



**REPUBLIC OF KENYA**

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

**PROBATE AND ADMINISTRATION**

**SUCCESSION APPEAL NO. 9 OF 2019**

**BUNICE WAMARWA GITHAE.....APPLICANT**

**VERSUS**

**MARGARET KARIUKO NJOKA & 4 OTHERS.....RESPONDENTS**

**RULING**

1. The application before this court is the one dated the 9<sup>th</sup> of October, 2019 and the applicant seeks the following orders;

(i) That the honourable court be pleased to certify this matter as urgent and hear it ex-parte in the first instance.

(ii) That the honourable court be pleased to issue a temporary order of injunction restraining the respondents by themselves, their agents, employees or anybody acting through them from entering into, interfering, demolishing, evicting selling transferring or in any way dealing with land parcels number Kabare/ Kiritine/ 3266, Kabare/ Kiritine/3267, Kabare / Kiritine/ 3268, Kabare/ Kiritine/ 3269, Kabare/ Kiritine/ 3270, Kabare/ Kiritine/ 3271, Kabare/ Kiritine/ 3272 pending the hearing and determination of prayer 3 and 4 of this application.

(iii) That the honourable court be pleased to issue an order of injunction restraining the respondents by themselves, their agents, employees or anybody acting through them from entering into, interfering, demolishing, evicting, selling transferring or in any way dealing with land parcels number Kabare/ Kiritine / 3266, Kabare / Kiritine/ 3267, Kabare/ Kiritine/ 3268, Kabare/ Kiritine/ 3269, Kabare/ Kiritine/ 3270, Kabare/ Kiritine/ 3271, Kabare/ Kiritine/3272 Pending the hearing and determination of this appeal.

(iv) That the costs of this application be borne by the Respondents.

2. This application is supported by the affidavit of Banice Wamarwa Githae sworn on 9<sup>th</sup> of October, 2019. Her contention is that she has filed an appeal in the Judgment of Succession cause 272 of 2016 at Gichugu.

3. After the Judgment was delivered, the 1<sup>st</sup> respondent moved to Court vide a Summons general dated 1<sup>st</sup> April, 2019 seeking an order that the Executive officer to sign document on his behalf, alleging that he had declined to sign the same.

4. When the summons came up for hearing on 24<sup>th</sup> April, 2019 a consent was entered whereby parties agreed that proceedings in succession cause number 272 of 2016 be stayed pending the hearing and determination of the Appeal.

5. That however, the 1<sup>st</sup> respondent without having the documents executed by himself and in total disregard of the consent order moved and caused land parcel number **Kabare/ Kiritine /545** to be sub-divided into 7 portions and the resultant parcels were sold to 3<sup>rd</sup> parties.

6. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents were not party to the proceedings at Gichugu neither were they beneficiaries of the estate of the deceased.

7. The respondents upon obtaining the title deeds moved into occupation of the entire parcel of land, and have started cultivating up to the doorstep of the beneficiaries of the Estate.

8. He deposes that if the respondents are not restrained, he will suffer loss and damage.

9. The respondents opposed the application and filed a replying affidavit sworn by Margaret Karioko Njoka sworn on 24<sup>th</sup> October, 2019, there contention is that after the grant was confirmed on 29<sup>th</sup> January, 2019 it was registered at the Lands registry and the registration

reflected the exact orders of the trial court and after registration they had the land partitioned and some of the beneficiaries decided to sell their portions.

10. The order by the trial magistrate did not in any way stay or injunct that the registration was done with the full knowledge of the applicant and he is not been truthful.

11. The applicant took possession of her rightful share and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents are innocent purchasers who purchased their portions of land after the confirmation of the grant and adhered to all the Statutory sale requirement during the said sale and all the beneficiaries including the purchasers have taken possession.

12. When this matter came up for hearing, the respondents informed the court that they have no objection to prayer number 2 on the application been issued. They only opposed prayer number 3 and so prayer number 3 is the one pending determination.

13. The parties have filed submissions, the applicant also filed a further supplementary affidavit where she depones that she was never involved in the process of execution of grant as all along she was aware that there was a pending appeal.

