



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO.709 OF 2011

IN THE MATTER OF THE ESTATE OF MORAA MOKANDU – DECEASED

AND

MORAA GISEMBA - - - PETITIONER

VERSUS

DAVID NYAKOI ONGORI - - APPLICANT/OBJECTOR

RULING

1. By an application dated 16th February 2015 titled “Summons for Injunction and Preservation of Estate of the Deceased pending hearing and determination of Succession Cause herein,” brought under **Section 47** of the **Law of Succession Act** and **Rules 44, 59** and **73** of the **Probate and Administration Rules**, the Applicant herein sought orders for:
 1. The instant Application be certified as urgent and same be heard Ex-parte in the first instance.
 2. Pending the hearing of this application inter-partes, there be an interim order of injunction restraining the Petitioner/Respondent either by herself, her agents, servants employees, in particular, **NANCY NYANCHOKA**, or any person acting through them from in any way whatsoever, alienating, transferring, disposing and/or appropriating, encroaching upon intermeddling with part of the property belonging to the estate of the deceased and in particular that portion of land measuring 0.16 Ha that is occupied by the Applicant in land parcel known as **LR. WANJARE/BOGIAKUMU/1380**.
 3. Pending the hearing and determination of the objection proceedings herein, there be temporary injunction restraining the Petitioner/Respondent either by herself, her agents, servants, employees, in particular, **NANCY NYANCHOKA**, or any person acting through them from in any way whatsoever, alienating, transferring, disposing and/or appropriating, encroaching upon intermeddling with part of the property belonging to the estate of the deceased and in particular that portion of land measuring 0.16 Ha that is occupied by the Applicant in land parcel known as **LR. WANARE/BOGIAKUMU/1380**.
 4. Costs of this Application be borne by the Respondents.
2. The said application is premised on the grounds on the face of the application which are mainly that the respondent has already caused the deceased’s parcel of land known as WANJARE/BOGIAKUMU/1380 to be subdivided while the dispute is yet to be reserved in the objection proceedings filed by the applicant.
3. The applicant further states that one NANCY NYACHOKA has already obtained title to LR. NO.WANJARE/BOGIAKUMU/6548 which is a subdivision of the deceased parcel of land

without following the due process of law.

4. The applicant further states that the Respondent and the said NANCY NYANCHOKA have encroached onto the deceased's said land parcel in the company of their agents and/or servants and are threatening to commence the construction of structures thereon unless they are restrained through a court order.
5. The applicant contends that the acts of the Respondent are criminal in nature and amount to intermeddling with the estate of the deceased which contravenes the mandatory provisions of **Section 45 of the Law of Succession Act**.
6. The applicant therefore seeks the intervention of the Probate and Administration court to invoke its jurisdiction and issue injunctive orders so as to preserve the status of the property of the deceased until the issue of the entitlement of the parties/beneficiaries herein is reserved.
7. It is the applicant's case that he has resided on the suit for decades and thus any forceful takeover could portend violence and disturb the peace that has existed on the land.
8. The applicant adds that the Respondent's unlawful activities on the land are aimed at undermining the authority of the court by distributing the estate of the deceased prematurely and unilaterally thereby bypassing the legal process that had been initiated by pre-empting its outcome.
9. The application is further supported by the affidavit of the applicant DAVID NYAKOI ONGORI dated 16th February 2015 in which he has basically repeated and expounded on the grounds set out on the body of the application and attached annexures in support of his claim that the estate of the deceased has indeed changed hands to third party NANCY NYANCHOKA before the confirmation of grant and in the face of the existence of a restriction placed on the suit land pending the confirmation of grant and despite calls by the County Land Registrar to the said NANCY NYANCHOKA to submit the irregularly acquired title for cancellation.
10. In the said affidavit the applicant deposes that he is listed as a beneficiary to the estate of the deceased having purchased a portion of the suit land measuring 0.16 Ha which the respondent had even before confirmation of the grant, sub-divided and transferred to different people including NANCY NYANCHOKA who had been allocated the portion of 0.16 Ha that had been earmarked for the applicant.
11. On 19th February 2015 this court (*differently constituted*) granted Interim Orders of injunction in the following terms:

