



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 575 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE KANYUGO WACHIRA-DECEASED

Christopher Mwangi Kaharu.....Applicant

Versus

Peter Muturi Kanyugo.....Respondent

RULING

By way of an application dated 25th November 2015, **Christopher Mwangi Kaharu** (hereinafter referred to as the applicant) moved this court under certificate of urgency seeking orders *inter alia* that:-

- i. *That this honourable court be pleased to issue a prohibitory and or restriction order or an injunction restraining the Respondent from disposing off, alienating, charging, transferring, cutting trees, bequeathing or dealing otherwise with land parcel no. **Mahiga/Kamako/1299** which forms the subject matter in this suit pending the hearing and final determination or conclusion of this succession cause..*
- ii. *That the Land Registrar, Nyeri County Land Office be ordered to register the said orders against the said title Land Parcel No. **Mahiga/Kamako/1299** and the said orders to remain in force till further direction or further orders of this court.*
- iii. *That the Respondent be restrained from evicting , threatening and or behaving in a manner likely to cause breach of peace till final disposal of this matter.*
- iv. *That this honourable court be pleased to confirm the grants in "my name".*
- v. *Costs of this application be provided for.*

The applicant has not specified the Rules under which the application is expressed. However, I am alive to the fact that the application cannot be defeated on account of the said omission. Under Article **159 (2) (d)** of the Constitution of Kenya 2010, the court is enjoined to administer justice without undue regard to procedural technicalities.

Section **47** of the Law of Succession Act^[1] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act^[2] and pronounce such decrees and make such orders therein as may be expedient.

Further under Rule **73** of the Probate and Administration Rules it is provided:-

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Also, Rule **49** of the Probate and Administration Rules provides that:-

“A person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit”

I find that the applicant’s application for injunction is properly before the court.

Essentially, the grounds in support of the application are stated on the face of the application and the supporting affidavit. These are summarized below:-

- i. *That suit property is in danger of being disposed off or transferred to other parties and the applicant will suffer irreparable damages and that the Respondent is evicting the applicant and ignoring their agreement dated 2nd December 2005.*
- ii. *That the applicant is a beneficiary in the deceased estate in that on 2nd December 2005 the Respondent, a son to the deceased together with other beneficiaries and successors sold their beneficial interest to him in L. R. No **Mahiga/Kamoko/1299** at a price of **Ksh. 280,000/=** as per the sale agreement annexed thereto.*
- iii. *That he commenced developing the said property as he awaited the grant of letters of administration to be confirmed in his name as agreed with the petitioner. However, he has now learnt that the Respondent is in the process of selling the same land to another person and that he is in the process of being evicted and his casual workers were chased as they were picking coffee.*

The Respondent filed grounds of objection through the firm of **M/s Muthoga Gaturu & Co** advocates stating that:-

- i. *The application is incompetent and defective as the applicant is not a party to the case and that the agreement dated 02. 12.2005 the subject matter of this application is a nullity and an illegality.*
- ii. *That the purported sale of land no. Mahiga/Kamoko/1299 amounted to intermeddling with the deceased's estate, and that the applicant does not have a prima facie case with a probability of success.*
- iii. *That the application is otherwise unmeritorious , an abuse of the process of the court, misconceived and lacks merit and should be struck off with costs.*

In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles. In the celebrated case of *Giella Vs Cassman Brown and Co .Ltd.* [\[3\]](#)the Court set out the Principals 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.*

The Court of Appeal in the case of *Mrao Ltd Vs First American Bank of Kenya and 2 others*[\[4\]](#) held that:-

“A Prima facie case in a 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”.

In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*^[5] *Bosire J* held that “to succeed in an application for injunction, an applicant must show he has a right legal or equitable, which requires protection by injunction.”

The applicant states that he purchased the land in question from the Respondent vide the sale agreement annexed to his supporting affidavit. The grant of letters of administration in this cause was issued on 16th July 2008 and the same is yet to be confirmed. In fact on 9th July 2010 Justice Sergon suspended the confirmation of the grant until a claim touching on the deceased's estate filed in this cause by way of an objection by an objector is determined. The said objector had raised a claim stating that his interest arose from dealings with the deceased. The deceased estate comprises only of the aforesaid title number **Mahiga/Kamoko/1299**.

The question that arises is whether or not the Respondent herein could legally sell the property in question as per the aforesaid sale agreement before the grant is confirmed. The answer to this question lies in Sections **45** and **82** of the Law of Succession Act^[6] which provides that:-

45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under the Act no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”

The section is clear that the *status quo* as at the time of the deceased's death ought to be maintained. The law requires that the deceased persons estate ought to be preserved as at the time of death. In the matter of the estate of *M'mugambiM'guoko alia Mugambi Gwoko alia Mugambi Guoko- Deceased*^[7] **Makau J** held that the Petitioners acts in the said case of attempting to sell or selling the deceased's property to anyone was illegal, null and void for contravening section **45(1)** cited above.

Section **82 (b) (ii)** of the Law of Succession Act provides that:-

‘No immovable property shall be sold before confirmation of Grant’

The applicant herein is armed with a sale agreement which is not disputed. The Applicant faces fundamental challenge, namely, that the transaction was entered into before the Grant was confirmed. Thus, the transaction offends both Section **45(1)** and Section **82 (b) (ii)** cited above. These are points of law which go to the root of the validity or otherwise of the said agreement. Further, the above sections prohibit selling, disposing or otherwise intermeddling with a deceased estate. To my mind, all transactions must await the confirmation of the grant. Thus, the agreement relied upon has no force of law in these proceedings and since it's the only ground upon which the application is premised, I find that the application before me is incompetent to the extent that the applicant claims to be a beneficiary to the deceased estate because such an incompetent agreement cannot confer upon him the status of a beneficiary and on this ground alone, the said application must fail.

Interpreting the section **45 (1)** cited above **Musyoka J** in *the Estate of Veronica Njoki Wakagoto- Deceased*^[8] had this to say:-

‘The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.’

Given the above legal position, I find that the Applicant has not demonstrated that he has established a *prima facie* case with a likelihood of success. Accordingly I find that the applicant has not satisfied this particular test.

The second test for determination is whether the applicant will suffer irreparable loss. The following

paragraph in *Halsbury's Laws of England*^[9] is instructive. It reads:-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

In my view the applicant has not demonstrated that he will suffer irreparable loss if the injunction is dismissed. It has not been shown that that alleged loss cannot be quantified.

Where any doubt exists as to the plaintiffs' right, or if his right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.^[10] The burden of proof that the inconvenience which the plaintiff will suffer if the injunction is refused is greater than that which the defendant will suffer if it is granted lies on the plaintiff/applicant.^[11]

From the Petition, there are other persons interested in this estate and until the distribution is done and determined, the shares of each of the beneficiaries cannot be assumed with certainty at this stage. For this reason, I am persuaded that the balance of convenience demands that the current *stus quo* be maintained to await the distribution of the estate and confirmation of the Grant.

In conclusion I find that the applicant has not satisfied the tests for granting an injunction as prayed. Consequently, I dismiss the application dated 25th November 2015. Since the Respondents did not attend court at the hearing of the application I make no orders as to costs.

Right of appeal 30 days

Dated at Nyeri this 22nd day of February 2016

John M. Mativo

Judge

[1] Cap 160 Laws of Kenya

[2] Ibid

[3] {1973}{EA358

[4]{2003} KLR125

[5] {1990} K.L.R 557

[6] Supra

[7]{2011}eKLR

[8]High Court Succession Cause No. 1974 of 2008

[9]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[10] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[11] Ibid