



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO 181 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE KIPLAGAT KIBITOK (DECEASED)

BETWEEN

DANIEL KIPRUTO LAGAT.....PETITIONER

VERSUS

JOHANA KIPTOO LAGAT.....OBJECTOR

RULING

1. The Petitioner filed this application under Notice of Motion seeking for orders that:-

i) Pending the hearing of this application, a preservative order be issued to restrain JOHANA KIPTOO, KIMWETICH KIPTOO or any of their agents from interfering with 21.2 Acres of Land curved from MEIBEI/MEIBEI BLOCK 4(KAPLOO)3 registered in the names of KIPLAGAT KIBITOK (Deceased) of which his family has been utilizing.

ii) Pending the hearing and distribution of the Estate of KIPLAGAT KIBITOK (Deceased), the applicant and his children do continue living and utilizing a portion of 22.2 Acres of MEIBEI/MEIBEI BLOCK 4 (KAPLOO)3.

2. The application was premised on the grounds that there is a dispute surrounding the sub division and the distribution of the deceased's Estate.

3. That MEIBEI/MEIBEI BLOCK 4 (KAPLOO)3 is being utilized by all the beneficiaries and that the objector and his children have threatened to unlawfully, illegally and without any colour of right enter into his portion and cut down mature eucalyptus trees.

4. The application was canvassed by way of written submissions. The petitioner in their submissions stated that the applicant and the deceased jointly bought the suit land which was approximately 46 Acres.

5. The subdivision in 1987, 13 Acres share of the applicant was amalgamated with the deceased's Estate to constitute MEIBEI/MEIBEI BLOCK 4(KAPLOO)3.

6. The respondents are wasting the Estate by indiscriminately cutting down trees the applicant planted thus depriving the applicant from enjoying the portion of Land that he planted trees.

7. The applicant is apprehensive that the property that forms part of the deceased's Estate is at risk of being wasted at the detriment of the beneficiaries.

8. The respondent on their part submitted that the deceased's property MEIBEI/MEIBEI BLOCK 4(KAPLOO)3 measuring approximately 46 Acres was subdivided into five portions.

9. That out of the portions the applicant was to get 8 Acres and not 22.2 Acres as alleged. After the demise of the deceased, it was agreed that each son gets 10 Acres and the remaining 6 Acres was to go to their mother

10. The Respondent contends that the applicant has not demonstrated any legitimate ground for entitlement to more land that the acreage apportioned to him.

11. The alleged trees that the applicant has complained of, sit on 0.5 Acres which was excused to allow the respondent access to the river.

The respondent desires that the applicant removes the trees but the effort has been rendered futile.

12. Lastly, the applicant is seeking orders that might amount to evicting the respondent from the Estate of the deceased. That this being a Succession Court, the applicant ought to have filed the present application in an Environment and Land Court.

13. In an application for an interlocutory injunction the onus is on the applicant to satisfy the Court that the application has merit. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles.

14. In the celebrated case of *Giella Vs Cassman Brown and Co. Ltd (1973) EA 358*, the Court set out the Principles for Interlocutory Injunctions (Preservation

Orders). These principles are:-

i. The Plaintiff must establish that he has a prima facie case with high chances of success.

ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.

iii. If the Court is in doubt, it will decide on a balance of convenience.

15. The above principles were authoritatively captured in the famous Canadian case of *R.J.R. Macdonald Vs Canada (Attorney General) (1994) 1 S.C.R.311* where the three part test of granting an injunction were established 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").

16. The criteria considered in granting an injunction laid down in the decision in *American Cyanamid Co. Vs Ethicom Limited (1975) AER 504* which established the test in the English Courts in deciding if an injunction should be granted. This test was followed in Ireland in the case of *Camus Oil Vs The Minister of Energy (1983) 1 IR 88*.

The test has three elements:-

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

17. In *Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR 1 Platt JA* echoed the position adopted in the American Cyanamid case cited above and stated that in an application for interlocutory injunction, the Court is not required to make final findings of contested facts and law but only *needs to weigh the relative strength of the parties cases.*

18. In *Moses C. Muhia Njoroge & 2 Others Vs Jane W. Lesaloi and 5 Others High Court ELC Case Number 514 of 2013*, the Court while making a determination on the issue of a Prima Facie case with a probability of success cited the Court of Appeal decision in the case of *Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125* where the Court of Appeal held that:-

"A Prima facie case in Civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

19. In *Kenleb Cnst. Ltd Vs New Gatitu Service Station Ltd & Another (1990) KLR 557 Bosire J* held that ***"to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."***

20. Also Bosire J in *Njenga Vs Njenga (1991) KLR 401* held that ***"an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."***

21. In a succession cause a party seeking a remedy related to the cause does not have to go to the Environment and Land Court to institute proceedings.

22. This is an issue arising out of contested succession proceedings. This Court is possessed of jurisdiction to hear and determine this application.

23. The dispute in the succession whether is on the portion of Land each party is entitled to in Land Parcel MEIBEI/MEIBEI BLOCK 4(KAPLOO)3. The lasting solution will be achieved after hearing and determination of Succession Cause No.181 of 2015.

24. To meet the ends of justice, the Estate need be preserved and guarded against waste by whoever party pending determination in the Succession matter. As such there is need of maintaining the status quo whereby each of the parties involved should continue living where they already are and utilizing the portion already utilizing and avoiding exploitation of permanent nature on the Land, like cutting down of trees.

25. To the said extent the application is allowed. Costs be in the cause.

DATED AND SIGNED AT ELDORET THIS 30TH JULY, 2019

S. M. GITHINJI

JUDGE