



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 149 OF 2014

JULIAH WAMBUI KIRATHI.....PLAINTIFF

VERSUS

NELIUS WANJIKU.....1ST DEFENDANT

REUBEN GIKONYO.....2ND DEFENDANT

RULING

The Plaintiff in her application dated **14th February 2015**, seeks the following orders:

1. *Spent*
2. *Spent*
3. *The court be pleased to grant a temporary order of injunction against the Defendants restraining them from trespassing on, demolishing, constructing, altering or in any other manner interfering with the Plaintiff's house situate on a piece of land known as **Limuru/Bibirioni /385** until the final determination of the suit.*
4. *The court be pleased to grant an order declaring that the Plaintiff is entitled to ½ share interest in that piece of land known as **Limuru/ Bibirioni/385**.*
5. *If Prayer No. 4 is granted, the Court be pleased to revoke the title for land known as **Limuru/Bibirioni/385** in the Defendants' names and order the District Lands Registrar Limuru to issue a new title to the Plaintiff for the half interest in **Limuru/Bibirioni/385**.*
6. *Costs of the application be provided for.*

The application is premised on grounds outlined in the application and supported by an affidavit sworn by the Plaintiff. She deposes that she and the 1st Defendant are co-wives of the late **Benjamin Kirathe**, the registered owner of the suit property and that each of them has a house erected thereon. The Plaintiff alleges that the Defendants have unlawfully trespassed and demolished her house with the intention of constructing a permanent house, which actions are in total disregard of her interests as a beneficiary of the estate. It is her deposition that the Defendants are taking advantage of the fact that letters of

administration have not been taken out and unless restrained, they will continue in their unlawful acts to her detriment.

The 1st Defendant swore a Replying Affidavit on **27th March 2014**, wherein she refuted the claim that the Plaintiff is her co-wife. She deposed that she was married to the deceased customarily in **1961** and subsequently in a Church ceremony in **1968**, and therefore the deceased had no legal capacity to marry the Plaintiff. It is her deposition that she purchased the suit property but that out of respect, she had the plot registered in the name of the deceased. However, that when the 2nd Defendant became of age, the deceased caused the property to be registered in their two names and the deceased gave the 2nd Defendant one half of the land whereas the other half was occupied by the deceased and herself.

The 1st Defendant further stated that the deceased constructed a wooden house for the Plaintiff to reside in temporarily as they looked out for land to purchase land for her. Subsequently, a parcel of land known as **Limuru/Kamirithu/2253**, was purchased where the Plaintiff moved to and the deceased gave the 2nd Defendant the wooden house where he resided until the deceased's demise. Further, that over the years, the 2nd Defendant has renovated the wooden house upgrading it to a permanent stone house where he has been residing with his wife and children. The deponent maintained that the Plaintiff did not have a house within the suit property and therefore the allegation of trespass was unfounded. It was also deposed that the Plaintiff had filed a claim over the suit property in the **Limuru Lands Dispute Tribunal**, and subsequently an appeal at the Provincial Appeals Tribunal which on **27th May 2009** held in the Defendants' favour and a further appeal to the High Court has never been prosecuted to date.

The Plaintiff filed a Supplementary Affidavit on **16th April 2014**, wherein she deposed that she got married to the deceased customarily in 1967 and has lived on the suit property with their children since then. The Plaintiff refuted the claim that the 1st Defendant purchased the property maintaining that the same was purchased solely by the deceased. She deposed further that registration in favour of the deceased and the 2nd Defendant was effected fraudulently as the caution she had placed against the title was removed as a result of misrepresentation of facts by the deceased and the 2nd Defendant. The Plaintiff also denied the allegation that **Limuru/Kamirithu/2253** was purchased by the deceased or that she relocated thereto.

The application was further canvassed by way of written submissions together with authorities which I have carefully read and duly considered. The Plaintiff seeks an order of injunction on the ground of trespass. It is to be noted, however, that the disputed property forms part of the **estate of Benjamin Kirathe** to which both parties claim to be beneficiaries to the estate. On the one hand, the Plaintiff claims to be in possession of a portion of the suit property and that being a widow of the deceased, she is entitled to the said portion. This claim is refuted by the 1st Defendant who contends that the Plaintiff is not a widow of the deceased neither does she reside on the suit property.

In my view, the dispute involves the estate of the deceased and part of the issues to be determined is who the rightful beneficiaries are thereto. In that regard, I am of the considered view that this Court is not the proper forum to adjudicate over a dispute of an estate and its rightful beneficiaries.

Whereas this court is seized with the jurisdiction to hear and determine disputes relating to the **environment** and the **use** and **occupation** of and title to land, questions as to rightful beneficiaries and distribution of the estate is a preserve of the **Probate and Administration (Family) Division** of the High Court. Notably also, to date, none of the parties has taken out letters of administration in respect of the estate and therefore none of the parties have the legal capacity to institute proceedings in respect of the properties forming part of the estate.

Having found that this is a dispute that is best addressed by the Family Division, I wish not to delve into whether or not the Plaintiff has met the threshold for the grant of injunction orders. This court is however mandated and empowered to ensure that justice prevails. In that regard, pursuant to the inherent powers of this Court given under **Sections 3A and 63 of the Civil Procedure Act**, I direct that the parties herein to

institute appropriate proceedings at the Probate and **Administration (Family) Division** of the High Court within **21 days** from the date hereof during which time the **status quo** shall be maintained. Consequently the Plaintiff's suit is hereby stayed for the above reasons pending the outcome of the Succession proceedings. Costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this **15th** day of **May, 2015**

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff

M/s Kiragu holding brief for M/s Wambua for the 1st and 2nd Defendants/Respondent

Hilda: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling Read in open Court in the presence of the above advocates and absence of the Plaintiff/Applicant.

L. GACHERU

JUDGE