



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1073 OF 2013

HENRY NJUNG'E KIRIKA.....1ST PLAINTIFF

DAVID KIMETHU KIRIKA.....2ND PLAINTIFF

VERSUS

KEZIA NJANGO KIRIKA (Being the administrator

of the estate of STEPHEN KIRIKA NJUNGE

(Deceased)..... DEFENDANT

RULING

The Plaintiffs' Application

The Plaintiffs are seeking the various orders set out hereinbelow in an application filed by way of a Notice of Motion dated 4th September 2013:

1. That the Defendant be restrained from undertaking any further disposition, alienation, transfer or otherwise dealing whatsoever with the properties that were registered in the names of the deceased Stephen Kirika Njunge, and appearing on the Certificate of Confirmation of Grant issued on 23/2/2011 pending the hearing and determination of this suit.
2. That the Defendant renders a comprehensive true and just account of all monies received and incurred in disposition, alienation or otherwise in dealing with the properties of Stephen Kirika Njunge (deceased) listed in the Certificate of Confirmation of Grant issued on 23/2/2011, and also avails a true and just inventory and the current ownership of all the properties appearing on the Certificate of Confirmation of Grant issued on 23/2/2011.
3. That all rental income derived from the estate be paid into a rental account to be operated by all the beneficiaries of the estate with the 2nd Plaintiff being allowed with the leave to court to draw funds for upkeep, maintenance and subsistence on a monthly basis.

The grounds for the application are on its face, and in the supporting affidavit and further affidavit sworn by the 1st Plaintiff on 4th September 2013 and 13th June 2014. The Plaintiffs are the children of the Defendant. They claim that the court issued a Certificate of Confirmation of Grant on 23/2/2011 to the Defendant on the terms that she was entitled to the Deceased's properties absolutely, whereas she is a spouse with children and therefore only has a life interest. Further, that the Defendant has been conducting the affairs of the Deceased's estate singlehandedly to the exclusion of the Plaintiffs, who are

not aware about what properties are still in the name of their deceased father's name, which properties have been disposed of, and how and by whom the proceeds of the disposition were shared.

The 1st Plaintiff in his supporting affidavit has explained the genesis of the dispute between the parties, and in summary has stated that the Defendant petitioned for letters of administration in respect of his deceased father's estate on 20/7/2009, and that the Plaintiffs willingly gave their consent subsequent upon which letters of administration were issued to the Defendant on 26/1/2011 and later on a Certificate of Confirmation of Grant on 23/2/2011. However, that from around June 2013 the Defendant started exhibiting reservations towards the Plaintiffs and has refused to provide for their upkeep and maintenance, indicated her resolve to disentitle and disinherit her own children, and resorted to humiliation and intimidation against her children by frequently reporting them to the police on flimsy grounds. The Plaintiffs stated that efforts and assistance from family members to resolve the issues in dispute have failed, and went to great lengths to deny the averments made by the Defendant about their conduct.

The Plaintiffs also indicated that on 15/7/2013 they instructed M/s Mbiyu Kamau & Co. Advocates to file an application for annulment of the grant, and the Defendant to avail an inventory of all the properties of their deceased father, but that the Judge advised that they could only sustain a claim based on trust and the grant could not be revoked.

The Defendant's Response

The Defendant's response is in a Replying Affidavit sworn on 2nd April 2014 in which she also explained in great detail the events leading to the dispute herein, and the conduct of the Plaintiffs before and after the death of her husband. The Defendant stated that she had faithfully and truthfully administered her deceased husband's estate ever since she was appointed as the administrator of the Estate, and that the said estate comprises of assets acquired through her and her husband's joint efforts as she was working even before their marriage in 1980. On the Plaintiffs' conduct, it would suffice to summarise that the Defendant expressed in great detail and emotion her frustration and anguish over the psychological trauma she had suffered in the hands of the Plaintiffs, and the alleged acts of irresponsibility, disrespect, malice and misappropriation of the deceased's and estate funds on their part.

The Defendant also outlined the provisions she had made for the Plaintiffs since the death of her husband, including availing them motor vehicles and paying the university fees for the 2nd Plaintiff, as well as paying dowry for the 1st Plaintiff. She further stated that she had tried to involve the Plaintiff in the decisions involving the estate assets, but that they had rebuffed her efforts and resorted to insulting her and humiliating her instead, and she gave various examples in this regard.

