



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 485 OF 2011

IN THE MATTER OF THE ESTATE OF LUSIA KHATSOTSI- DECEASED

PAUL NDIMU AMUSIBWA.....APPLICANT

VERSUS

SIBELA WAWIRE.....RESPONDENT

RULING

1. By the Notice of Motion dated 2nd May 2014 brought pursuant to **Section 45** of the Law of Succession Act and **Rule 73** of the Probate and Administrative Rules the applicant seeks for orders :

1. THAT this Honorable Court be pleased to restrain the Respondent herein SIBELA WAWIRE her Agents and/or Servants from constructing and/or otherwise inter meddling in any manner with land parcel registration number **BUTSOTSO/INGOTSE/1961** until final determination of the succession cause.
2. THAT costs of the application be provided for.

2. The application is supported by the affidavit of Paul Ndimu the applicant and premised on the grounds that succession proceedings in respect of the said deceased's estate are pending hearing and final determination and that the Respondent ought to be restrained from any further dealings and inter meddling with the said deceased's parcel of land until succession is determined. In the Supporting Affidavit Paul Ndimu Amusibwa depones that he is the administrator of the deceased's estate herein and that he was granted prohibitory orders barring any alienation of land parcel registration number BUTSOTSO/INGOTSE/1961 pending the hearing and determination of the succession cause but the Respondent has gone ahead and started constructing on the mentioned parcel. He has annexed a copy of the said order and search "PNA-1" and a copy of letter from the Chief and photograph marked "PNA-2" which shows that there is a construction on going and a complaint to the Chief.

3. The application is not opposed. There is an affidavit of service showing that the Respondent was duly served.

4. Section 45 of the Law of Succession Act falls in the division of the Law of succession dealing with the protection of the estate of a deceased person. It specifically provides against intermeddling and it outlaws intermeddling with an estate by a person who has no authority to handle estate property. There is nothing in the provision which gives this probate court power to make orders of injunctions in probate matters but the provision merely defines intermeddling and criminalizes it. Under Section 45 (2) any person who contravenes Subsection (1) shall (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has

intermeddled after deducting any payments made in the due course of administration.

5. Rule 73 deals with the inherent powers of the court, and it reads:-

“Nothing in these rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

6. It is to be noted that the inherent powers of the court are resorted to where there are no clear provisions touching on the matters in issue. The point was made by Khamoni J. In the matter of the Estate of Erastus Njoroge Gitau (deceased) Nairobi High Court Succession Cause No. 1930 of 1997 to the effect that Rule 73 is to be used only in deserving cases where no specific provisions exist to deal with the situation in question. It is not an omnibus provision which allows the court to entertain all manner of applications. Rule 73 only relates to gaps in the Law of Succession Act and the Probate and Administration Rules. In *Re Estate of Kilungu (Deceased)* (2002) 2 KLR 136 Khamoni J observed that Rule 73 cannot be used to do what the Law of Succession Act does not allow the court to do. The Law of Succession Act does not grant any power to the court to grant injunctions. An injunction is a drastic order that should not be granted under the inherent power. It should only be sought in a proper suit. This court is alive to **Rule 63** of the Probate and Administration Rules which imports several provisions of the Civil Procedure Rules. The provisions imported do not include those that provide for injunctions. The fact that ORDER 40 has not been imported into the probate practice means that there was no intent at all on the part of the drafters of the law to empower the court to entertain injunctions in probate and succession matters. The prayer for injunction as sought by the applicant herein is therefore declined. As properly stated above the same should be sought in a proper suit. The application dated the 2nd May 2014 is hereby dismissed with no orders as to costs.

Delivered, dated and signed in open court at Kakamega this 11th day of March 2015

RUTH N. SITATI

JUDGE

In the presence of

Mr. Kundu for Mr. Kiveu for Applicant

No appearance (duly served) for Respondent

Mr. Juma for Court Assistant