



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 23 OF 2010

NICHOLAS NYAGA MURIMI.....PLAINTIFF/APPLICANT

VERSUS

PHYLLIS WANJRU KAMAU.....1ST DEFENDANT/RESPONDENT

REGISTRAR OF MOTOR VEHICLES.....2ND DEFENDANT/RESPONDENT

RULING

The Applicant in this Chamber Summons dated 20th January 2010 seeks orders against the two Respondents under Order XXXIX Rules 1 (a), 2, and 9 of the Civil Procedure Rules that:-

“2. Pending the hearing and determination of this application and the main suit the 1st Defendant, his servants and/or agents or otherwise howsoever be restrained by way of temporary injunction from any further transfer or dealing in the said motor vehicle (the suit property).

3. Pending the hearing and determination of this suit, the 2nd Defendant/Respondent, their servants and/or agents be ordered to stop any further transfer or registration of the suit vehicle.

4. IN THE ALTERNATIVE pending the hearing and determination of this suit the 1st Defendant/Respondent, his servants and/or agents or otherwise howsoever be restrained from misusing, wasting, destroying, or in any other manner howsoever, damaging, the suit motor vehicle which devolved to the estate in Nairobi succession Cause No. 1463 of 2008.”

The Plaintiff/Applicant seeks costs of this Chamber Summons.

Grounds the basis of the Chamber summons are found on the face of the Chamber Summons which is supported by the affidavit of the Applicant deponed on 20th January 2010 and his Supplementary Affidavit deponed on 8th February 2010.

The 1st Respondent filed a Replying Affidavit dated 30th January 2010.

The Chamber Summons is filed in a suit where the Plaintiff/Applicant is alleging fraud against the 1st Defendant/Respondent in connection with the estate of George Githaiga Murimi who was the

Applicant's brother. Mr. Mbichile from M/s Wanyoike & Macharia Advocates represents the Applicant while Mr. Nderi from M/s Nderi & Kiingati Advocates, represents the 1st Respondent. The 2nd Respondent never cared to participate in these proceedings though served.

From what has been filed in this matter and is before me and amplified by oral submissions from both learned Counsels aforesaid, there is no dispute that one George Githaiga Murimi died and that the Plaintiff/Applicant in this matter was a brother of the deceased. There is, however a dispute whether the Deceased was married to the 1st Defendant/1st Respondent in this matter.

In any case, following death of the Deceased, two grants of letters of administration intestate, to the estate of the Deceased were obtained separately. While the Applicant obtained his grant of letter of Administration, in High Court Succession Cause No. 1463 of 2008 at Nairobi, jointly with Samuel Murimi Nyaga, the 1st Respondent obtained her grant of Letters of Administration in High Court Succession Cause No. 434 of 2008 at Nyeri. The Nyeri Grant was issued on 10th November 2008 and was subsequently confirmed on 12th June 2009. The grant issued in High Court Succession Cause No. 1463 of 2008 at Nairobi has not been brought to this court but there is a certificate of confirmation of grant to the effect that that grant was confirmed on 2nd November 2009. I cannot therefore say the date on which that grant, if any, was issued and if indeed it was issued to two Co-Administrators, why both of them are not Plaintiffs in this suit. Assets in the estate of the deceased include a piece of land which does not seem to be an issue in this suit apparently because the Plaintiff has filed this suit as a beneficiary, and not as an Administrator, of the Estate of the Deceased and that seems to answer my question above why the Plaintiff's Co-Administrator is not a Co-Plaintiff in this suit.

As I think and write, more come to be written but let me restrain myself and conclude this ruling saying that since there exist more than one grant of Letters of Administration in the estate of the Deceased in this matter, it is better for parties to realize that a proper lawful solution in their dispute lies in succession proceedings and not outside Succession proceedings. Someone may for instance be convicted for fraud in a Criminal Case but where such fraud is found to be based on what was in Succession proceedings with the relevant court order untouched, the conviction and sentence in the Criminal Case will remain there only to constitute a second court order which may or may not be consistent with the order in the Succession Cause, to remain independent of each other until parties in the Criminal Proceedings lawfully go to the said succession Cause to have the issue of fraud also considered there for relevant lawful order.

Apparently the issue of fraud never featured in any of the two Succession Causes. It is a party in the Nairobi succession Cause who is now raising that issue and that party is doing it in this Civil Suit, outside both Succession Causes. Two independent Court Orders now exist being, the Nyeri succession Cause Court Order and the Nairobi succession Cause Court Order. The two Succession Court Orders are not only inconsistent but also contradictory. In this Civil Suit the Plaintiff/Applicant seeks a third independent Court order, this time, based on fraud.

The Plaintiff/Applicant is from the Nairobi succession Cause Court Order which is good for him and wants to maintain it. As I have said the dispute has to be resolved through Succession proceedings, those proceedings have to be in one of the two existing Succession Causes. Since the Plaintiff/Applicant has to maintain the Nairobi Succession Cause Order and he is the party complaining in this H.C.C.C. No. 23 of 2010, it becomes mandatory for him to seek a proper and lawful solution through the Nyeri Succession Cause, No. 434 of 2008 under Section 76 of the Law of Succession Act. This is not to say it is unlawful for Phyllis Wanjiru Kamau to seek similar court orders in Nairobi Succession Cause No. 1463 of 2008. In any case the two Succession Causes have, in the end, to be handled together for a proper lawful solution.

In addition and in dependent to what I have said above, I do point out the legal position in this matter that, since the 1st Defendant/1st Respondent in this Civil Suit holds the suit motor vehicle by virtue of a Court Order which has not been set aside, it would amount to inconsistency and be lawfully unpalatable for me or any other person to grant the prayers asked for by the Plaintiff/Applicant in this Chamber Summons.

On the while, and to conclude this ruling therefore, I hold the view it will be improper in law to grant any of the orders prayed for in this Chamber summons before me because granting such orders will constitute a Third Inconsistent and/or contradictory High Court Order concerning the same Estate of the Deceased GEORGE GITHAIGA MURIMI thereby causing confusion to the extent of confusing justice into the impossibility of locating it in this matter.

Accordingly the Plaintiff/Applicant's Chamber Summons dated 20th January 2010 be and is hereby dismissed with costs to the 1st Defendant/1st Respondent.

Delivered, dated and signed at Nairobi this 26th day of March 2010.

J.M. KHAMONI

JUDGE

Present

Mr. Mbichile for the Plaintiff/Applicant

Mr. Nderi for the 1st Defendant/1st Respondent

Court Clerk: Kabiru



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