



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**IN THE MATTER OF THE ESTATE OF STEPHEN HUMPHREY KIMEMIA NJIRU  
(DECEASED)**

**SUCCESSION CAUSE NO. 6 OF 2017**

**KENNETH NJAGI NJIRU.....1<sup>ST</sup> APPLICANT**

**JANE WANGECHI NJIRU.....2<sup>ND</sup> APPLICANT**

**IRENE S.W. NJIRU.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**MUMBI GICHURU.....1<sup>ST</sup> RESPONDENT**

**WAMBUI GICHURU.....2<sup>ND</sup> RESPONDENT**

**RULING**

The proceedings relate to the estate of Stephen Humphrey Kimemia Njiru (deceased) who died on 9th December 2016. The Applicants filed under certificate of urgency the application on 6th January 2017 and sought limited grant *ad litem* which was granted on 9th January 2017.

On 30th January 2017, the Applicants through Counsel intimated that the 1st Respondent had in her possession the deceased's motor vehicle Mercedes Benz, she caused the servant quarters to be locked and the 2nd Applicant's driver was arrested and charges preferred against him.

The deceased's documents from his law firm were missing from the house and the deceased's firearm was missing yet it was required to be surrendered to authorities.

The 1st Respondent through Counsel denied the allegations and stated that the motor vehicle in question belonged to her and it was not the deceased's vehicle.

The Court granted the Respondents leave to file Replying affidavits. Meanwhile the matters related to the deceased's law firm were to be dealt with by Law Society of Kenya and the surviving law firm partner. The party with custody of the firearm was to release it to the licensing authority or nearest police station. The properties in possession of each of the claimants which belong to the deceased's estate to be held in trust for the deceased's estate and will be taken into account during distribution of the estate as the estate of deceased.

On 22nd February 2017, the parties had not complied with earlier orders with regard to filing pleadings. The court granted orders that the parties were at liberty to petition for grant of letters of administration

intestate and any Objector to object. Parties could also consider Court annexed mediation and if not agreeable the hearing of the matter was to proceed *interpartes*.

## **APPLICATION**

On 24th April 2017, this Court was informed of an urgent application filed and scheduled by the duty Court for *interpartes* hearing. The Respondents were to file Replying Affidavits and serve so the Court granted them requisite period to do so before hearing on 5th May 2017.

In the meantime Deputy Registrar Family Division was scheduled to visit the suit property and independently interview and relevant persons on the issue at hand, compile the report and serve copies to each of the parties and the Court before the Hearing.

The application that is the basis of the Court's ruling is one filed on 20th April 2017 by Respondents/Applicants seeking orders that the Court issues;

**a. Mandatory injunction allowing the Applicant ingress into the matrimonial home, property number L.R.Nairobi/Block 90/158 Loresho.**

**b. Temporary injunction directed at Respondents, their agents, servants or persons acting on their instructions from in any way.**

**c. Evicting and disturbing the status quo in respect of L.R.Nairobi/Block 90/158 Loresho.**

**d. Permanent injunction directed at Respondents, their agents, servants or persons acting on their instructions from in any way evicting and disturbing the status quo in respect of L.R.Nairobi/Block 90/158 Loresho.**

**e. OCS Spring Valley Police Station to enforce orders of this court issued on 22nd February 2017.**

## **APPLICANT'S CASE**

The 1st Respondent/ Applicant through Counsel informed Court that she resided in the suit property L.R. Nairobi/Block 90/158 Loresho from 2011 with the deceased and after his demise she was left in the said home. This Court issued orders of 22nd February 2017 that the status quo be maintained until petition for grant of letters of administration was filed or further orders from court.

On 1st April 2017, the 2nd Applicant /Respondent, mother of the deceased denied her access to the home and she sought Police intervention. On 12th April 2017, the Applicants/Respondents locked out the 1st Applicant and her employees from the home and brought strangers who put padlocks and she left without personal items.

The 1st Applicant/Respondent made several reports to Spring Valley Police Station on the continuing harassment and violent assault by the Applicants/Respondents. The 1st Applicant is apprehensive that she may lose all her belongings and become destitute.

The 1st Applicant had improved the home and paid utility bills as shown in annexed documents. The administrators cannot purport to evict the 1st Applicant from the home without orders from Court. Therefore she moved to Court expeditiously.

