



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

SUCCESSION CAUSE NO.24 OF 2015

IN THE MATTER OF THE LATE: KIBORE ARAP KOMBICH *alias* KIBORE A. KOMBICH.....DECEASED

AND

DANIEL KIPNGENO MUTAI.....1ST PETITIONER

SAMMY KIPKEMOI RONO.....2ND PETITIONER

RECHO KOMBICH.....3RD PETITIONER

RULING

1. The application coming for consideration in this ruling is the one dated 7/5/2018 seeking the following orders:

i. That an order do issue that this Application be and is hereby certified urgent and service be dispensed with in the first instance(spent).

ii. That pending interpartes hearing of this application, a temporary injunction do issue restraining the two administrators DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO from disposing, transferring, leasing and/or making further dealings whatsoever on land parcel KERICHO/MOGOGOSIEK/172 in defiance of the mode of distribution set out in the certificate of confirmation of grant issued on 26/7/2017.

iii. That pending interpartes hearing of this application, this court be pleased to direct the Registrar of Lands, Bomet Land Registry to forthwith recall the title issued on 9/4/2018 in the names of the two beneficiaries DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO and to issue a fresh one as per the certificate of confirmation of grant issued on 26/7/2017 in the names of the three administrators for the purpose of transferring to their beneficiaries.

iv. That an order do issue that the title deed issued on 9/4/2018 to the two administrators DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO be revoked.

v. That an order do issue to cite and convict DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO for contempt of court for disobeying orders of this court issued on 5/4/2017, 28/9/2017 and the certificate of confirmation of grant issued on 26/7/2017 and to imprison them for 6 months or a fine of 200,000 each.

vi. That an order do issue that the costs of this Application be paid by the 1st and 2nd Respondents personally.

2. The Application is based on the following grounds;

i. That the court delivered a ruling on 5th April 2016 ordering that the deceased property subject of succession be distributed and shared equally among the children of the deceased whether alive or dead.

ii. That this succession initially commenced as Succession Cause No.170 of 2014 at Kericho Law Courts where only Daniel Mutai & Sammy Kipkemoi Rono were issued with Letters of Administration.

iii. That eventually the matter was transferred to Bomet High Court and Letters of Administration was revoked and a fresh grant was issued as per Orders of this court on 19th March 2015.

iv. That the 1st and 2nd Respondents, Daniel Mutai and Sammy Rono were fully aware of the existence of the amended grant and even annexed to their Replying Affidavit on record sworn on 3rd May 2016 as Exhibit DKM-3(b).

3. Mr. Kigen for the applicant relied on the supporting affidavit sworn by the Applicant Recho Kombichi dated 7/5/2018 in which she has deposed as follows;

i. That the Applicant is the 3rd Administrator of the Estate of the deceased herein of the late Kibore Arap Kombichi (deceased).

ii. The 1st & 2nd administrators have irregularly obtained a title issued on 9th April 2018 excluding the 3rd Administrator and all the beneficiaries and the property is now at risk of disposal of all the beneficiaries.

iii. That this succession cause was commenced at Kericho High Court and it was transferred to Bomet High Court.

iv. That the grant was amended and the court ordered that the property be distributed equally amongst the three beneficiaries namely:

a) Daniel Kipngeno Mutai

b) Sammy Kipkemoi Rono and

c) Recho Kombich

v. That the 1st and 2nd Administrators were fully aware of the amended grant and certificate of confirmation but due to their hostility, the land has not been surveyed.

vi. That on one occasion they turned violent and threatened to kill the Advocate on site if the survey went on.

vii. That the applicant is holding the original title to the property yet the 1st and 2nd Administrators have been issued with a title deed in their names leaving the applicant out.

viii. The Applicant is seeking to enforce prayer 5 of the application dated 7/5/2018 that an order do issue to cite and convict DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO for contempt of court for disobeying orders of this court issued on 5/4/2017, 28/9/2017 and the certificate of confirmation of grant issued on 26/7/2017 and to imprison them for 6 months or a fine of 200,000 each.

4. Upon perusing the Application dated 7/5/2018, I find that the issues for determination are as follows;

i) Whether the 1st and 2nd Respondents should be cited for contempt of court.

ii) Whether the title deed issued to the 1st and 2nd Respondents by the Registrar of Lands, Bomet Land Registry on 9/4/2018 should be revoked.

iii) Whether a temporary injunction should issue restraining the two administrators DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO from disposing, transferring, leasing and/or making further dealings whatsoever on land parcel KERICHO/MOGOGOSIEK/172 pending distribution of the Estate.

5. On the 1st issue as to whether the 1st and 2nd Respondents should be cited for contempt of court, I find that the prayers are sought under the Contempt of Court Act No. 46 of 2016 which has been declared unconstitutional in the case of **Kenya Human Rights Commission – vs- AG & Another (2018) eKLR** in the following words;

“A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary” (Emphasis added).

6. However, I find that there is no lacuna in the law as Section 5(1) of the Judicature Act is still applicable. The said Section provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

7. This section was repealed by section 38 of the Contempt of Court Act, which Act is now no longer operative, however, the substance of the common law is still applicable under section 3 of the Judicature Act.

8. The Court had the following to say in **Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka**

“The Contempt of Court Act is however no longer operative as from the date of the judgment declaring it unconstitutional in Kenya Human Rights Commission v Attorney General & Another (supra). I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court’s orders. It was in this respect observed in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

In addition, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court”.

9. In the circumstances, concerning the order to cite and convict DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO for contempt of court for disobeying orders of this court issued on 5/4/2017,28/9/2017 and the certificate of confirmation of grant issued on 26/7/2017, I find that it is not clear if the 1st and 2nd Administrators were personally served with the application dated 7/5/2018.

10. The affidavit on record shows that they were served with the hearing notice. The said notice did not have a penal warning that the 1st and 2nd Petitioners were required to appear personally.

11. The hearing of the application proceeded ex-parte on 28/3/2019. The court was told that the Respondents had not filed any response to the application and an affidavit of service dated 24/5/2014 had been filed.

12. I accordingly direct that a Notice to show be served upon the 1st and 2nd Petitioners DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO personally to appear before this Court and show cause why they should not be punished for disobeying this Courts’ orders issued 5/4/2017,28/9/2017 and the certificate of confirmation of grant issued on 26/7/2017.

13. I also direct that the proceedings be typed so that the court can give directions as it appears that the court had ordered that the demarcation exercise be conducted and that the OCS KONOIN police station to provide security.

14. As for the prayer that the title deed issued on 9/4/2018 to the two administrators DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO be revoked, I find that the said title deed issued in defiance of the Court orders in the names of the two is a nullity since the court had pronounced itself in its orders and a certificate of confirmation was issued on 26/7/2017 which is still in force.

15. Finally, on the 3rd issue as to whether a temporary injunction should issue restraining the two administrators DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO from disposing, transferring, leasing and/or making further dealings whatsoever on land parcel KERICHO/MOGOGOSIEK/172, I find that the Applicant has established the conditions for grant of an interlocutory injunction.

16. The conditions for consideration in granting an injunction are now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

17. The principles in **Giella vs Cassman Brown**(supra) are as follows:

- i. Is there a serious issue to be tried?;**
- ii. Will the applicant suffer irreparable harm if the injunction is not granted?**
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")**

18. The test for granting of an interlocutory injunction was also considered in the **American Cyanamid Co. vs Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried,**
- ii. Damages are not an adequate remedy,**
- iii. The balance of convenience lies in favour of granting or refusing the application.**

19. This court accordingly issues restraining orders against the two administrators DANIEL KIPNGENO MUTAI and SAMMY KIPKEMOI RONO from disposing, transferring, leasing and/or making further dealings whatsoever on land parcel KERICHO/MOGOGOSIEK/172 in defiance of the mode of distribution set out in the certificate of confirmation of grant issued on 26/7/2017 pending the distribution of the Estate.

20. Any party aggrieved by this judgment has a right of Appeal within 28 days of this date.

Delivered and signed at Bomet this 5th day of August 2020.

A. N. ONGERI

JUDGE