



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 309 OF 2011

RE: ESTATE OF LUKA YATICH SERIOT (DECEASED)

HOSEA KOSGEI YATICH.....PETITIONER

VERSUS

JOSEPH KIBOR KOMEN.....OBJECTOR

RULING

1. The objector prays for a *temporary injunction* to restrain the petitioner from interfering with his possession of a portion of land known as Lelan/Kabiengo/65. The portion in contest measures 9.2 hectares or thereabouts. The land is registered in the name of the deceased. In that regard, and subject to the determination of the objection, it comprises the net intestate estate of the deceased. The objector claims he has acquired rights to the portion by *adverse possession*.
2. The summons are dated 8th July 2014 and expressed to be brought under Rules 49 and 59 of the Probate and Administration Rules. There is a deposition sworn by the objector on even date. The objector deposes that he has enjoyed possession since 11th September 1970. That is well over *fourty years*. In June 2014 or 1st July 2014 or thereabouts, the petitioner or his agents pulled down his fence, destroyed crops and buildings and blocked his access. It was not the first time: the petitioner had engaged in similar acts in December 2004 and January 2005. The petitioners entered the land on 8th February 2005. That time, the petitioner reported the matter to the area Chief who failed to take any action.
3. He avers that he was sued by the deceased in 1990 in Eldoret PMCC 745 of 1990. The deceased was seeking orders for his eviction. It is not clear whether any orders were issued. His former counsel in the matter applied in Miscellaneous Application 10 of 1992 to transfer the suit to the High Court. An order for transfer was granted. The Deputy Registrar called for the records of the lower court on 18th March 1992. However, the matter was never given a serial number; and, the records appear to be lost. The objector's case is that he stands to suffer irreparable harm unless an injunction is granted.
4. The application is contested. The petitioner has filed a replying affidavit sworn on 1st August 2014. He avers that the objector has no rightful claim over the land. The petitioner avers that the deceased never sold the portion of land to the objector. He also states that the objector's land is Lelan/Kibiengo/66 but he has encroached upon the petitioner's land, Lelan/Kibiengo/65. The latter has a separate and distinct title. He avers that the deceased's land is on both sides of the road. He avers that it is not true as alleged by the objector that the road marks the boundary between the two parcels. The petitioner has annexed a letter dated 25th July 2011 from the area Chief addressed to the objector. It required the latter to stop the encroachment.
5. On 22nd October 2015 I heard arguments from both learned counsel. The petitioner has also filed a list of authorities dated 17th October 2015. I have considered the summons, the depositions,

- authorities and the rival submissions.
6. Section 47 of the Law of Succession Act gives the High Court jurisdiction to entertain *any* application and determine *any* dispute under the Act. Rule 73 of the Probate and Administration Rules provides that nothing in the Rules shall limit the inherent powers of the court to make such orders as are necessary to prevent the ends of justice from being defeated. Like I stated the summons is expressed to be brought under Rules 49 and 59 of the Probate and Administration Rules.
 7. The principles governing the grant of prohibitive injunctions are well settled. See Giella v Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. In addition, this court is enjoined by article 159 of the Constitution; and, by sections 1A and 1B of the Civil Procedure Act, to do *substantial justice* to the parties. Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.
 8. The objector is praying that the *status quo* be maintained. He seeks to restrain the petitioner by a temporary injunction from interfering with his possession of a portion of the deceased's land. If I heard the objector correctly, he is saying that he has occupied the portion for over *fourty years* and acquired title by *prescription*. He did not present documentary evidence to show that he filed a suit for a *declaration* that he has acquired the title by way of *adverse possession*. Furthermore, that action is ill-founded in these succession proceedings.
 9. I have no doubt that those matters are within the true province of the Enviroment and Land Court. See Gichane v Ayub Ngurira, Murang'a, High Court Succession Cause 40 of 2012 [2014] eKLR. The decision of that court will be relevant in determining whether the portion of 9.2 hectares belongs to the objector; and, whether it should be removed from the schedule of assets of the deceased. The less I say about it the better as the objection proceedings are still pending.
 10. The only suit referred to by the parties is Eldoret PMCC 745 of 1990. It is not contested that those proceedings were brought by the deceased deceased to *evict* the objector from the disputed portion. It is not clear whether any orders were granted by the lower court. Those were the proceedings that were ordered to be transferred to the High Court by an order in Eldoret High Court Miscellaneous Application 10 of 1992. The Deputy Registrar called for the records of the lower court on 18th March 1992. However, the matter was never given a serial number; and, the records appear to be lost. The fault does not lie entirely with the objector. But there is no good reason why his former or current counsel has never moved the High Court, for nearly *24 years*, for an alternative remedy including a reconstruction of the lower court file from the records and documents held by the parties.
 11. I remain alive that this is a land dispute. But I have considered that the objector owns adjoining land known as Lelan/Kibiego/66. The dispute is over a portion of land across the road bordering his land *registered* in the name of the *deceased*. I have expressed serious doubt that the claim for adverse possession can be determined in this succession cause. I thus find that the objector has *not* made out a *prima facie* case. In any event, damages would be available. I *cannot* then say that the objector will suffer *irreparable harm*. Having so found, I need not deal with the balance of convenience. Kenya Commercial Finance Company Ltd Vs Afraha Education Society [2001] 1 E.A. 86.
 12. The upshot is that the objector's summons dated 8th July 2014 is devoid of merit. It is dismissed. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 28th day of January 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:-

No appearance for the petitioner.

No appearance for the objector.

Mr. J. Kemboi, Court clerk.