



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 313 OF 2015

SAMUEL KIMANI MUTU. PLAINTIFF

VERSUS

ABRAHAM MANGI MUTU. 1ST DEFENDANT

SAMUEL KIMANI MWANGI. 2ND DEFENDANT

MUTU MWANGI. 3RD DEFENDANT

KIARIE MWANGI. 4TH DEFENDANT

KARANJA MWANGI. 5TH DEFENDANT

NDUNGU MWANGI. 6TH DEFENDANT

R U L I N G

This is a ruling to a “Preliminary Objection” dated 6th October, 2015 and filed on the 7th October, 2015. The objection has been raised by the 1st Defendant and the same is premised on the fact that the matter herein is related to Succession Cause Number 749 of 1994 which is still pending before the High Court at Nairobi in the Family Division.

The Plaintiff in this matter filed a plaint dated the 3rd September, 2015 and a Notice of Motion dated the same day which was brought under a certificate of urgency. The Notice of Motion seeks for orders: -

- a. **That a temporary injunction be issued restraining the defendants, their servants and/or agents or any person acting on their behalf, authority or directions from verbally or physically assaulting him or publishing words or materials defamatory of the Plaintiff pending the hearing and determination of the Application and/or the suit.**
- b. **That there be a temporary injunction restraining the Defendants or their agents from entering his farm situated on L. R. Ndarugu/Gacharage/949, harvesting any crops thereof, destroying his crops or any other property until the hearing and determination of the Application and/or the main suit.**

The Application was slotted for hearing on the 8th October, 2015 but in view of the Preliminary Objection, the learned counsels agreed to have the “Preliminary Objection” argued first.

Mr. Nyakiangana appeared for the first Defendant (who raised the Preliminary Objection) and in his submission he told the court that the Notice of Motion dated 3rd September, 2015 was filed by the Plaintiff following his client's filing of an application for revocation of the grant in Succession Cause No. 949 of 1994. In the said Application the first Defendant is seeking for revocation of grant that was issued by the court involving the same parties as in the instant case. The Application raises issues involving the distribution of the Estate of Mutu Kimani who is the father of the Plaintiff and the 1st Defendant. The subject matter of the Succession Cause is land Reference Number Ndarugu/Gacharage/949 (the land) which is also the subject matter in the case before this court.

In the present suit, the Plaintiff is seeking an injunction restraining the first Defendant from entering the land. The Plaintiff has annexed a title deed in respect of the land showing it belongs to the 1st Defendant and himself and it is the same property that the first Defendant is being asked not to interfere.

He submitted that under the Succession Act Cap 160 Laws of Kenya, the Plaintiff can still seek and obtain the same remedy as sought in this case. He urged the court to stay this matter pending the hearing and determination of the Application for revocation of the grant and the matters raised therein.

According to Mr. Nyakiangana, the Estate has not been fully administered as the title for the subject matter is in joint names and in applying that the matters be heard by the same court, it will avoid a situation where there may be conflicting rulings/judgments by two different courts over the same subject matter.

In his reply, Mr. Ndala appearing for the Plaintiff submitted that the "Preliminary Objection" does not meet the required standards and that a preliminary objection has to be on a point of law. He admitted that there is a pending Succession Cause being Succession Cause Number 749 of 1994 but the case involves the Plaintiff and the first Defendant and not the other Defendants. He argued that the Succession Cause is already spent as a certificate of confirmation of the grant has already been issued by the court and that the estate has been administered.

He submitted that the Plaintiff has raised the issues of defamation and trespass which can only be dealt with by the civil division. Though the title is in joint names of the Plaintiff and the Defendant, each party occupies a separate portion of the land with a clear boundary on the ground. We cannot drag all the parties to the Succession cause. He urged the court to dismiss the objection.

The court wholly concurs with the counsel for the Plaintiff that what is purported to be a "Preliminary Objection" does not meet the required standards. The essence of a Preliminary Objection was given by law JA Old Sir Charles Newbold P, in **Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors (1969) E.A 696** at Page 700 Law JA stated that: -

"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Example are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles Newbold P added as follows page 701: -

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion."

The court has considered the submissions made by counsels for the respective parties in support of and against the "Preliminary Objection". It is true that there is a pending succession cause before the Family Division wherein the 1st Defendant is challenging the certificate of confirmation of the grant and has applied for the revocation of the same. The said Application is yet to be heard and determined by the court. It is also not in dispute that the Plaintiff and the 1st Defendant are parties to the Succession Cause

by virtue of being beneficiaries to the Estate of Mutu Kimani whose Estate the Succession Cause relates to, and the subject of the same is, Land Reference No. Ndarugu/Gacharage/949. The land is registered in joint names of the Plaintiff and the 1st Defendant and it's also the subject matter of the case before the Civil Division.

The court has also noted that the Plaintiff and the Defendants are family members, the Plaintiff and the 1st Defendant are brothers while the 2nd to 6th Defendants are children of the 1st Defendant. This is a family matter and the issues raised herein can effectively be addressed in the Succession Cause. The divisions created in the High Court are meant to allow parties to file their matters in the right division for easier and quicker determination of the same.

For the foregoing reasons, the matter herein is stayed pending the hearing and determination of the Succession Cause No. 749 of 1994.

Dated and delivered at Nairobi this 5th day of November, 2015.

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LUCY NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiff

..... for the Defendants