumba Mberia (deceased)

g. The cost of this application be provided for.

2. The application is grounded on the annexed affidavit of the applicant and on grounds:

a. Contrary to clear provision of Section 45 of the Succession Act, the Respondents have recklessly intermeddled with the estate of the deceased and unless restrained by this court they shall continue to damage the said estate to the detriment and loss of other beneficiaries. The particulars of intermeddling are that:

i. Since the demise of the deceased the respondent have continued to harvest tea without giving any account at all

ii. That since the demise of the deceased, the respondents have continued to harvest and sell mature trees without being accountable to anybody

iii. That the applicant has information that without the knowledge of other beneficiaries the respondents have leased out the tea to third parties

b. That since the passing of the deceased the respondents took over completer possession of the applicant's matrimonial

house/situate in the parcel No. Nandi/Chepterit/1191 and all personal effects, household goods and has never allowed the applicant to access or remove anything

c. The grounds upon which the applicant seeks immediate occupation of her matrimonial house are:

- i. She is the surviving widow of the deceased with who were blessed with two daughters namely Nancy Jepkemboi Mberia-27.02.87 and Jackline Jerotich Mberia 19.08.89.
- ii. Since the day of the burial 10 years ago the respondents have denied the applicants two daughters access to visit their father's grave
- iii. Currently the two daughters are adults and one of them Jackline want to introduce her fiancé to the family in accordance to Kalenjin culture
- iv. The Matrimonial home constructed in land parcel No. Nandi/Chepterit /1191 was constructed with the input of the applicant jointly with her late husband and the purpose of the house according to the Kalenjin Culture was to serve as her house/home with her children and grand children and cannot be occupied by strangers.

3. The gist of the application, the affidavit and the grounds in support is that the applicant is the surviving widow of the deceased while the respondents are the sons of the deceased from the 1st wife.

4. Among the properties comprising the estate is parcel number Nandi/Chepterit /1191.

5. It is averred that the parcel of land is matrimonial home where according to the Kalenjin culture was to serve as the applicants house/home and cannot occupied by strangers.

6. The application is opposed by the respondent who has raised the following grounds:

a. On whether the applicant has proved grounds to warrant the granting of a temporary injunction as sought.

- i. The respondent submits that the judge can only exercise judicial discretion on settled principles and not on private opinion and draws courts attention to the case **M. Sethat v. P Singh [1931] 13 KLR 2**
- ii. In deciding whether or not to grant temporary injunction the court is guided by **Giella v Cassman Brown (1973) EA 358:**
 1. A prima facie case
 2. The applicant will suffer irreparable damage
 3. If in doubt the application will be decided on a balance of probability
- iii. The respondent submits that the applicant has not met the conditions set in Giella v. Cassman Brown since she was out of the matrimonial home before the death of the deceased. The applicant has also not adduced evidence to warrant the issuance of the injunction.

b. On the issue of rendering accounts the respondents submit that:

- i. the applicant should also render accounts as she has information of property forming part of the estate of the deceased
- ii. The respondent submits that the applicant seeks to mislead the court by alleging mismanagement of the estate. They draw courts attention to the decision by Musyoka J, in the Matter of the Estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR

c. On the issue of appointing of an interim administrator, the respondents submitted that:

- i. The applicant has not approached the respondents with an agreement to appoint an interim administrator.

7. I have had occasion to consider the application, the affidavit evidence and submissions on record. Four (4) issues for determination emerge;

1. Whether the applicant has met the threshold for the issuance of an injunction.
2. Whether the respondents should render accounts of their dealings with the estate herein.
3. Whether the respondents should be compelled to produce to court all documents, files and briefcase they seized from the

applicant.

4. Whether the court should appoint a responsible and accountable interim administrator to the estate.

8. It is instructive that a grant of letters of administration has not been issued to any person in this matter. This, despite this cause having been filed about over 8 years ago.

9. Disputes regarding estates of deceased persons will naturally arise even before the appointment of an administrator and the court has the duty resolve them as no citizen should be removed from the seat of justice without being accorded a fair hearing.

10. A word of caution though; from experience, when the court opens the door to a floodgate of litigation between parties, be they beneficiaries or otherwise over an estate of a deceased person, the resultant effect is that the real trophy/goal is missed as at this stage the only logical remedy is for the preservation of the estate.

11. The primary dispute which must take precedence in resolution must of necessity be on the rightful administrator of the estate. When this issue is not resolved timeously, there is real danger of a litany of disputes arising from varied actions of those laying claim to the estate giving rise to what has become very common; convoluted litigation through multiple applications requiring parties who are not administrators to give accounts. Such applications are riddled with profound challenges as such persons are not accountable to the estate but they are intermeddlers who ought to be dealt with in line with **Section 45** of the **Law of Succession Act**.

12. In our instant suit, I am at this early stage expected to determine issues of whether or not there was eviction, who occupied/or built which house, who has what rights to what property etc. issues which are better left for disposal at the main trial.

13. Has the applicant met the threshold for an injunction? A prime facie case is established in that the applicant has shown that she has a discernable interest in the estate. Again she would suffer irreparable damage if the estate was to go to waste. Lastly, the balance of convenience tilts in her favour.

14. I will be quick to add though, that on the basis of the material before court, she has not achieved the threshold for a mandatory injunction sought under prayer (c). Her success is limited to the preservation of the estate and specifically in restraining the respondents from selling, transferring or leasing the properties constituting the estate.

15. As regards whether the applicants should render accounts, the rival positions taken reveal a ping pong of a blame game from both quarters each accusing the other of mismanagement of the estate and requiring accounts. This matter is better left for ventilation at the main trial. The rider here being that any person who may have before this date misappropriated proceeds of the estate or intermeddled with the estate in any proven manner shall be subject to sanction under **Section 45** of the **Law of Succession Act** and where necessary a set off against his/her entitlement shall be effected.

16. On the issue of production of documents, files and briefcase allegedly seized by the respondents, I need not say much. This is a matter better left to the processes of discovery and/or notice to produce during hearing.

17. The court has been asked to appoint an interim administrator. **Rule 10 (fifth schedule)** of the **Probate Rules** under forms of limited grant provides;

“Rule 10 (fifth schedule) - Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate, and the administrator shall be subject to the immediate control of the court and shall act under its discretion.”

18. This cause is in its 9th year in court.

19. There is evidence that the estate herein is vast and includes running concerns like tea farming.

20. The question to pose as the protracted litigation continues is what preservation mechanisms are available to the court in the interest of the estate and the beneficiaries.

21. Notably, the estate is in the hands of persons not accountable to court as no one has been given the legal mandate to deal with the estate so far. Any dealings with the estate without legal mandate attracts sanctions under **Section 45** of the **Law of Succession Act** which prohibits intermeddling with estates of deceased persons.

22. In the meantime, the estate is on its own, exposed to the fiat and designs of all and sundry and at the peril of being mutilated with abandon by any bystander.

23. The court must of necessity step in to protect the estate. This is the exact mischief that **Rule 10 (fifth schedule)** was meant to cure.

24. I hold the view that the administration of estates must be confined within the relevant law, the **Law of Succession Act** under which law the function of the Probate Court is to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution to the rightful heirs of the net assets of the estate.

25. A grant of letters of administration is necessary for a party to seek substantive orders in respect of an estate of a deceased person. The court must thus be very reluctant to entertain any application by a person who is not an administrator seeking substantive orders in respect of the property of a deceased person and any such applications as may become necessary from time to time must be ones for preservation of the estate.

26. My considered view is that in the absence of an administrator of the estate, this is a proper case for the appointment of an administrator *pendente lite* in accordance with **Rule 10(fifth schedule)**.

This will serve the interests of the estate and all beneficiaries entitled as the estate will be protected from waste through intermeddling and the running concerns will have a ready and accountable manager.

27. In the first instance the court opens a window for the parties to agree on an interim administrator within 30 days in default of which an interim administrator shall be appointed by court.

28. With the result that the application herein is partially successful and I make the following orders;

- 1. An order is hereby issued for the preservation of the entire estate herein restraining any dealings adverse to the estate including acts of waste, sale, transfer, or leasing pending further orders of court.**
- 2. There be appointed an administrator for purposes of administration of the estate *pendente lite*.**
- 3. The parties to mutually agree on an administrator within 30 days, preferably a qualified and registered auditor.**
- 4. In default the court to appoint an administrator.**
- 5. The appointed administrator to within 4 months of appointment provide to the court a report on the status of the estate.**
- 6. Each party to bear its own costs.**

Dated and Signed at Nakuru this 4th day of April, 2019.

A. K. NDUNG'U

JUDGE