



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 489 OF 2015**

**IN THE MATTER OF THE ESTATE OF**

**THE LATE JAPHETH MULURE OTIENO *Alias* JAPHETH MULERE (DECEASED)**

**AND**

**ERICK VINCENT MULURE.....CITOR/RESPONDENT**

**VERSUS**

**GEORGE HAYON MULURE.....CITEE/APPLICANT**

**RULING**

Before the Court are 3 applications for determination.

*(i) The first application by the Citee/ Petitioner, who shall henceforth be referred to as “The Applicant”, is dated 19<sup>th</sup> May 2021. It is an application for orders to restrain the Citor/Respondent from developing or constructing on the deceased’s land L.R. NO. EAST GEM/ANYIKO/11.*

*(ii) The second application was brought by the Citor/Respondent, who shall henceforth be referred to as “The Respondent”. It is an application dated 23<sup>rd</sup> June 2021, and it was seeking the discharge, variation, review or setting aside of the orders which the court had made exparte, on 31<sup>st</sup> May 2021.*

*(iii) The third application is dated 27<sup>th</sup> September 2021, and it was filed by the Applicant. It was an application seeking the reinstatement of the interim injunction which had been issued on 31<sup>st</sup> May 2021.*

1. When canvassing the applications, the Applicant made submissions in respect of all three. However, the Respondent made submissions only in respect to the application dated 27<sup>th</sup> September, 2021. In the opinion of the Respondent, the other two applications would still remain outstanding.
2. It would have provided finality if the applications were canvassed together.
3. However, I do appreciate that the parties did not address the Court on the question regarding whether or not to have the applications heard together. In the circumstances, the Court did not give directions on the said question.
4. As the Respondent has made it clear that he was only answering to the application dated 27<sup>th</sup> September 2021, this Ruling shall deal with the said application.
5. The said application sought an extension of the consent order made on 31<sup>st</sup> May 2021.
6. The Respondent has submitted that an order which had lapsed could not be extended.
7. He has also submitted that the reinstatement of the order was not a matter of right to be granted to the Applicant.
8. I agree absolutely with the Respondent, that when a party was seeking the reinstatement of an order which had lapsed, the Court had the discretion to either grant or reject the relief sought.

9. In order to appreciate the circumstances prevailing in this case, it is important to go back in history.

10. The Applicant lodged an application dated 19<sup>th</sup> May 2021, through which he sought the revocation of the Grant which had been issued on 23<sup>rd</sup> March 2017, to **PATRICK RADIGO MULURE** and **ALICE OTIENDE MULURE**.

11. The primary reason for seeking the revocation of the Grant is that both the widows, Patricia Radigo Mulure and Alice Otiende Mulure had died before the Grant was issued in their names.

12. It was the Applicant's case that the Respondent was meddling with the estate of the deceased, by commencing preparations to put up some permanent structures on the suit property **L.R. NO. EAST GEM/ANYIKO/11**.

13. As the Applicant says that the construction was being conducted on the portion of land which had been allocated by the deceased, during his lifetime, to the 2<sup>nd</sup> Widow, Alice Otiende Mulure, he believed that the construction ought to be stopped until the dispute herein was resolved.

14. The Court was informed that the Applicant hailed from the 2<sup>nd</sup> House, whilst the Respondent hailed from the 1<sup>st</sup> House, of Patricia Radigo Mulure.

15. In answer to the application, the Respondent submitted that the Court orders issued on 31<sup>st</sup> May 2021 had been obtained by non-disclosure, concealment, misleading, cheating and distortion of material facts.

16. It was for that reason that the Respondent had filed his application dated 23<sup>rd</sup> June 2021, seeking to discharge, set aside or vary the Order dated 31<sup>st</sup> May 2021.

17. The Respondent invited the Court to consider the fact that his application dated 23<sup>rd</sup> June 2021 was uncontroverted.

18. I am afraid that it is not open to the Respondent to first state that he was only answering to one application (dated 27<sup>th</sup> September 2021); and in the same breadth invite the Court to draw some conclusions on a separate application, which he has already said, was still pending. If by the time the said application comes up for hearing, appropriate orders will be made, depending on the circumstances prevailing at the time.

19. In any event, following the lapse of the order made on 31<sup>st</sup> May 2021, it would follow that the application dated 23<sup>rd</sup> June 2021 had been overtaken by events. I so find because there would be no need for the Court to discharge, vary, review or set aside an order which was no longer in force.

20. What remains for determination now is whether or not the Court can and should reinstate the injunctive reliefs which had been granted on 31<sup>st</sup> May 2021.

21. Citing the decision in **DIRECTOR OF PUBLIC PROSECUTION Vs JUSTUS MWENDWA KATHENGE & OTHERS CIVIL APPEAL NO. 201 OF 2014**, the Respondent submitted that there must be sound reasons for the reinstatement of an interim relief which had lapsed. I am in agreement with the Respondent's contention, as derived from the decision by the Court of Appeal, that;

***“..... whereas orders of temporary injunction are vital in the preservation of properties in dispute, such orders are suscetible to abuse and certain guidelines have been developed in considering the grant of such orders.”***

22. The legal threshold of criteria for considering whether or not to grant either an extension of an injunctive order or a reinstatement of such order, requires the Court to consider the following;

***(a) Is there sufficient Cause or Reason?***

***(b) Has the Applicant established a demonstrable irreparable prejudice to warrant the order being granted?***

***(c) Would the respondent be prejudiced by the grant of the order?***

***(d) Has the applicant moved the court without undue delay?***

23. The Court has an inherent jurisdiction to invoke the provisions of **Section 3A** of the **Civil Procedure Act** in a situation where a party was seeking the reinstatement of a temporary injunction.

24. The Applicant has explained that the failure to seek the extension of the injunction was due to an oversight or inadvertence on the part of his lawyer.

25. Although the Respondent submits that the reason advanced by the Applicant does not justify the exercise of the Court's discretion in his favour, I hold a contrary view.

26. First, the order in question was recorded by consent of the parties; even though the Respondent later indicated that the advocate who was then representing him, did not have his express authority to enter into the said consent.
27. Based on the record of the proceedings until now, I find that the order was recorded by consent.
28. Thereafter, although the Respondent had replaced his advocate, it is noteworthy that on 18<sup>th</sup> October 2021, the interim orders were again extended, with the consent of the parties.
29. Prior to the said consent, on 18<sup>th</sup> October 2021, the Court had issued an order on 28<sup>th</sup> September 2021, in the following terms;
- “(1) The application dated 27<sup>th</sup> September 2021 is fixed for Mention for further Directions on 06/10/2021.***
- (2) Applicant to serve the Respondent, as soon as possible.***
- (3) In order to preserve the subject matter of the application, a conservatory order is issued herewith, stopping all construction or other developments upon L.R. NO. EAST GEM/ANYIKO/11, until 06/10/2021.”***
30. When an order had been extended from time to time; but the Applicant candidly affirms that on the one occasion he inadvertently forgot to seek an extension, I find that that is a plausible explanation, in the circumstances.
31. The Respondent has submitted that the main purpose of an interlocutory injunction is to preserve the status quo and not to punish the Respondent.
32. I could not agree more!
33. It is the Respondent’s contention that the foundation for the house he was constructing was being damaged and wasted. He said that he had already spent Kshs 3,000,000/= on the construction.
34. He also said that he had hired building machines and equipment worth Kshs 4,000,000/=.
35. In the circumstances, the Respondent submitted that if the injunction was reinstated, he would be undergoing punishment.
36. Presuming that the Respondent has spent Kshs 3,000,000/= on construction, and had committed a further sum of Kshs 4,000,000/=, that is a clear sign of his determination and commitment to finalize the task at hand.
37. The pain of seeing the investment going to waste would be real.
38. However, I also find that the Court is enjoined to do substantive justice, by weighing the competing rights of the parties.
39. In this case I find that there has not yet been a distribution of the estate of the deceased. The estate of the deceased is still in his name.
40. If there is any truth in the contention that the Grant was issued to the 2 widows after they had passed away, the said Grant would be absolutely useless.
41. Until such time as the Grant was confirmed, so that each of the beneficiaries is assigned his or her portion of the estate, it would be completely premature for any beneficiary to assign to himself or to herself any particular portion of the estate.
42. There appears to be competing interests between the parties herein, concerning the portion to be assigned to either the first house or the second house.
43. The Court will therefore have to make a determination on the said competing interests, in order for the beneficiaries to know their respective portions.
44. If the Respondent continued to build, he would definitely be incurring further expenses. It is not the amount of money which he spends that will give him an entitlement to the portion he would have built upon. The apportionment will be determined after the Court evaluates all such evidence as the parties will provide. Therefore, whereas it is possible that the Respondent might get the portion on which he was already building, there is no guarantee whatsoever that it shall be so.
45. In the event, justice demands that all further construction or any other developments be put on hold for now. Accordingly, there shall issue forthwith, an injunction to restrain the Respondent from carrying out any further construction or any other developments upon **L.R. NO. EAST GEM/ANYIKO/11**, until determination of the Succession Cause.
46. Each party will bear his own costs of the application dated 27<sup>th</sup> September 2021.
47. Finally, the Court directs the parties to move with expedition, to finalize the Succession Cause.

**DATED, SIGNED AT DELIVERED AT KISUMU**

**THIS 26TH DAY OF JANUARY 2022**

**FRED A. OCHIENG**

**JUDGE**