



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 566'A' OF 2013

IN THE MATTER OF ESTATE OF MATHAGU TITIA (DECEASED)

FRANCIS MUGENI KIRIAMBURI.....APPLICANT

VERSUS

CHELESTINO NJAGI THANGA.....ADMINISTRATOR/1ST RESPONDENT

CHARLES NJERU NJIRU.....2ND RESPONDENT

BONIFACE RUNJI NJUKI.....3RD RESPONDENT

RULING

A. Introduction

1. The applicant herein moved this court vide summons general dated 29.07.2020 and which is brought under Rules 63 and 73 of the Probate and Administration Rules and Section 68 of the Land Act, 2012. The applicant substantively seeks for orders inhibiting any dealings with parcels of land Nos. Embu/ Mavuria/4199, Embu/Mavuria/4200 and Embu/Mavuria/ 4201 being resultant sub-divisions of Embu/Mavuria/49 and orders restraining the 1st, 2nd and 3rd respondents, their agents, servants, employees and/or anybody claiming through them from entering upon, taking possession of, cultivating on, cutting down trees, or causing any acts of wastage on the parcels of land Nos. Embu/Mavuria/4199, Embu/ Mavuria/ 4200 and Embu/Mavuria/4201 being resultant sub-divisions of Embu/Mavuria/49 or preventing or in any way interfering with the applicant's use and occupation of parcels of land Nos. Embu/Mavuria/4199, Embu/Mavuria/4200 and Embu/ Mavuria/4201 being resultant sub-divisions of Embu/ Mavuria/49 pending the hearing and determination of the application for revocation of grant. The applicant further prayed for the costs of the application.

2. The said summons is based on the grounds on its face and further supported by the affidavit annexed on the application. In a nutshell, the applicant's case is that the deceased herein and whose estate is in issue is an uncle both to him and the 1st respondent herein. That the deceased had no children but was the registered proprietor of LR. Embu/Mavuria/49 but which land the applicant was utilizing upon the demise of his father and until sometimes in June 2020 when the respondents herein forcefully entered the said land and started sub-dividing the same into portions. That he proceeded to conduct a search at the lands office and found that the said land parcel had been transferred to him (1st respondent) by way of transmission but he together with other beneficiaries as indicated on the chief's letter were excluded from the succession proceedings, were never summoned to court during the confirmation of the grant nor did they execute any consent to the mode of distribution. This is despite themselves (including the applicant) having been included as dependants in the summons for confirmation of grant.

3. That the consent to the mode of distribution was given by members of the clan and who were strangers to the proceedings and the 1st respondent caused the said land to be sub-divided into three parcels and the said resultant parcels registered in his names and those of the 2nd and 3rd respondents respectively and which sub-division is contrary to the grant thus disinheriting the rightful beneficiaries. That the respondents have now taken over the parcels of land and have started fencing it off and the applicant and other beneficiaries will suffer great loss if they are not stopped. As such, the orders sought herein ought to be granted so as to preserve the estate pending the hearing and determination of the application for revocation of grant.

4. The application is opposed by the 3rd respondent vide a replying affidavit sworn on 7.09.2020 and where he deposed that he is the proprietor of parcels of land Nos. Embu/ Mavuria/4200 and Embu/Mavuria/4201 having bought the same from Chelestino Njue Nguru and who had bought the same from the 1st respondent herein. That he did not buy the land parcels from the 1st respondent and neither was he party to the succession proceedings herein. That at the time of purchasing the said land parcels they were not part of LR. Embu/Mavuria/49 and he was not aware whether the said land parcels were sub-divisions of the said land and neither were the land parcels subject to the

succession proceedings and he followed the correct procedure during purchase of the same.

5. Further that, he has been wrongly enjoined in the proceedings as he is an innocent purchaser and it will be unfair to encumber or inhibit the said land parcels whereas he did not acquire the same from the estate of the deceased herein and restraining him from entering the said land parcels will be unfair and an infringement of his right to own property. He thus prayed for the application to be dismissed with costs.

6. The application was canvassed by way of written submissions wherein both the applicant and the 3rd respondent reiterated the contents of their respective documents filed herein to wit the summons and the replying affidavit. However, the 3rd respondent submitted that he holds valid title deeds to the two parcels and which he obtained procedurally and as such the applicant has no claim over the same. Reliance was made on **sections 25 and 26 of the Land Registration Act, 2012** on the sanctity of title.

7. The 1st respondent despite having not filed any pleading in opposition to the application filed his written submissions and wherein he submitted essentially that the applicant has not met the threshold for grant of temporary orders of injunction as were laid down in the case of **Giella –vs- assman Brown [1973] E.A. 358.**

8. I have considered the application herein and the response by the 3rd respondent and further the rival submissions filed herein. As I have already noted, the applicant seeks orders of inhibition and also restraining orders. It is my considered view therefore that the issue which this court ought to determine is whether the said orders ought to be granted.

9. As for the order of inhibition, the same is provided for under section **68(1) of the Land Registration Act 2012 and which is one of the provisions under which the instant application is brought. This section** gives the court discretion to inhibit registered dealings on land for a particular time or until the occurrence of a particular event.

