



IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 168 OF 2011

**IN THE MATTTER OF THE ESTATE OF THE ESTATE OF TIMOTHY KANYUA MUGAMBI-
(DECEASED)**

DAVID MURIUKI MUGAMBI.....APPLICANT

VERSUS

JESSE N.K. MUGAMBI &

4 OTHERS.....RESPONDENTS

R U L I N G

1. The applicant David Mugambi filed an application dated 30th April, 2013 seeking the following orders;

- (a) That the Honourable court be pleased to make an order that the administrators be restrained from chasing away the tenants doing their farm work particularly in the land at Blue Valley Embu and the *status quo* be maintained.
- (b) That the administrators be ordered to stop wanton destruction of trees planted by the applicants herein and also be stopped from secretly selling plots of land before a succession dispute is concluded.
- (c) That the applicant be made one of the administrators together with the others or in place of Catherine Mugambi by virtue of his knowledge of the history of the deceased properties and also by virtue of his seniority in age to the said joint administrator Catherine N. Mugambi.

2. The application is based on the ground that the administrators continue to sell the the plots at Blue Valley before the conclusion of the succession cause and that the administrators continue to hide material facts of the succession cause from the applicant herein and continue to harass genuine tenants farming in some of the land forming part of the estate.

3. In his affidavits,the applicant averred that he has been the caretaker of the estate of the deceased for many years and continues to perform his duties even after the demise of the deceased. He alleges that the letters of administration were obtained clandestinely and that the same should be nullified or amended to include him. He also claims that Catherine Mugambi who is married, overambitious and junior in age should not be left to administer the estate as she is violent and arrogant. The applicant however states that he has no problem with the the other co-administrator Jesse Mugambi being an administrator as he has not been involved in the maladministration of the said estate. He states that he was never part of the deliberations on the appointment of the administrators and that if he was,he would not have approved Catherine to be one of the

administrators. He also alleges that Catherine did not witness any of the original land transactions and as such cannot be capable of distributing the estate of the deceased.

4. The 1st administrator Jesse Mugambi in his affidavit confirms that the family members and himself met and agreed that Catherine Mugambi and himself be appointed as the joint administrators of the estate. A consent to this effect was recorded in court. He states that he has no problem with the applicant being made an administrator.
5. The 2nd administrator Catherine Mugambi also filed a replying affidavit. She stated that her co-administrator and herself were appointed as administrators of the estate of the deceased after lengthy deliberations were made by the family members. A consent to this effect was filed in court and adopted as an order of the court. She is of the view that the consent cannot be varied without the consent of other parties involved in the deliberations. She avers that everyone cannot keep seeking to be joined as an administrator of the estate and that the applicant has not shown that he will suffer any prejudice and can always file a protest if he is dissatisfied by the distribution. She claims that the applicant allegation are baseless and based on malice.

6. UNDISPUTED FACTS

- (a) That Catherine Mugambi and Jesse Mugambi are the joint administrators of the deceased's estate.
- (b) That a consent appointing the said joint administrators was recorded in court.

7. DISPUTED FACTS

- (a) That the applicant was part of the family deliberations that led to the appointment of the joint administrators.
- (b) That one of the administrators Catherine Mugambi is Mal-administering the estate.

8. ISSUES FOR DETERMINATION

- (i) Whether the applicant has proved any grounds that should cause the consent dated 24/1/13 to be varied.
- (ii) Whether the applicant's allegations regarding Catherine Mugambi's age, gender and marital status are discriminatory and unconstitutional.
- (iii) Whether the actions of Catherine Mugambi has exceeded her statutory powers as an administrator in handling the estate.
- (iv) Whether the issues raised by the applicant satisfies the conditions required before a court can grant an interlocutory injunction.
- (v) Whether the applicant has proved the grounds upon which an administrator can be removed or substituted.

9. FINDINGS

Issue No. (i)

The applicant has stated that he was not present at the meeting where deliberations on who were to be appointed as administrators were made. The 1st administrator Jesse however confirmed that family members were present at the meeting where the administrators were agreed upon. Catherine Mugambi the other administrator also confirmed that the consent was recorded after family members deliberated at length on the appointment of administrators. The request by the applicant to be made a co-administrator means varying and or setting aside the consent order dated 21/1/13.

In the case of *KCB Vs Benjoh Amalgamated Ltd. & Another, Nairobi Civil Appeal No.276 of 1997*, the

Court of Appeal quoting the case of *Flora Wasike Vs Destimo Wamboko [1981] 1 KAR 625* held that;

"a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside....."

The court of appeal went ahead and listed the grounds upon which a consent order may be set aside by relying on the case of *Hirani Vs Kassam [1952] 19 EACA 131* in which the court held as follows;

"prima facie, any order made in the presence and with the consent of counsel is binding on all parties and to the proceedings or action and on those claiming under them.....and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court.....or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement"

In view of the fact that the applicant has not proved any of the grounds to warrant the setting aside or varying the consent dated 24/1/13 and in view of the fact that the family members have not agreed to set aside or vary the consent order recorded. My finding is that the application cannot be allowed on this ground.

Issue No. (ii)

The applicant cites age and marital status as one of the reasons why Catherine should not be a co-administrator. He states that Catherine is his junior in age hence inexperienced in administering the estate. He also emphasized that Catherine is a married woman. This in my opinion is discriminatory and unconstitutional. Article 27 of the Constitution is clear that every person is equal before the law and that no one should be discriminated on grounds of marital status, sex or age. In view of this ground 3 of the application should fail.

Issue No. (iii)

Section 82 and 83 of The Law of Succession Act provides the powers and duties of an administrator. In my opinion the applicant has not proved before this Court that Catherine Mugambi has exceeded or abused her statutory powers as an administrator.

Issue No. (iv) & (v)

It is a principle of law that he who alleges a fact must prove it.

Section 107(1) of the Evidence Act provides:-

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

*In this regard the Applicant had a duty to provide proof of his allegations. He however did not provide the same and as such this ground also fails. The principles governing the granting of interlocutory injunctions were well laid down in the case of *Giella Vs Cassman Brown [1973] EA 358* and which have been cited in several cases.*

In an application as this, the Court has discretion to grant an interlocutory orders. It is the duty of the applicant to prove that he/she has a prima facie case with a probability of success and that he will suffer irreparable loss which cannot be compensated by monetary terms if the orders sought are not granted.

The Applicant has failed to show any proof of the wanton destruction of trees belonging to the estate, the

mistreatment of tenants and others. All he has presented to the Court are unsubstantiated allegations. He has also failed to show that other family members would want him to administer his father's estate. He has an opportunity to protest if he is not satisfied with the mode of distribution.

All in all I find no merits in the application dated 30th April 2013 and I disallow it. Its dismissed with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF JULY, 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Ndorongo for 1st Administrator/Respondent

Kirong CC