## **RESPONDENTS' CASE**

The 1st Respondent through Counsel stated to court based on Replying affidavit filed on 5th May 2017 that the instant application is an abuse of Court process, brought in bad faith as the 1st Applicant has come to court with unclean hands and she is alleged to have perpetrated criminal acts against the 2nd

Applicant mother of the deceased.

The suit property L.R.Nairobi/Block 90/158 Loresho is not a matrimonial home; the deceased and the 1st applicant were not married and she was in the suit property as a guest or invitee but not as wife or spouse. The 1st applicant did not plead any legal or customary marriage to the deceased. The 1st Respondent indicated through photographs and copies of handbooks attached; that in various ceremonies or functions the deceased and 1st Applicant were not referred to as man and wife.

With regard to the allegation that the Applicants/Respondents evicted the 1st Applicant from the home the 1st Applicant stated that she left the home sometime late March 2017 and later learnt she went to her sister's place.

Thereafter she sent her driver to the house to pick up items and then leave on several occasions.

On 1st April 2017 the 2nd Applicant/Respondent was concerned by the constant daytime visits by the 1st applicant's driver and he collected items and left. They locked the gate and curtailed the items taken out of the home on each visit.

The 1st & 2nd Applicants denied they evicted and physically assaulted the 1st Applicant as alleged and if so she should have reported the matter to Police for investigations to be conducted and charges preferred against them.

Instead the 1st Applicant/Respondent stated that on 12th April 2017, his mother 2nd applicant /Respondent called him and he went to her rescue as she was attacked and strangled by the 1st Applicant/Respondent's watchman. He called his brother to come and help, on arrival, the watchman took out a knife and chased his brother threatening to kill him, until he was restrained by people. The culprits were taken to Spring Valley Police Station and they were released.

The 1st Applicant alluded to the fact that at no time did they disregard the court orders to maintain status quo and they did not evict the Applicant but she left and they locked the gate to prevent and preserve the deceased's property. He reiterated that this whole matter is about inheriting property from the deceased's estate. However, they discovered the deceased has a son and this complicates the issue of succession.

The 2nd Applicant/Respondent through her Counsel relied on affidavit in response filed 4th May 2017 and confirmed that her sister 1st Applicant/Respondent who lawfully resided in the suit property from 2011 with the deceased was evicted from the home on 12th April 2017 as shown by the attached pictures.

On the deceased's demise she temporarily moved in to live with her sister, the 2nd Applicant /Respondent harassed 1st Applicant and locked the main gate. She left on 6th March 2017 and the 1st Applicant came to visit her and get away from being mistreated by the 2nd Applicant/Respondent.

The Deputy Registrar Family Division visited the scene/suit property and interviewed various parties, compiled report and availed copies to parties and Court. Unfortunately, the same has been source of dispute and not assistance to the matter at hand.

## **DETERMINATION**

After consideration of the pleadings filed and oral arguments presented by each party through Counsel, the issue for determination is whether the 1st Applicant shall at this stage of proceedings be reinstated back to the suit property L.R.Nairobi/Block 90/158 Loresho and the Applicants/Respondents restrained by injunction from interfering with her quiet possession of the suit property.

An injunction preventive and protective in nature and it is defined as;

***any command or a process taken with a view to protecting rights by having commanded a particular act be done, or by prohibiting the doing of a certain act.***[\[1\]](#)

The requisite standard to grant injunction was set out in

**GIELLA vs CASSMAN BROWN & CO LTD [1973] E.A.358**

***First, an Applicant must show a prima facie with a probability of success. Secondly, the interlocutory injunction will not be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.***

The mandatory injunction is akin to a decree of specific performance or order of mandamus granted where;

***The infringement of right has created a state of affairs continuing to damage the Plaintiff. The injunction is granted with the purpose of altering or modifying the state of affairs so that the Plaintiff's right will no longer be infringed.***

Therefore, applying the above enunciated principles; Can Family Court grant injunction? Under Law of Succession Act there is no provision for application of injunction. The nearest possible remedy under the Act is preservation of the estate of the deceased under **Section 45 of the Act**.

However, **Section 3 of Judicature Act** prescribes that Courts shall apply the Constitution, subsidiary legislation, doctrines of equity and statutes of general application in force in England on 12th August 1897 in conformity and not inconsistent with our laws. Therefore injunction is an equitable remedy under common law and where applicable it may be granted as it is not inconsistent with our laws.

