



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 1012 OF 2011

IN THE MATTER OF THE ESTATE OF TABITHA NDINDA MUTUKU ALIAS NDINDA MUTEVU

LITHER KAVANA MUTEVU (Suing administrator of the Estate of the TABITHA

NDINDA MUTUKU ALIAS NDINDA MUTEVU.....APPLICANT

-VERSUS-

SERAH KAMENE WILLIAM.....RESPONDENT

RULING

1. The Applicant approached the Honourable Court pursuant to a Notice of Motion Application dated **24th September, 2020** seeking the following orders:

a. *SPENT*.....

b. THAT the Respondent be restrained by way of temporary injunction either by themselves, their agents and/or servants from further taking possession, disposing off and/or in any manner alienating any asset belonging to the Estate of the late **TABITHA NDINDA MUTUKU ALIAS NDINDA MUTEVU** (deceased) without authority and/or sanctioned of court.

c. **THAT** the Respondent be ordered to render accounts to the court on the manner in which she dealt with the assets of the Estate of the late **TABITHA NDINDA MUTUKU ALIAS NDINDA MUTEVU** (deceased).

d. THAT the Honourable Court do issue an order revoking and/or cancelling the transferred land title numbers-

i. Title No. Matungulu/Kyaume/759

ii. Title No. Matungulu/Kyaume/1306

iii. Title No. Ndalani/Ndalani Block 1/942

iv. Title No. Ndalani/ Ndalani Block 1/972

v. Title No. Ndalani/ Ndalani Block 1/973

vi. Title No. Ndalani/ Ndalani Block 1/974

vii. Title No. Ndalani/ Ndalani Block 1/975

viii. Title No. Ndalani/ Ndalani /967

ix. Title No. Ndalani/ Ndalani Block 1/608

- x. Title No. Ndalani/ Ndalani Block 1/609
- xi. Title No. Ndalani/ Ndalani Block 1/77
- xii. Title No. Ndalani/ Ndalani Block 1/704
- xiii. Title No. Ndalani/ Ndalani Block 1/143
- xiv. Title No. Ndalani/ Ndalani Block 1/625

Hereinafter referred to as the “**said properties**”

e. THAT the Respondent has intermeddled in the estate of the late TABITHA NDINDA MUTUKU ALIAS NDINDA MUTEVU (deceased).

f. THAT this Honourable court grants any other relief that may be deemed appropriate.

g. THAT costs of the Application be provided for.

2. The Application is premised on the supporting affidavit of the Applicant dated 23rd September 2020 and on the grounds that the deceased died on 22nd March 1993 and that the Respondent is alleged to have legally transferred the properties of the estate to herself and persons’ unknown to the Applicant to the exclusion and detriment of the beneficiaries of the estate. The applicant contends that unless the respondent is restrained by an order of injunction, there is real likelihood that she will further intermeddle with the estate to the detriment of the applicant.

3. The Respondent filed a replying affidavit on 19th October 2020 in which she opined that the application was grossly incompetent, misplaced, malicious, frivolous, vexatious and an abuse of the court process and should be dismissed. She denied transferring the properties and stated that no evidence had been adduced to support the said allegations and that further the searches annexed indicate that the properties belong to third parties for whom she could not speak while others belong to herself. She stated that Title No. Matungulu/Kyaume/1306, Ndalani/Ndalani/1/972, Ndalani/Ndalani/1/973, Ndalani/Ndalani/1/974, Ndalani/Ndalani/1/609, Ndalani/Ndalani/1/608 belonged to her which she had acquired by virtue of being a member of Matungulu Yatta Ranching Company Limited and that the same have never been the deceased’s properties. She stated that the properties belonging to 3rd parties were;

- i. Matungulu/Kyaume/759 - Jane Ndinda William**
- ii. Ndalani/Ndalani Block 1/942 –owner not disclosed**
- iii. Ndalani/Ndalani Block 1/975 –Cosmas Mutyambai Kamuti**
- iv. Ndalani/ Ndalani/967 –Timothy Muisyo Kyalo**
- v. Ndalani/Ndalani Block 1/608 –Leonard Kimeu Ndambuki &Another**
- vi. Ndalani/ Ndalani Block 1/177 - Leonard Kimeu Ndambuki &Another**
- vii. Ndalani/Ndalani Block 1/704 – Government of Kenya**
- viii. Ndalani/Ndalani Block 1/143 – Benjamin Gibson Nyatha**
- ix. Ndalani/Ndalani Block 1/625 – Simon Ng’ang’a King’ara**
- x. Matungulu/Kyaume/1297 - Ndinda Mutevu**

