



REPUBLIC OF KENYA



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In Estate of Okullo Adongo Adongo (Deceased) (Miscellaneous Application E071 of 2021) [2022] KEHC 15729 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION E071 OF 2021**

JN KAMAU, J

NOVEMBER 24, 2022

RULING

1. In his Notice of Motion dated and filed on July 22, 2021, the applicant herein sought orders that an injunction be issued restraining the respondent either by themselves, their servants and/or agents or anyone whomsoever deriving authority or acting on their (sic) behalf from entering, remaining in occupation or continuing to occupy/cultivating, constructing on, alienating, selling or doing any act on land parcel Kisumu/Kadongo/629 and Kisumu/Kadongo/737 (hereinafter referred to as the “subject properties”) pending the opening of the skeleton file In the matter of the Estate of Okullo Adongo Adongo Succession Cause No 47 of 1996.
2. He swore an Affidavit in support of the said application on 19th July 2021. He averred that he had a pending application before this court for the revocation of the grant of the estate of the deceased and another pending application for the opening of a skeleton file. He added that they (sic) had had several meetings with the Chief whereby it was agreed that all other sons of Ominde (sic) would have beneficial interest in the deceased’s estate but the Respondent indicated that he had the Grant and would process the land titles in his favour.
3. He stated that the respondent processed the titles of the subject properties in July 2020 using the Grant and sought the services of Maseno Police to evict him from the subject properties in November 2020. He pointed out that they (sic) had always cultivated the subject properties until April 2021 when the Respondent unlawfully entered and interfered with the land, destroyed the land where he burnt the trees and slashed the land.
4. He contended that the respondent had fraudulently registered his name as owner of the subject properties and that if he was not restrained by the court, all the beneficiaries of the deceased’s estate were bound to suffer irreparable damage as he would continue to interfere with the land. He averred that it was in the best interests that the present application be allowed.
5. In opposition to the said application, the respondent herein swore a replying affidavit on October 8, 2021. The same was filed on 12th October 2021. He averred that he was one of the surviving step-grandchildren of the deceased, who together with his wife one Joyce Asiri Okullo, was not blessed with



- any children. He pointed out that the deceased only had one brother, Otiende Obaro, who had several children and that when the deceased's wife died, together with his cousin and nephew, they took care of the deceased.
6. He asserted that the deceased was the owner of eleven (11) separate pieces of land which, save for land parcel 1182, his wife transferred to one Arthur Dornald Owido, a son of the deceased's brother-in-law who had no beneficiary rights over the deceased's properties.
 7. He further stated that they complained to the Senior Land Adjudication & Settlement Officer of the then Kisumu District who wrote a letter dated June 18, 1993 summoning all the parties including the said Arthur Dornald Owido to appear before him on July 2, 1993 to sort out the problem but that the said Arthur Dornald Owido died before the said date.
 8. He added that they filed objections vide official receipt number AZ 313871 dated July 28, 1994. He asserted that he requested for certified copies of the objection proceedings vide a letter dated September 4, 1996 but he did not receive any feedback.
 9. He further contended that he applied for Grant of Letters of Administration in Kisumu HC Succession Cause No 47 of 1994 and distributed the deceased's estate to the beneficiaries as per the said Grant. He added that as per the distribution, he was given the subject properties, which he asserted that the deceased also gave him in his lifetime in the presence of his step mother, Jesca Sagna Ojore, and his cousin.
 10. He pointed out stated that the subject properties had since been registered in his name. He was emphatic that registration of the subject properties in his name was therefore not fraudulent as had been alleged by the applicant herein as the same was made pursuant to valid Grant which had not been challenged and/or revoked.
 11. He further contended that on another occasion the deceased also gave him and one Charles Ominde Okullo another parcel of land which they purchased at a sum of Kshs 800. He said that the main purpose of going to court was to cause all the parcels of land to revert back the name of the deceased.
 12. He stated that the alleged meetings with the Chief were fictitious as he had never indicated to any one that he would process the other titles in his name because he knew that nine (9) different properties belonged to the Applicant and other beneficiaries who were already in possession of the same. He averred that they were free to seek his assistance to transfer the same to their names.
 13. He denied ever having sought the services of Maseno Police to evict the Applicant from the subject properties and was emphatic that the Applicant had never been in possession of the subject properties and/or cultivated and/or planted trees but that he was only using the present application to gain entry into the subject properties.
 14. The applicant's Written Submissions were dated and filed on 1 March 6, 2022 while those of the respondent were dated and filed on May 23, 2022. This Ruling is based on the said Written Submissions which parties relied on in their entirety.

Legal Analysis

15. Both parties placed reliance on the case of *Giella vs Cassman Brown* (1973) EA 358 where the conditions for the grant of an interlocutory injunction were that an applicant had to show that he had a prima facie case with a probability of success, that if the interlocutory injunction was not granted he would suffer irreparable injury which would not adequately be compensated by an award of damages and that if the court was in doubt, it would decide the application on a balance of convenience.



