



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
SUCCESSION CAUSE NO. 2295 OF 2015
IN THE MATTER OF THE ESTATE OF J K K (DECEASED)

E N K.....APPLICANT

versus

V W K.....1ST RESPONDENT

B W K.....2ND RESPONDENT

R U L I N G

1. The deceased to whose Estate these proceedings relate is J K K. On 16th September, 2015 one E N K filed a Summons under Certificate of urgency seeking preservatory orders to prohibit any adverse dealings in respect of the deceased's properties to wit Loc.16/Kimandi Wanyaga/[particulars withheld] and motor vehicle KDZ [particulars withheld] Ford Lorry pending inter-parties hearing of this application.

2. Secondly the Applicant also prayed for a temporary order restraining the Respondents by themselves from trespassing, attaching, motor vehicle registration No. KDZ [particulars withheld] Ford Lorry or interfering with her peaceful occupation together with that of her three children on land parcel No. Loc.16/Kimandi Wanyaga/[particulars withheld].

3. Thirdly the Applicant prayed that the court inhibits/prohibits any further registration/dealings in regard to all the properties left by the deceased namely Loc.16/Kimandi Wanyaga/[particulars withheld], Loc.2/Kanderendu/[particulars withheld], Loc.2/Kanderendu/[particulars withheld] and Loc.2/Kanderendu/[particulars withheld]. The court did grant interim stay orders to the Applicant.

4. The application is premised on grounds that the Applicant is the 2nd wife to the deceased, whilst the 1st Respondent is the 1st wife of the deceased and the 2nd Respondent is the 1st Respondent's daughter. That the deceased had three children with the Applicant namely:

i. M W K – 15 years

ii. J K K – 10 years

iii. D N K – 4 years

That the deceased had set up a matrimonial home with the Applicant and their three children at Loc.16/Kimandi Wanyaga/[particulars withheld] and also left the motor vehicle registration No. KDZ [particulars withheld] Ford Lorry (herein after a Ford Lorry) under the care, control and custody of the Applicant.

5. The Applicant alleges that the Respondents filed Nairobi High Court succession cause No. 1889/2011, secretly without informing the Applicant and had all the deceased's properties transferred into the 1st Respondent's name having misrepresented to the court that she was the only surviving wife of the deceased. That the Respondents obtained an introductory letter from the Chief Githurai whilst the deceased, and all the properties are located in Makomboki Murang'a County.

6. The Applicant further alleges that in the month of September, 2015, the Respondents in the company of unknown persons invaded the Applicant's home with a view of evicting the Applicant from Loc.16/Kimandi Wanyaga/[particulars withheld] and also tried to forcefully take over the Ford Lorry.

7. The Applicant has sworn a supporting affidavit dated 16th September, 2016 in which she reiterates the contents of her application. She also deposes that the deceased left behind the following properties:

Loc 2/Kanderendu/[particulars withheld]

Loc 2/Kanderendu/[particulars withheld]

Loc 2/Kanderendu/[particulars withheld]

Loc 2/Kimandi/Wanyaga/[particulars withheld]

Motor vehicle Registration No. KDZ [particulars withheld] – Lorry

8. She avers that the Respondent secretly and fraudulently filed this cause without informing her as a beneficiary of the estate and has proceeded to transfer Loc 2/Kimandi/Wanyaga/[particulars withheld] measuring approximately 0.61 ha and Loc 2/Kanderendu/[particulars withheld] measuring approximately 0.61 ha. That the Respondent has also transferred Loc 2/Kanderendu/[particulars withheld] and [particulars withheld] respectively to one Daniel Gitau Kimani who is not a beneficiary of the estate.

9. V W K (hereinafter the Respondent) in reply, swore an affidavit and opposed the application for reasons that the Applicant was a girlfriend of the deceased and not a wife, as she was not married under any law to the deceased. That the Applicant is a stranger to the deceased, and that is why the Respondent found no reason to inform her about the filing of succession cause.

10. The Respondent also argued that there was nothing wrong with her obtaining a letter of introduction from the Chief of Githurai since that is where she lived at the material time. She urged the court to dismiss the Applicant's application for lack of merit.

11. Mr. Kanyi learned counsel, for the Applicant filed written submissions in which he stated that the Applicant was the second wife of the deceased under Kikuyu Customary law with whom they had three children. That all the children's birth certificates bear the deceased's name as their father. Counsel stated that the deceased had properties as mentioned in the Applicant's affidavit and that since the marriage of the Applicant and the deceased, they established a matrimonial home in Loc 16/Kimandi/Wanyaga/[particulars withheld] where they have always lived.

12. Mr. Kanyi further submitted that the Applicant was equally left in possession of the Ford Lorry. He argued that the Respondent secretly obtained a grant dated 30th January, 2012 which was later confirmed on 27th May 2013. That after the confirmation of grant, the Respondent started to distribute the estate and sent auctioneers to repossess the Ford Lorry from the Applicant, without any documents to show that they had been authorised to do so.

