



REPUBLIC OF KENYA

IN THE LAND & ENVIRONMENT COURT AT NYERI

E.L.C.NO.58 OF 2013

NELIUS WANJIKU NGUNYI.....PLAINTIFF

VERSUS

SAMUEL NGUNYI KIMATHI.....DEFENDANT

R U L I N G

The plaintiff is the mother of the defendant. She avers that she is the sole proprietor of **L.R.NGOBIT/SUPUKO/BLK.III/732** which she has offered her son (the defendant) to settle with his family.

The plaintiff and one Jathan Wambugu Ngunyi (deceased) were appointed administrators of the estate of the late Mary Nyamiogo Ngunyi (deceased) comprising of **L.R. NO.RUGURU/KARUTHII/425** vide grant of letters of administration intestate issued on 8/10/2002 in Nyeri Succession Cause No.295 of 1997.

The plaintiff claims that the defendant refused to take the offer to settle on **L.R.NGOBIT/SUPUKO/BLK.III/752** and instead trespassed on **L.R. No.RUGURU/KARUTHI/425** where he has occupied the plaintiff's land unlawfully against the wishes of the plaintiff. She further claims that she has been obstructed from staying on the suit land by the defendant's insults and physical threats. Lastly that the plaintiff has been allowing his neighbors cows and donkeys to graze on the suit land and has been destroying and cutting down trees growing therein and subjecting the land to wanton waste.

The plaintiff filed a plaint and notice of motion dated 20/3/2013 where she is applying for a temporary injunction to restrain the defendant from interfering with and/or trespassing on **L.R. RUGURU/KARUTHI/425** pending hearing and determination of suit.

The application is based on grounds that the plaintiff is the administrator of the estate of the late Mary Nyamiogo Ngunyi comprising of **L.R.RUGURU/KARUTHI/425** and therefore she has the right over the estate and that the defendant has no right over the same and that the defendant who has no right on the same has been trespassing. The application is supported by the affidavit of Nelius Wanjiku Ngunyi sworn on 20/3/2013 whose import is that the plaintiff is the administrator of the estate of Mary Nyamiogo Ngunyi and therefore has a right to the parcel of land in dispute.

The defendant on his part filed a memo of appearance and a replying affidavit whose import was that he has lived on the parcel of land for over 40 years and therefore he is a beneficiary of the estate of deceased. He states that the plaintiff has never lived on the land and that her intention is to disposes him and dispose off the property.

He claims that the deceased before her demise bequeathed the property to him and has raised his family on the parcel of land. He claims that the matter has been deliberated upon and it has been suggested that she desists from interfering with the suit land. He is categorical that the plaintiff has not involved him in the succession cause and that he intends to challenge the grant.

The plaintiff filed a further affidavit stating that being a daughter of the deceased, his son could not take pre-eminence over her and inherit the suit land. She claims that the defendant has been preventing her from settling on the suit land. Moreover, that the deceased left and will bequeathing the property to her children and not grandchildren.

Mr. Andrew Kariuki appeared for the applicant whilst the defendant/respondent was in person. Mr. Kariuki submitted forcefully that the respondent has no right known in law to deny the mother the right to settle on her mother's land when she has the letters of administration.

On his part Mr. Ngunyi argues that he has settled on the land for over 40 years. He was brought up on the land and educated by her grandmother. The grandmother died in 1994 and left her on the parcel of land with the authority to stay on the land.

I have considered the application dated 20th March 2013 and the supporting, replying and further affidavits in this suit and the submissions of the parties and do find that the plaintiff is a joint administratrix of the estate of the deceased with one Jathan Wambugu Ngunyi. She is the mother of the defendant and a daughter of the late Mary Nyamiogo Ngunyi who died intestate. The dispute between the two is based on the law of succession, thus inheritance of the property of their late mother and grandmother respectively.

The plaintiff wants the defendant to vacate the parcel of land and move to another parcel of land she has bought for him thus L.R.NGOBIT/SUPUKO/BLK.III/752. Though she claims to have settled him on this land, the same is still registered in her name and the defendant has refused to settle on this parcel of land. She claims that the defendant is cutting down trees an accusation the defendant has denied. She reported the matter to the police who visited the suit land and after investigations they prudently concluded that this was a civil matter.

The court finds that defendant has settled on the suit land with his family and appears to have been a dependant of his late grandmother. The plaintiff on her part has letters of administration jointly with her late brother who is an uncle to the defendant.

The plaintiff has not substituted the deceased co-administrator of the estate of the deceased to enable her proceed and confirm the grant of the letters of administration. Without confirmation of the letters of administration and transmission of the property of the deceased, the plaintiff has no better right than that of the defendant. The fact that the defendant is a grandson to the deceased who was dependent on her throughout his childhood until she died in 1994 makes her a beneficiary of the estate of the deceased.

The upshot of the above is that the plaintiff has not established a prima facie case with a likelihood of success for a permanent injunctions and therefore on this finding alone the application should be dismissed.

On the issue of irreparable injury that the plaintiff is likely to suffer, the court finds that the plaintiff has not demonstrated the same as the plaintiff has denied destroying the trees. No report of the forest officer was produced to show the value of the trees destroyed.

Even if the court was to decide on balance of convenience the same would be in favour of the defendant, who has been residing on the land since his childhood and occupies the parcel of land with his family, other uncles and aunties. The plaintiff on the other hand is living in a rented house and has an alternative parcel of land registered in her name. The parcel of land in dispute belongs to neither plaintiff nor defendant and therefore none has a right as an owner but both have rights as beneficiaries as they were Dependants of the deceased.

The application is therefore dismissed with costs to the assessed in the main suit.

Dated, signed and delivered at Nyeri this 11th day of October 2013.

A. OMBWAYO

JUDGE