



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 539 OF 2014

IN THE MATTER OF THE ESTATE OF JULIUS KYALE (DECEASED)

ROSAITA MBITHE KYALEAPPLICANT

VERSUS

JACKSON KIILU MUTISYA.....RESPONDENT

RULING

The Summons

The Petitioner in this succession cause was issued with a grant of letter of administration intestate on 15th December 2014 in respect of the estate of the deceased Julius Kyale Kyungu. The Petitioner subsequently filed an application dated 9th April 2014 seeking orders that the Respondent vacates from the parcel of land known as ATHI RIVER/ATHI RIVER BLOCK 5/133 amongst other prayers. This Court in a ruling delivered on 9th February 2016 ordered the Respondent to vacate from the subject parcel of land within 90 days of the date of the ruling, failing which eviction orders would be issued.

The Petitioner has now filed an application by way of summons dated 10th October 2016 seeking the following orders therein:

1. That an order of eviction be issued against the Respondent to vacate and demolish all houses and structures erected by the Respondent on land title No .ATHIRIVER /ATHIRIVER BLOCK 5/133 .
2. That upon granting of prayer 1 above the order of eviction be executed by an auctioneer to be appointed by the Petitioner.
3. That the Officer Commanding Station (O.C.S) Athi River police station be directed to provide security at the time of execution of the order of eviction .
4. That the costs of execution of the eviction order and security be borne by the Respondent.
5. That the costs of this application be awarded to the Petitioner.

The Applicant in her supporting affidavit sworn on the same date averred that her Advocate obtained an order extracted from the ruling delivered by the Court on 9th February 2016 which she annexed, and that the Respondent was served with the said order on 26th February 2016. That on 29th February 2016 the Respondent in compliance with the said order surrendered the title deed of the subject parcel of land, but has not vacated from the said subject parcel of land.

Further, that the period of 90 days since the date of the ruling have lapsed, and the Respondent is therefore in contempt of court as well as intermeddling with the estate of the deceased. The Petitioner further averred that it is necessary for the eviction orders to issue against the Respondent to pave way for distribution of the deceased's estate. The Petitioner also relied on an affidavit sworn on 10th October 2016 by Japheth K. Mwanja, a process server of this Court, who stated he served the Respondent on 29th February 2016 with the court orders issued on 24th February 2016.

The Respondent did not respond to the said application after being served with the same, and Mr. Nduva Kitonga, the Petitioner's learned counsel, submitted during the hearing on 14th December 2016 that he would rely on the pleadings he had filed.

I have read and carefully considered the pleadings filed by the Petitioner herein. The issue to be decided is whether the mandatory injunction orders sought herein are available to the Applicant. The sections of the law relied on by the Applicant in this regard is section 47 of the Law of Succession Act, which gives this court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may meet the ends of justice. The Applicant also relied on Rule 49 of the Probate and Administration Rules which states that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file a summons supported if necessary by affidavit.

These provisions give wide discretion to the Court as to the orders it can make, however the Court is still obliged to observe settled principles of law and equity that may be applicable. In the present application the orders sought are in the nature of final orders seeking the Respondent to undertake or refrain from undertaking certain actions. They are essentially therefore orders for mandatory injunctions.

The principles that are applicable for the grant of such mandatory injunctions were set out by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109**, wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

As to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

An additional provision of the law that supports this position is section 45 of the Law of Succession Act, the operative law when seeking to stop intermeddling with a deceased's estate, and which provides that other than instances expressly authorized by the Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

Applying these principles to the instant application, it is not disputed that the Petitioner is the Administrator of the estate of the deceased Julius Kyale Kyungu. It is also not disputed that the deceased died on 20th May 2006, and that the property known as No. ATHI RIVER/ATHI RIVER BLOCK 5/133 is registered in the name of the deceased Julius Kyale Kyungu. In addition, this Court in its ruling delivered on 9th February 2016 ordered as follows:

1. That the agreement made on 8th October 2007 between Justina Waeni Kyale and the Respondent in so far as it relates to the sale of the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 is hereby declared null and void.

2. That the Respondent shall vacate the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 within 90 days of the date of this ruling, failing which eviction orders shall issue.

3. That the Respondent shall forthwith surrender the original title deed for land title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 to the Petitioner herein within 30 days of the date of this ruling.

4. That the prayers seeking orders of demolition of all the houses and structures erected by the Respondent on the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 are hereby denied.

5. Each party shall meet their respective costs of the Applicant's summons dated 9th April 2015.

This is therefore a clear case for the eviction orders sought to issue. However, it is also evident that the orders that were sought by the Petitioner of demolition of all the houses and structures erected by the Respondent on the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 were denied in the ruling delivered on 9th February 2016, and cannot also be granted in the present application. This is principally for the reason that the grant issued to the Petitioner on 15th December 2014 is yet to be confirmed and the decision as to how the properties are to be distributed has not been agreed upon. The Court also observed in the previous ruling that there is still a possibility of accommodating the Respondent after confirmation of the said grant, and it may be premature to grant the orders sought by the Applicant for demolition of the permanent house and structures erected on title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 by the Respondent at this stage.

Arising from the foregoing, I accordingly order as follows pursuant to the provisions of section 47 of the Law of Succession Act:

1. An order of eviction shall issue against the Respondent to vacate the land title No. ATHI RIVER /ATHI RIVER BLOCK 5/133 .

2. The order of eviction shall be executed by an auctioneer to be appointed by the Petitioner, and the Officer Commanding Station (O.C.S) Athi River police station shall provide security at the time of execution of the order of eviction .

3. That the costs of execution of the eviction order and security be borne by the Respondent.

4. For the avoidance of doubt the orders sought of demolition of all houses and structures erected by the Respondent on land title No. ATHI RIVER /ATHI RIVER BLOCK 5/133 is hereby denied.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 1st day of March 2017.

P. NYAMWEYA

JUDGE