It was the Defendant's averment that after being appointed as the administrator of her husband's estate, she not only improved the value of some of the assets including the matrimonial home which she improved by adding extension houses thereto for rental purposes, but has also been in the process of tracing and securing the ownership of some assets whose locality was unknown and which had been grabbed by some unscrupulous people.

The Defendant denied having abused her role as the sole administrator of her deceased's husband's estate and stated that there was no basis for her removal. Further, that it would be disastrous to appoint the Plaintiffs as administrators or co-administrators unless they change their approach and thinking, as they would otherwise plunder and waste the estate. However, she stated that she would have no problem for the estate to be shared between all the beneficiaries if that would translate to peace and harmony in her family. Lastly, the Defendant averred that the Plaintiffs ought to challenge the issues they have raised in the succession court and not in the current suit.

The Issues and Determination

This Court issued directions that the parties do file and exchange written submissions on the Plaintiffs'

application, and the Advocates for the Plaintiff filed submissions dated 6th November 2013 and supplementary submissions dated 12th June 2014. The Advocates for the Defendant filed submissions dated 25th July 2014. I have read and carefully considered the pleadings, annexed evidence and submissions made. The preliminary issue I need to first determine is whether the Plaintiffs application, and indeed this suit is competently before this Court.

The Plaintiffs in their Complaint dated 4th September 2013 are seeking the following substantive prayers:

- (a) A declaration that the Plaintiffs and their sister Sarah Wanjeri Kirika, are entitled to the properties listed in the Certificate of Confirmation of Grant issued on 23/2/2011 to the Defendant.
- (b) A cancellation of any entries made in disposition, alienation or subdivision, and revocation of any titles issued in respect of the properties listed in the Certificate of Confirmation of Grant issued on 23/2/2011, and all the properties be redistributed equally among the Plaintiffs and Sarah Wanjeri Kirika, their sister.
- (c) In the alternative to (b) above, the Plaintiffs and their sister Sarah Wanjeri Kirika, be granted monetary compensation equal to the value of the properties they would have been entitled.

The Plaintiffs in the said Complaint also disclose that there is a succession cause being Nairobi High Court Succession Cause Number 1636 of 2009 pending between the parties.

The Plaintiffs in their submissions have argued that there is a trust relationship between them and the Defendant arising from her duties under sections 83 and 84 of the Law of Succession Act. Further, that under section 35 of the said Act, the Defendant is only entitled to a life interest in their deceased father's estate. They also relied on various Articles of the Constitution, including Articles 20, 27, and 45 on their rights to protection, social justice and equity as a family unit. Lastly they submitted that this Court had jurisdiction to deal with the issues they have raised by virtue of sections 13 (2)(d) and 13(7) of the Environment and Land Court Act.

The Defendant on the other hand submitted that the orders being sought by the Plaintiff are in their nature orders that can only be given by the Family Court in the succession matter in which the confirmed grant was issued, as they relate to the distribution and administration of the deceased's estate. Further, that the Plaintiffs are in any case not entitled to the orders sought as they had not demonstrated a *prima facie* case, as they are seeking to have the Defendant restrained from performing her duties as an administrator

I must agree with the Defendant's submissions that if the Plaintiffs are aggrieved as a beneficiary of the Deceased's estate, and arising from the acts of the Defendant as an administrator of the estate, then the right forum to ventilate their grievances is in the succession cause in the High Court, and not in this court. This is for the reason that administration of estates of deceased persons are governed by the Law of Succession Act, which under section 47 gives the High Court jurisdiction to deal with any matter arising under the Act. The High Court in this regard has concurrent jurisdiction with this Court to hear and determine disputes of succession relating to land.

I also refer in this regard to the **Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts** issued by the Chief Justice dated 25th July 2014 and published in Gazette Notice 5178 of 2014, which direct in Practice Direction No. 6 that all cases touching on inheritance, succession and distribution of land under the Law of Succession Act shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.

I therefore decline to grant the orders sought in the Plaintiffs' Notice of Motion dated 4th September 2013 for the foregoing reasons. I also in addition stay this suit pursuant to the provisions of section 6 of the Civil Procedure Act, pending the hearing and determination of Nairobi High Court Succession Cause Number 1636 of 2009, and direct the Plaintiffs and Defendant to move the Court in which Nairobi High

Court Succession Cause Number 1636 of 2009 is pending to resolve and determine the dispute herein.

The Plaintiffs shall meet the costs of the Notice of Motion dated 4th September 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____13th____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE