



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.532 OF 2018

IN THE MATTER OF THE ESTATE OF DAVID LAWRENCE WANGALACHI (DECEASED)

LEONIDA SUSAN WANGALACHI.....1ST APPLICANT

VERONICAH NAKHAYO WANGALACHI.....2ND APPLICANT

VERSUS

MARTIN WATUA RESPONDENT

RULING

1. The Application coming for consideration is the Notice of Motion dated 7.11.2018 seeking the following orders;

(i) THAT the Court be pleased to grant a temporary injunction restraining the Respondent, his agents, servants, employees and/or assignees from trespassing, claiming or interfering with the suit property being LR NO. NAIROBI/BLOCK 82/119 in any manner inconsistent with the Applicant's right of access pending the hearing and determination of this Application.

(ii) THAT this Court be pleased to issue an order of eviction against the Respondent and a permanent injunction restraining the Respondent, his agents, Servants, Employees and or assignees from claiming and/or interfering with the suit property.

2. The Application is supported by the Affidavit of VERONICAH NAKHAYO WANGALACHI, one of the Administrators ad Litem of the Estate of the deceased DAVID LAWRENCE WANGALACHI (Deceased)

3. The Deceased DAVID LAWRENCE WANGALACHI died intestate on 18.11.2016. The Applicants VERONICAH NAKHAYO WANGALACHI and LEONIDA SUSAN WANGALACHI petitioned for grants of Letters of Administration which were issued on 19.7.2018.

4. The Respondent who is occupying the servant quarter of LR NO. NAIROBI/BLOCK 82/119 (hereafter referred to as the suit property) has refused to vacate the suit property prompting this Application. The Application proceeded ex parte since the Respondent did not file any response despite being served and neither did he appear in Court for hearing of the Application.

5. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles. In the celebrated case of **Giella –v- Cassman Brown & Company Ltd (1973) EA 358** the Court set out the Principals for Interlocutory Injunctions (preservation orders). These principles are:-

- a. The Plaintiff must establish that he has a prima facie case with high chances of success.
- b. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
- c. If the court is in doubt, it will decide on a balance of convenience.

6. Also see **BeninaNdugwa Kunyuma and 4 others vs National Land Commission [2015] eKLR** and **Healey vs Hawkins (1968) 3 ALL E R** and **Diment vs N H Foot Ltd [1974] 2 All E R.**

7. In the case of **Vic Preston MurithiRuchabi v Mary Wangari& 3 others [2018] eKLR** the applicant relied on the case of **Waithaka vs**

Industrial and Commercial Development Corporation [2001] eKLR the applicant submitted that now that he had proved that the Respondents herein had illegally sub divided his property and displaced him, damages would not adequately serve the injury inflicted upon him and that he would suffer irreparably should the injunctive relief so sought not issue.

8. The tests for granting injunctions as enumerated above do apply, among them is whether the applicant has a good case with probability of success. The applicant has expounded that she is the Co-Administrator of the deceased's estate. That the Respondent who is in the servant quarters of the deceased property has refused and or neglected to move out. The Respondent did not file a response to the allegations made against him.

9. The second test for determination is whether the applicant will suffer irreparable loss if the order is not granted. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. The applicant has argued this point by stating that the refusal to vacate the premises has resulted in continuing financial loss. This in my view demonstrates continuing irreparable harm if the orders are not granted.

10. Where any doubt exists as to the applicants' right, or if his right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, the Court takes into consideration the balance of convenience. In this case, the violation of the right was not denied.

11. On the second prayer for an eviction order, the applicant submitted that the Respondent is illegally in occupation of the servant quarters of the suit property and they are unable to get a tenant for the main house. It is not clear how the Respondent gained access to the suit property but his actions amount to a criminal offence punishable under the Law of Succession Act.

Section 45 of the Law of Succession Act states as follows:

(1) Except so far as expressly authorized 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.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration

12. I find that the actions of the Respondent amount to intermeddling with the estate of the deceased and he is liable to be punished. In the foregoing, I find that the Application is not opposed and the same is accordingly allowed.

13. I find the Application meritorious and I accordingly allow it in the following terms;

(i) THAT the Respondent be and is hereby restrained from interfering with the Suit Property LR No. NAIROBI BLOCK 82/119.

(ii) THAT the Respondent be served with a Notice to Vacate the premises within 14 days of this date and failure to vacate, the Respondent to be evicted from the Suit Property.

(iii) THAT Police from Buru Buru Police Station to supervise the eviction.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 12TH DAY OF JULY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.