



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. APPLICATION NO. 65 OF 2013

IN THE MATTER OF THE ESTATE OF WANJOKA NJAGI alias STELLA WANJOKA NJAGI (DECEASED)

JULIUS MUGO MUCHIRI.....APPLICANT

VERSUS

NJIRU K. NJAGI.....1ST RESPONDENT

EDWARD MUGO MUNENE.....2ND RESPONDENT

RULING

INTRODUCTION

1. The matter that was before the court was an application dated 20.7.2020 by the applicant for an injunction to prevent the respondents from occupying, restricting sale, transfer and charge of the suit property parcel no. Baragwe/Guama/1088 pending the hearing and determination of the appeal in the Court of Appeal at **Nyeri No.32 of 2018**.

2. The 2nd respondent in his replying affidavit dated 27/7/2020, averred that the suit property does not exist as the same was subdivided into 13 parcels. He annexed the green card and title deeds. He also claimed that the applicant had been hostile to him and he could not utilize the land since 2010. That the ruling of this court delivered on 14.06.2016 dismissed the applicants case and gave him possession over the land which he subsequently subdivided.

3. The respondents through their advocates filed grounds of opposition dated 29.07.2020 on the grounds that the application was incompetent, bad in law and an abuse of the court process and that it lacks merit. The respondent's advocate orally prayed for the application to be struck out as the applicant had not adhered to order 9 rule 9, to seek leave of the court to appear for the applicant after judgement. The applicant's advocate invoked Article 159 of the Constitution and the applicant's right to be heard.

4. Interim orders of injunction orders for the property land No. Baragwe/Guama/1088 were issued dated 24.7.2020.

ISSUES

5. The issues which arise for determination are:-

- i. whether the application dated 20.7.20 should be struck out and whether ordered 9 rule 9 applies.**
- ii. Whether the threshold for an injunction has been met.**
- iii. Whether land parcel no. Baragwe/Guama/1088 has been subdivided/ and the application overtaken by events.**

ANALYSIS AND DETERMINATION:

Whether the application dated 20.7.20 should be struck out and whether Order 9 Rule 9 applies.

Order 9 rule 9 of the Civil Procedure Rules provides for the procedure of change in representation once Judgement has been entered, the same can only be effected by an order of the court or consent as between the outgoing and incoming Advocates.

Rule 63 (1) of Probate and Administration Rules provides for the Sections and Rules in the Civil Procedure Rules that are applicable to

the Succession cases as follows:

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”

6. Therefore, **Order 9** is not applicable in succession matters. The application is therefore properly on record and should be heard and determined by the Court on merits. (see **Jackson M. Miyogo v Simeon Mose Omiti [2016] eKLR**)

Whether the threshold for an injunction has been met?

The second issue to consider is the application for an injunction and whether the conditions for an injunction have been met. The principles for granting of injunctions are laid out in case of **Giella –v- Cassman Brown & Company Ltd (1973) EA 358**. The applicant must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable loss which may not be compensated by an award of damages. If the court is however in doubt on the foregoing, it should decide the matter on the balance of convenience.

7. The applicant seeks an injunction pending the hearing of the appeal. The appeal was filed on 5/3/2018. The applicant prays for an injunction restricting the sale, charge or transfer of the land parcel Baragwe/Guama/1088.

8. A review of the file indicates that the suit property has had a long litigious history as between the applicant and family of the deceased. Numerous cases had been filed as regards the disputed suit property, parcel Baragwe/Guama/1088.

9. The appeal is based on the ground that the applicant was not accorded an opportunity to be heard upon the rectification of the grant to include parcel Baragwe/Guama/1088. The ruling by this court dated 14.6.2016 found that the issue of title/ownership to the disputed parcel was already ascertained in Meru High Court No. 60 of 1990 which was later transferred to be Embu Civil Appeal No. 20 of 1996, which the Applicant failed to appeal against. There were therefore no sufficient grounds to revoke the rectified grant as provided for in **Section 76 of the Law of Succession Act**.

10. A prima facie case has been defined in the black’s law dictionary 9th edition p.1310 as **‘the establishment of a legally required rebuttable presumption; a party’s production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party’s favour.’**

Also case law has defined it to mean as held, In **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125**, a prima facie case was defined in the following words:-

“In Civil cases a prima facie case is a case in which on the material presented to 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.”

11. The prima facie case presently is as regards the appeal on section 76 of the Law of Succession Act, the applicant has failed to prove he has a prima facie case with a probability of success as the grounds for revocation as set out in the Act were not met to warrant the revocation or annulment of the grant.

12. On the issue of irreparable damage, it would have been occasioned should the land parcel be sold or transferred, as the applicant could not recover in damages his investments in the land which he claims to have been in occupation and tilling since 1959. However, from the review of the green card it is noted that the land had already been transferred to the 2nd respondent. Equity does not favour the indolent. Title to the land parcel has clearly already been transferred from the estate to a third party. Damages can therefore be sufficient remedy for the applicant as against the Estate.

Whether land parcel no. Baragwe/Guama/1088 has been subdivided/ overtaken by events.

According to the 2nd respondent parcel no. Baragwe/Guama/1088 does not exist as it was subdivided on 5.7.2017. He averred that he is the registered proprietor of the parcels of land, he annexed title deeds to that effect. That after the ruling on 14.6.2016 he took possession of his title and took action against the applicant. He also averred that the applicant was no longer in possession of the suit property.

13. The green card indicates the land parcel has been issued to the 2nd respondent for a consideration of Kshs. 400,000 in 2010, it was later subdivided in August 2019 into parcel no. Baragwe/Guama/4132-0.04ha, 4133-0.04ha, 4134-0.05ha, 4135-0.05ha, 4136-0.05ha, 4137-0.05ha, 4138-0.05ha, 4139-0.05ha, 4140-0.05ha, 4141-0.04ha, 4142-0.04ha. The request for injunction for land parcel Baragwe/Guama/1088 can therefore not be issued as it has been overtaken by events, as there exists new land parcels. The court would be acting in vain to issue an injunction over a none existent parcel of land. Courts orders are not issued in vain.

CONCLUSION

14. In view of these reasons the application does not meet the threshold for the grant of an injunction. The application is without merits and is dismissed.

Dated at Kerugoya this 14th day of August 2020.

L. W. GITARI

JUDGE