



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NO.180 OF 2012

JANE KANYI KAHARA.....PLAINTIFF

VERSUS

WAWERU TITI MICHAEL.....DEFENDANT

RULING

1. The Plaintiff brought this suit against the defendant WAWERU TITI MICHAEL on 5/4/2012 seeking a mandatory injunction to compel him and his agents to vacate all that parcel of land known as LR No. Dagoretti/Uthiru/580 (hereinafter referred to as **“the suit property”**) and to demolish and remove all structures and fixtures illegally erected thereon. The Plaintiff also sought general damages and mesne profits. From the record, it appears that the defendant was not served with the summons to enter appearance. There is a letter in the court file dated 22/8/2012 that was addressed to the Deputy Registrar by the Plaintiff’s advocates on record requesting for the issuance of summons to enter appearance for service upon the defendant which summons were issued on 8/10/2012.
2. Prior to that date, the Plaintiff had filed an application by way of Notice of Motion dated 31/7/2012 in which she sought an order that one, Margaret Waweru Titi and David Titi Waweru be joined in this suit as legal representatives of the defendant, Waweru Titi Michael deceased. The application was brought on the ground that the defendant died in April 2012 and that, they said Margaret Waweru Titi and David Titi Waweru who are the defendant’s children were administering the estate of the deceased defendant by collecting rents from the deceased’s rental apartments. If the defendant had died in April, 2012 as claimed by the plaintiff in this application dated 31/7/2012, he could not have been served with the summons to enter appearance that was issued on 8/10/2012 as aforesaid.
3. For reasons which are not clear from the record, the plaintiff did not prosecute the said application dated 31/7/12. Instead, the plaintiff filed another application on 5/6/2015 by way of Notice of Motion dated 3/6/2015 in which she sought the following orders:-
 - i. THAT the children of the deceased defendant namely, Lucy Waweru, Alex Waweru, Peter Titi Waweru and Monica Wairimu Waweru (hereinafter referred to only as **“the respondents”**) be held to have intermeddled with the estate of the deceased defendant contrary to section 45 of the Laws of Succession Act and be committed to civil jail for a period not exceeding one year with a fine.
 - ii. THAT further or in the alternative, the court be pleased to issue the respondents with grant of letters of administration ad litem for the purposes of being joined in this suit as defendants in place of the deceased defendant.
4. This is the application which is the subject of this ruling. Like the first application that was dated 31/7/12, this application was brought on the grounds that the defendant died in April 2012 and that the respondents who are the defendant’s children are intermeddling with his estate contrary to

- section 45 of the Law of Succession Act in that they are dealing with the properties of the deceased before obtaining grant of letters of administration in respect of his estate. The plaintiff has contended that the respondents' failure to take out a grant of letters of administration in respect of the estate of the deceased has hindered the prosecution of this suit thereby exposing it to the risk of being dismissed for want of prosecution.
5. The application was supported by the affidavit of the plaintiff sworn on 3/6/2015 in which she reiterated that the defendant died in April, 2012 and that the respondents who are his children have refused deliberately to take out grant of letters of administration in respect of his estate. The plaintiff stated that as a result of the failure by the respondents to obtain grant of letters of administration in respect of the estate of the deceased as aforesaid, she is unable to prosecute this suit because there is no one she can substitute as a defendant in place of the deceased defendant.
 6. The Plaintiff's application was not opposed by the respondents. The respondents were served with the application but failed to respond to the same. When the application came up for hearing on 22/9/2015 Mr. Ngoge advocate appeared for the plaintiff. Mr. Ngoge in his submission reiterated the grounds set out in the body of the application and the contents of the plaintiff's affidavit in support of the application which I have referred to above. Mr. Ngoge added that in the event that the court finds that it has no jurisdiction to grant the orders sought, it should transfer the application to the family division of the High Court for hearing and determination.
 7. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the submissions by the plaintiff's advocate. I am not satisfied that the Plaintiff is entitled to the orders sought for various reasons. The plaintiff has contended that the defendant, Waweru Titi Michael died in April 2012 and that the defendants are his children. There is no evidence before me that the defendant died in April 2012 or at all. As I have stated earlier in this ruling, this suit was filed in April, 2012. It is not clear whether this suit was filed before or after the defendant's alleged death. If the suit was filed against the deceased defendant after his death then the same is incompetent and the deceased cannot be substituted therein by the respondents. Again, if the defendant is not deceased, the issue of the respondents intermeddling with his properties does not arise. The plaintiff had a duty to place sufficient material or evidence before the court in proof of the defendant's alleged death.
 8. There is also no evidence before me that the respondents are the children of the defendant and that they have intermeddled with the properties of the defendant. The plaintiff has not given the particulars of the defendant's alleged properties and how each of the respondents has intermeddled with the same. The plaintiff's claim that the respondents have intermeddled with the estate of the deceased has no basis in the circumstances. Consequently, the plaintiff's prayer that the respondents be committed to jail is not warranted assuming that this court has power to do so. Even if the plaintiff had established that the respondents have intermeddled with the estate of the defendant, I am of the view that this court has no jurisdiction to impose the punishment sought by the plaintiff.
 9. Intermeddling with property of a deceased person is a criminal offence under section 45 of the Succession Act, Cap 160 Laws of Kenya. The power to prosecute criminal offences of this nature lies with the Director Public of Prosecution and the prosecution is done at the Magistrate's Court. The plaintiff ought therefore to have lodged a complaint with the police regarding the alleged intermeddling. The police would have investigated his complaint and if satisfied that an offence had been committed, would have referred the matter to the Director of Public Prosecution for necessary action. This court has no jurisdiction to try the respondents for the alleged offence of intermeddling with the property of the defendant at the instance of the plaintiff and to pass the sentence sought. Prayer 1 of the plaintiff's application is therefore not for granting.
 10. In her alternative prayer, the plaintiff has urged the court to issue the respondents with a limited grant of letters of administration in respect of the estate of the defendant so that they may be substituted as defendants in this suit in place of the defendant who is said to be deceased. This prayer cannot also be granted. As I have stated earlier, there is no evidence of whatsoever nature before me that the defendant is deceased. A court cannot issue a grant of letters of administration limited or otherwise in respect of the estate of a deceased person without evidence that the person in respect of whose estate the grant is sought is deceased. Furthermore, this court has no jurisdiction to issue grants of letters of administration. Applications for grant of letters of administration are made under the Law of Succession Act, Cap 160 Laws of Kenya. Section 47 of