“restraining the Petitioner/Respondent either by herself, her agents, servants, employees, in particular NANCY NYANCHOKA or any person acting through them from in any way whatsoever, alienating, transferring, disposing, and/or appropriating, encroaching upon intermeddling with part of property belonging to the estate of the deceased and particular that portion of land measuring 0.16 Ha that is occupied by the applicant in land parcel known as LR. WANJARE/BOGIKUMU/1380.”
12. The respondent did not file any replying affidavit in opposition to the said application despite having been duly served with the application and further the respondent did not appear in court during the inter-partes hearing despite service.
13. In effect, the applicant's instant application was not opposed and at its hearing on 21st September 2015, Mr. Ochoki advocate for the applicant sought for prayers No.3 of the said application which were for orders of injunction to restrain the respondent from selling the suit property that was the subject matter of the Succession Case.
14. Mr. Ochoki submitted that the application was necessitated by the need to preserve the estate of the deceased pending the hearing of the objection proceedings.

Analysis & Determination:

15. I have considered the application in its entirety together with the submissions of Mr. Ochoki, learned counsel for applicant. The prayers, as framed, seek a temporary injunction pending the hearing and determination of the objection proceedings herein.
16. I have perused the entire file in respect to this succession case several times in a bid to establish if and when the much touted objection proceedings were filed to no avail. Objection proceedings are instituted if after a petitioner has filed and obtained grant of letters of administration, a beneficiary or any interested party seeks a revocation or annulment of the said grant for reasons outlined in **Section 76 of the Law of Succession Act.**
17. In view of the fact that there are no objection proceedings initiated in this matter, this court is at a loss as to why the applicant has, in this application, christened himself objector/applicant/defendant and the respondent, petitioner/respondent/plaintiff.
18. From the court record, the respondent obtained grant of letters of administration on 25th July 2012 and applied for confirmation of grant on 7th March 2013. The said grant has not been confirmed as the said application for confirmation is still pending to-date.
19. From the above foregoing, it is clear that there are no objection proceedings pending between the applicant and the respondent so as to warrant the issuance of interim injunctive orders pending their outcome.
20. Having said that, even assuming that there was indeed a pending objection proceedings in this matter, would this court be able to grant the orders sought by the applicant? In order to grant the orders sought, even in a case such as this where the application is not opposed, this court would be under a duty to act in accordance with the law.
21. An order for injunction is ordinarily sought under **Order 40 of the Civil Procedure Rules.** The Probate and Administration Rules, under which this instant application is anchored do not provide for an injunctive relief since **Order 40 of the Civil Procedure Rules** is not one of the Civil Procedure Rules envisaged and covered by **Rule 63 (1) of the Probate and Administration Rules** as being applicable to Succession matters. (See **Estate of Kibomen Komen (Deceased) Nakuru Succ. No.500 of 1997.**)
22. The applicant has in the body of his application quoted **Section 45 of the Law of Succession Act** as the section empowering the court to intervene in a case such as this by issuing injunctive orders in order to preserve the estate pending its distribution. **Section 45 (1) of the Law of Succession Act** states as follows:
- “(1) 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.”***
23. My understanding of **Section 45(1) of the Law of Succession Act** is that it specifically provides against intermeddling with the estate of the deceased by a person who has no authority to handle the estate property. There is nothing in that provision which grants this probate court powers to make orders of injunction. The provision merely defines intermeddling and criminalizes it as shown in **Section 45 (2)(a)** which states:
- “(2) Any person who contravenes the provisions of this section 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...***

24. **Rule 73**, which the applicant has also relied on in this application, grants the court inherent powers and states as follows:

“73. Nothing in these Rules shall limit or otherwise affect the inherent power 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.”

