REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 52 OF 1994

IN THE MATTER OF THE ESTATE OF KITE ARAP TIREN (DECEASED)

IN THE MATTER OF AN APPLICATION FOR

TEMPORARY INJUNCTION

BETWEEN

PHILIP TIREN...1ST APPLICANT

JAMES TIREN...2ND APPLICANT

THOMAS TIREN...................................3RD APPLICANT

-VERSUS-

EILEEN KIRUMEI.............................1ST RESPONDENT

MARY JOAN CHERONO.................2ND RESPONDENT

ROSE CHERONO TIREN.................3RD RESPONDENT

RULING

[1] Before the Court for ruling is the application dated **24 March 2016**. It was filed by three of the beneficiaries of the Deceased herein, namely, **Philip Tiren, James Tiren** and **Thomas Tiren** pursuant to **Rules 49, 63 and 73** of the **Probate and Administration Rules**, for orders that:

> **[a]** a temporary injunction be issued to restrain the Respondents from subdividing and/or selling land parcel **Number L.R. No. 8709, L.R. No. 8344/1, L.R. No. 8344/2 and IRONG/ITEN545;**
>
> **[b]** That the Court do vary and/or set aside the order issued herein dated **14 April 2008;**
>
> **[c]** That pursuant to Prayer **[a]** above, the Court be pleased to redistribute the estate asset, **L.R. No. 8709** measuring 209 acres to the beneficiaries of the deceased as ordered in the Judgment dated **22 February 1998;**
>
> **[d]** That the process of subdivision relating to **L.R. No. 8344/1, 8344/2** and **IRONG/ITEN/545** be stopped pending the hearing and determination of this suit;
>
> **[e]** That the costs of the application be in the cause.

[2] The application was premised on the grounds that, on the **14 April 2008**, the Court made orders awarding **L.R. No. 8709** measuring 809 to the 3rd Respondent, **Rose Cherono Tiren**; and that there is an error on record in regard to that order, because the property belongs to the estate of the late **Kite Tiren** and not the 3rd Respondent; and that the 3rd Respondent, knowing well that the said asset belongs to the estate of

the deceased, is in haste to dispose of it to third parties. It was further the apprehension of the Applicants that, unless restrained, the Respondents are intent on distributing the other assets, namely **L.R. 8344/1, 8344/2** and **IRONG/ITEN/545** in disregard of the court order.

[3] In support of the application, the Applicants relied on the affidavit annexed thereto, sworn on **24 March 2016** by the 1st Applicant, **Philip Tiren**. It was averred therein that, on the **22 February 1998**, Judgment was delivered herein whereby the Court varied the will of the deceased after appreciating the evidence tendered pursuant to the Objection proceedings, and proceeded to distribute the remainder of the estate of the deceased to provide for the beneficiaries who were unprovided for in the deceased's will. It was further the averment of the 1st Applicant that at no time did the 3rd Respondent, **Rose Tiren**, lay claim to **L.R. No. 8709** measuring 69.66 Hectares.

[4] The 1st Applicant further deposed that, later on **18 April 2008**, the Court varied the Judgment of **22 February 1998** by reviewing the entire mode of distribution without inquiring into the 3rd Respondent's claim to ownership of **L.R. No. 8709**, yet the same formed part of the deceased's estate. He contended therefore that the estate stands to suffer irreparable loss should the property be disposed of by the 3rd Respondent before the hearing and determination of this matter. He further averred that the Respondents had also interfered with **L.R. No. 8344/1, L.R. No. 8344/2** and **IRONG/ITEN/545** by surveying portions which were not identified for them by the Court; and that it is, in the premises, necessary for the Respondents to be retrained pending the determination of the issues in dispute herein.

[5] A perusal of the court record reveals that though the application was duly served on the Respondents, no response was made thereto. In essence, therefore, the application is unopposed. In similar vein, although directions were issued on **12 November 2018** for the filing of written submissions, the Respondents failed to comply.

[6] Having given careful consideration to the application, the averments in the Supporting Affidavit and the annexures thereto, as well as the written submissions filed herein by learned Counsel for the Applicants, it is manifest that most of the facts are not in dispute. The undisputed facts are that the deceased, **Kite Arap Tiren** died testate on **7 February 1993**. After the executors of the deceased's will filed for probate of the will, an objection was raised thereto by some of the beneficiaries on the grounds that not all the deceased's dependants were provided for in the will. The objection was ultimately heard and determined on **22 February 1998** by **Hon. Nambuye, J.** (as she then was). The key finding was thus:

> **"That the distribution of the deceased's last will be and is hereby varied as here under taking the house of Susan on one hand as a unit and the houses of the objectors as another unit. Each unit will then go and share out the property disposed to it on its own and in the event of any disagreement the matter will be referred back to the court for distribution or ruling on the matter."**

[7] The Court then proceeded to distribute the estate to the units as aforementioned. In respect of the Suit Property, **L.R. No. 8709** the Judgment dated **22 February 1998** states thus under paragraph 1(c):

> **"LR. 8709 – a portion of it comprising 209 acres**
>
> **i. 69.66 acres to Rose Cherono Tiren**
>
> **ii. 69.66 acres to the house of Susana**
>
> **iii. 69.66 acres to the house of the objectors"**

[8] Apparently, the 3rd Respondent was aggrieved by the Judgment dated **22 February 1998.** Thus, she filed an application dated **26 May 2005** seeking stay of execution and a review of the distribution orders made on **22 February 1998**. Her contention was that there was an error apparent on the face of the decree and/or order delivered on **22 February 1998** in that the court misdirected itself in apportioning that piece of land known as **L.R. Number 8709** mearing 209 acres which land did not belong to the deceased at the time of his death. According to her, the court lacked jurisdiction to make orders relating to the property as it did not form part of the estate of the deceased; hence her prayer, per paragraph 2 of the said application that:

> **"…this Honourable court be pleased to review and/or set aside the Judgement/Ruling and Decree/Order delivered on 22nd February 1998 to the extent that it affects all and/or part of all that piece of land known as L.R. NO 8709."**

[9] The court record shows that the 3rd Respondent's application was compromised and a consent order made in that regard, dated **14 April 2008** in the following terms:

> **"(1) Prayer 2 of the Application dated 26th May, 2005 is hereby allowed.**
>
> **(2) Any order/finding that all that property known as L.R. No. 8709 was part of the Estate of the late Kite Arap Tiren is hereby set aside including the orders of distribution thereof.**
>
> **(3) The said property was not in law part of the said Estate and not available for distribution at the time of the judgment.**
>
> **(4) Costs in the Cause.**
>
> **(5) Distribution in respect of the remaining properties to proceed."**

[10] The Court further granted leave and liberty to any of the parties to move the court as appropriate, in the event of a stalemate with regard to the distribution of the estate. Some of the units were in agreement as to how to distribute their respective share of the estate amongst themselves. Others were not so agreeable; and as a result, the affected parties returned to court for its intervention, vide the application dated **23 April 2008**. Having heard all the concerned parties, the Court **(Hon. Mwilu, J**., as she then was) rendered herself as hereunder on **28 July 2010:**

> **"Doing the best I can in the circumstances and guided by these principles I now distribute the estate as hereunder:-**
>
> **The property known as IRONG/ITEN/545 being land measuring 109 acres to be distributed between the four houses not catered for in the will. This will be shared as follows;- The first house of Kimoi Tiren now represented by Eileen Kirumei will get 10 acres of land to be excised around the place where the late Kimoi Tiren's house stood. The fourth house of Tingo Tiren now represented by Mary Joan Cherono will get 10 acres of land to be excised around the place where the late Tingo Tiren's house stood. An equal share of the entire 109 acres divided between the four houses would be 27.3 acres per house. In distributing as above I have considered that there is now left only one child each in house numbers one and four while there are more than one child in the remaining two houses. As regards the parcel of land known as LR NO. 8344 measuring 408 acres the first house of Kimoi Tiren now represented by Eileen Kurumei will get 40 acres and that of the fourth house of Tingo Tiren now represented by Mary Joan Cherono will get 40 acres for the same reasons as above. The four (4) town plots will be shared a plot for each house…House number two and three worked in unison and consent and proceeded by consent in the distribution of the estate. In light of that I order that continuing in their such unison and consent they shall proceed to share the residue of the estate as they have proposed with minor alterations to accommodate the distribution to house numbers 1 and 4 above as ordered above. Either party is at liberty to apply, however it is hoped that this long outstanding matter may now be brought to a close and the beneficiaries may have time to enjoy their share while they still appreciate the taste of it without that taste being diluted by age and the passage of time…"**

[11] Unfortunately, the parties did not heed the advice and therefore the dispute did not end there. The wrangling continued whereby the Court's intervention was invited by means of various applications, including the instant application dated **24 March 2016**. Accordingly, the twin issues for consideration are:

> **[a]** Whether the Applicants are entitled to a temporary injunction in the manner sought in prayers (1) and (4) of the application dated **24 March 2016.**
>
> **[b]** Whether the Applicants are entitled to an order setting aside the Consent Order dated **14 April 2008** as well as an order for the redistribution of **L.R. No. 8709** as part of the estate of the deceased.

<u>On Temporary Injunction</u>

[12] The principles laid down in **<u>Giella vs. Cassman Brown & Co. Ltd</u>** are that:

> **"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."**

[13] As to what amount to a *prima facie* case, the Court of Appeal, in <u>Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123</u> furnished the following helpful definition:

> **"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."**

[14] In the light of the foregoing background, it is manifest that the Applicants' complaint is in respect of a Consent Order made by the parties, by which the Suit Property was excluded from the estate of the deceased. The Applicants have alleged herein that on the **14 April 2008**, the Court made orders awarding **L.R. No. 8709** measuring 809 to the 3rd Respondent, **Rose Cherono Tiren**; and that there is an error on record in regard to that order, because the property belongs to the estate of the late **Kite Tiren** and not the 3rd Respondent; and that the 3rd Respondent, knowing well that the said asset belongs to the estate of the deceased, is in haste to dispose of it to third parties. It was further the apprehension of the Applicants that, unless restrained, the Respondents are intent on distributing the other assets, namely **L.R. 8344/1, 8344/2** and **IRONG/ITEN/545** in disregard of the court order.

[15] What the Applicants failed to come clear on is the fact that the order complained of was a Consent Order negotiated by the parties. While they blame the Court for that order, there is no indication in the Supporting Affidavit that the order was obtained by fraud or mistake, or that they were not party thereto. It is also noteworthy that, whereas the impugned order was made on **14 April 2008**, it was not until **24 March 2016** that the Applicants found it fit and necessary to seek the interposition of the Court in connection therewith. No attempt was made to explain the inaction between **14 April 2008** and **24 March 2016**. Accordingly, I am far from being convinced that the Applicants have a *prima facie* case in so far as **L.R. 8709** is concerned.

[16] In similar vein, although it was alleged that the Respondents, in subdividing the estate as distributed, are not strictly adhering to the decisions of the Court dated **22 February 1998** and **28 July 2010**. However, there is no demonstration as to the manner of the alleged breach, as pertains to **L.R. No. 8709, L.R. No. 8344/1, L.R. No. 8344/2 and IRONG/ITEN/545.** Again, it cannot be said that a *prima facie* case has been made out in respect of the said properties.

[17] It is now settled that where no prima facie case is made out the Court need not consider whether irreparable loss will ensue or the balance of convenience. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012,** the Court of Appeal made this point thus:

> **"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) demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration..."**

On Setting aside the Consent Order

[18] The well-beaten path, when it comes to an application for the setting aside of a consent order is that there must be proof that the impugned Consent Order was obtained by mistake or fraud. This is because a consent order is a separate valid contract between the parties thereto which can only be set aside or varied upon proof of certain prerequisites. Thus, in Flora **Wasike vs Destimo Wamboko [1988] 1 KAR 625, Hancox, JA**, reiterated this principle thus:

> **"It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out."**

[19] As to what would justify the setting aside of a contract, guidance was given in the case of **Brooke Bond Liebig (T) Ltd vs Mallya [1975] EA 266** in which a passage from **Seton on Judgments and Orders, 7th Edition, Vol. 1 p. 124** was quoted with approval thus:

> **"Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."**

[20] Similarly, I would endorse the holding in **Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd, Civil Case No. 1728 of 1979 [1980] eKLR,** that:

> **"...the making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or an order on one or either of the recognized grounds..."**

[21] As has been pointed out herein above, there is not a single averment in the Supporting Affidavit alleging fraud or mistake. Indeed, the Applicants blamed the Court, as opposed to the parties, for the Order dated **14 April 2008**. It is plain therefore that the conditions for the setting aside of a Consent Order have not been met by the Applicants.

[22] It is in the light of the foregoing that I find that the application dated **24 March 2016** is totally lacking in merit. The same is hereby dismissed. Owing to the nature of the dispute, it is hereby ordered that the costs of the application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF AUGUST, 2019

OLGA SEWE

JUDGE