



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.269 OF 2009
IN THE MATTER OF THE ESTATE OF GRACE NJOKI KARANJA (DECEASED)

RULING

The Notice of motion dated 8th March 2016. The applicant seeks the following orders to

Set aside the orders given by this court on 7th December 2015 and 11th October 2015 and further

That this honorable court be pleased to strike out all proceedings in Nairobi Succession cause no. 269 of 2009 and set aside all orders made therein.

That this honorable court does find that John Maina Gatuyu is the lawful and bonafide administrator of the estate of his late mother Grace Njoki Karanja and also that he is the lawful beneficiary of all that property known as L.R. No. 209/6021, Ofafa Maringo Shopping center, Nairobi.

That the honorable court be pleased to issue a permanent injunction restraining Benson Wachira Kingori and Margaret Gathoni Kingori either by themselves, their agents or servants from interfering or otherwise dealing with the estate of his late mother the estate of Grace Njoki Karanja and **L.R. No.209/6021**, Ofafa Maringo shopping Center.

That costs of the application be provided for.

The applicant avers that the late Peter Karanja Gatuyu was the registered owner of parcel known as L.R. 209/6021, Ofafa Maringo. The applicant was one of the co-administrator of the late Peter's estate. The grant in the said succession cause was confirmed on 2nd December 2008 which vested the said parcel of land to the applicant adding that Grace Njoki Karanja was neither the registered owner nor heir to the said parcel of land. That the court on 7th December 2015 in Nairobi Succession Cause in the matter of the Late Njoki Karanja had ordered the applicant to stop meddling with the deceased's estate property namely the Maringo bar located at land reference no. 209/6021, Ofafa Maringo while previous orders issued on 11th October 2011 had ordered Benson Wachira Kingori and Margaret Gathoni Kingori be appointed as administrators of the estate of the late Grace Njoki Karanja. He avers that the orders of 11th October 2011 and those issued on 7th December 2015 were based on the misrepresentation of the fact that L.R. 209/6021, Ofafa Maringo Shopping center was inherited by John Maina Gatuyu from his father Peter Karanja Gatuyu's estate and not his mother the late Grace Njoki Karanja's estate. He avers that Benson Wachira Kingori and Margaret Gathoni Kingori were ill advised that they had to become administrators to assert their alleged claim against the deceased's estate adding that they ought to have sued John Maina Gatuyu directly being the holder of limited grant ad litem of the late Grace Njoki Karanja which was granted on 9th November 2004 in Nairobi Probate and administration cause no. 3065 of 2004 In his opinion the said Benson Wachira Kingori and Margaret Gathoni Kingori have no business being administrators of the estate of the late Grace Njoki Karanja. He adds that due to the said

misrepresentation the two orders issued on 11th October 2011 and those issued on 7th December 2015 respectively should be set aside adding that should the application not be allowed the applicant may be deemed not to be keen in complying with the said orders as the same are not capable to be complied with.

The respondent in opposition to the said application aver that his and Mrs. Margaret Gathoni Kingori's appointment was as a result of the applicant refusal to accept the citation they filed on 24th December 2009 to take out grant of letters of administration prompting this court to appoint them on 11th October 2011. The respondent sought to recover a judgment debt that had accrued as against the estate from the subject property. The applicant through his advocates on record acknowledged receipt of the citation and even filed a memorandum of appearance however he went quite and did not participate in the proceedings. Upon appointment as administrators they filed an application seeking to bar the applicant from intermeddling with the estate of the deceased which application was allowed in this court's ruling of 11th October 2011. They aver that the applicant being aware of the proceedings cannot turn around and claim that this court made an error in its findings and now seeks to benefit from his own inequities. The respondent avers that there is no misrepresentation of facts as alleged further that he had an opportunity to advance the current arguments earlier and as it stands there is nothing new to warrant this court to disturb its court's decision and urged this court to dismiss the applicant's application.

A brief background will shed light on this matter. Succession cause no 127 of 1981 relates to the late Peter Karanja Gatuyu who died intestate on 11/04/1978. The deceased was survived by 2 widows Grace Njoki Karanja and Nancy Wanjiru Karanja. The deceased's widows and two of their sons John Gatuyu and James Maina petitioned for letters of administration to the deceased's estate and the court granted the same on 18th August 1978. The said administrators on 26th June 2008 filed summons for confirmation of grant. At the time the summons for confirmation were filed the said James Maina and Grace Njoki Karanja were deceased both having died on 11th December 1995 and 25th June 2004 respectively. The deed of distribution accompanying the said application for confirmation of the deceased's estate listed the late James Maina and Grace Njoki Karanja as beneficiaries to the deceased's estate. By the time the confirmation of the grant of the deceased's estate on 2nd December 2008 was being realized Grace Njoki Karanja had died and this resulted to the amendment of the certificate of confirmation of grant on 4th July 2012. As per the amended confirmation of grant John Maina Gatuyu was awarded L.R. No. 209/6021 Ofafa Maringo Shopping Center.

