



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

SUCCESSION CAUSE NO. 1 OF 2016

IN THE MATTER OF THE ESTATE OF JOEL MBITHI GEDION NDUMBU DECEASED)

DOROTHY MONTHE NDUMBU.....1ST APPLICANT

SUSAN KATUNGU NDUMBU.....2ND APPLICANT

THOMAS RENE NDUMBU.....RD APPLICANT

MATTHEW BENJAMIN NDUMBU.....4TH APPLICANT

VERSUS

MARY P. MBITHI NDUMBU.....RESPONDENT

RULING

1. The 3rd and 4th Applicants (Beneficiaries of the Estate) through the firm of **Nicholas Ngumbi Advocates** filed summons dated the 6th day of **October, 2016**, seeking interim orders of injunction restraining the Respondent an Administratrix of the Estate either by herself, her agents, servants, employees or any person acting through them in any way whatsoever, from disposing, encroaching upon or intermeddling with parcels of land known as **LR No. Mulango/Kyangunga/1436; LR No. Nzambani/Kyanika/7; and Mulango/Wikililye/1369**.

2. The application is premised on grounds that: On the 7th **March, 2014** the Applicants filed summons for Revocation or Annulment of Grant issued to the Respondent; Portions of **LR No. Mulango/Kyangunga/1436; LR No. Nzambani/Kyanika/7; and Mulango/Wikililye/1369** form the substratum of the application for Revocation of Grant; cautions have been registered against the properties to preserve them pending hearing and determination of summons for revocation of grant which have not been lifted per the Court record but a physical search at the Land Registry on 5th **September, 2016** showed the cautions had been lifted, hence the apprehension that the Respondent will sell properties **LR No. Mulango/Kyangunga/1436; LR No. Nzambani/Kyanika/7; and Mulango/Wikililye/1369** before the application for revocation of grant is heard.

3. The Respondent through the firm of **S. O. Madialo & Company Advocates** filed grounds of opposition stating that as at 6th **October, 2016** the Applicant's Advocates were not properly on record. That the registration and deregistration of the caution should be canvassed before the Environment and Land Court and no evidence had been adduced to support allegations of wastage or intermeddling with the Estate of the Deceased by the Respondent.

4. The application was canvassed by way of written submissions. The Applicants submitted that the Court has a duty of protecting the Estate of the Deceased as held in the matter of the **Estate of Pete Odusi alias Pete Odusi Tabu (Deceased) (2012) eKLR**; it has the duty of protecting wastage of the Estate until distribution is done; to ensure assets of a Deceased person are preserved and properly managed for the benefit of all beneficiaries as held in the **Estate of Jared Okoth Oloo (Deceased)** and that the legal process of revocation proceedings will be defeated if orders prayed are not granted.

5. In her submissions the Respondent argued that the cautions were lifted because the Applicants did not have registrable interest in the parcels of land and if aggrieved they should have challenged the decision of the Registrar by way of Judicial Review or Constitutional Petition. That the perceived apprehension should be supported by substantive evidence. She cited the case of **Samuel Kamiri Crispoh vs. John Njeru Kahihu (2015) eKLR**.

6. Further, she submitted that the conditions of granting an interlocutory injunction as set out in the case of **Giella vs. Cassman Brown & Co. LTD (1973) EA 358** had not been established and **Rule 73** of the **Probate and Administration Rules** should only be used in deserving cases where no specific provisions exist to deal with the situation in question as stated in the matter of the **Estate of Erastus Njoroje Gitau (Deceased) Nairobi HC Succession Cause No. 1930 of 1997**.

7. This is a matter where a grant of representation to the **Estate of Joel Mbithi Gedion Ndumbu** was issued to the Respondent herein. The Estate was distributed and all assets forming the Estate were to be transferred to the Respondent. On learning of the fact that was not brought to their knowledge the Applicants filed summons for revocation of the grant on **3rd April, 2014**. In an endeavour to have the Estate of the Deceased preserved the Applicants caused a caution to be registered on the properties. It is admitted that the caution has since been lifted.

8. The relief sought at this stage is interlocutory in nature. In the celebrated case of **Giella vs. Cassman Brown & Co. LTD (Supra)** the Court stated thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”

9. In the case of **Mrao LTD vs. First American Bank of Kenya LTD & 2 Others Civil Appeal No. 39 of 2002** the Court of Appeal stated this in respect of a *prima facie* case:

“A prima facie case in civil application includes but not confined to a genuine 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.”

10. The Applicants herein are challenging the issuance of the grant to the Respondent. They have applied to have it revoked because they claim interest in the Estate of the Deceased. All assets forming the Estate have already been transferred to the Respondent who allegedly concealed from them the fact of obtaining Letters of Administration. In order to decide whether or not the Applicants are beneficiaries to the Estate who may be entitled on intestacy with any degree of priority according to the alleged beneficial interest, evidence must be adduced.

11. Prior to receiving such evidence the Court has a duty of ensuring the Estate of the Deceased is preserved. The Applicants are apprehensive that the Respondent is likely to dispose of the properties that form the Estate of the Deceased although they have not demonstrated the intent on the part of the Respondent, it has been demonstrated that the action they took to ensure the properties were intact prior to the issue of the revocation of grant being addressed was thwarted. In the circumstances any detrimental step that may be taken by the Respondent would result into the Applicant suffering irreparable loss. In the circumstances, the balance of convenience tilts in their favour.

12. This therefore calls for issuance of the orders sought. Therefore I grant orders as follows:

a. A temporary injunction shall issue restraining the Respondent from disposing, transferring, leasing, charging or mortgaging parcels of Land Reference Numbers **Mulango/Kyangunga/1436; Nzambani/Kyanika/7** and **Mulango/Wikililye/1369** pending hearing of the application dated **3rd March, 2014** that should be fixed for hearing on priority basis.

b. Costs of the application shall be in the cause.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 20th day of June, 2018.

L. N. MUTENDE

JUDGE