



**REPUBLIC OF KENYA**

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

**PROBATE AND ADMINISTRATION DIVISION**

**SUCCESSION CAUSE NO. 2083 OF 2008**

**IN THE MATTER OF THE ESTATE OF CHEGE MURIRA alias NJIHIA MURIRA  
(DECEASED)**

**STEPHEN IRUNGU WANJENGA.....APPLICANT**

**VERSUS**

**KARANJA MURIRA.....RESPONDENT**

**RULING**

1. Stephen Irungu Wanjenga (hereinafter the Applicant), filed summons under **Rule 73** of the **Probate and Administration Rules** in respect of the Estate of Chege Murira alias Njihia Murira, the deceased, who died on 6<sup>th</sup> December 2007. He sought or orders that:-

(i) the court do give him leave to substitute and replace Francis Wanjenga Ndegwa (now deceased).

(ii) Karanja Murira (hereinafter Respondent), his agents, servants, employees, and/or people working under him be restrained by an order of this court from cutting trees, demolishing house, cultivating, leasing, selling or in any other way interfering with the applicants physical possession and use of land parcel **LOC.3/MUKURIA/945** – the only asset of the deceased herein pending the hearing and determination of this application, and thereafter pending the hearing and determination of this cause.

(iii) a conservatory order be issued to retain and sustain the status of the asset of the estate herein **LOC.3/MUKURIA/945** in the same physical condition as it has been during the pendency of this cause and therefore restrain the Respondent from selling, leasing, or in other way interfering with the Applicant's physical possession and use of land parcel, pending the hearing and determination of this cause.

2. No grounds of the application were provided but it was supported by the affidavit of the Applicant sworn on 4<sup>th</sup> March 2015 in which he deponed that Francis Wanjenga Ndegwa, the Applicant in the Summons for revocation of the Grant dated 12<sup>th</sup> February 2010 is his father who subsequently died on 12<sup>th</sup> November 2014; that he has since obtained limited grant of representation for his father's estate for the sole purpose of substituting and replacing him in this cause; that he now seeks leave of the court to be allowed to substitute and replace him so that this cause can be heard and determined; that the Respondent and his agents have entered into parcel No. LOC.3/MUKURIA/945 where they have started to undertake acts of wastage therein.

3. The Applicant further averred that his family has been in physical possession of the suit parcel of land since 19<sup>th</sup> March 1998; that since the demise of his father, the Respondent together with his agents and servants entered into the land and demolished a house that was on the land and cut down all mature trees and started to cultivate the land. That the Respondent has gone as far as selling the said parcel of land to a third party despite the existence of this cause. He therefore prays that conservative orders do issue in respect of the suit parcel of land so that he can continue to be in possession of the land as before.

4. The application was opposed. The Respondent filed a replying affidavit sworn on 9<sup>th</sup> March 2015 in which he deponed that he is the Administrator and sole beneficiary of the Estate of Chege Murira and in particular LOC.3/MUKURIA/945 the parcel of land in question. That he should not be restrained from utilizing and/or managing the proceeds from the said land, including harvesting of mature trees as he was utilizing the said land even when his brother was alive. That the applicant is not telling the court the truth since he has never utilized L.R. NO. LOC.3/MUKURIA/945 or part thereof. That the Applicant is a stranger to the deceased's Estate, and therefore his prayers Nos. 3,4 and 5 are misplaced and only calculated to delay the conclusion of the succession cause.

5. The Respondent further averred that he is agreeable to the substitution as prayed by the Applicant in the Chamber Summons, but he is opposed to his interference with his quiet and peaceful utilization of LOC.3/MUKURIA/945. That the Applicant's claim lies not in a succession cause, but in a civil suit for recovery of purchase price (if any).

6. Parties filed brief written submissions to the application. Mr. Kariuki, learned counsel for the Applicant submitted that from the pleadings in the court file, it is clear that the Applicant is the one who has been in possession and use for the subject parcel of land LOC.3/MUKURIA/945. That the deceased Applicant in the summons for revocation of grant dated 12<sup>th</sup> February, 2010 took possession of the land on 19<sup>th</sup> March, 1998 in the lifetime of the deceased, Chege Murira alias Njihia Murira, and that he had built a house on the land, planted trees and tea bushes and has been cultivating the said parcel of land until his demise on 12<sup>th</sup> November, 2014. After his death, the Respondent using his agents, or people he has leased the land to, entered into the parcel of land, cut the mature trees existing therein and also started to cultivate the said parcel of land. That he has effectively interfered and changed the status of the Estate of a deceased person during the pendency of this cause, and the matter has since been reported to Githumu Police Station under OB No. 20/21/11/2015.