13. Counsel argued that the Respondent, in her replying affidavit averred that the Applicant was a girlfriend to the deceased. He pointed out that the Respondent did not comment on how the Applicant came to occupy the deceased's property, or to be in possession of the Ford Lorry, or about the three children of the Applicant whose birth certificates clearly state that they were fathered by the deceased.

14. Counsel also contended that the Respondent was very much aware of the existence of the Applicant as a wife to the deceased. That the deceased owned property within Makomboki in Murang'a County, and the death certificate indicates that the deceased hailed from Makomboki. That due to bad blood between the Respondent and the Applicant the Respondent relocated to Githurai, where she schemed the illegal move by lying to the area chief that she and her children were the only heirs of the deceased's estate. Mr. Kanyi asserted that the Respondent's hands are tainted with fraud and illegality with a motive to disinherit the innocent children of the deceased who are very young and school going.

15. In reply Mr. Karanja learned counsel for the second Respondent restated what the Respondent, V W K had averred in her replying affidavit, that the Applicant was only a girlfriend of the deceased and not a wife as alleged. That the Applicant was never married under any law to the deceased and she cannot therefore claim to be a widow, or a dependant of the deceased's estate as defined under section 29 of the Succession Act.

16. Mr. Karanja argued that the Applicant has no capacity to apply for preservation of the estate of the deceased as she is not a beneficiary to the estate, and neither is she a dependant. That the Applicant has not brought any documentary evidence to show that she was indeed married to the deceased. He relied on the principles for seeking for the grant of an interlocutory orders as were crystallized in the case of **Giella vs Cassman Brown & Company Limited and Another [1973] E.A. 358**.

17. Mr. Karanja further submitted that the Applicant cannot claim that she stands to suffer irreparable loss and damage if the application is not allowed, as the Respondents had no knowledge of any other family of the deceased. That the deceased in his lifetime had never introduced nor mentioned the Applicant or her children to the Respondent.

18. Mr. Karanja asserted that the Respondent followed the law by filing the succession cause, and that if the Applicant was indeed a wife and had interest in the deceased's estate, she had an opportunity to file an objection before the grant was issued and subsequently confirmed. He urged that the mere fact that the Applicant's identification card bears the deceased's last name is not proof enough to warrant a conclusion that the Applicant was the deceased's wife.

19. According to counsel the Respondent is the only wife of the deceased and she was issued with the Grant as the wife and administratrix, hence she had the authority to distribute the estate Mr. Karanja urged the court to dismiss the application since the Applicant has failed to prove her case beyond reasonable doubt to warrant the issuance of an injunction.

20. The conditions for the grant of an interlocutory injunction were settled in the case of **Giella vs Cassman Brown & Company Limited and Another [1973] E.A. 358**, adverted to above. First an applicant must show that he/she has a *prima facie* case with a probability of success at the trial. Secondly, an interlocutory injunction will not normally 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 a balance of convenience.

21. The issue for determination in the application before me is therefore whether the Applicant has established the grounds to merit the granting of an interlocutory injunction.

22. It must also be appreciated that an interlocutory injunction is a discretionary remedy and accordingly, it will not be granted where it is shown that the applicant's conduct with respect to the matters pertinent to the suit does not meet the approval of a court of equity.

23. It has been argued that that the Respondent followed the law by filing the succession cause, and that if

the Applicant was indeed a wife and had interest in the deceased's estate, she had an opportunity to file an objection before the grant was issued and subsequently confirmed. I note however that the Respondent has deposed that indeed she saw no need to give the Applicant any notice of the petition for grant of letters of administration for the subject estate because, in her view, the Applicant is a girlfriend and not a widow who would be a beneficiary of the estate. It is clear therefore that the Applicant had no opportunity to file her objection.

24. There is no dispute that the Applicant is in possession of parcel No. Loc.16/Kimandi Wanyaga/[particulars withheld] and the Ford Lorry both being properties of the estate of the deceased. The Applicant is also said to be the mother of three children whose birth certificates state that they were fathered by the deceased, and this has not been disputed by the Respondent although she argues that she knew nothing about them while the deceased was alive.

25. In my view the foregoing facts in paragraphs 23 and 24 point to a prima facie case with a probability of success. Whether or not the case will actually succeed is a matter of fact depended on evidence to be produced at the trial. The facts asserted above will have to be proved to the required standard by evidentiary material during the trial. The Applicant will have to prove the nature of her marriage to the deceased, or the nature of her dependency under **Section 29** of the **Law of Succession Act**.

26. Should it turn out that there is substance in the averments of the Applicant, the actions of the Respondent will have led to her being disinherited together with her children and that in my view is an irreparable loss. For the foregoing reasons I find that the balance of convenience tilts in favour of the Applicant at this point in time. Reasons wherefore the court finds that the application dated 10th February, 2016 is meritorious, and grants it in terms of the three prayers sought.

No orders as to costs.

SIGNED DATED and **DELIVERED** in open court this **15th day of September, 2016**

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L. A. ACHODE

JUDGE

In the presence ofadvocate for the Applicant

In the presence ofadvocate for the Respondents