



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 55 OF 2021

ANTHONY BULITIA SIMIYU & 5 OTHERS.....PLAINTIFFS

VERSUS

MEAVE KHALAGAI.....1ST DEFENDANT

DOROTHY NABALAYO SIMIYU.....2ND DEFENDANT

MOSES SIMIYU.....3RD DEFENDANT

ABRAHAM SHIKUKU SIMIYU.....4TH DEFENDANT

JOEL NEKESA SIMIYU.....5TH DEFENDANT

AMOS WANJALA SIMIYU AS ADMINISTRATOR.....6TH DEFENDANT

RULING

(On grant of injunction at interlocutory stage)

1. This is a ruling on a Notice of Motion dated **22/07/2021**, brought under Certificate of Urgency. The Motion sought Orders, inter-alia:

(1) **...spent**

(2) **...spent**

(3) **THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant, their agents, servants, employees and/or all those claiming through him from in any manner utilising, fencing, entering and or undertaking any kind of activities on the plaintiffs' portion of land measuring fifty (50) acres of Bituti Farm, Land parcel No. 5569/pending the hearing and determination of the suit herein (sic).**

(4) **THAT the Officer Commanding Police Station (OCS) Saboti Police Station to supervise and oversee the implementation of this order.**

(4) **THAT costs be provided for.**

2. The Application was brought under **Order 40 Rule 1** and **51 Rule 1** of the **Civil Procedure Rules, 2010, Sections 1, 1a, 2b of the Civil Procedure Act** and **all enabling provisions of the law (sic)**.

3. It was grounded on a number of points and supported by the Affidavit of one Anthony Bulitia Simiyu, sworn on **22/07/2021**. In summary, the grounds were that the Applicants and Respondents are all children of the deceased, one Barnabas Simiyu Munialo. The deceased had "three houses" (which I understood to mean three wives whose names and children's names were given both in the grounds of the Application and the Supporting Affidavit). The deceased is said to have owned a land parcel known as Butili Farm, Land Parcel No. **5569/2** part of which the Plaintiffs were granted **50** acres.

4. A further ground was that after the confirmation of grant in **Kitale High Court Succession Cause No. 252 of 2015**, the Plaintiffs and

defendants took possession of their respective shares. After some time, the Defendants/Respondents embarked on a selling spree of their portion and now encroached onto the Plaintiff's portion and had started selling it to unsuspecting buyers. They then stated that they stood to suffer irreparable harm if the orders sought were not granted since the Defendants intended to sell off the plaintiff's portions without their knowledge or consent.

5. The Supporting Affidavit repeated the contents of the grounds save that the deponent attached to it a copy of the High Court Judgment in Succession Cause, which detailed the manner of the distribution of the estate of their deceased father. He also attached to his Affidavit a copy of the confirmation of grant to show the title number in issue and copies of some WhatsApp text messages purported to be in reference of the Defendants' occupation of the portion of land in issue. He also annexed to it photographs of the homestead and others showing the said encroachment to the 50 acres.

6. He deponed further that the Plaintiffs had discovered an un-administered 19 acres on which he asked the Court to issue an order of preservation pending distribution. He then deponed how the Plaintiffs had tried to resolve the matters amicably but in vain and that the Respondents had become hostile and threatening. He prayed for the orders to issue.

7. The Application was not opposed given that the Respondents were served but did not file any documents in response. Even so this Court must determine the Application on merits.

8. On the 24/11/2021 the court directed that the application be canvassed by way of written submissions. The Applicants filed theirs on 20/12/2021.

Issues, Analysis and Determination

9. I have considered the application, the affidavit in support and all the annexures thereto and the submissions on record. In the submissions the Applicants restated the principles in *Giella v Cassman Brown and Co. Ltd (1973) EA 358* and submitted that they had a prima facie case with high chances of success. I find three issues for determination in this matter. They are:

1. Whether the applicants satisfied the principles for grant of a temporary order of injunction; and if so,

2. Who to bear the Costs of the Application?

10. The law on grant temporary injunctions is now settled. It is trite law that he who alleges the existence or non-existence of a fact must prove it. **Section 107** of the Evidence Act, Chapter **80** of the Laws of Kenya provides as much. But before I embark on the analysis of the issues, it is worth of note that some of the provisions learned counsel cited are, in my humble view, not existent in the country's statutes. These were **Sections 1a, 2b** of the **Civil Procedure Act**. The ones which exist are **Sections 1A** and **1B**.

11. From the supporting affidavit and the documentary evidence so far on record, it appears that there is a real family dispute over the disputed parcel of land. Again, it appears to me that the issues herein relate to an unsettled and incomplete distribution of the Estate of the parties' deceased father.