The evidence adduced by the 1st Applicant is controverted by evidence by 1st Respondent and therefore what is presented is one's word against the other on invariably all issues. The evidence is contradictory and convoluted and thus insufficient to warrant orders as to the specific rights of parties at this stage with regard to the deceased's estate.

On the one hand, the 1st Applicant states that she lived with the deceased in the home for 6 years. Whereas this fact is not denied, the 1st Respondent's claim is that the 1st Applicant is not wife to the deceased.

Secondly the events of 12th April 2017 are contested, the 1st Applicant stated that she was evicted from the home by denial of access to and from the home. At the same time, 1st Respondent claims on the material day, his mother was physically assaulted by the 1st Applicant's worker.

Both parties have also argued on the interpretation of the status quo orders issued on 22nd February 2017. With respect, the events that culminated to orders of status quo were on issues regarding; the following; compliance with orders of 30th January 2017; release of the firearm to relevant authorities, pursue the Law Society of Kenya on the Deceased's Law firm issues or claims and filing of further pleadings. This Court extended orders of 30th January 2017 that each of the parties retain what one has in his/her possession in trust for the deceased's estate until the full grant is issued or further orders from court. The issue of who resides in the suit property was not canvassed until on 27th April 2017. Therefore the issue of status quo with regard to the deceased's residence is moot.

Having considered the evidence on record; it is not crystal clear the legal right of each party in the matter with regard to the deceased's estate in the absence of cogent evidence. **In Succession Cause 342 of 2005(High Court Nyeri) in the Matter of the Estate of Patrick Mwangi Wathiga (deceased)** the Court opined that it is well established rule of evidence that whoever asserts a fact is under obligation to prove it in order to succeed.

The 1st Applicant has not established the legal right to warrant the remedy of injunction. The administration of the deceased's estate ought to be determined first; who are beneficiaries and/or dependants of the deceased's estate; who are administrators of the estate and what are the assets that

comprise the deceased's estate. These critical issues ought to be determined upon the Applicants filing the petition or the Respondent filing citations so as to facilitate *interpartes* hearing and determination of this matter. Until then, the remedy of injunction cannot be availed to any party save to preserve all assets that comprise of the deceased's estate under **Section 45 Law of Succession Act** until hearing and determination of the matter.

Due to the nature of the of the matter at hand , there is on record evidence suggesting strongly that the Applicants and Respondents are acrimonious and this has extended to the employees and despite reports to various Police Stations by the parties there's no lasting solution. The dispute regarding the suit property is a threat to security of all parties involved.

The Court is obligated to ensure that the deceased's estate is preserved and protected and is not wasted and there is no intermeddling until a full grant is issued.

Therefore, the Court appoints the Public Trustee as an independent party to take full inventory of the items in the suit property, ensure security and conduct general management of the suit property.

### **DISPOSITION**

- 1. The application seeking injunction is not granted at this stage as the Applicant has not proved a legal right over the deceased's estate yet.**
- 2. The mandatory injunction if granted at this stage would determine the matter finally when we are at the interlocutory stage.**
- 3. The full grant shall be sought by the Respondents under Section 67 of Law of Succession Act Cap 160.**
- 4. In default the 1st Applicant may file citation for petition of letters of administration intestate.**
- 5. The Deputy Registrar shall inform the Public Trustee in writing within 14 days that the Public Trustee shall to take over the management of the suit property L.R.Nairobi/Block 90/158 Loresho, hold meetings with all relevant parties; Respondents and Applicants and Counsel with a view to take inventory of the property in the premises, secure it, pay utility bills and statutory fees over the property and file reports within 30 days in Court.**
- 6. The 2nd Applicant shall have access and reside in the adjacent quarters of L.R.Nairobi/Block 90/158 Loresho without interference. The main house shall remain vacant until hearing and determination of the matter.**
- 7. The 1st Applicant may have access on arrangement with parties and in presence of Counsel to collect the personal effects she requires pending hearing of the matter.**
- 8. Further mention on 10<sup>th</sup> July, 2017.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 9<sup>TH</sup> JUNE 2017.**

**M.W.MUIGAI**

**JUDGE**

**In presence of:**

Mrs. Wambugu for 1<sup>st</sup> Respondent

Mrs. Nduati for the 2<sup>nd</sup> Respondent

Mr. Kinyanjui for the Applicants present

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[\[1\]](#) Principles of Injunctions by Justice Richard Kuloba.