



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 2063 OF 2014

IN THE MATTER OF JOSEPH KIMANI MAKINYA (DECEASED)

ALICE WAMBUI MWANGIAPPLICANT

- Versus -

MAVOLONI OSTRICH FARM LIMITEDRESPONDENT

R U L I N G

1. The Applicant Alice Wambui Mwangi, has brought an application by way of Summons dated 31st July 2014, under **Rules 12, 24 and 49** of the **Probate and Administration Rules, Rule 8** of the Fifth Schedule and **Sections 36 and 49** of the **Succession Act (Cap 160) Laws of Kenya**.
2. The Applicant through learned counsel M/s. L. N. Muchira prays for orders that pending hearing and determination of this application and petition an order do issue restraining the Respondent, whether by itself, its representatives, servants, agents or any other person claiming through it from entering into, letting, evicting or in any other manner dealing with the cause premises L.R. No. NBI/BLOCK 82/6766. Further that interim orders be issued restraining the Respondent from selling or transferring or in any other manner dealing with the estate of the deceased and more particularly, the assets subject of this cause, set out in the affidavit filed herewith.
3. The application is based on the grounds that the deceased to whom the summons relates died on 29th November 2013 and the Applicant is his widow, the two having been married under Kikuyu Customary Law and having lived together as husband and wife from 2010 till his demise on 29th November 2013. That the two lived in their matrimonial house bought by the deceased in 2004, erected on the suit premises L.R. No. NBI/Block 82/6766 and that the Respondent's directors are siblings of the deceased and the brothers and sister-in-law of the applicant.
4. The Applicant alleges that the Respondent has threatened to evict her from her matrimonial home claiming it now belongs to them. That the Applicant has learnt reliably that the Respondent is devising a wretched plan to evict her and unless restrained, the Respondent has the financial muscle to traumatize the Applicant and has already served her with a written notice to vacate the home and/or pay rent effective 31st July 2014.
5. The Respondent company was represented by learned counsel M/s. Osundwa. In the replying

- affidavit dated 21st November 2014, Fredrick Kinyanjui Makinya, a Director of the Respondent Company, opposed the Applicant's summons stating that she alleges to have been married to the deceased, Joseph Kimani Makinya, yet she had never been introduced to the Directors of the Respondent Company as such. That therefore, she is a stranger to the Respondent company and does not have the locus standi to seek the orders herein. That the deceased was married to one Margaret Nyambura Benson with whom they were blessed with one issue of marriage being Pharell Makinya Kimani. That the Applicant's affidavit sworn in the absence of the deceased, cannot in the circumstances, be construed as conclusive evidence of existence of marriage.
6. The Director contends that the matrimonial house on L.R. No. Nairobi/Block 82/6766 was bought in the year 2004 by the Respondent Company, from continental Developers Limited in a commercial transaction, before incorporation of the Respondent Company in the year 2005. That to date, the title thereto is held by Continental Developers Limited, since it has never been transferred to the Respondent and therefore, this property is not part of the estate of the deceased. The Director avers that prior to his demise, the deceased had sold his shares and resigned as a Director/shareholder of the Respondent Company.
 7. The Respondent also asserts that some of the properties claimed by the Applicant as part of the estate of the deceased belong to the Respondent Company and the deceased's mother, Beatrice Wanjiku Makinya. Further that the Applicant is in arrears of rent and is using the process of the court to evade payment. That a Limited Liability Company is governed by the Companies Act and not the law of Succession Act, and a party claiming a right against a company ought to proceed against the said company and its Directors in separate legal proceedings properly convened in line with the provisions of the companies Act.
 8. The Applicant filed their written submissions on 15th January, 2015, while the Respondent's written submissions were filed on 21st January, 2015.
 9. Having considered the application, the affidavits for and those against, as well as the rival submissions by counsel for the respective parties, I have determined that the main issue for consideration is whether the Applicant's application is merited.
 10. The Applicant seeks from court restraining orders against the Respondent from selling or transferring or in any other manner dealing with the estate of the deceased pending the hearing and determination of the petition. Injunctive orders against the Respondent Company were granted on interim basis pending interpartes hearing. The Applicant has filed a petition for grant of letters of administration.
 11. The Applicant's case is that she is the surviving widow of the late Joseph Makinya, married under Kikuyu customary law and had been living together from 2010 till the demise of the deceased on 29th November, 2013. Further, that they lived in their matrimonial house erected on the suit premises and that the Respondent served her with a Notice to vacate the said property, on or about 24th June, 2014. In the notice she was required to pay Kshs. 60,000 per month as rent for the matrimonial house or vacate within 7 days.
 12. On their part, the Respondent's submit that the suit property is held by Continental Developers Limited for the Respondent Company, and cannot therefore form part of the free property of the deceased available for distribution. It is contended that the Respondent being a limited liability company, is not subject to the Succession process and can only be dealt by use of procedures and mechanisms established under the **Companies Act, Chapter 486 Laws of Kenya**.
 13. It is their submission that the Applicant has not established a prima facie case for reasons that she has failed to adduce evidence in proof of the purchase and ownership of the suit property by the deceased as alleged or at all.

14. There is no doubt that the parties have raised a number of issues in both their affidavits and submissions. Some of the issues raised, I am afraid, are not relevant at this point in time. This is an application for temporary injunction pending the hearing and determination of the petition. The said petition is not being determined herein, and is not the concern of this Court at the moment. The Applicant as has been stated has asked the court to issue restraining orders as against the Respondent. That is what this court can properly deal with.
15. The well settled principles for the granting an injunction are that firstly, an applicant must show a prima facie case with a probability of success; secondly, that the applicant might suffer irreparable injury if the injunction is not granted. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See the celebrated decision in the case of **GIELLA – VS- CASSMAN BROWN & CO. LTD. (1973) E. A. 358.**
16. There is no dispute that the Applicant and the deceased resided in the said property which she claims to be their matrimonial property. The Respondent's action of requiring the Applicant to pay rent of Kshs. 60,000 per month without fail from 1st July, 2014 or to vacate the same if not agreeable, has elicited this application. In view of the fact that the Applicant is in occupation of the said property which she alleges is matrimonial property to date, this Court holds that she has established a prima facie case.
17. It should be noted that the Respondent has not brought before this court, any material showing what prejudice if any, it would suffer if the orders sought herein are granted. The Probate Court being a court of Equity, and in the circumstances of this case, I hold that the ends of justice would best be met by the granting of the said orders.

Accordingly, I find that the Applicant's application is merited and is hereby allowed.

SIGNED DATED and DELIVERED in open court this 6th day of May 2015.

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L. A. ACHODE

JUDGE