



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2374 OF 2010

IN THE MATTER OF THE ESTATE OF ELIUD THIGANI NGANDU (deceased)

KIMANI THIGANI.....APPLICANT

-VERSUS-

JOSEPH NGANDU.....1ST RESPONDENT

RAPAHHEL THUKU GAKERE.....2ND RESPONDENT

RULING

1. Eliud Thigani Ngandu, the deceased to whose estate these proceedings relate died testate on 25th May 2012. A grant of probate was issued to Raphael Thuku Gakere on 25th May 2012 and confirmed on 22nd May 2013. On 20th September 2014 Kimani Thigani via an application dated 26th September 2014 brought under rule 73 of the probate and administration Rules section 3A and 63 (c) and (e) of the Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules 2010. He seeks the following orders;

- i. He seeks a temporary injunction against the respondents restraining them from either themselves, their servants and/or agents from interfering with, putting on sale, demolishing, occupying, remaining there on and or otherwise trespassing on the applicant's land Githunguri/Githunguri/401 or forcefully entering thereon until the hearing and final determination of this application or until further orders of this Court.
- iii. That the respondents, their servants, agents and/or any other person howsoever acting on behalf, be and are hereby restrained by an order of the high Court from in anyway interfering with the applicant's peaceful enjoyment of his parcel of land and on the suit property known as Githunguri/Githunguri/401 or trespassing thereon until the full hearing and final determination of this matter.
- iv. That the OCS Githunguri police station do enforce and ensure full compliance of these orders and costs of the application.

2. The application is based on grounds that the deceased divided the said property into equal shares among his beneficiaries John Joseph Ngandu, Kimani Thigani, Peter Waweru and Eliud Thigani. The applicant constructed 2 houses on his portion of land and cultivated maize, beans, yams, bananas and trees. The applicant seeks to revoke the grant of probate for reasons that the same is defective and the applicant was not aware of the same. An interim order issued on 20th August 2013 stopped the grant from taking effect. Subsequent to the said orders the respondents descended on the applicant's land and destroyed his crops together with his house. The respondents were arrested but were mysteriously

released and have continued to trespass into the applicant's parcel on diverse dates between May 2014 and September 2014 destroying everything on the land hence causing huge loss and damage to the applicant as a result he has been unable to plant or harvest anything and the applicant is likely to suffer damage unless they are restrained by a court order.

3. The application is unopposed. The application came for hearing on 4th February 2015. The respondents despite being served did not file a reply.

4. In essence what the applicant is seeking is an injunction against the respondent from interfering with his quiet enjoyment of his portion of land willed to him by his father. The probate and administration rules do not expressly state a probate court can issue orders of an injunctive nature. Rule 63 of the Probate and Administration Rules imports certain provisions of the Civil Procedure Rules. It did not adopt the provisions governing grant of injunctive orders. However, that is not to say that the probate court cannot grant preservatory orders in appropriate cases under inherent powers as provided in rule 73. Having considered the application, the affidavits in support of the said application. In essence this is an application for temporary injunction, consideration to be taken into account be court in granting the same are laid out in the case of **GIELLA –VERSUS- CASSMAN BROWN & CO. LTD [1973]** which raises three ingredients. Whether the applicant has a prima facie case with probability of success, whether, the applicant stands to suffer irreparable injury that an award in damages cannot be adequate to compensate, if the court is in doubt it will decide the same on a balance of probability. The applicant's allegations are not controverted. In his affidavit in support of his application he has indicated that the respondents have trespassed to his parcel of land and has even adduced pictures to support his clams. I find that he has a prima facie case with possibility of success. He has not been able to farm and is worried that should he cultivate any crops the same will be damaged by the respondents. I find that the balance of convenience tilts in his favor. I grant him the following orders;

- i. A temporary injunction to issue against the respondents restraining them from either themselves, their servants and/or agents from interfering with, putting on sale, demolishing, occupying, remaining there on and or otherwise trespassing on the applicant's land Githunguri/Githunguri/401 or forcefully entering thereon until further orders of this Court.
- ii. The respondents, their servants, agents and/or any other person howsoever acting on behalf are hereby restrained by an order of the high Court from in anyway interfering with the applicant's peaceful enjoyment of his parcel of land and on the suit property known as Githunguri/Githunguri/401or trespassing thereon until the full hearing and final determination of this matter.
- iii. The OCS Githunguri police station assist in enforcing and ensuring full compliance of these orders

The applicant shall also have cost of the application.

Dated, signed and delivered this 12th day of **March** 2015.

R. E. OUGO

JUDGE

In the presence of:-

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

.....**For the Respondents**

.....**Court Clerk**