



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO.410 OF2015**

**IN THE MATTER OF THE ESTATE OF THE LATE CLISPO KAHIHU alias KAHIHU S/O  
GACHOKA-DECEASED**

**SAMUEL KAMIRICRISPOH.....PETITIONER/APPLICANT**

**VERSUS**

**JOHN NJERUKAHIHU.....RESPONDENT**

**RULING**

By way of a summons dated 10<sup>th</sup> September 2015 expressed under the provisions of Rule 73 of the Probate and Administration Rules and Order 40 Rules 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the law, **John NjeruKahihu** (hereinafter referred to as the applicant) moved this court under certificate of urgency seeking orders *inter alia* that:-

- i. *That the application be certified urgent and heard ex-parte in the first instance.*
- ii. *That a temporary injunction be issued restraining the Respondent from entering, using, wasting, or in any other way dealing with or interfering with the applicants possession of L.R. N. Githi/Kirerema/177 pending the hearing and determination of this application.*
- iii. *That a temporary injunction be issued restraining the Respondent from entering, using, wasting, or in any other way dealing with or interfering with the applicants possession of L.R. N. Githi/Kirerema/177 pending the hearing and determination of this succession cause.*
- iv. *Costs of this application be provided for.*

As stated above, the application is expressed under Rule 73 of the Probate and administration Rules and Order 40 Rules 1 & 2 of the Civil Procedure Rules and all other enabling provisions of the law. The provisions of the Civil Procedure Act and Civil Procedure Rules which are applicable in Succession Causes are well spelt out under Rule 63(1) of the Probate and Administration Rules. The said Rule provides:-

63. (1) *Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules*

Section 47 of the Law of Succession Act<sup>[1]</sup> enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act 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.*

Under Article 159 (2)(d) of the Constitution of Kenya 2010, the court is enjoined to administer justice without undue regard to procedural technicalities. Further, 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 as stated on the face of the application and the supporting affidavit are:-

- i. *That pursuant to sale agreement dated 23.4.01 between the parties herein; the Applicant has been in occupation of the suit premises which is the only asset relating to the deceased’s estate.*
- ii. *That the Respondent has entered into the suit premises and has started committing acts of waste to the same.*
- iii. *That the parties herein are brothers and are entitled to the suit premises in equal shares and that pursuant to the agreement referred to above, the Respondent sold his share/portion to the Applicant whereupon the applicant took possession and commenced development and that the Applicant has been in possession since 23.4.2001*
- iv. *That in an attempt to reclaim the land the Respondent forcefully entered into the land and started erecting a structure on the said land and attempts to resolve the matter amicably through family members and other forums have been unsuccessful.*
- v. *That he has developed the land and the actions by the Respondent will lead to losses on his part, hence the need for the injunction sought.*

The Respondent filed a replying affidavit on 29.10.2015 in opposition details of which are:-

- i. *The suit premises comprises of 4.55 acres and that the same is supposed to be shared among 5 sons of the deceased each getting 0.91 acres and he has his portion out of the said land which he has leased to the Applicant herein at an annual rent of Ksh. 10,000/= and that the applicant has defaulted in rent payment for 5 years.*
- ii. *He denies selling the said land to him, and even if there was sale, (which is denied) the same is null and void for want of a grant of letters of administration.*
- iii. *That the major issue for determination is the rightful heirs to the estate and mode of distribution and he denied interfering with the applicants’ portion.*
- iv. *That the applicants claim ought to be filed in the Environment and Land Court.*

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.*<sup>[2]</sup> The Court set out the Principles for

Interlocutory Injunction (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 said principles were repeated in the *Moses C Muhia Njoro & 2 others Vs Jane W Lesaloi and 5 others*<sup>[3]</sup> where the court in making a determination on the issue of a *prima facie* case with a probability of success relied on the decided Court of Appeal case of *Mrao Ltd Vs First American Bank of Kenya and 2 others*<sup>[4]</sup> where the Court of Appeal 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*<sup>[5]</sup> Bosire J held that *“to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”*

Also Bosire J in *Njengavs Njenga*<sup>[6]</sup> held that *“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.”*

The applicant states that the Respondent is his brother and both are entitled to the suit premises in equal shares of 1 acre each and that the Respondent sold his interest to him and has annexed a sale agreement. The Petition also discloses other persons and since distribution has not been done, it's not clear how their rights are or will be affected by the transaction between the parties herein. Further, they were not served with the application herein as persons interested in the said estate.

The Petition for letters of administration was gazetted on 14<sup>th</sup> August 2015 and the grant has not yet been issued nor has the 6 months lapsed since the same was Gazetted. The parties are yet to apply for confirmation which is the stage whereby distribution will be dealt with and their rightful share determined.

The question that arises is whether or not the parties herein could legally sell the property in question as per the annexed sale agreement before the grant is issued. The answer to this question lies in Section 45 of the Law of Succession Act 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* at the time of the deceased ought to be maintained. The law requires that the deceased person ought to be preserved as at the time of death. In the matter of the estate of *M'mugambi M'guoko alia Mugambi Gwoko alia Mugambi Guoko- Deceased*<sup>[7]</sup> 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 has been disputed. Even if this court was to

accept that indeed he purchased the said portion from the Respondent, the Applicant faces yet another challenge, namely, that the transaction was entered into before the Grant was issued and 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. In my view, the sections do not exempt transactions among family members *inter se*. To my mind, all transactions must await the grant.

Interpreting the section 45 (1) cited above **Musyoka Jin the Estate of Veronica NjokiWakagoto-Deceased**<sup>[8]</sup> 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.*

*In this matter the respondent sold property belonging to a dead person without authority as letters of administration had not yet been made. The fact of having petitioned for letters did not clothe him any authority. He and Felix Kunuthia intermeddled with the estate, and they no doubt committed an offence under section 45 (2) (a) of the Act. It is unfortunate that the prosecutorial authorities do not focus on offences of this kind as prosecutions are hardly mounted over them. This explains why property of dead persons is routinely intermeddled with’*

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*<sup>[9]</sup> 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.<sup>[10]</sup> 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.<sup>[11]</sup>

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 *status quo* be maintained to await the distribution of the estate and confirmation of the Grant.

I also find that the applicant has not satisfied the tests for granting an injunction as prayed. Consequently, I dismiss the application dated 10<sup>th</sup> September 2015 with no orders as to costs.

Right of appeal 28 days

Dated at Nyeri this **25th** day of **November** 2015

**John M. Mativo**

**Judge**

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[1] Cap 160 Laws of Kenya

[2] {1973} {EA358}

[3] High Court ELC case Number 514 of 2013

[4] {2003} KLR125

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

[6] {1991} **KLR 401**

[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