Inherent powers of the court are usually resorted to where there are no clear provisions.

25. Khamoni J, in the matter of the **Estate of Erastus Njoroge Gitau (deceased) Nairobi HC SUCC.NO.1930 of 1997** held 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**.

26. In the **Estate of Kilungu (Deceased) (2002) 2KLR 136**, Khamoni J, still on the subject of **Rule 73** observed that the rule 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 the court any powers to grant injunctions. Injunctions are, by their very nature, very drastic orders that have the effect of restraining a party from doing a particular thing that is clearly spelt out in the order with a rider that if the order is disobeyed, the restrained party may face certain sanctions or consequences. The drastic injunctive orders should in my humble view, be sought only in a proper suit in which the applicant will have to fulfill and the mandatory conditions for the granting of orders of interlocutory injunctions that were spelt out in the celebrated case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**.

27. The courts have in many instances grappled with the question of whether orders of injunction can be made in succession cases with the main question being whether the court is clothed with the powers to grant such orders.

28. In the instant case, I note that the concerns and issues raised by the applicant are valid in the sense that it is quite apparent that the estate of the deceased has been interfered with and distributed even before the confirmation of the grant by this court. In the applicant's own words, the suit land has been sub-divided and had changed hands in effect, some of the actions which the applicant seeks to restrain the respondent from doing have already taken place.

29. The suit land which the applicant cited as LR. No. **WANJARE/BOGIAKUMU/1380** has already changed its character and form after the subdivision and issuance of new numbers one of which the applicant cited as LR. No. **WANJARE/BOGIAKUMU/6548** registered in the name of one **NANCY NYANCHOKA**. The other numbers arising from the same subdivision have not been disclosed by the applicant.

30. Ideally therefore, granting temporary interlocutory injunction orders on a title that no longer exists will be an exercise in futility as such a superfluous order would not be enforceable on any party and would be tantamount to court granting orders in vain.

31. Furthermore, a temporary injunction presupposes the existence of a substantive suit between a plaintiff and a defendant that is pending determination.

32. In this instant case, as I had noted, there is no substantive suit or even objection proceedings pending between the applicant and the respondent that would entitle this court to make interim orders pending the outcome thereof.

33. A succession case, by its very nature is not a substantive suit strictly pitting one party against the other but is rather an avenue in which the estate of a deceased person is referred to court so that a determination can be made on the respective beneficiaries' shares.

34.I find that the fact that **Rule 63** of the **Probate and Administration Rules** has imported into several provisions of the Civil Procedure Rules and omitted **Order 40 of the Civil Procedure Rules** that deals with injunctions is a clear pointer that there was no intention to empower the Probate and Administration Court to entertain injunctions.

35.In the instance case, however, the attention of the court has been drawn, by the applicant, to information that clearly shows that the estate of the deceased has been intermeddled with and has changed hands even before the confirmation of the grant by this court. I agree with the applicant that this turn of events is an affront to the authority and function of this court in determining the Succession Cause for which the court cannot just sit back fold its hand and watch for want of jurisdiction to entertain applications for temporary injunction in succession matters.

36.I find that **Rule 73** of the **Probate and Administration Rules** grants this court the wide discretion to make appropriate orders as may be necessary in the interest of justice or to prevent abuse of the process of the court.

37.For the foregoing reasons, the prayer for interlocutory injunction is declined. Consequently, the Interim Orders granted by this court on 19th February 2015 are hereby set aside and in its place and purely in the interest of justice, an order for the maintenance of status quo obtaining as at today is hereby issued in order to safeguard and preserve the deceased's Estate as it awaits confirmation of the grant already issued.

38.The application dated 16th February 2015 is accordingly disallowed with no orders as to costs.

39.It is so ordered.

Dated, signed and delivered in open court this 9th day of November, 2015

HON. W. OKWANY

JUDGE

In the presence of:

- N/A for the Petitioner
- M/S Sagwe for Objector/Applicant
- Mr. Ogega: court clerk