



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
SUCCESSION CAUSE NO. 311 OF 2012
FROMERLY HCC. SUCC. CAUSE NO. 107 OF 2011
IN THE MATTER OF THE ESTATE OF GICHIRA KINYUA alias JAMES

GICHIRA KINYUA (DECEASED)

REBECCA WANJI KAMAU.....APPLICANT

VERSUS

WAMARWA KINYUA GICHIRA.....1ST RESPONDENT

JULIUS NJIKARI KINYUA.....2ND RESPONDENT

CYRUS KAIGUA KINYUA.....3RD RESPONDENT

RULING

1. The application before me is dated 5th May, 2014. It seeks orders to restrain the 2nd and 3rd Respondents or any other party from burying the remains of the 1st Respondent, **Wamarwa Kinyua Gichira** on the land parcel known as LR No. Mwerua/Kithumbu/1743 or land in sub – division Mwerua/Kithumbu/2274 upto Mwerua/Kithumbu/2296 pending the hearing and determination of the succession cause herein. The Applicant also sought for a review or the setting aside of orders issued by this court on 9th April 2014 in respect of Mwerua/Kithumbu/1742 claiming that the said parcel of land is no longer in existence owing to its subdivision.

The Applicant relied on the grounds stated on the body of the application, her supporting affidavit and further affidavit sworn on 5th May 2014 and 9th May 2014 respectively.

2. It is the contention of the Applicant that the Respondents obtained ex- parte interim orders on 4th April, 2014. That order number 4 thereof was already spent as Title No. Mwerua/Kithumbu/1742 did not exist and was incapable of being preserved as the land to which the title related had been subdivided and the resultant parcels of land transferred to third parties. It was further deponed that in particular parcel No. Mwerua/Kithumbu/2743 which mutated from Title No. Mwerua/Kithumbu/1742 had been registered in the name of Sarah Wanjiru Kariuki who is a stranger to this suit.

The Applicant additionally claims that the 1st Respondent has passed on and there were plans by her

family members to bury her remains in one of the disputed properties which belong to her. In support of her claim, she annexed a letter dated 6th May 2014 addressed to Kenyatta National Hospital authored by the Chief of Mwerua Location requesting the Hospital to waive the hospital bill incurred by the deceased Wamarwa Kinyua (1st Respondent). She also contended that since the 1st Respondent's late husband was buried in a piece of land known as LR No. Mwerua/Kagio/424, it would only be logical and proper if the deceased was buried next to her husband.

3. Upon being served with the application, the Respondents filed a replying affidavit sworn on 8th May 2014 by **Julius Njikari Kinyua** who is named as the 2nd Respondent. He maintained that the application was incompetent and fatally defective and was therefore an abuse of the court process. The 2nd Respondent conceded that the 1st Respondent had been critically ill but claimed that he was unaware of her demise. He averred that as the Applicant had failed to produce any proof of the 1st Respondent's death, she was not deserving of the orders of injunction sought in the application.
4. The 2nd Respondent also deposed that the prayers for review or setting aside of the orders issued on 4th April 2014 should be dismissed as contrary to the Applicant's allegations, the orders were issued after the court heard both parties. The Respondents further challenged the Applicant's ownership of land LR No Mwerua/Kithumbu/1743 claiming that the same was tainted with illegality as it was the product of fraudulent activities.
5. By consent of the parties, the application was disposed of by way of written submissions. Mr. Ogeto represented the Applicant while Mr. Gacheche Wa Miano appeared for the Respondents.

Learned Counsel Mr Ogeto submitted that as the 1st Respondent had passed on, the Applicant was very apprehensive that her family members want to bury her remains in one of the disputed properties; that this application was not meant to stop the burial of the deceased but to restrain the Respondents from burying her remains on the disputed parcels of land namely LR No Mwerua/Kithumbu/1743 and the parcels resulting from subdivision of title No. Mwerua/Kithumbu/1742 (the suit land). As such, it was argued, the Applicant had sufficiently demonstrated that she had a prima facie case with a high probability of success and that further she would suffer irreparable injury if the deceased's remains were buried on the suit land which belonged to her. In support of her case, she relied on the case of **Giella – vs- Cassman Brown & Co. Limited (1973) (EA) 358**. The applicant therefore urged the court to allow the prayers sought in the application.

