



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 374 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE NDIRANGU GATHUYA-DECEASED

FRANCIS MURIITHI NDIRANGU.....APPLICANT

VERSUS

RUTH WANJIKU NDERITU.....RESPONDENT

RULING

By way of a summons general dated 21st July 2015, **Francis Muriithi Ndirangu** (hereinafter referred to as the applicant) moved this court seeking orders that the Respondent, his agents, servants and or employees be restrained from constructing, building and or putting up any structures or buildings and or further depositing building materials on **L. R. No. Tettu/Kiriti/12**. I find it rather disturbing that this application which was filed under certificate of urgency and certified as urgent and interim orders granted due to the urgency has taken over one year to be determined. To me, time has come for practice directions to be put in place stipulating strict time frames for determining applications once certified as urgent.

The application is premised on the grounds in the annexed supporting affidavit in which the applicant avers that the Respondents is a stranger to the deceased's estate and is intermeddling with the deceased's estate, specifically the above land parcel on which he took steps to construct a permanent house. The applicant also avers that the Respondent has no connection with the deceased's estate and that she has ignored verbal warnings to stop the intended construction, hence the need for an injunction.

The Respondent in his Replying affidavit filed on 11th August 2015 avers that she was a beneficiary to the deceased's estate and cited the affidavit in support of the summons for confirmation of grant in which her name appears as entitled to the petitioners share. She avers that the petitioner died prior the confirmation of the grant and before the protest could be heard, hence she is not a stranger to the estate. It is her position that prior to the petitioners death, there was a consent to the effect that she was to get the petitioners share. She also averred that prior to the petitioners death, she authorized her shares to be transferred to her. She also stated that since the petitioner had not been substituted, the applicant had no *locus standi* in this case.

Both counsels filed written submissions which I have carefully considered. The issue that falls for determination is whether or not the applicant has demonstrated sufficient grounds to warrant granting of the injunction sought.

The applicant is a son to the deceased, hence, he has sufficient interest in the deceased's estate and

therefore he has necessary legal capacity to file the application now under consideration.

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”

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 Principles 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.”* As stated above, the applicant as a son to the deceased and a beneficiary to the estate, he has a right, legal or equitable which requires protection by an injunction.

The Respondent states that she has an interest to the estate and that she was listed in the affidavit in support of the application for confirmation of the grant as entitled to benefit from a share to the estate. In particular she states that she was to benefit from the share belonging to the petitioner. It is instructive to point out that a protest had been filed to the application for confirmation and that protest is yet to be determined.

In my view, distribution can only be determined after hearing the protest and application for confirmation of the grant and distribution done by the court. It is only then that it will be possible to determine the entitlements of the beneficiaries including the Respondents rights to the estate.

So long as distribution has not been determined by the court, the Respondents acts of developing, constructing or erecting any structures on the said land are illegal and amount to intermeddling with the deceased's estate. The actions complained of offend the provisions of section sections 45 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. Thus, the Respondents actions offend Section 45(1) cited above. These are points of law which go to the root of the validity or otherwise of the said actions. Further, the above section prohibits selling, disposing or otherwise intermeddling with a deceased estate. To my mind, all transactions/actions touching on deceased's properties must await the confirmation of the grant and distribution. Thus, whether or not the Respondent is entitled to the said portion of land is an issue that will be determined at the trial. In other words, the validity of the Respondents claim will have to be determined at the hearing of the protest.

Interpreting the section 45 (1) cited above **Musyoka Jin the Estate of Veronica Njoki Wakagoto-Deceased**^[7] 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 demonstrated that he has established a *prima facie* case. Accordingly I find that the applicant has satisfied this particular test for granting of injunctions.

The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in *Halsbury's Laws of England*^[8] 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 demonstrated that he estate will suffer irreparable loss if the injunction is dismissed.

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.^[9] 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.^[10]

From the Petition, there are other persons interested in this estate including the applicant and until the distribution is done and or 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 satisfied the tests for granting an injunction as prayed. Consequently, I allow the application dated 21st July 2015 and order as follows:-

a. That pending the hearing and determination of this cause, an order of injunction be and is hereby issued against the Respondent restraining her, her servants, agents or persons acting on her behalf from constructing, building, erecting any structures or depositing building materials on **L.R. No.Tetu/Kiriti/12.**

b. That no orders as to costs.

Right of appeal 30 days

Dated at Nyeri this 21st day of November 2016

John M. Mativo

Judge

Delivered at Nyeri this 21st day of November 2016

Hon. Justice Jairus Ngaah

Judge

[1] Cap 160 Laws of Kenya

[2] Ibid

[3] {1973}{EA358

[4]{2003} KLR125

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

[6] Supra

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

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

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

[10] Ibid