



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 113 OF 2014

IN THE MATTER OF THE ESTATE OF NDIKU KILUU (DECEASED)

NANCY NG'ONDU NDIKU.....APPLICANT

VERSUS

HELLEN MBINYA NDIKU.....RESPONDENT

RULING

Nancy Ng'onde Ndiku, the Applicant herein, and Hellen Mbinya Ndiku, the Respondent, are both wives of the deceased Ndiku Kiluu who died on 8th August 2009 (hereinafter referred to as the "deceased"). The Applicant has filed an application by way of Chamber Summons dated 14th February 2014 brought under Section 45 (1) and (2) of the Law of Succession Act and section 3 (A) of the Civil Procedure Act, seeking an order to restrain the Respondent, her agents, servants, sons and daughters from transacting and/or alienating the whole or any part of land parcel Kangonde Adjudication Area Plot No. 1090, pending there hearing and determination of the application herein.

The said application is supported by an affidavit sworn by the Applicant on 14th February 2014 and a supplementary affidavit she swore on 2nd April 2014 to which she attached the deceased's death certificate and certificate of official search for land parcel Machakos/ Kangonde/1090.

The Applicant alleges that the Respondent has sub-divided that parcel of land known as Kangonde Adjudication Area Plot No. 1090 into three (3) parcels known as Plot Numbers 3437, 3438 and 3439 and sold them to third parties who the Applicant named in her pleadings, and that the Respondent has failed to co-operate and persistently refused to file for a succession cause in respect to the estate of the deceased. Further, that the Respondent, her agents, servants, sons and daughters have threatened the Applicant and her family with death if they venture into the said parcel of land.

The Applicant's learned counsel, J. M. Muinde & Company Advocates, filed submissions on 22nd October 2014 wherein they urged that the Applicant has *locus standi* in her claim pursuant to section 40 (1) of the Law of Succession Act, which provides for the distribution of property in instances where the deceased died intestate and was polygamous. Therefore, as the deceased was polygamous and had two wives, namely the Applicant herein and the Respondent, the Applicant together with her children are indeed beneficiaries of the deceased's estate and legally entitled to their claim.

It was also submitted that section 45 (1) of the Law of Succession Act provides for the protection of the deceased's estate and that nobody is entitled to intermeddle with the property of deceased person, and the Respondent isn't entitled to interfere with the deceased's estate unless full letters of administration have been duly acquired, therefore, the said sale of the portions of the land parcel number 1090 under Kangonde Adjudication Section to the third parties is indeed null and void as it is evident that there hasn't

been any confirmation of grant with regards to the deceased's estate declaring the Respondent as the administrator of the deceased's estate.

Further, that, the act of the Respondent having subdivided the said parcel of land into portions and selling them to third parties amounts to her intermeddling with the deceased's estate which in accordance with section 45 (2) of the law of Succession of Act .

The Response

The Respondent filed a replying affidavit sworn on 12th March 2014 in response to the application, wherein she averred that the deceased subdivided his land in 1988 between his two wives to avert any possible feud, and later sold the Applicant's portion and relocated her to Kamwinyendei in Mwea using the proceeds from the sale. Further, that the remaining portion on which the Respondent lives is one which was adjudicated as Parcel Number 1090.

The Respondent contended that that the said portion of land was sub-divided by the deceased before he passed away into 3 (three) portions namely plot numbers 3437, 3438 and 3439 in 2006, and the same were allocated to Respondent's three sons as follows;

- a) Plot Number 3437 was allocated to Mwanzia Ndiku
- b) Plot Number 3438 was allocated to Musyoka Ndiku
- c) Plot Number 3439 was allocated to Kiluu Ndiku

The Respondent denied alienating any of the deceased's land as the deceased had already transferred the said portions of land before his death, and instead accused the Applicant of obtaining the deceased's death certificate fraudulently, while the Respondent still had the deceased's original identity card.

The Respondent's learned counsel, Anyegah & Company Advocates, filed submissions dated 23rd February 2015 in which it was contended that the Applicant has no *locus standi* to bring this claim against the estate of the deceased reason being that she has no interest on Parcel Number 1090 under Kangonde Adjudication section .