14. She further contends that the respondent moved to defeat the appeal.

15. I have considered the application.

**The issue which for determination is the issuance of injunction.**

- The leading authority in the issuance of injunction is the case of; **Giella -vs- Cassman Brown (1973) EA 358** and the conditions upon which the court will grant an injunction are that a party must show that there is a prima facie case with chances of success.

- The applicant is likely to suffer irreparable loss.

- That where the court is in doubt it may determine the case on a balance of convenience.

- **It was stated:**

**“The conditions for the grant of an interlocutory injunction re now, I think, well settled in East African. First, an applicant must show a prima facie case with a probability of success.**

**Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not 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.” -**

16. The applicant have shown that she has a prima facie case with chances of success. She has filed an appeal and it is not in dispute that the parties had by consent agreed to have the proceedings stayed pending the hearing and determination of the appeal.

17. It has been demonstrated that the respondent went ahead and had the land sub-divided and sold to 3<sup>rd</sup> parties and if Injunction is not issued the applicant is likely to suffer irreparable loss as the respondents may continue disposing off the estate before the appeal is heard and determined.

18. The respondents have raised the issue of that an injunction will not be issued against a registered owner of immovable property.

19. The respondent have not demonstrated good faith as they created this position of having 3<sup>rd</sup> parties registered when there was an order staying the proceedings.

It is trite that he who comes to equity must come in clean hands The law does not protect a proprietor of immovable property where it is shown there was misrepresentation to which is proofed to be a party, or where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme.

**Section 26 (1) OF The Land Registration Act Cap 26 Laws of Kenya Provides as follows;**

**“Certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by p proprietor shall be taken by all courts as prima facie evidence that the person named as a proprietor of land is the absolute and divisible owner, subject to encurburrences , easements, restrictions and conditions contained and endorsed in the certificate and the title shall not be subject to challenge except;**

20. The respondents have also raised the issue that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents were not parties in the proceedings before the lower court. However, a joinder or non-joinder of parties does not defeat a suit. But the court will determine the issue in dispute.

Order 1 Rule 9 of the Civil Procedure Rules provides that;

**“ no suit shall be defeated by reason of the mis-joinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it.’**

**Rule 73 of the Probate and Administration Rules provides that:**

**“shall limit or otherwise affect the inherent power of the court to make such orders as will be necessary for the ends of justice or to prevent abuse of the process of the court.”**

The rule gives the court wide powers that would make orders that would be in the interest of justice.

22. Prayer number 2 which is seeking restraining orders and this order is only issued pending the hearing and determination of prayer number 3 and 4 of this application.

23. Prayer 4 is the substantive prayer in the application.

24. The applicant deserves the orders been sought and this court has jurisdiction to grant the prayer for an injunction pending the hearing and determination of the appeal and furthermore Under Section 47 of Law of Succession Act the Court has jurisdiction to entertain any application and determine any dispute and make such orders as may be expedite in the circumstances of the case.

25. In the court of appeal in a case cited by the applicant has stated that the Court has jurisdiction to issue injunctive orders in succession matters. In the case of ; **Floris Pierro -vs- Giancarlo Falasconi, Civil appeal Number. 145 of 2012 (UR)** this court pronounced itself as follows;

**“ 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 injunction 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 injunctive orders. In other words we are of the firm 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.”**

I find that the application meets the threshold of the grant of injunctive orders.

I order that there be an order of injunction restraining the respondents themselves, their agents or employees or anybody acting through them or entering into, interfering, demolishing, evicting, selling or transferring or in any other way dealing with land parcel Kabare/ Kiritine/ 3266, Kabare/ Kiritine/3267, Kabare / Kiritine/ 3268, Kabare/ Kiritine/ 3269, Kabare/ Kiritine/ 3270, Kabare/ Kiritine/ 3271, Kabare/ Kiritine/ 3272 pending the hearing of this appeal.

Costs in the cause.

**Dated, signed at Kerugoya this 29<sup>th</sup> day of May 2020.**

**L. W. GITARI**

**JUDGE**