7. Mr. Kariuki in his submission quoted Section 45(1) of the Succession Act Chapter 160 Laws of Kenya which provides that:

**“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”**

Mr. Kariuki urged the court to grant the prayers sought in order that the status of the Estate may be restored to the condition that it was in before the illegal and unlawful acts of the Respondent.

8. Mr. Mugo learned counsel for the Respondent argued that the Applicant is not a survivor or dependant or beneficiary in the Estate of Chege Murira and cited Section 29 of the Law of Succession Act that defines the meaning of dependant as follows:

“For the purposes of this Part, “dependant” means—

**(a) the wife or wives, or former wife or wives, and the children of deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his**

**death; and**

**(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

The Applicant claims that his father, Francis Wanjenga Ndegwa purchased the land from the deceased.

9. Learned counsel submitted that while the said sale is denied, transactions affecting agricultural land are governed by Section 6, of the Land Control Act which applies to:

**“6. (1) Each of the following transactions that is to say –**

**(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with agricultural land which is situated within a land control area;**

**(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations.”**

10. Mr. Mugo further submitted that the Respondent’s father has never been in possession of the subject parcel of land L.R LOC.3/MUKURIA/945. That upon the demise of the deceased, the Respondent who is the deceased’s brother, continue to till his brother’s land even as he did in the deceased’s sunset years, when the deceased had no capacity to till and/or utilize the Land. He therefore urged the court to invoke the spirit and letter of **section 6 (1) (a)** of the **said Land Control Act**, and make a finding that the Objector’s/Applicant’s claim, if any, can only lie in a civil suit and not a Succession Cause. That Succession Cause should, as a matter of Law, fact and practice, only encompass the dependants as tabulated by section 29 of the Law of Succession Act above.

11. Having carefully considered the respective pleadings of the parties in support and opposition to the application, the rival submissions of the parties and the authority relied upon by counsel for the Respondent, I find that the issue for determination is whether the Applicant has made a case to warrant the exercise of this court’s discretionary powers in his favour.

12. I note that there is an unprosecuted summons for revocation/annulment of grant, filed by one Francis Wanjenga Ndegwa now deceased. The said summons was dated 12<sup>th</sup> February 2010 and filed on even date. Francis Wanjenga Ndegwa is said to be the father of the Applicant in the application now under consideration, hence the prayer for substitution of the Applicant in his place. The prayer for substitution is not opposed by the Respondent.

13. On the prayer for temporary injunction, the principles applicable in deciding whether or not to grant a temporary injunction are well settled. In the case of **Shitakha v Mwamodo & 4 others [1986] KLR pg 445**, wherein the celebrated case of **Giella v Cassman Brown & Co Ltd [1973] E.A. 358** was cited, the principles were restated as follows:

**“The principles are that the applicant must establish a prima facie case with a probability of success, show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages and if the court is in doubt, it should decide the application on the balance of convenience.”**

The court will not decide substantive issues at the interlocutory application stage, as this ought to be left for the trial.

14. The Applicant before me is not one of the beneficiaries of the Estate of the deceased. The pleadings filed by the Applicant’s father now deceased, have not been heard for a determination to be made on merit. This ruling must therefore be confined to the length and breadth of the application dated 4<sup>th</sup> March 2015. The material that has been placed before this court is not sufficient to enable the court to determine

with any degree of certainty, what his interest in the Estate is or the status quo on the ground. These are substantive issues that must be determined at the hearing of the summons for revocation.

15. It is my finding that the facts as presented before me in the application dated 4<sup>th</sup> March 2015, are not sufficient to persuade me to make a finding that this is a case in which an interlocutory injunction is merited. No document of title has been exhibited and as stated earlier, the Applicant is not a beneficiary or dependant of the Estate. I observe however that the grant of letters of Administration issued in this cause has not been confirmed. The Respondent therefore has no powers, or colour of right to alienate or sell the suit property or any part thereof at this stage and to do so would be to act in vain.

16. In the premise I grant the second prayer of the application, giving leave to Stephen Irungu Wanjenga to substitute and replace Francis Wanjenga Ndegwa as the Applicant in the Summons dated 12<sup>th</sup> February 2010.

The 3<sup>rd</sup> and 4<sup>th</sup> prayers are dismissed.

Costs be in the cause.

**SIGNED DATED and DELIVERED** in open court this **6<sup>th</sup> day of October 2015.**

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**L. A. ACHODE**

**JUDGE**