



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ENVIRONMENT AND LAND DIVISION**

**ELC. CASE NO. 10 1 OF 2014**

**ZUWEINA SALIM..... PLAINTIFF**

**VERSUS**

**CLIVE KHISA..... DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 31<sup>st</sup> January 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from evicting or in any way interfering with the Plaintiff's peaceful occupation of the parcel of land known as Nairobi/Block 63/440 (hereinafter referred to as the "suit property") pending the hearing and determination of the Application and suit. The Plaintiff/Applicant also seeks for costs to be in the cause.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Zuweina Salim, sworn on 31<sup>st</sup> January 2014 in which she averred that she is the wife of the late Joseph Simiyu Khisa (hereinafter referred to as the "Deceased") who passed on in Nairobi on 24<sup>th</sup> December 2013. In support of that assertion, she annexed a copy of an Affidavit dated 7<sup>th</sup> September 2010 ostensibly sworn by both her and the Deceased. She further averred that the Deceased was the legally registered owner of the suit property and that she and the Deceased had been staying in the suit property as their matrimonial home for about 6 years. To prove that assertion, she annexed a copy of the Certificate of Lease in the name of the Deceased. She further averred that immediately after the burial of the Deceased, the Defendant/Respondent who is her step-son starting sending threats to the effect that he would evict her and her family from the suit property. She further stated that should the Defendant/Respondent make good his threat, she and her family will suffer irreparable loss and damage since they would remain homeless. She further added that it is now that the family is planning to file a succession case in court to have the court adjudicate on the affairs of the estate of the Deceased.

The Application is contested. The Defendant/Respondent filed his Replying Affidavit sworn on 14<sup>th</sup> February 2014 in which he averred that the suit property belongs to him by virtue of the same being his parent's matrimonial home. He further averred that the affidavit exhibited by the Plaintiff is a forgery as the Deceased never contracted a customary marriage or otherwise in his life with the Plaintiff. He further asserted that his late father had only one wife namely his mother known as Josephine Kapukha Khisa. In support of that assertion he annexed a copy of the marriage certificate. He further added that his father had also sired a child called Abigail Khisa with a lady known as Esther Ithome Mulekyo to whom he was introduced. He further added that the said Esther Mulekyo also got twins named Kezia Khisa and Jael Khisa both of whom were also sired by the Deceased. He then averred that the Plaintiff is a former woman friend of the Deceased who prevented him from accessing the suit property which was his home. He added that the Plaintiff is an imposter and not a dependant of the Deceased.

Further to the above, the Defendant/Respondent raised a Preliminary Objection to the effect that this court has no jurisdiction to hear and determine this matter s it affects the estate of the Deceased which is the subject of the law of succession in Bungoma P&A 53 of 2014.

In reply thereto, the Plaintiff/Applicant filed her Supplementary Affidavit sworn on 4<sup>th</sup> March 2014 in which she averred that it is true that Josephine Auma Kapukha, the Defendant's mother, was married to the Deceased at some point. She further averred that the said Josephine Auma Kapukha however divorced the Deceased and went to the USA where she got married to a Mr. Glen L. Trueman on 18<sup>th</sup> May 2008. She further averred that that marriage is still subsisting and is blessed with a 5 year old son by the name Imani. She further stated that the Defendant and his sister were subsequently adopted by the said Glen L. Trueman as his children and that they are now all US citizens. She further disclosed that the Defendant only came to Kenya to buy his father the Deceased. The Plaintiff/Applicant also admitted that the Deceased had a relationship with a lady known as Esther Ithome Mulekyo with whom he sired a baby girl by the name of Abigael Khisa and later gave birth to twin baby girls known as Kezia and Jael Khisa whose paternity is yet to be determined through a DNA test. She further stated that she is the only legal wife to the Deceased and that her affidavit of marriage is genuine and not a forgery as asserted by the Defendant/Respondent. She further added that she was included in the insurance papers and official documents of the Deceased as his wife and was accorded the same respect at his funeral. She added that the Defendant/Respondent, his mother and sister are now US citizens and have no right to inherit the property of the Deceased and that as the only widow of the Deceased, she is entitled to inherit the matrimonial property being the suit property.

Both the Plaintiff/Applicant and the Defendant/Respondent filed their written submissions which have been read and taken into account in this ruling.

I will address the Preliminary Objection raised by the Defendant/Respondent which, to my mind, shall direct the way forward with this suit. The Defendant/Respondent raised a Preliminary Objection to the effect that this court has no jurisdiction to hear and determine this matter as it affects the estate of the Deceased which is the subject of the law of succession in Bungoma P&A 53 of 2014. The suit property which is the subject matter of this suit is stated to have belonged to the Deceased and now forms part of his estate. This is a fact that has been conceded to by all the parties hereto and has been supported by the copy of the Certificate of Lease produced by the Plaintiff. Both the Plaintiff and the Defendant are laying claim to the suit property by way of inheritance. This issue may only be properly adjudicated upon in a succession cause under the Law of Succession Act which is for the following purpose:

**“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons...”**

Accordingly, I do agree with the Preliminary Objection that this court has no jurisdiction over this matter and that the succession court is the one conferred with jurisdiction to handle matters of this nature. In light of the foregoing, I hereby dismiss the Application with no order as to costs.

**DELIVERED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2014.**

**MARY M. GITUMBI**

**JUDGE**