16. They further relied on the case of *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 where the court held that a prima facie case was one which on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed upon by the opposite party as to call for an explanation or rebuttal from the latter.
17. The applicant also referred to the case of *Joseph Siro Mosiama vs HFCK* (eKLR citation not given) to support his argument that he had established a prima facie case having demonstrated that he had two (2) pending applications for revocation and opening of a skeleton file and further because the respondent had fraudulently registered himself as the owner of the subject properties and had sought to evict him.
18. He added that the land parcel was unique and could not be equated in value to another and hence compensation by an award of damages would not be adequate. He further submitted that if in doubt, the balance of convenience tilted in his favour and thus urged this court to grant him an injunction as they would continue to suffer irreparable harm if the said order was not granted.
19. On his part, the Respondent also relied on the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR to buttress his argument that the Applicant had not presented sufficient evidence to demonstrate that he stood to suffer irreparable loss or damage.
20. He argued that there was no likelihood that the applicant's rights over the subject properties were about to be infringed by sale, alienation or eviction and that he had not demonstrated that the registration of the subject properties in his name was fraudulent or the Grant issued was fraudulently obtained. He contended that as such, the applicant had not established a prima facie case with a probability of success and was therefore not entitled to the orders of injunction.
21. He submitted that the applicant had not yet filed any application for revocation and/or annulment of the Grant of Letters of Administration issued to him in Kisumu HC Succession Cause No 47 of 1994. He pointed out that the present application was therefore premature as the application to open a skeleton file was still pending hearing and determination.
22. Notably, as was stated hereinabove, an applicant seeking an injunction was required to demonstrate that he had met the three (3) conditions that were set out in the celebrated case of *Giella vs Cassman Brown* (Supra). Having said so, this court noted that for one to seek an order for interlocutory injunction, he was required to have sought the reliefs in a substantive suit.
23. Indeed, it is trite law that injunctive orders in an application must mirror the orders in the substantive suit. This very court had occasion to deal with the issue of relevance of prayers in an application vis-à-vis the reliefs in a plaint in the case of *Shirin Jiwa vs Ismailia Co-operative Society Limited* [2015] eKLR in which it stated as follows:-

“...It was evident that although the plaintiff had argued that her application was in line with the prayers that she had sought in her Plaint, the orders sought in the application herein had no relation to the reliefs sought in the plaint. The prayers were distinct. It is irrespective that the matters at issue arose out of the same transactions as had been contended by the plaintiff for the reason that they purported to create a totally new cause of action. They had no relationship whatsoever with the subject matter of the suit as had been rightly pointed out by the Defendant...the court did not see the nexus of that prayer to the reliefs that the plaintiff had sought in her Plaint.”



24. In view of the fact that the present proceedings were instituted by way of a miscellaneous application seeking to reconstruct a skeleton file, this court found and held that it could not grant the orders as had been sought. As was correctly pointed out by the respondent herein, the present application was premature as the applicant's Notice of Motion application dated April 19, 2021 and filed on 20th April 2021 seeking to open a skeleton file in the matter of P & A Cause No 47 of 1994 In the Matter of the Estate of Okullo Adongo Adongo was yet to be heard and determined.
25. Notably, on April 21, 2021, this court directed the applicant to serve his said Notice of Motion application dated 19th April 2021 and filed on April 20, 2021 upon the respondent for inter partes hearing and/or for further orders and/or directions on a date to be taken at the Registry. This was fixed on hearing on June 22, 2021.
26. When the matter came up in court on June 22, 2021, the applicant's counsel indicated that its Notice of Motion application dated March 19, 2021 and filed on July 22, 2021 was the one that was coming for hearing. The court then directed the respondent to file a response to the said application and fixed the matter for mention on September 22, 2021. On July 22, 2021, the applicant filed the present application which the court directed to be fixed for directions on September 22, 2021.
27. On October 8, 2012, the applicant's counsel informed the court that they had not been served with the respondent's response to their Notice of Motion application dated March 19, 2021. When the matter came for mention on November 10, 2021, the applicant's counsel prayed for a hearing date for the present application whereupon the court gave directions on the filing of Written Submissions culminating in the reservation of the ruling on May 25, 2022.
28. This court noted that despite the applicant's counsel's assertions during several court appearances, there was no Notice of Motion application dated March 19, 2021 and filed on July 22, 2021 on the court file. What was in the court file was a Notice of Motion application dated April 19, 2021 and filed on April 20, 2021 and another dated and filed on July 22, 2022.
29. Having said so, it was clear that at no given time did the applicant's counsel seek to have the Notice of Motion application dated April 19, 2021 and filed on April 20, 2021 seeking to open a skeleton file heard. It was therefore irregular for him to have filed the Notice of Motion application dated and filed on July 22, 2021 seeking injunctive orders pending the opening of the skeleton file In the matter of the Estate of Okullo Adongo Adongo Succession Cause No 47 of 1996. It was necessary that the Applicant moves in a systematic manner to avoid confusion and delays in this matter.

Disposition

30. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated and filed on 22nd July 2021 was not merited and the same be and is hereby dismissed with costs to the Respondent herein.
31. To progress this matter, it is hereby directed that the applicant's Notice of Motion application dated April 19, 2021 and filed on April 20, 2021 be and is hereby listed for inter partes hearing and/or for further orders and/or directions on 13th February 2023.
32. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2022

J. KAMAU

JUDGE

