REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 277 OF 2011

DANIEL MWILARIA M' IPWI.....PETITIONER

Versus

PETER KITHELA KAREA.....OBJECTOR

RULING

[1] The significant orders being sought by the Objector/Applicant in the Notice of Motion dated 2nd September, 2015 is an injunction to restrain the petitioner and One MUGAMBI MWILARIA, their assignees, agents or, servants or employees or any other person acting at their behest from in any way whatsoever continuing with construction on the estate property or forcefully developing, utilizing or interfering with the Applicant's occupation of the estate. He also applied for any other order the court may deem fit and costs of the application.

[2] The said Application is expressed to be brought pursuant to Rule 73 of the Probate and Administration Rules and is supported by the grounds on the face of it and an affidavit sworn by the Applicant. In the affidavit, the Applicant deposed that him and his family reside on the estate of the deceased herein and that in the last one week the Petitioner and his son one Mugambi Mwilaria had begun construction of permanent building on parts of the estate which the Applicant and his family occupy and that the ongoing constructions will greatly alter the ground evidence hence the instant application.

[3] The Application was opposed via a Replying Affidavit sworn by the Petitioner. The Petitioner deposed inter alia that the application is riddled with falsehoods which are aimed at misleading the court. He further averred that estate to which these proceedings relate belonged to his late grandfather and that both parties are grandsons of the deceased. He continued to state that his uncle Joseph Thiine had no wife or children and so he took him as his own son and lived with him. The Petitioner contended that he used to take care of his said uncle until his death when he buried him. He also said that he had put some various developments on the portion that he has been living on including semi-permanent house and crops such as miraa, bananas, trees and sugarcane. He asserted that he has lived on and utilized the land for several decades but Applicant/Objector and his family had never lived on the land as alleged. Therefore, the Applicant is merely misleading the court on that allegation. Based on these averments, the Petitioner concluded that it was abundantly clear that it is not conceivable that he and his son could have stormed and forcefully entered the land they had lived on all along.

[4] When the matter came up for hearing on 19th November 2015, Mr. Mbogo for the Applicant/Objector intimated to court that they were exploring the possibility of negotiating the matter but still requested for 14 days within which to file a reply to the Replying affidavit filed herein; the

request was allowed. During the mention of this case on 21st March 2016, Mr. Mbogo was yet to file his reply and he again requested for another 14 days to do so; the request was granted except the court marked it as the last chance. 0n 16th August 2016 Mr. Kiogora holding brief for Mr. Rimita for the Petitioner/Respondent informed the court that Mr. Mbogo had not complied with orders issued by the court on 21st March 2016. The court, then, assigned a date for a ruling on the application.

[5] I have carefully considered the application and the averments in the affidavits filed by the parties. The application essentially seeks for an injunction and as such it must satisfy the threshold of the law set in the case of **GIELLA vs. CASSMAN BROWN.** Except, however, the court must consider all the circumstances of the case and the demands of justice in order to take a path with least risk of injustice should it turn out that the court was wrong. On this see ***Justice Hoffman*** in the English case of **FILMS ROVER INTERNATIONAL (1986) 3 All ER 772** ***at page 780-781*** when he stated that***:-***

> ***"A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."***

But we do so, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown which are:

i. Has the Applicant established a prima facie case with high chance of success?

ii. Does the applicant stand to suffer irreparable harm unless an injunction is issued?

iii. On which side does the balance of convenience lie?

[6] In applying the above test, it is worth to critically examine the facts of this case as set out in the affidavits. Other than making general allegations that the Petitioner has engaged in forceful development which the Applicant will alter the ground evidence of his occupation, he has offered nothing to show that he really lives on the estate land. In any event, despite the various opportunities, the Applicant did not file any reply to the Petitioner's/ Respondent's contentions that the Applicant has never lived on the estate property. Again, the averments by the Petitioner that it is him and his family who have lived on the estate property for several decades were not controverted at all. In those circumstances, I agree with the Petitioner that it is not conceivable that he could have forcefully entered into the land which he was already in occupation. In addition, the Petitioner has shown his occupation of the land and the development he has carried out on it. Accordingly, the Applicant has not shown that his right has been infringed as to deserve an injunction to protect it; he has not established any prima facie case for which an injunction would issue. See the case of MRAO on what prima facie case is. Of course with that finding, there could be no irreparable damage which the Applicant will suffer. And, without a doubt, the balance of convenience lies in refusing the injunction. In the upshot, I dismiss the application dated 2nd September 2015. Consequently, the orders issued by this Honourable Court on 9th September 2015 are vacated forthwith. As this is a succession matter involving close family members, I order that each party shall bear own costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 29th day of September 2016

.....

F. GIKONYO

JUDGE

In the presence of:

M/s. Rimita advocate for applicant

Mr. Mbogo advocate for respondent

.....

F. GIKONYO

JUDGE