12. Times without number it has been restated that the remedy of orders of injunction is an equitable one. Its grant is discretionary in any court. However, the exercise of that discretion should be judicious. This was stated in the case of **Kahoho v Secretary General, EACJ Application No. 5 of 2012**. Additionally, my brother Munyao J. states as much in *Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/118862>* where he stated as follows, "... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously." I need not explain what it means by a Court being judicious but it suffices to say that in so doing it must take into account all the facts and circumstances of each case and make a decision that is not plainly wrong. It is a delicately balance of the interests of the parties and justice.

13. In order for a party to be granted a temporary injunction he must pass the test set out in the case of **Giella -vs- Cassman Brown [1973] EA 358**. It is a three-pronged one. Its three limbs are:

(a) Whether the applicant has established a prima facie case;

(b) Whether the he or she would suffer irreparable loss that may not be compensated by damages; and

(c) That if the court is in doubt, it may rule on a balance of convenience.

14. In the instant case, it was imperative that the Plaintiffs/Applicants prove that they were allocated the specific portion of land which is yet to be registered in their names and it is delineated and specifically fixed. It is not in dispute that the parties are heirs of the estate of their late father. The Applicants stated that as a result of the Court judgment in **Kitale High Court Succession 252 of 2015** they were allocated fifty acres of a portion of the land parcel No. Bituti Farm, Land parcel **5569/2**. The Court appreciates that that might as well be the position. However, they did not prove to the Court which specific part of the entire land parcel number the **50** acres lies and which of the portions is being sold or encroached. They neither annexed a map to show the said parcel of land and the subdivisions thereof nor a surveyor's report to show which of the part of the entire parcel of land is in dispute. As far as the Court could discern the dispute, it is on a fluid or undetermined portion of the land. In my view, for the reasons above, the Plaintiffs have not established a prima facie case as against the defendants herein. Therefore, their first claim fails on the first limb.

15. As to whether the Applicants will suffer irreparable loss if the orders are not granted, the Court has to first bring out the understanding of the phrase irreparable loss. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR <http://kenyalaw.org/caselaw/cases/view/156488/>*

Justice Munyao stated as follows: “*Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.*”

16. The Applicants stated in the supporting Affidavit and grounds that the Defendants had encroached their portion of land and started utilizing and selling parts of it hence they are likely to suffer irreparable loss if the orders sought were not granted. In the grounds in support of the Application they stated that the Respondents had sold off all their share and encroached onto their share of **50** acres. They then referred to agreements of sale which they purportedly annexed to the Affidavit of Anthony Bulitia Simiyu sworn on **22/7/2021** and marked as **ABS 3**. They also referred to reports said to be made by one Anthony B. Simiyu to relevant government authorities about the encroachment and purported to mark it as **ABS 7** while they referred to and purported to mark copies of reports as **ABS 8** from his farm workers about numerous interferences from the Respondents on his portion of land.

17. This Court perused in detail through the record and could not trace any of the three sets of annexures referred to. In actual sense the Applicant did not attach any of the documents. Therefore, his depositions were hollow unsubstantiated statements. It is in my considered view that the Applicants therefore failed to demonstrate how they may suffer irreparable loss if the prayers sought are not granted. This is particularly so in regard to the claim that portions of the suit land were being sold by the Respondents where there was nothing to back up the claim. Even from the WhatsApp texts that were annexed and marked as **ABS 5 (a)**, there was no evidence of a sale having taken place on the alleged disputed land. The Court was left to guess that something of the sort was ongoing.

18. Again, the balance of convenience tilts in favour of the Defendants. The *Giella Case* gives the Court this third limb which should be applied as the Court exercises discretion. The case explains that where the court is in doubt, it should rule on a balance of convenience. I have weighed the circumstances of the parties and the genesis of the dispute. Doing the best I can, I am of the view that since the Applicants having not shown who occupies which specific part of the land yet all of them are said to be in occupation, the balance of convenience tilts in favour of the Respondents.

19. The Applicants raised a very serious issue at **paragraph 30** of the Supporting Affidavit. It was to the effect of discovery of an un-administered portion of 19 acres which they wanted the Court to make an order of preservation on. In so far as the fact was raised, and if it is true, then this Court would lack jurisdiction to do as requested by the Applicants because it does not handle Probate and Administration matters. The Applicants are hereby invited to address the Court, as directed below, on the jurisdiction of this Court on the issue. I hereby find that the entire application fails.

(2) Who to bear the Costs of the Application?

20. Regarding costs of the Application, I note that the Application has been lost. Costs follow the event but since the Respondents failed to oppose the application, I order that the Applicants bear their own costs.

21. A last point to note: In order to fast track this matter, the Plaintiffs are directed attend the Court for the mention of the matter on **8/03/2021** with a view to fixing a date when they can address the Court on its jurisdiction as stated above.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 16TH DAY OF FEBRUARY, 2022.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.