Further, that the Applicant has not come to this court with clean hands but instead with material non-disclosure and untruths which this court ought to take note of. It was in this regard submitted that the Applicant has deliberately failed to disclose that she was relocated to another piece of land by the deceased and instead chose to lay claim on what was left to the Respondent, her co-wife. In addition, that the Applicant applied for grant of letters of administration of the estate of the deceased in this succession cause without the knowledge of the Respondent, which application for grant of letters of administration intestate is fraudulent in nature as the Applicant fraudulently acquired a death certificate for the deceased.

Reliance was in this regard placed on the decision by Musyoka J. in **Wilson Kamau Muigai v Njeri Kamau & Another, [2013] eKLR**, that the probate court is largely a court of equity, and therefore in granting any order sought this court would be exercising its jurisdiction as a court of equity.

Lastly, on the orders of injunction sought by the Applicant, the Respondent submitted that it is trite law that an injunction order should be sought pursuant to Order 40 of the Civil Procedure Rules, and that the Law of Succession Act and the Probate and Administration Rules do not provide for an injunctive relief, as Order 40 of the Civil Procedure Rules is not stipulated as being applicable to succession matters.

Reliance was placed in this regard on the decisions by Mutende J. in **Francis Kilonzo & Another versus Vincent Mutua Mutiso, [2013] eKLR** , and Musyoka J. in **Josephine Wambui Wachuka & 2 Others v Margaret Njoki Njoroge, [2013] eKLR**. In addition, that the upshot of section 45 of the Law of Succession Act on which the Applicant's application is founded is to criminalize any interference with the estate of the deceased before grant of representation, and it does not provide a civil remedy against

intermeddling.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Applicant and Respondent. The issue to be decided is whether the orders of injunction sought herein are available to the Applicant. I have noted that the section of the law relied on by the Applicant in this regard is sections 45 of the Law of Succession Act.

Section 45 of the Law of Succession Act addresses intermeddling with a deceased's estate, and 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.

As regards the issue of injunctions by this Court it is notable that in addition to injunctions being issued under Order 40 of the Civil Procedure Act, they are essentially equitable remedies, that can be issued by any Court of equity such as this Court. In addition, the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules in addition give wide discretion to the Court as to the orders it can make, and it is my view that this discretion notwithstanding this Court is still obliged to observe settled principles of law and equity that may be applicable to any order sought.

The equitable principles that are applicable for the grant of a temporary injunction are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, which are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The question I must therefore answer is whether the Applicant has met the criteria for the grant of an injunction. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR stated as follows as to what constitutes a *prima facie* case:

“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.”

Applying these principles to the instant application, I note that both the Applicant and the Respondent are wives and beneficiaries of the deceased, and are therefore all entitled to a share of Machakos/Kangonde/1090 which the Applicant has shown is registered in the deceased's name, unless and until the Respondent is able to prove otherwise. Secondly, although the Respondent stated that the said land was sub-divided by the deceased before he died, the Applicant brought evidence of certificate of official search dated 13th March 2014 showing that as at that date land parcel number Machakos/Kangonde/1090 was registered in the name of the deceased Ndiku Kiilu, having been so registered since 16th November 2010. I also note that neither the Applicants and Respondent have been appointed as the Administrators of the estate of the deceased, and a grant of letters of administration has not been issued to them. Lastly, no decision has been made as to the distribution of the deceased's estate.

In the circumstances, I cannot make a finding that the Respondent is an intermeddler, as being a beneficiary, she also has an interest in the land owned by the deceased known Machakos/Kangonde/1090, which interest is awaiting crystallization through the process of administration and distribution. The Applicant cannot therefore claim a better interest in the said property as she has the same status as the Respondent, but she has established sufficient ground for the protection and preservation of the deceased's estate pending distribution. This Court in this regard accordingly orders as follows:

1. The *status quo* that shall obtain as regards all the properties and assets belonging to the estate of

the deceased and particularly Machakos/ Kangonde/1090 pending the issue of and confirmation of grant of letters of administration shall be that the Applicant, Respondent and Beneficiaries of the deceased shall continue to be in possession and occupation of the properties and assets they currently occupy, and the said Applicant, Respondent and Beneficiaries shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets.

2. Each party shall meet their respective costs of the Applicant's Chamber Summons dated 14th February 2014.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 3rd day of May 2017.

P. NYAMWEYA

JUDGE