Prior to her demise Grace Njoki Karanja had been sued in civil case no. 1799 of 1997. The same involved disillusion of a partnership known as Brother Bar Maringo between the Grace Njoki Karanja and Kingori Kibe. The parties entered a consent judgment on 11th November 2003 with the late Grace Njoki Karanja being urged to pay the plaintiff, Kingori Kibe Kshs. 350,000. Upon the demise of Kingori Kibe on 21st September 2003 his wife and son Margaret Gathoni Kingori and Benson Wachira Kingori petitioned for a grant of representation of his estate and were granted the same on 16th April 2004. Subsequently Grace Njoki Karanja died on 25th June 2004 before the matter was concluded and this necessitated her son John Maina Gatuyu to file probate and succession cause no. 3065 of 2004 on 27th September 2004 seeking a limited grant of letters of administration for purposes of filing a suit until further representation was granted. This was granted on 9th November 2004. From a perusal of the file John Maina Gatuyu did not pursue the matter further. This prompted Margaret Gathoni Kingori and Benson Wachira Kingori to cite John Maina Kingori to take out a grant on the late Grace's Estate. He however failed to do so and this prompted them to file apply for the grant of letters of administration as creditors to the estate and they were appointed as administrators of Grace Njoki Karanja's estate and started seeking to evict John Maina Gatuyu however John Maina Gatuyu refused to relinquish the said property to enable them administer the said property and continued drawing benefits from the same. It was on this basis that Margaret Gathoni Kingori and Benson Wachira Kingori filed the application dated 20th August 2014 seeking court to intervene and stop John Maina Gatuyu from meddling with the said property. This court in its ruling dated 7th December 2015 issued a temporary injunction against John Maina Gatuyu from intermeddling with the deceased's property namely maringo bar located on land Reference 209/6021 Ofafa Maringo and ordered him to render full account to the lawful administrator of the deceased's estate on the benefit he has received from the estate property within 30 days from the date of the ruling with the officer commanding the Jogoo road police station having jurisdiction to assist in effecting the said order. This is the order the applicant seeks to set aside. The applicant does not refute having been cited to take out grant

of letters of administration as against the estate of the late Grace Njoki Karanja. His argument is however that the said property did not belong to Grace Njoki to begin with. From the amended certificate of confirmation dated 4th July 2012 it states that John Maina Gatuyu is the absolute beneficiary to the title of L.R. No. 209/6021 Ofafa Maringo Shopping center. There is no indication that the same was ever held or registered in the names of Grace Njoki Karanja as such the respondents claim can only extend to the estate of Grace Njoki but cannot extend to the late husband's Peter Karanja Gatuyu's estate. I find that the court did not have full facts in issuing an injunction as against the applicant from intermeddling with the said property as such I set aside the interlocutory injunction issued against the applicant on 7th December 2015. The orders of 11th October 2011 had ordered Benson Wachira Kingori and Margaret Gathoni Kingori be declared the lawful and bonafide administrator of the estate of his late mother Grace Njoki Karanja. The applicant despite being cited the applicant did not take the necessary steps to take out this court presented by an application and on the basis of the said citation went ahead to appoint the respondents as administrators in the deceased's estate. I find the some followed due process and as such there is no error to warrant the proceedings to be struck out. In **National Bank of Kenya Ltd v. Ndungu Njau (Civil Appeal No.211 of 1996)** this Court (differently constituted) stated with regard to review:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

Due process was followed and the respondents were rightly so appointed as administrators of the late Grace Njoki Karanja's estate as such I find no reason to set aside the ruling of 11th October 2011 appointing Benson Wachira Kingori and Margaret Gathoni Kingori as administrator's to the late Grace Njoki Karanja's estate.

The applicant has also sought to be declared the lawful and bonafide administrator of the estate of his late mother Grace Njoki Karanja and also the lawful beneficiary of all that property known as **L.R. No. 209/6021, Ofafa Maringo Shopping center**, Nairobi. The property in question forms part of Peter Karanja Gatuyu and not Grace Njoki's estate and as such can only be administered by the estate Peter Karanja Gatuyu. According to the amended certificate of confirmation of grant dated 4th July 2012. The same shows that the said property L.R. No. 209/6021, Ofafa Maringo Shopping center, Nairobi devolved to John Maina Gatuyu absolutely as such I don't find that this property forms part of the late Grace Njoki Karanja's estate.

The applicant has also sought to have all proceedings in Succession cause no 269 of 2009 be struck out. On this am guided by the findings in the case of **D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1** It was held in that,

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

And should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

I do not find any reasonable cause to warrant this court to strike out the proceedings herein.

The applicant has sought a permanent injunction restraining Benson Wachira Kingori and Margaret

Gathoni Kingori either by themselves, their agents or servants from interfering or otherwise dealing with the estate of his late mother the estate of Grace Njoki Karanja and L.R. No.209/6021, Ofafa Maringo shopping Center. In the case of **LOCABAILL INTERNATIONAL FINANCE LTD. V. AGROEXPORT [1986] 1 ALL E.R. 901, Mustil, LJ** restated the same principle thus:

“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.”

The Court of appeal in the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** held that,

Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to retrain, with the intention of defeating the plaintiff’s claim or where the defendant is otherwise bent on stealing a match on the plaintiff.

On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.”

Further in the case of **BHARAT PETROLEUM CORP LTD V. HARO CHAND SACHDEVA, AIR 2003, Gupta, J. of the Delhi High Court** held that;

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

I find that the order for mandatory injunction sought by the applicant would be detrimental to this case at this point in time. Cost in the cause. It is so ordered.

Dated, signed and delivered this 9th day of February 2017.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Applicant**

.....**For the Respondent**

MS. CharityCourt Clerk