the Law of Succession Act which has been cited by the Plaintiff provides as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders herein as may be expedient. Provided that the High Court may for the purposes of this Section be represented by resident magistrates appointed by the Chief Justice.”

11. It is clear from the foregoing that the only court with Jurisdiction to entertain an application for grant of letters of administration is the High Court. In certain circumstances, the jurisdiction may be exercised by the Resident Magistrate's Court. The jurisdiction of this court as conferred by section 13 of the Environment and Land Court Act, 2011 does not extend to issuing grants of letters of administration. Article 159(2) (d) of the constitution enjoins this court to administer justice without undue regard to procedural technicalities. The obstacles that stand on the way of the plaintiff's application are not merely technical in nature. In the case of, **Samuel Kamau Macharia & another vs. Kenya Commercial Bank and 2 others, (2012) eKLR** the Court of Appeal stated that, ***“We agree with the counsel of the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain the proceedings.”***
12. I have anxiously considered the plaintiff's advocate's plea that the application be referred to the High Court for hearing and determination in the event that this court finds that it has no jurisdiction to grant any of the orders sought. I do not think that any purpose would be served by transferring the present application to the family division of the High Court as suggested by the Plaintiff's advocate. For the reasons that I have given herein earlier, the application has no chance of succeeding in the High Court in its current form. I am of the view that no injustice would be occasioned to the plaintiff if the present application is not transferred to the High Court. The plaintiff is at liberty to file a proper application before the High Court for a limited grant of letters of administration to be issued to the respondents.
13. Section 54 of the Law of Succession Act Cap 160 Laws of Kenya provides as follows;

“A court may according to the circumstances of each case issue a grant of representation which it has jurisdiction to make in the forms described in the fifth schedule.”

Paragraph 14 of the Fifth Schedule provides that;

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or the person entitled to an administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in the suit limited for the purposes of representing the deceased therein, or in any other cause or suit which may or any other court between the parties, or any other parties, touching the matters at issue in the cause or suit and until a final decree shall be made therein and carried to complete execution.”

14. The plaintiff is at liberty to move the High Court pursuant to the said provisions of section 54 and the Fifth Schedule of the Succession Act for a limited grant to be issued to the respondents for the purposes of being joined in this suit as defendants in place of the defendant who is alleged to be deceased. Once the said grant of letters of administration is issued, the plaintiff can then move this court under 24 of the Civil Procedure Rules for the substitution of the defendant with respondents.
15. I have said enough to show that the application before me dated 3/6/2015 has no merit. The same is dismissed with no order as to costs.

Delivered, Dated and Signed at Nairobi this 22nd Day of October, 2015

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff/Applicant

N/A for the Respondents