



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 46 OF 2018

IN THE MATTER OF THE ESTATE OF NJENGA NJOROGE GATHECA ALIAS NJENGA NJOROGE (DECEASED)

SUSAN NYAMBURA NJENGA.....1ST APPLICANT

NAOMI WAIRIMU GICHUNGO.....2ND APPLICANT

MARGARET WANJIKU NJENGA.....3RD APPLICANT

FRANCIS NJENGA.....4TH APPLICANT

FRANCIS MAWIRA.....5TH APPLICANT

VERSUS

JOSEPH NJOROGE NJENGA.....1ST RESPONDENT

JOHN NGUMO NJENGA.....2ND RESPONDENT

DAVID KARANJA NJENGA.....3RD RESPONDENT

MARGARET NJERI GACHERU.....4TH RESPONDENT

RULING

1. Before me is a Chamber Summons filed on 27th August, 2018, brought under Section 45 of the Law of Succession Act seeking a mandatory order requiring the Respondents by themselves, their agents, servants, employees and/or proxies to vacate, uproot sisal, remove beehives and not cultivate the parcel of land described as LR. No. Ndeiya/Ndeiya/373 within such a period as the Court may deem reasonable and in default of which, the Petitioners/Applicants and other beneficiaries access the land and cultivate and that the court be pleased to issue an order of mandatory injunction to compel the Respondents to forthwith cease intermeddling with all the deceased's properties and in particular the property known as LR. No. Ndeiya/Ndeiya/373.

2. The Application is based on among other grounds that the suit land is an asset in the estate of Njenga Njoroge Gatheca, the deceased herein; that Respondents have unlawfully entered into the said deceased's property and are cutting down trees, installing beehives and burning charcoal while denying other beneficiaries access to cultivate the land, which amounts to intermeddling with the deceased's estate.

3. **SUSAN NYAMBURA NJENGA** swore the affidavit in support of the application on her own behalf and on behalf of her Co-Applicants. She deposed that together with her Co-Petitioners they had agreed to petition for letters of administration of the deceased's estate but the Respondents refused to sign the same forcing them to file a citation. She further deposed that the Respondents are holding the title of the deceased's properties and are adamant that only the sons of the deceased should inherit from the estate as the daughters are married; that the Respondents have seriously intermeddled with the deceased's estate; that the Applicants have a prima facie case with high possibility of success and as such conservatory orders should be issued to avert irreparable loss to them.

4. **JOSEPH NJOROGE NJENGA and JOHN NGUMO NJENGA** swore the replying affidavit in opposition to the application. They denied allegations by the Applicants that they have blocked the Applicants from accessing Land Parcel No. Ndeiya/Ndeiya/373. They deposed that the deceased had in his lifetime appointed certain portions to the respective beneficiaries which they cultivate and that they have not extended the portions. They asserted that they have always occupied these portions and have not intermeddled with the deceased's estate

as they are entitled to occupy and utilise the land belonging to the deceased.

5. The application was canvassed by way of oral arguments. Miss. Githuku for the Applicants relied on the Applicants' supporting affidavit. She submitted that the Applicants are seeking a temporary injunction to restrain the Respondents as prayed in their application. Mr. Kimani for the Respondents relying on the replying affidavit opposed the application. It was his submission that the Respondents have always lived on the land and as such cannot be evicted and that their use of the land does not amount to intermeddling. He argued that the case presented by the Applicants does not rise up to the threshold for granting the mandatory injunctions sought by the Applicants. He relied on the case of **Kenya Breweries Ltd and Another v Washington Okeyo (2002) eKLR**

6. The court has considered the material canvassed by the parties in respect of the motion filed on 27th August 2018. The two live prayers therein seek a temporary mandatory injunction even though prayer (5) as crafted appears to seek a prohibitory injunction. The law applicable to the latter is settled. In **Nguruman Limited v Jan Bonde Nielsen and 2 Others [2014] e KLR** the Court of Appeal restated the principles in **Giella v Cassman Brown** and observed that the role of the judge is merely to consider whether the principles for the grant of an interlocutory injunction had been met and that the Court ought to be careful not to determine with finality any issues arising.

7. The Court further observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella case, they could rather be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

- a) establish his case only at a *prima facie* level**
- b) demonstrated irreparable injury if a temporary injunction is not granted.**
- c) allay any doubts as to (b) by showing that the balance of occurrence is in his favor.”**

8. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established the court need not look into the question of irreparable loss or balance of convenience.

9. As to what constitutes a *prima facie* case, the Court of Appeal expressed itself as follows:-

“Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:

“In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

9. Applying the above principles to this case, it seems that the Applicants were primarily aggrieved that the male heirs of the deceased appear to have taken over the sole asset of the estate namely, **LR NO NDEIYA/NDEIYA/373** and have evinced an intention to lock out other beneficiaries, while themselves using the asset, committing waste thereon and purporting to share out the estate amongst themselves. Although the Respondents claim to have been living on the land all their lives, they have not tendered any evidence that they have any dwellings or developments thereon. And while the Applicants claim that some beneficiaries have been evicted and denied access to the asset, no details of the affected parties are supplied. The Applicants may have a right to the land equal to their male counterparts but their material does not demonstrate a clear case of the alleged actions of the Respondents that infringe upon their rights as beneficiaries. Mere apprehension is not enough; the grounds for such apprehension must be established. So that even if the Court were to consider prayer 5 of the motion as seeking a prohibitory temporary injunction, it is not satisfied that a prohibitory injunction is deserved in the circumstances of the case.

10. By their 4th prayer, the Applicants seek a temporary mandatory injunction to effectively evict the Respondents, who are admittedly also beneficiaries to the estate. As stated in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) eKLR** a temporary mandatory injunction can only be issued in rare and special circumstances where there are compelling circumstances, and in the clearest of cases involving a simple act that can be easily reversed, or where it is evident that the Respondent is bent on stealing a match on the Applicant. There is no justification in the material proffered by the Applicants for the issuance of a temporary mandatory injunction as prayed or a prohibitory injunction in terms of prayers in the motion.

11. However, the court notes that pursuant to the citation filed by the Applicants against their male counterparts, a Petition for letters of administration was filed by the parties on 27th March 2019. The Petition is yet to be published. In order to preserve the substratum of the Petition, the court will issue an order that the *status quo* respecting the ownership of the suit land, crops and trees on the land be maintained pending the distribution of the estate. For the avoidance of doubt any beneficiary who has been cultivating on the suit property as at 2017 is allowed to continue, so long as no waste such as logging or felling of trees, making charcoal, installing beehives and other adverse acts of waste attends such cultivation. By a further order, the court directs that **Chief Thigio location** files into court within 14 days a list of beneficiaries who were cultivating the suit land as at 3rd January 2017. This order will be extracted and served upon the said Chief by the Applicants.

12. The parties are to pursue the gazettelement of the Petition so that the estate can be distributed among the rightful beneficiaries. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 5TH DAY OF MARCH 2020.

C MEOLI

JUDGE

In the presence of:

Mr. Makumi holding brief for Ms. Githuku for Applicant

Respondent – No appearance

Court Assistant – Ndege/Nancy