4. Further, she denied taking away the deceased’s 35 cows and 6 goats or anything belonging to the deceased. That the prayer for preservation orders and accounting of shares does not arise in this case as the applicant has not proved the allegations. She therefore opined that the orders sought cannot be justifiably granted as the properties claimed belong to herself and other parties and not the estate of the deceased as alleged. She thus asked the court to strike out the application with costs.

5. Peter Mbwika Mutuku, the acting chairman of Matungulu Yatta Ranching Company filed a further affidavit dated 12th February 2020 in which he opined that Ndalani block 1/971, 972, 973, 957, 974, 608, 609, 104, 704 and 143 belonged to the deceased and that on 15th of April 2015 a meeting was held in which the company advised the applicant and respondent to deal with the issues of the property as a family.

6. The respondent filed an application dated 17/8/2021 in which she sought to be allowed to file a supplementary replying affidavit sworn on even date wherein she averred that the properties listed by Matungulu Yatta Ranching Co. Ltd confirmed that the properties belonged to her and she annexed letters from the said company as proof thereof. The application was allowed by consent of the parties on 20/9/2021.

7. Parties agreed to dispose the application by way of written submissions. The applicant's submissions are dated 29/1/2021 and 7/4/2021 while those of the respondent are dated 1/3/2021 and 20/5/2021.

8. The Applicant pointed out that the main issue for determination is whether the application has merit. As to whether the Respondent had intermeddled in the estate, she submitted that the Respondent had sold and transferred the parcels mentioned without obtaining letters of administration in total disregard of the courts direction of 21st of June 2012 that joint letters of administration be taken out. Further, it was submitted that the Respondent has refused to render accounts on the shares owned to the estate at Matungulu Yatta Ranching Company and even selling and taking away 35cows and 6 goats. She also submitted she was entitled to the orders sought as the properties are in danger of being alienated by the Respondent who has already intermeddled in the estate. In addition to this, she submitted that she would suffer loss of the property which cannot be compensated by damages.

9. The applicant relied on section 45 and 82 of the Law of Succession Act, Cap 160 Laws of Kenya as well as Order 40 of the Civil Procedure Rules, 2010. To support her case, she placed reliance on the case of **Morris Mwiti Mbirungu vs Denis Kimathi M'Mburungu [2016] eKLR, Re Estate of John Gakunga Njoroge [2015] Eklr and Muriuki Hassan Vs. Rose Kanyua and 4 others [2014] Eklr, Giella vs Cassman Brown and Company Limited [1973] EA 358, American Cyanamid Company vs Ethicom Limited [1975] A AER 504, Mrao Limited vs First American Bank of Kenya and 2 others [2003] eKLR 125 and Paul Gitonga Wanjau vs Gathuthis Teas Factor Company Limited & 2 others [2016].**

10. The Respondent in her submissions on 3rd of March 2021 reiterated the contents of her replying affidavits and stated that the threshold under section 26 of **the Land Registration Act No. 3, Giella vs Cassman Brown and Njuwangu Holdings Limited vs Langata KPA Nairobi & 5 others [2014], Embakasi Housing Company Limited vs Registrar Ministry of Lands [2014] eKLR** had not been met and therefore the orders sought should not be granted. She submitted that the parcels as stated are registered in the names of different people while others are in her name. Further, that no evidence had been put before the court to demonstrate the transfer of said parcels from the deceased's estate to her and therefore the Applicant has no claim against the Respondent who has demonstrated how she acquired the said parcels of land. She submitted that there must be a succession cause duly filed and grants issued for a transfer to take place and in this case there is none.

11. The Applicant filed supplementary submissions and placed reliance on the further affidavit of **Peter Mbwika Mutuku** from Matungulu Yatta Ranching Co. Ltd and submitted that entry number 489/46/67 was under the name of the deceased and that it was clear that the respondent had caused her name to be included in her late mother's entry to allocate title Ndalani/Ndalani 1/972,974, 608 and 609 and reiterated that the application is merited.

12. I have considered the Application, the affidavits of both parties in support and in opposition to the application and the submissions thereto and find the following as the issues for determination;

i. Does the court have jurisdiction to issue injunctive orders under the Law of Succession Act Cap 160?

ii. Has the Applicant established threshold to warrant grant of injunctive orders?

Does the court have jurisdiction to issue injunctive orders under the Law of Succession Act Cap 160?

13. **It is trite law that where a question of jurisdiction arises it must be determined first. The Applicant approached this Honourable Court seeking injunctive orders against the Respondent. It is thus important to determine whether this court is clothed with jurisdiction to grant the orders sought. None of the parties has questioned the jurisdiction of this court but nonetheless it behooves it to determine the issue of jurisdiction whether raised or not. Jurisdiction is so important that anything done by a court without jurisdiction amounts to a nullity.**

14. **The Applicant's application is premised on Order 40 rule 1 of the Civil Procedures, 2010. It is my view that the Probate and Administration Rules do not provided for an injunctive relief because Order 40 of the Civil Procedure Rules is not one of the Civil Procedure Rules stipulated as being applicable to succession matters. (See Rule 63(1) of the Probate and Administration Rules in the Estate of Kibowen Komen (deceased) NKR Succession Cause No.500 of 1997. The above notwithstanding, by dint of the provisions of section 47 of the Law of Succession Act, this court must determine the issue brought before it in a fair manner.**

15. Further, section 45 (1) of the Law of Succession Act, under which this application has been brought, on the other hand, provides as follows:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

16. Section 47 of the Law of Succession Act gives the High Court the jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. The reasons given for this application fall within the ambit of section 45(1) of the Law of Succession Act. It has been alleged that the Respondent has illegally transferred some of the Estate properties to her name and is therefore capable of continuing to waste the property in question so as to warrant the issuance of injunctive orders to preserve the estate of the deceased.

17. The Court of Appeal has pronounced itself on the issue of Injunctions. In the case of **Floris Piezzo & Another –vs- Giancarlo Falasconi (2014) eKLR**, while considering whether an injunction can issue in a Succession Cause the Court of Appeal expressed itself as follows;

“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.” (Emphasis mine).”

18. The upshot of the foregoing is that this court has jurisdiction to issue all manner of orders including injunctions to preserve the estate. However, when it comes to matters of how the estate should be dealt with, then the same should be done once letters of administration are sought.

19. A perusal of the record shows that the applicant herein filed a citation dated 21/11/2011 wherein she cited the respondent (Citee) herein and directed her to either accept or refuse to take up letters of grant of administration failing which the applicant (Citor) would proceed to do the same. The citation application was fixed for hearing on the 21st of June 2012 whereupon the parties entered into a consent to jointly take out letters of administration intestate within forty-five (45) days from the date of the consent with no orders as to costs. No grant has ever been taken out to date and there is no indication on the file that the consent has ever been set aside. This was also noted by the court on 25th of October 2018.

20. The hands of the court are tied as there is no succession cause before it as the same has been filed by an incompetent person in the eyes of the law. Once the citation application dated 21/11/2011 was finalized on the 21/6/2012 then the citation proceedings were thus concluded and that the parties were then expected to file a proper succession cause where they could proceed to obtain joint letters of grant pursuant to the consent so entered. The filing of further applications in a concluded citation cause is an abuse of the court process.

Whether the Applicant has established the threshold for grant of injunctive orders?

21. The law on grant of injunctive orders is well-known. Our courts have traveled down that path for long and the law is now settled. The courts have since laid down principles governing grant or denial of injunctive reliefs.

22. The leading authority on interlocutory injunction is the well-known case of *Giella –vs- Cassman Brown & Co. Ltd (1973) E.A 358* that has also been cited by the parties. *Spry VP in* his judgment put forth three conditions to be satisfied before an interlocutory injunction can be granted:

“The conditions for the grant of interlocutory injunctions are now. I think, well settled in East. First, an applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E. A. Industries -vs- Trufoods, (1979) E.A. 420)”

23. From the case of *Giella –vs- Cassman Brown (Supra)*, the onus is on the Applicant to prove satisfactorily that the aforementioned conditions are satisfied, more importantly:

- i. That there is a prima facie case with a probability of success; and
- ii. That the Applicant will suffer irreparable injury not atonable by way of damages;
- iii. The Applicant must prove his case on a balance of probabilities

24. In my view, therefore, I need not re-invent the wheels on the subject of the law on injunctions. A great number of judicial decisions have now settled the legal principles which guide the courts in determining whether to grant or deny a party an injunctive relief.

i. Prima facie case

25. The Applicant is required to demonstrate to the court that it has a prima facie case with likelihood of success. The Court of Appeal in the case of *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others CACA No. 39 of 2002* defined what prima facie case is. It is said,

“So what is a prima facie case? I would say that in civil cases it is a case in which on material presented to the court a tribunal properly directing its self on the law and evidence will conclude that there does exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” Page 8.

That "...prima facie case is more than arguable case. It is not sufficient to raise issues. The Evidence must show an infringement of a right, and a probability of success of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case." Page 9.

26. The **Concise Oxford Dictionary of Current English 8th Ed.** defines "probability" as the "*the likelihood of something of happening ...the extent to which an event is likely to concur measured by the ratio of favourable cases to the whole number of cases possible...*"

27. Considering the material before the court, I am called upon to determine whether the Applicant has satisfied this threshold. In this matter, the Applicant approached the court through a notice of motion application where petition for letters of administration of the Estate has not been filed by any party. It is instructive that the parties agreed by consent on the 21/6/2012 to file for joint letters of grant but they haven't done so. This is a stand-alone application. Even in the ordinary civil suits, an application for injunction cannot stand alone as it must be anchored on a plaint and the same applies to succession matters. I have keenly considered the evidentiary materials placed before me by both parties and I find that the Applicant has not established a prima facie case with likelihood of success majorly because the evidence placed before the court does not establish the allegations that the Respondent illegally and fraudulently transferred the suit properties as no such evidence was tendered showing the alleged transfer of deceased's properties into her name or to third parties. On that account, my view is that the Applicant has failed to demonstrate existence of a prima facie case with likelihood of success in line with **Giella –vs- Cassman Brown (Supra)**.

ii. Will the Applicant suffer irreparable injury not atonable by way of damages?

28. It is to be noted that the court shall only entertain this second requirement and/or condition of the **Giella Case** only if it entertains some doubt on first condition. Justice Maraga (as he then was) in **J.M. Gichanga -vs- Co-operative Bank (2005) Eklr** applying the finding in the court of Appeal in **Aikman -vs- Muchoki (1984) KLR 353** stated as follows:

" My understanding of the Court of Appeal decision in *Giella* case is that the court proceeds to consider the second condition of irreparable harm which cannot be compensated for by an award of damages only if it entertains doubt on the 1st condition of the probability of success, like when the court thinks that the Plaintiff has a fifty/fifty chance of success."

29. I am unable to find that the Applicant will suffer any harm should this court decline to grant injunctive orders. This is because nothing has been placed before me to establish the that suit properties are part of the Estate and I strongly believe that such a conclusion can only be made during the hearing of the petition for grant or letters of administration or even confirmation of such grant.

iii. In whose favour does the balance of convenience tilt?

30. The third and final condition laid down by **Giella Case** for grant of an interlocutory injunction is that if the court is in doubt, it is to determine in whose favour the balance of convenience tilts.

31. Mabeya J. in **Jan Bolden Nielsen –vs- Herman Philliipus Steya also Known as Hermannus Philliipus Steyn & 2 Others (2012) eKLR** stated as follows:

"I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Giella –v-s Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the law. In *Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-*

"Counsel for the defendant urged that the scope of the law governing the grant of injunctive relief was long ago, in *Giella – vs- Cassman Brown*, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover Internationale* made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:-

"A fundamental principle ofthat the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong'"

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella –vs- Cassman Brown*, the Court has had to consider the following questions before granting injunctive relief.'

i) is there a prima facie case

ii) does the applicant stand to suffer irreparable harm.....

iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. **The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....**

If granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a much larger risk of injustice if I found in favour of the defendant than if I determined this application in favour of the applicant."

32. The totality of the foregoing observations and in view of the fact that the application has been filed in a concluded citation cause, I am satisfied that the application dated 24/9/2020 lacks merit. The same is dismissed with no order as to costs. The parties herein are directed to comply with the consent order dated 21/6/2012.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE