



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K Kemei-J

CIVIL APPEAL NO. 58 OF 2020

ELIZABETH NGINA KAUMBULU.....APPELLANT

VERSUS

DAUDI MUSYIMI.....1ST RESPONDENT

PATRICK KINYOLO MBITHI.....2ND RESPONDENT

(Being an Appeal from the proceedings and Judgement delivered on 14th July 2020 by M.O.A OPANGA SENIOR RESIDENT MAGISTRATAE in CITATION CAUSE NO. 8 of 2020 KANGUNDO Law Courts).

IN

IN THE MATTER OF THE ESTATE OF MUOTI MUSYIMI NDOLO (DECEASED)

ELIZABETH NGINA KAUMBULU.....CITOR

VERSUS

DAUDI MUSYIMI.....1ST CITEE

PATRICK KINYOLO MBITHI.....2ND CITEE

RULING

1. The Appellant herein by a Notice of Motion application dated 8th September, 2020 sought for the following orders:

i. Spent.

ii. THAT pending the hearing of the application herein, the Honourable Court do issue preservative orders of injunction restraining the Respondents, their agents, servants and/or representatives from entering, cultivating, constructing, selling, transferring, and/or interfering in any manner whatsoever with the land reference number KANGUNDO/MUISUNI/2027.

iii. THAT pending the hearing and determination of the appeal herein, the Honourable Court do issue preservative orders of injunction restraining the Respondents, their agents, servants and/or representatives from entering, cultivating, constructing, selling, transferring, and/or interfering in any manner whatsoever with the land reference number KANGUNDO/MUISUNI/2027.

iv. Costs be provided for.

2. The application is supported by the grounds set out on the body of the application and the affidavit of the Appellant/Applicant sworn on even date in which she raised the following issues:

i. The lower Court delivered a judgement on the 14th July 2020 dismissing the Appellant/Applicant's citation.

ii. The Applicant being dissatisfied with the said judgment has filed an appeal with high chances of success.

iii. The respondents have descended into the land subject matter belonging to the deceased and are committing wanton acts of destruction and cultivation and unless the orders of preservation of the estate are granted, the appeal herein will be rendered an academic exercise.

iv. It is just and fair for the orders sought to be granted.

3. The 1st and 2nd Respondents in opposition to the application first filed their Cross-Appeal as they were dissatisfied with the ruling delivered on 14th July 2020 in the lower court on the issue of costs and raised one ground namely that the learned Magistrate erred in law and fact in failing to award costs of the citation to the Citees who are the respondents herein. In the Cross-Appeal the 1st and 2nd Respondents sought for the following reliefs:

a) The ruling delivered on the 14th of July 2020 be upheld with the exception on the finding on the costs of the Citation.

b) The Order for each party to bear their own costs be set aside and the costs of the Citation be awarded to the CITEES.

c) Costs of this appeal be awarded to the Respondents.

4. The Respondents opted to file grounds of opposition to the application as follows:

i. The matter before the Court is a civil Appeal whereas the matter in the Magistrate's lower Court was a succession cause.

ii. The Appellant's application has been brought under the provisions of the Law of Succession Act in a Civil Appeal.

iii. The subject land title no. KANGUNDO/MUISUNI/

2027 comprises part of the estate of the deceased whereas the Appeal herein is a civil matter.

iv. The said land title is the subject of the proceedings in Kangundo SPMCC Cause NO.83 OF 2020 (In the matter of the estate of Muoti Musyimi (Deceased)).

v. In the premises the Appellant's application ought to be struck out with costs to the Respondents.

5. The application was disposed of by way of written submissions. It is only the submissions by the respondents that are on record. Learned counsel for the Respondents submitted that they filed a Petition for Grant of Letters of Administration in Kangundo Senior Magistrate's Court Succession Cause no. 83 of 2020 pursuant to the trial court's ruling dated 14.7.2020 and that the requisite notice was published in the Kenya Gazette on 7th August 2020.

6. It was further submitted that no objection was raised against the filing of the said Petition and upon the lapse of 30 days the Court made a Grant of Letters of Administration to the Petitioner/1st Respondent herein on 9th September, 2020 and that all the requisite documents regarding the succession cause are all on record. It was contended that the grant is now awaiting confirmation.

7. Finally, it was submitted that the Appellant's claim is that of an alleged purchaser of estate of the deceased and that the Kangundo Succession Court has jurisdiction over the alleged claim but not this Honorable Court and that the said application be struck out with costs to the Respondents.

8. I have considered the appellant's application and the grounds of opposition as well as the submissions. It is not in dispute that the appellant had earlier filed a citation cause at Kangundo law courts where she had cited the two respondents herein and had sought orders of injunction regarding the suit property namely Kangundo/Muisuni/2027. It is not in dispute that the trial court dismissed the citation and directed the 1st respondent to proceed to file for letters of grant of administration intestate which has already been done. It is also not in dispute that the applicant has already lodged an appeal. The issues for determination are firstly; whether the appellant/applicant has presented sufficient reasons to warrant an order of temporary injunction pending determination of the appeal and secondly; what orders may the court grant?

9. As regards the first issue, the Appellant seeks for a conservatory order pending determination of the appeal. She had the duty of establishing that the appeal has a prima facie case with a probability of success. In the case of **Mrao Limited Vs First American Bank & Another (2001) eKLR** the issue of a prima facie case was held as follows:

"A prima facie case in a civil application includes but is not confined to a 'genuine and arguable case.'" It is a case which on the material placed presented to the court, a tribunal properly directing itself will conclude that here exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

As noted from the record of the lower court and more specifically the ruling dated 14.7.2020, the appellant had cited the respondents to take up letters of grant of administration intestate of the estate of Muoti Musyimi Ndolo as she had a purchaser's interest in the estate. The learned trial magistrate rightly found that the appellant's prayer for an injunction was misplaced since the appellant was first to pursue the citation after which the issue of her interest could then be agitated. Since the sole aim by the appellant was to nudge the respondents to take up letters of grant then she ought to wait until the same is done. In any case the appellant's interest is one of a purchaser and which could only be

agitated in a succession cause or a civil suit in the Environment and Land Court. It is now confirmed that the respondents have filed the requisite **succession cause number 83 of 2020 at Kangundo law courts** and that she should now proceed to the said court to ventilate her claim. That is the right forum to determine the fate of the appellant's purchaser's interest if any. Prudence would demand that the applicant should approach the succession court at Kangundo and present his claim either as an interested party or an objector where she can establish her interest in the estate. Further, as the administrators of the estate are now known the applicant is still at liberty to institute a suit against the administrator in the Environment and Land Court over the subject property. That being the position, I am not satisfied that the appellant has shown that the appeal has high chances of success. She has also not shown sufficient reasons to justify the grant of a conservatory order at this stage. I find that she will suffer no prejudice if the prayer for an injunction is declined since the road to pursuing her claim against the estate is now clear as the administrators have already been appointed by the court.

10. As regards the second issue and in view of the foregoing observations, the application lodged by the appellant lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this **24th** day of **February, 2021**.

D. K. Kemei

Judge