



**\_REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 136 OF 2019**

**IN THE MATTER OF THE ESTATE OF AYIEKO OURE (DECEASED)**

**BETWEEN**

**JOSEPH AYIEKO AYIEKO.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**GEORGE OTIENO AYIEKO.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**NICHOLUS OWITI AYIEKO.....3<sup>RD</sup> APPELLANT/RESPONDENT**

**-VERSUS-**

**RAEL KEMUNTO ONDARI.....RESPONDENT/APPLICANT**

**RULING**

By a certificate of urgency application dated 10/06/2020, filed in court on 12/06/2020, the applicant, through the firm of **S.M. Sagwe & Company** sought the following orders:-

**i. Spent.**

**ii. Spent.**

**iii. The Honourable Court be pleased to grant an order of temporary injunction restraining the citees/respondents either by themselves, agents, servants and/or anyone claiming under the citees/respondents, from entering upon re-entering, trespassing onto, laying claim to, building on, cultivating, crushing sugarcane by use of force, interfering with and/or in any other manner, whatsoever, dealing with the portion under covered by sugarcane of land parcel number Kamagambo/Kanyajuok/1146, or in any portion thereof, pending the hearing and determination of the citation.**

**iv. The Honourable Court be pleased to assess damages caused by citees/respondents and be ordered to pay the citor in terms of monetary terms.**

**v. The Honourable Court be pleased to direct the crops officer of Rongo sub county to visit the site and make the assessment of the sugarcane harvested and a report filed in court at specific period.**

**vi. The OCS Rongo police station to comply with the order urgently and impound the crushing machine with all properties which are on the said portion of land.**

**vii. That the citees/respondents be condemned to pay costs of this application as a penalty to deter illegal acts.**

The application is based on the grounds appearing on the face thereof and is supported by the Supporting Affidavit of **RAEL KEMUNTO ONDARI** the applicant herein. The applicant briefly deponed:-

**i. That the citees/respondents forcefully entered and trespassed upon the applicant's and planted a crushing machine with a view to crush her sugarcane;**

**ii. That the actions of the citees/respondents are calculated to deny and/or deprive the applicant of her right to use and/or**

enjoy the benefits to the suit land which she purchased;

**iii. That the respondents are bound to continue with the trespass and/or interference unless the same are restrained by this Honourable Court.**

The application was opposed. The respondents through the firm of **Moerwa Omwoyo & Co. Advocates** filed a replying affidavit dated 24/7/2020 on 29/7/2020 sworn by Nicholas Owiti Ayieko the 1<sup>st</sup> respondent herein. The deponent deposed that they have never entered, trespassed onto and/or planted a crushing machine as alleged; that the photograph annexed to the application shows the activities on parcel no. Kamagambo/Kanyajuok/1161 which land is registered in the names of Ronald Onderi Nyamweya who is not a party to this suit; that the aforementioned parcel number is not the suit land herein; that the applicant is a stranger to the estate of their deceased father and is misleading the court and is not entitled to the orders sought herein. The respondent urged this court to dismiss the application with costs.

The application was canvassed by way of written submissions. The applicant filed her submissions dated 21/10/2021 evenly. The applicant submitted that there is a pending succession cause in Rongo being Succession Cause No. 109 of 2019; the applicant filed citation proceedings against the respondents and she was given the power to file succession proceedings; That the applicant purchased a piece of land from one Ayieko Oure (Deceased) on 12/10/1983 being land parcel number Kamagambo/Kanyajuok/1862; that on 16/10/2019, the certificate of official search showed that the land belonged to the deceased; that the respondents aided the said Ronald Onderi Nyamweya to obtain title no. Kamagambo/Kanyajuok/1161 a share that belonged to the applicant without undertaking succession hence violation of Section 45 of the Law of Succession Act; that since the respondents have intermeddled with the estate of the deceased, the court should disallow the appeal for it is frivolous and intended to block the hearing of the succession cause in Rongo court; that the court should order the said Ronald Onderi Nyamweya to surrender the title Kamagambo/Kanyajuok/1161 to the land registrar as no succession was undertaken.

The respondents filed their submissions dated 26/3/2021 on 30/3/2021. The respondents submitted that the property in contention is land parcel number Kamagambo/Kanyajuok/1146 registered in the name of Ayieko Oure (Deceased) and yet in the application, the applicant attached photos showing activities on land parcel no. Kamagambo/Kanyajuok/1161 which is registered in the names of Ronald Onderi Nyamweya who is not a party to this suit; that the applicant has no capacity to sue as the suit land is registered in the name of Ayieko Oure (Deceased); the applicant has no proof of ownership as the same has not been attached in the application and neither has she been in possession of any part of the suit land whatsoever; that applicant is a stranger to the estate of the respondents' deceased father and therefore not entitled to the orders sought as she has not shown any viable cause of action as regards the suit land herein; that the application is unmerited, frivolous, misplaced, vexatious, and abuse of the court process and should be dismissed with costs.

This court has carefully read and considered the application, the replying affidavit and the rival submissions.

The applicant has asked this court to grant an order of temporary injunction against the respondents whether by themselves or any of their agents from interfering with the suit land Parcel No. Kamagambo/Kanyajuok/1146 pending the hearing and determination of the citation proceedings.

The citation proceedings which the applicant is referring to was filed in the Resident Magistrate's Court in Rongo being Succession Cause No. 49 of 2017 by the applicant and a ruling was delivered on 30/9/2019 in favour of the citor, the applicant herein, allowing her to proceed with succession proceedings in the said estate of the late Ayieko - Oure (Deceased).

However, the respondents/citees filed a Memorandum of Appeal dated 28/10/2019 against the said ruling and order, which appeal has never been determined to date.

The applicant is seeking for a prayer for temporary injunction pending the hearing and determination of the aforementioned, pending an appeal before this court.

**Order 40 Rule 1 and 2** of the Civil Procedure Rules provides for the principles the court should consider when granting temporary injunctions.

The said principles were enunciated in the celebrated case of **Giella vs Cassman Brown (1973) E.A 358** which sets out the three principles upon which once of injunctive orders namely, whether the applicant has demonstrated that she has prima facie case with a probability of success; whether the applicant will suffer irreparable injury which cannot be compensated by way of damages, thirdly, and if the court is in doubt, it can decide the application on a balance of convenience.

On a prima facie case, the Court of Appeal in Mombasa in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** described prima facie case to be:-

**“... in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.**

The applicant has made the argument that there is intermeddling of the suit land parcel number Kamagambo/Kanyajuok/1146 owned by Ayieko Oure (Deceased) that the respondents assisted one Ronald Onger Nyamweya to obtain a portion of the suit land and process a title in his name being land parcel number Kamagambo/Kanyajuok/1161 in which she has an interest as a purchaser. The applicant had cited the Respondents to take out letters of Administration in respect of the estate of Ayieko once but they failed to attend proceedings. The court allowed the applicant to file succession cause and she did so in Rongo Succession cause No. 109 of 2019 which is yet to be determined.

To the supporting affidavit of the applicant, there is no evidence of the title deed annexed to show who owns the suit land title number

Kamagambo/Kanyajuok/1146. The applicant has only annexed a photograph and marked it as **'Exhibit 1'** showing a sugarcane crushing machine on the alleged piece of land. In addition, there is no proof whatsoever produced by way of evidence of the applicant's interest in the land by way of the sale agreement between the applicant and the deceased. The fact that the applicant was allowed to commence succession proceedings is not proof of her right or interest in the land.

As was stated in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** a prima facie case is more than an arguable case. It goes beyond mere allegations and raising issues. The allegations of having an interest in the land and of intermeddling of the estate by the respondents need also to be proved.

In the circumstances, the applicant has not established a prima facie case with high chances of success. The other principles to be considered that is irreparable harm and a balance of convenience therefore fall by the way.

I wish to point out at this stage that submissions with all due respect, do not amount to evidence unless the parties have expressly agreed to do so. Evidence ought not to be introduced by way of submissions but should be by way of the affidavits. In the case of **Mary Wambui Gatheru vs Peter W. Wanjare Ngugi Nairobi HCCC No. 36 of 1993**, J. Mwera said the following about submissions:-

**"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

In **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

**"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."**

As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

**"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."**

If indeed the intention of the applicant was for the court to take into consideration the documents attached to the submissions, she should have annexed them to her supporting affidavit. The practice of attaching evidence to submissions is not supported in the law. The reason why a respondent is ordinarily given the opportunity to file a response by way of a replying affidavit is to answer to the issues raised by the applicant in their supporting affidavit which should include the annexures they rely on. At the point where the same are attached to the submissions, the respondent has no way of responding to them and if the court was to take the said annexures into consideration, then it would be prejudicial to the other party.

In the end I make the following orders:-

**That the application dated 10/6/2020 is hereby dismissed with costs to the respondents.**

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 30TH DAY OF SEPTEMBER, 2021**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

Mr. Omwoyo for the Applicant.

No appearance for the Respondents.

**Nyauke** Court Assistant