10. As such, an inhibition order is an order which is in the nature of a prohibitory injunction restraining dealings on land pending further orders by the court. The purpose of the said order is to preserve the property from acts that would otherwise render a court order incapable of being executed and or to give an opportunity to hear and decide the matter.

11. *The conditions for grant of an order of inhibition are now settled. In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions: -*

a) *That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.*

b) *That the refusal to grant orders of inhibition would render the applicant's suit nugatory.*

c) *That the applicant has arguable case."*

(See the case of Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria [2012] eKLR and In re Estate of Paul Kimeu (Deceased) [2020] eKLR which authorities I find persuasive).

12. *In the instant case, it is not in dispute that the 1st respondent herein filed for grant of letters of administration intestate in respect of the estate of the deceased herein and after which LR. Embu/Mavuria/49 was transmitted to him. He later caused the sub-division of the said land into three parcels and one of which parcel (LR. Embu/Mavuria/4199) was registered in his names and the other two parcels (LR. Nos. Embu/Mavuria/4200 and Embu/Mavuria/4201) registered in the names of the 3rd respondent herein. Despite the 3rd respondent having deposed that he bought the two land parcels from Chelestino Njue Nguru, the copy of the green card for LR. Embu/Mavuria/49 clearly indicate that the two parcels registered in his name are resultant parcels of LR. Embu/ Mavuria/49. It is my considered view that by the three land parcels being in the hands of third parties (1st and 3rd respondents herein) they definitely stand a risk of *being disposed of or alienated or transferred to other parties. Such transfer will be to the detriment of the applicant herein. The applicant's interests need to be protected.* That the refusal to grant orders of inhibition would render the applicant's application nugatory as it might be hard to trace back his share of the estate if the land parcels are transferred to third parties. There is indeed a need to protect the said land parcels from further dealings.*

13. Further, the applicant deposed that he is a nephew to the deceased herein and which fact the 1st respondent did not controvert. The issue that the 1st respondent is also a nephew to the deceased and that deceased was not survived by any child or spouse are also not controverted. The 1st respondent did not oppose the application but proceeded to file submissions and which cannot take the place of pleadings or evidence. Under the Law of Succession Act, the applicant is a beneficiary of the estate and ranks equally in priority with the 1st respondent in terms of the person entitled to apply for the grant of letters of administration intestate for the estate of the deceased herein.

14. Without pre-empting the application for revocation which is pending hearing, it is my considered view that the applicant herein has an arguable case. There is the question on how the 1st respondent was able to obtain the grant herein without disclosing all the beneficiaries in Form P & A 5 and further without getting the consent from the beneficiaries who appear on the letter from the chief which is attached to the petition whereas some of the beneficiaries appears to rank even higher in priority than him. The applicant has further established that he is an interested party in relation to the estate herein and thus his application cannot be said to be hopeless and an abuse of the court process.

15. *In Philip Mwangi Githinji –vs- Grace Wakarima Githinji (2004) eKLR Okwengu J* (as she then was) held that *before the court can issue such an order it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition, such grounds would normally be in the form of a sustainable claim over the suit land.* Considering all the above, it is my considered view that the applicant herein has good grounds to warrant the grant of the orders of inhibition. Prayer 2 of the application is hereby granted.

16. As for the restraining orders, it is clear that the applicant is basically seeking interim orders of injunction. The conditions which an applicant need to satisfy so as to warrant grant of such orders are now settled. The principles were laid down in the **Case of Giella –v- Cassman Brown (supra)**. The applicant must establish a *prima facie* case with a probability of success, that he stands to suffer irreparable harm which damages will not be an adequate remedy and that the balance of convenience is in his favour (where the court is in doubt).

17. As for the establishment of a *prima facie* case with a probability of success, the Court of Appeal in the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd [2003] eKLR**, defined “*prima facie case*” as: -

a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

18. As I have already noted elsewhere in this ruling, the applicant has an arguable case for the reasons that the grant was obtained by the 1st respondent without his consent whereas he is a beneficiary of the estate herein. As such it is my view that he has a *prima facie* case with probability of success. The dispute herein involves land and if the orders of injunction are not granted and the land parcels are disposed of or dealt with in any way averse to the applicant’s interests, he definitely stands to suffer irreparable loss.

19. It is not disputed that he has been using the said land to graze his cattle. He definitely stands to suffer if the actions of the 1st and 3rd respondents are not restrained. Further, having used the said land over the years and after the demise of his father (brother to the deceased), the balance of convenience tilts in his favour. As such, the applicant has made a case for grant of restraining orders as prayed in prayer 3.

20. As for the costs of the application, the dispute herein being one involving two cousins and thus a family dispute, each party ought to bear their own costs.

21. Considering all the above, the application herein is merited in terms of prayers (2) and (3). However, I note that the applicant withdrew the instant application as against the 2nd respondent vide a notice of withdrawal dated 18.11.2020 and filed in court on 9.03.2021. As such, the orders as prayed in prayers 2 and 3 of the application herein not will apply to the said 2nd respondent.

22. Each party to bear its own costs.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents