



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MAKUENI
HIGH COURT P&A. NO. 33 OF 2017
IN THE ESTATE OF LAZARO MULEI KYAI (DECEASED)
DR. MARIA NDUKU MULLEI.....APPLICANT
-VERSUS-
MUTUNGA KIILU.....RESPONDENT
RULING

INTRODUCTION

1. The instant matter was commenced via a petition by Maria Kavindu Lazaro filed on 10/04/2015 in which the supporting affidavit listed plot No. 4236 Mutitu Adjudication Section as asset of the deceased.

2. The beneficiaries listed consisted Kiasyo – first wife deceased, Maria Kavindu (Petitioner) wife, Muthini Lazaro third wife, that is three homes and issues therein as follows:-

First House - Kiilu - deceased

- Philip - deceased

- Grace - daughter

Second house - Sirdig - Son

- Ndinda - Daughter

- Maria - Daughter

- Rosco - Son

Third Home - Kimuyu - Son

- Mutinda - Son

- Wambua - Son

- Ndanu - Son

3. The records from LA&S department (**DELASO**) showed the parcel No. 4236 is in names of Lazaro Mulei Kyai, Maria Kavindu Lazaro and Muthini Lazaro as by 19/04/2013 owned in common.

4. By Application dated 06/11/2015 the Petitioner sought to stop Mutunga Kiilu first Respondent *inter alia* from inter meddling with same plot 4236.

5. After hearing the same, the court rendered a ruling with resultant orders as follows:- status quo to obtain pending hearing and determination of petition was:-

a) Petitioner and beneficiaries to continue occupation as at the date of the ruling.

b) No transfer to be effected by Petitioner or beneficiaries.

6. By a Notice of Motion dated 25/11/2016 and filed on 28/11/2016, the Applicant sought orders for contempt to commit Respondent Mutunga to civil jail.

7. Same appears to be still pending as there is no record of the hearing of the same.

8. Thereafter a Chamber Summons dated 15/11/2017, was filed by Petitioner which was later amended on 24/11/2017 and filed on 27/11/2017.

9. This is the instant Application which parties agreed to canvass by way of submissions.

10. The same is based on provisions of Section 45 and Rule 49 of Cap 160 and P&A Rules, Order 40 Rules (1), (2) and (3) CPR 2010.

11. The same sought injunctive reliefs and eviction of Respondents 1-6 for intermeddling with estate plot No. 4236 and police supervision of eviction exercise.

12. The Applicant filed the following affidavits,

- *Supporting affidavit sworn on 24/11/2017.*
- *Supporting affidavit sworn on 15/11/2017.*
- *Supplementary /affidavit sworn on 05/03/2018.*
- *Supplementary affidavit sworn on 08/05/2018.*

13. The Respondents in opposition to the Application filed the following documents:-

1st Respondent Replying Affidavit sworn on 06/12/2017.

4th Respondent Replying Affidavit sworn on 06/12/2017

Grounds of opposition by 6th Respondent dated 11/12/2017.

1st Respondent further affidavit sworn on 15/03/2017.

4th Respondent further affidavit sworn on 15/03/2018.

1st Respondent reply to Supplementary Affidavit sworn on 22/05/2018.

4th Respondent reply to Supporting Affidavit of 22/05/2018.

14. Respondents No. 2, 3 and 5 never filed any Replying Affidavit despite of evidence of service being filed via affidavit of service.

15. The parties agreed to canvass the Application via submissions which were filed and exchanged by Applicant and Respondents' No. 1, 4 and 6 only. Respondent No. 2, 3 and 5 did not file same.

16. I have observed and noted that the Applicant has grants now dated 20/09/2017 issued by this court.

17. The matter is pending confirmation of grant. There is no Application to revoke the same nor protest filed by any of the beneficiaries or interested parties.

18. However, same can still be filed at the stage of confirmation of grant and distribution.

SUBMISSIONS

19. The Applicant submits that she is the administrator of deceased estate vide grant dated 20/09/2017 and thus has locus to seek protection

of parcel No. 4236 being estate asset subject herein she cites Section 79 of LSA Cap 160. She also relies in; **In re Estate of Damaris Njeri Kimani (deceased) 2015 eKLR.**

20. She further submits that by dint of Section 45 Law of Succession Act Cap 160 and 40 (1) (2) (3) CPR 2010 and rule 49 P & A rules. The Application is properly in court and court has jurisdiction to issue orders sought.

21. She also relies on case of **“Lillian ‘S’ –Vs- Caltex Oil (K) Limited 1989 KLRI.**

22. She also relies on the orders of **Nyamweya Judge in Kyale –Vs- Mutisya 2017, EKLR** where court relied on Section 45 LSA Cap. 160 to stop intermeddling with deceased’s estate.

23. She also relies on **GIELLA –VS- CASSMAN BROWN & CO. LTD 1973 E.A 358** case on principles of grant of temporary injunction.

