



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC P&A NO.135 OF 2017

IN THE MATTER OF THE ESTATE OF MICHAEL JOHN KATHUKU MULANDI (DECEASED)

ELIZABETH MULANDI.....1ST PETITIONER

EDWARD MULANDI.....2ND PETITIONER

-VERSUS-

FAUSTINA NGINA.....RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 14/04/2016, the Petitioner/Applicant prays for orders for temporary injunction against the Respondent by her servants and/ or agents restraining them from destroying trees, vegetation and the house erected on Plot No. 1520 situated at Kilungu village, Ngandani Sub-location in Kikumbulyu Location pending the hearing and determination of the Succession proceedings.
2. They also seek to be allowed to withdraw the citation dated 23rd July 2013 served upon the Respondent and Costs of this Application.
3. Same is supported by the grounds on the Application which are stated in brief hereinafter. The Respondent has been living on Plot No. 1520 which is part of deceased state.
4. She has been destroying trees for the purposes of charcoal burning destroying the vegetation and the house erected on the said parcel of land without any color of right, as the deceased's estate is yet to be distributed.
5. Thus value of same will be depreciated. Further that the Applicants filed a citation dated 23rd July 2013 on the Respondent to accept or refuse letters of administration intestate, but the Respondent always sought time to source for legal counsel and this Honourable court was generous enough to grant her time, even after judgment was made in the lower court dismissing the Respondent as a wife of the deceased.
6. The Applicants and the beneficiaries of the estate wish that this matter is concluded expeditiously and any further delay will only cause more anxiety among the beneficiaries and is subsequently very prejudicial to them as these proceedings have failed to take off due to the delay of the Respondent alone.
7. The Application is supported by affidavit of Elizabeth Mulandi sworn on 15/04/2016 and her Supplementary Affidavit sworn on 19/07/2016.
8. The same is opposed by Respondent via Replying Affidavit sworn on 23/05/2016.
9. The parties agreed to canvass the Application via Written Submissions which they filed and exchanged.

APPLICANT'S SUBMISSIONS

10. The Applicant submits that the facts are that the Respondent has been living in a house erected on plot No. 1520 where she was employed to take care of the deceased's two children.

11. The said parcel of land forms part of the deceased estate. The Respondent started destroying trees which she has been using to burn charcoal for sale and she said charcoal burning has subsequently led to the destruction of vegetation of parcel of land.
12. At the time of writing these submissions, the Respondent was still cutting down more trees despite the court's order to maintain a status quo.
13. Provisions of Order 40 of the Civil Procedure rules, but the said rule is not applicable in probate matters. However injunctive orders can be sought under Rule 73 of the probate & Administration rules and the applicable authority in granting the same would be the celebrated case of **Giella –Vs- Cassman Brown**.
14. The Petitioners have been kind enough to let the Respondent live on the premises, pending this succession cause. The Applicants and the beneficiaries of the estate are only interested in preservation of the estate pending distribution of the same.
15. The attached pictures are evidence that the Respondent has been destroying the deceased's estate as she wishes without authority of the other beneficiaries or this court.
16. The Applicant submits that she has met the first precondition as set out in **Giella –Vs- Cassman Brown** on having a *prima facie* case with a probability of success.
17. The Applicants are apprehensive that by the time the estate is finally distributed, the land will be without any vegetation and value and the house completely depleted, leaving it with little value to the beneficiaries of the said parcel of land.
18. At this particular juncture, none of the beneficiaries know what they are going to get from the deceased's estate. It will be prejudicial to a beneficiary getting plot No. 1520 which will have no trees and/or vegetation, with a depleted house and will have to work with what he/she gets.
19. The Applicants have clearly satisfied the first two pre-conditions, but be that as it may, the balance of probabilities tilt in favor of the Applicants.
20. The beneficiaries are not interested in chasing the Respondent, as alleged, but rather preserve the deceased's estate pending the conclusion of this matter.
21. The Applicants seek to withdraw the citation on the Respondent dated 23rd July 2013.
22. The Respondent is not opposed to the said Application on condition that the Applicants pay her the costs of the citation.
23. The Applicants and the other beneficiaries have always maintained and continue to maintain that the Respondent was never married to the deceased and was only hired to take care of the second wife's children.