6. On behalf of the Respondents', Learned Counsel Mr Gacheche submitted that this court does not have jurisdiction to hear the instant application which involved a burial dispute. That the instant suit was a probate and administration matter (Succession Cause); that the court's jurisdiction was limited to dealing with the assets comprising the estate of the late Kinyua Gichira and cannot be extended to entertain the present application. According to the Respondents, the Applicant should have filed a separate suit within which the instant application should have been filed, heard and determined.
7. It was also the Respondents case that in the event that the court did not agree with the foregoing submission, the application should nevertheless be dismissed as the applicant had failed to meet the threshold required for the granting of injunctive relief as prayed. That having failed to avail evidence proving the death of the 1st Respondent, the Applicant had failed to demonstrate that she has a prima facie case with a probability of success as set out in the case of **Giella –vs- Cassman Brown (supra)**

Mr. Gacheche also submitted that though the applicant had presented title documents to illustrate that she was the registered owner of the disputed properties, her title was tainted with illegality as the previous owner Ms. Jennifer Wamwirua Mariku had acquired the same through fraudulent means. It was contended that the said Jennifer Wamwirua was granted letters of administration of Gichira Kinyua's estate through misrepresentation of material facts by masquerading as his widow

prompting the application for revocation of grant filed by the Respondents which is pending hearing.

Concerning the 1st Respondent's burial site, relying on the case of **Maagu-vs- Waweru (1982) KLR 159**, the Respondents' advanced the view that according to the kikuyu custom, a woman should be buried at her husband's home by his kin. And that in the present case, the 1st Respondent never knew of any other home apart from the suit land which lawfully belonged to her deceased husband and that therefore, she ought to be buried in the suit land.

It was further submitted that the proposal that the 1st Respondent be buried in LR No. Mwerua/Kagio/424 was untenable as the said land did not belong to the late husband and that in any case, the said land was not subject to the instant suit.

8. With regard to the prayer for revision or setting aside of the orders dated 4th April 2014, it was the Respondents' submission that the same should await the determination of the application dated 2nd April 2014. It was Mr. Gacheche's contention that contrary to the Applicant's averments, the said orders were issued inter parties. The Respondents therefore urged the court to dismiss the application with costs.
9. I have considered the application, the affidavits on record, the rival submissions made by Counsel for the parties and the authorities cited. I note that though it is not expressly stated in the application, the orders sought by the Applicant are in effect orders of injunction restraining the Respondents' or any other person from burying the remains of the 1st Respondent in the suit land.. In the premises, I concur with both counsels that the principles set out in the case of **Giella –vs- Cassman Brown (Supra)**, ought to be satisfied before the injunctive orders can be issued. That is to say that the Applicant must demonstrate the following;
 - i. That she has a prima facie case with a probability of success;
 - ii. That she stands to suffer irreparable loss or damage if the orders sought are not granted ; And
 - iii. That in the event the two requirements have not been satisfied, that the balance of convenience was in her favour.

But before delving into whether the Applicant has satisfied the principles set out in the **Giella** case, I wish to first resolve the issue of jurisdiction raised by the Respondents' because as set out in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**, jurisdiction is everything and without it, a Court has no power to make one more step. Where there is a challenge on the court's jurisdiction, it should always be resolved as the first thing because if the court were to determine that it does not have jurisdiction, then there would be no basis for a continuation of the proceedings in question.

10. In this case, the Respondents' challenge on this court's jurisdiction to hear this application is based on grounds that the main suit being a succession cause, this court only has jurisdiction to hear matters that touch on the property and assets of the late ***Gichira Kinya alias James Gichira's*** Estate. That therefore the matter relating to where the 1st Respondent should be buried is a burial dispute and falls outside this court's the jurisdiction.

In a rejoinder to those submissions, Mr Ogeto argued that the matter before the court was not a burial dispute since the Applicant was not claiming any interest in the deceased's body. The Applicant's only interest was that the 1st Respondent's body was not buried on the disputed parcels of land.

11. I with respect do not agree with the Respondents' contention that this court lacks jurisdiction to hear and determine this application for the following reasons:

As correctly pointed out by the Applicant, the issue at hand is not a burial dispute. If I understand the Applicant correctly, she is not claiming a right to bury the remains of the deceased. She is also not seeking orders to stop the 1st Respondent's kin from burying her but is only seeking orders aimed

at ensuring that her burial site is not in the suit properties.

It is clear from the record that the suit land originally formed part of the estate of the late **Gichira Kinya** alias **James Gichira Kinyua**. A grant of letters of administration of the said estate was issued to **Jennifer Wamwira Mariiku** on 4th June 2009 in Kerugoya Succession Cause No. 3 of 2009. This grant has been challenged by the Respondents' in two applications seeking revocation of that grant.

The first summons for revocation of that grant is dated 7th March 2011 and was filed before the High Court in Embu before the matter was transferred to this court. The second application was filed recently on the 13th March 2014 while the application dated 7th March 2011 was still pending hearing. It would appear that the suit properties changed hands and were acquired by the Applicant after the contested grant was confirmed. The summons for revocation of grant therefore seeks to have the suit land restored back to the estate of the late **Gichira Kinya** alias **James Gichira Kinyua**.

In my view, considering that the clear objective of the Applicant in this application is to preserve the current status of the suit land so that there is no interference with it on the ground by the Respondents' pending the determination of the summons for revocation of the grant issued herein, and it is not disputed that the suit land is the subject matter of the pending succession proceedings, I have no doubt in my mind that this court has jurisdiction to hear and determine the said application.

12. Having resolved the issue of jurisdiction, I shall now proceed to determine whether on the material presented before me, the Applicant has established a prima facie case with a probability of success to warrant the grant of a temporary injunction pending the hearing and determination of the summons for revocation of grant or whether she stands to suffer loss that is incapable of being compensated by an award of damages.
13. A prima facie case was defined in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 others (2003) KLR 123** as follows:

“..a prima facie case in a civil application includes but is not confined to a “genuine and arguable”. it is a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” (Emphasis added)

14. According to the Applicant, the present application was provoked by the 1st Respondent's death during the pendency of the succession cause. It was averred that the 1st Respondent succumbed to illness at Kenyatta National Hospital. The only document produced by the Applicant as evidence to support this fact is a letter dated 6th May, 2014 authored by the Chief of Mwerua location one **David Mwaikira**. It is marked “**RWK1**”. It was annexed to the Applicant's further affidavit. The letter indicates that the 1st Respondent, who was patient number 0105471, is now deceased. That her body was still lying in the mortuary and was yet to be discharged due to non-payment of a huge hospital bill. The chief in that letter urged the hospital to assist the deceased's family by waiving the hospital bill.
15. Despite the production of this letter, the 2nd and 3rd Respondents contended that the Applicant had failed to prove the death of the 1st Respondent. According to the Respondents, the Applicant should have produced either a burial permit, death certificate or hospital records to support her contention. That in the absence of such documentation, the Applicant had not demonstrated to the court that she had a prima facie case with a probability of success.
16. Having carefully evaluated the arguments by both parties and the material placed before the court, it is my finding that the Respondents did not challenge the letter by the Chief of Mwerua location marked as “**RWK1**.” They did not contest the authenticity of the same nor its contents. The letter clearly shows that the 1st Respondent is dead and that her remains were yet to be released to her family members due to an accumulated hospital bill. Further, it would be impractical to expect the Applicant to produce copies of a burial permit, death certificate or hospital records while as it is

common knowledge that such documents by their very nature can only be obtained by a deceased's person next of kin. Such documents cannot be accessible to the Applicant unless they are provided by the Respondents'. Such documents in the ordinary course of business in the context of this case can only be obtained by the Respondents'.

17. Be that as it may, though the 2nd Respondent in his affidavit purported to deny that the 1st Respondent had passed on, his Counsel when addressing the court on 26th May 2014 confirmed that the 1st Respondent was indeed dead and that her remains were yet to be buried as they were awaiting the outcome of the succession cause. Further, in the Respondents' written submissions, there was an admission of the death of the 1st Respondent. This can be seen from the submission that the 1st Respondent, never knew any other home apart from the suit land which lawfully belonged to her deceased husband and that therefore, she ought to be buried in the suit land.

From the foregoing, it is clear that the 1st Respondent is indeed deceased and from the Respondents submissions, it is clear that the Applicant's apprehension that the Respondents and her other family members intend to bury her remains in the suit property is justified and well founded.

18. The Applicant is seeking to restrain the burial of the deceased on the suit properties. She has annexed copies of title deeds to the suit properties marked as "**EXBII 2**" to demonstrate that she is the sole registered proprietor of the suit land. The Respondents however contend that the title no. Mwerua/ Kithumbu/1743 produced by the Applicant is not authentic since a certificate of search dated 28th February 2014 and which they produced as "JNK2" shows that the registered proprietors of that land were **Jennifer Wamwerua Mariku** and **Peter Munene Gichira** and not the Applicant. That further the sale of the suit land to the Applicant was fraudulent as **Jennifer Wamwerua Mariuki** obtained letters of administration of **Gichira Kinyua's** estate through fraudulent means.

19. Having said that, I will say no more concerning the competing claims of ownership of the suit properties since in my view, this is an issue that needs to be fully ventilated and resolved in the pending proceedings for revocation of grant issued herein. Suffice it to note that the certificate of search produced as "JNK " is dated 28th February 2014, while the title deed to Mwerua/ Kithumbu/1743 produced as "**RWK2**" was issued on 11th March 2014. It is thus clear that the certificate of search was not current and may contain outdated details as regards the status of ownership of the said parcel of land.

20. As I have stated before in this ruling, my concern is to determine whether the Applicant has demonstrated that she is entitled to the orders of injunction as sought in her application. On the material placed before me, I find that the Applicant has tendered evidence to prove that she is the registered proprietor of the suit parcels of land. She has produced title documents to that effect. It is also not disputed that the 1st Respondent is dead and that there is every intention by the members of her family to bury her in the suit properties. Though the Applicant's ownership of the suit properties is disputed, the fact of the matter is that as matters now stand, she is the registered proprietor of the said land and though this fact by itself may not be sufficient basis for a finding that she has demonstrated that she has a prima facie case with a probability of success in the pending succession proceedings, it is in my view prove that if orders sought are not granted and the 1st Respondent's body is interred in the suit land, the Applicant is likely to suffer irreparable injury which cannot be compensated by an award of damages if eventually the Respondents fail in their bid to have the grant of representation to the deceased's estate revoked.

21. It is also my finding that granting the injunctive orders sought will serve the ends of justice since they will have the effect of preserving the status quo pertaining to the suit land on the ground and they are not likely to prejudice any of the party's alleged rights to the suit land pending the hearing and determination of the summons for revocation of grant.

If on the other hand the orders sought are not granted and the 1st Respondent's remains are interred

in the suit land before the parties ownership wrangles are resolved, this would do nothing more than to aggravate and convolute the dispute between the parties.

I am therefore satisfied that the Applicant is entitled to the orders sought in prayers 2 and 4. I consequently allow the application and hereby grants orders restraining the 2nd and 3rd Respondents, their agents or anybody claiming through them from burying the remains of the deceased (1st Respondent) in the suit land namely land known as LR No. Mwerua/Kithumbu/1743 or land in parcel numbers Mwerua/Kithumbu/2274 to Mwerua/Kithumbu/2296 (subdivisions from Mwerua/Kithumbu/1742) pending the hearing and determination of the summons for revocation of the grant issued in this cause. These orders shall be served upon the County Commander Kirinyaga County and OCS Kagio Police station for compliance.

22. With regard to prayer number 3 seeking a review and setting aside of the orders dated 4th April 2014 and issued by this court on 9th April 2014 and in particular the interim conservatory orders relating to against land parcel number Mwerua/Kithumbu/1742, I find no reason to interfere with those orders since the same were of a temporary nature meant to preserve the current status of the land claimed as part of the deceased's estate so that no further transactions take place involving the suit land pending the hearing and determination of the application dated 2nd April 2014. Besides, the Applicant has not demonstrated that the parcel numbers given to the subdivisions done on LR NO. Mwerua/Kithumbu/1742 have actually been officially registered in place of the mother title. I therefore find no merit in prayer 3 and it is hereby dismissed.

23. In the result, the Applicant's application dated 5th May, 2014 partially succeeds in respect of prayers 2 and 4. Costs of this application shall be costs in the cause. Orders accordingly.

C.W. GITHUA

JUDGE

DATED AND DELIVERED AT KERUGOYA THIS 11TH DAY OF JUNE 2014.