24. Also cited are case **Sigei –Vs- Juliana. Salim –Vs- Okungo 1976 KLR 42** among others.

25. She avers that Respondents have inter meddled with estate Subject herein by making constructions encroachment. Same is demonstrated by photographs and is not rebutted or denied.

26. The above act violates the court’s orders of 23/03/2016 of status quo.

27. The intermeddling is ongoing according to the Respondent. It is submitted that the 6th Respondent plots 4234 and No. 3235 were cut off from deceased plot No. 4236 subject herein.

28. The 5th Respondent is continuing construction as matter proceeds in court.

29. The 1st Respondent submits that he has a right like other beneficiaries. The Petitioner did not involve all beneficiaries when lodging instant petition in court. He asks court to appoint himself and 4th Respondent as co-administrators to represent other household’s interest. He is a grandson to the deceased.

30. The 4th Respondent says that she is 3rd wife of the deceased. She was not involved in lodging of the instant petition. She submits that deceased had three houses including her house which was the third house, Applicant belongs to the 2nd house and 1st house wife had died.

31. All beneficiaries are entitled to the deceased estate. She asks court to appoint her and 1st Respondent as co-administrators.

32. The 6th Respondent submits that the 6th Applicant is not a trusteeship thus there is a misjoinder.

33. That the 6th Respondent is the owner of plots No. 4234 and No. 4235 which have no connection with plot No. 4236 subject matter herein.

34. The 6th Respondent relies on **GIELLA CASE** to submit that the principles for grant of temporary injunctions have not been established factually to warrant issuance of the orders sought.

35. After going through the evidence in the affidavits and the submissions, I find the issues are:-

1) Whether Applicant has locus to lodge instant Application?

2) Whether Application has merit?

36. The court vide Nyamweya - Judge order of 23/03/2016 granted status quo orders to the effect that Petitioners and beneficiaries to continue occupation of subject plot herein and that no transfer was to be effected by the Petitioner or beneficiaries pending hearing of the instant petition.

37. However, since that time the Applicant complains of activities of construction and encroachment of the subject plot.

38. When orders were issued above, Respondents No. 2 – 6 were not listed as parties only Mutunga Kiilu now 1st Respondent.

39. Thus the other Respondents were not heard in the aforesaid Application issued the aforesaid orders of status quo.

40. The court declined to grant Petitioner orders sought in the Application namely ***“Orders to stop intermeddling”*** as by then the Application had no grant.

41. The court relied on the case of **Transtick –vs- Alice Mbeyu CA 145 of 1990.** However the court invoked the provisions of Section 47 of Cap 160 LSA to order status quo to be maintained.

42. In the present circumstances, the Applicant got grants on 20/09/2017 thus has locus to protect the deceased person estate.
43. Respondents No. 2, 3 and 5 have refused to oppose the Application thus the court grants prayers 3 and 4 of the amended chamber summon amended on 24/11/2017.
44. As regards, Respondent No. 1, 4 and 6 seem to mount different content such that 1st and 4th Respondents are beneficiaries of the estate with equal rights as those of the other beneficiaries.
45. The two (Respondents 1 and 4) are beneficiaries of the status quo ordered by the court on 23/03/2016. Thus their occupation cannot be disturbed.
46. However they cannot transfer any of the estate property or part thereof as court prohibited such acts.
47. As for the 6th Respondent, the court notes that a certificate of incorporation dated 19/02/1982 empowered trustees to hold the property of Jehova witness in East Africa registered the deponent is a trustee vide his affidavit sworn on 19/03/2018.
48. He avers that he has authority to swear the affidavit. He confirms that the 6th Respondent owns plot No. 4234 and No.4235 and thus the 6th Respondent has no interest in plot No. 4236 the subject herein.
49. The court has seen Ministry of Lands and settlement letters of 29/11/1999, 3rd December 1999, confirming ownership of the two plots as averred by 6th Respondent.
50. The Applicant claim same were cut off from the deceased plot No. 4236. As of now, the Applicant does not say whether the interference by 6th Respondent is on the two plots shown to be theirs or plot No. 4236 owned by deceased.
51. The court will have to hear the evidence and may be visit site as pertains to the ownership of plots No. 4234 and No. 4235 if need be.
52. As for now the court declines to issue orders as against the 6th Respondent.
53. The court thus makes the following orders:-

1) The court issues orders as prayed in prayers no. 3 and 4 against Respondent no. 2, 3 and 5.

2) Application is declined on Respondent no. 1, 4 and 6.

3) However status quo as pertains to plot no. 4236 to be maintained in the following terms.

a) No further development or encroachment construction until further orders of the court by any of the Respondents, agents, servants or anybody claiming through them.

b) The OCS Mtito Police Station to ensure compliance with these orders and implement same.

4) Matter to be heard on priority basis on distribution.

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

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C. KARIUKI

JUDGE