RESPONDENTS SUBMISSIONS

24. The Respondent submits that there is no evidence that the Respondent has cut any trees or that she has carried out any trees or that I have carried any other acts of wastage on Plot No. 1520.
25. There is no evidence that she has even cut one tree and Applicants are making this Application to justify the long wish to kick her out of the plot which she has been living with the deceased and their son before his death. It's a general rule of the law of evidence that he who alleges must prove. The Applicants admit she lives in Plot number 1520.
26. She has been there by virtue of being the 3rd wife of the deceased. It is evident therefore the Application is in bad faith and motivated by ulterior motives.
27. She has been living in the house the Applicants are referring to since she was married and even after the death of her husband, she has continued to live there.
28. Then the question is, how can she destroy the house where she is living together with her son?
29. The referred suit and judgment in Makindu PMCC No. 279/2013 is inconsequential because she was not a party and it violates the rules of natural justice.
30. The Respondent was not a party to the suit in **Makindu PMCC No. 279 of 2013 – Elizabeth Mukulu Mulandi –Vs- Simon Mulandi & Muendi Musuu**.
31. The Plaintiff stated the Respondent in the current Application Faustina Ngina was her employee yet she cited her to take letters of administration.
32. The Respondent Faustina Ngina was not a party to the suit. She was not sued at all and the said judgment applies to Simon Mulandi, Muendi Musuu and the plaintiff the parties to the suit. The Respondent claims from the deceased and not Simon Mulandi.

33. The Applicants are therefore misled to rely on a judgment which was not directed to the Respondent by virtue of being not a party and not even touching on her marriage with the deceased.

34. The marriage allegedly nullified was allegedly between Faustina Ngina and Simon Mulandi but which according to the Respondent never existed at all.

35. Thirdly, if the judgment in Makindu PMCC No. 279 of 2013 was to apply to the Respondent it would be a violation of her rules of natural justice which simply states no party shall be condemned unheard. The Respondent was never made a party to the suit she cannot be condemned unheard.

36. The plaintiff in that suit failed to join her in the suit intentionally to avoid the truth being discovered by the court.

37. The Applicant has not demonstrated they have a prima facie case with high chances of success. The Respondent asserts she is wife of deceased. More evidence is required to determine the issue. She is therefore more suited and her case is a stronger.

38. No irreparable damage has been proved. The Respondent has been in occupation a fact admitted by Applicants. No proof of damage has been provided.

39. The balance of convenience tilts in her favor a person who is in occupation by virtue of being a wife of the deceased. The Applicants have not satisfied any of the conditions.

ISSUES, ANALYSIS AND DETERMINATION

40. After going through pleadings and parties submission, I find the only issue;

- Whether the Application is meritorious?

41. It is not disputed that the Respondent is in occupation of the suit plot No 1520 in Kilungu village which is part of deceased estate herein. She occupies it with her son sired by her and the deceased. The deceased passed on while she was in occupation. She firmly believes to be wife of the deceased person and thus one of the beneficiaries.

42. To the Applicant, she was an employee masquerading as one of the beneficiaries as she never married the deceased via any mode and form of marriage known by law or customs of the parties.

43. The above issue can only be determined as to her marital status with deceased during the hearing of the succession cause.

44. The Applicant complaint is that the Respondent has been destroying trees which she has been using to burn charcoal for sale and the said charcoal burning has subsequently led to the destruction of vegetation of parcel of land.

45. The Respondent denies the same. The matter is yet to be heard to determine the shares of the parties and beneficiaries thereof. The purpose of injunction as a relief is to preserve subject matter and preserve status quo *inter alia*.

46. The Respondent views Application as a move by the Applicants to eject her from the suit plot.

47. The court finds that to protect the interest of all parties and beneficiaries, the status quo and subject matter must be preserved until succession cause is finalized.

48. Thus the court makes the following orders:-

i. The Respondent, Servants and/or Agents are restrained from destroying trees, vegetation and the house erected on Plot No. 1520 situated at Kilungu village, Ngandani Sub-location in Kikumbulyu Location pending the hearing and determination of the Succession proceedings.

ii. The parties are hereby ordered to maintain the status quo prevailing at the moment.

iii. Court allows the Petitioners/Applicants to withdraw the citation dated 23rd July 2013.

iv. No orders as to costs.

SIGNED, DATED AND DELIVERED THIS 4th DAY OF October 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE