



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION CAUSE NO. 923 OF 2013.

IN THE MATTER OF THE ESTATE OF ETETE MASAKHALIA ::::::::::::::::::::DCD.

NASHON WAFULA ETETE :::::::::::::::::::: PETITIONER.

AND

JAMES NATO ETETE :::::::::::::::::::: APPLICANT.

VERSUS

KENNEDY WELEKAU ETETE :::::::::::::::::::: RESPONDENT.

R U L I N G.

1. The applicant James Nato Etete filed this application on 2nd February, 2015. It was brought under certificate of urgency. The parties recorded a consent in court for the sugarcane growing on land parcel Nos. **Bunyala/Nambacha/665** and **Bunyala/Nambacha/666** to be harvested and the proceeds deposited in court. The applicant now seeks the following orders.
 - i. ***THAT the respondent, his agents, servants and or persons acting under his instructions be restrained by way of temporary injunction from interfering with harvesting, threatening, receiving proceeds from cane harvest in respect of Land Parcel No. Bunyala/Nambacha/665 and Bunyala/Nambacha/666 pending distribution of the deceased's estate herein;***
 - ii. ***THAT the applicant be at liberty to harvest his canes growing on Land parcel No. Bunyala/Nambacha/665 and Bunyala Nambacha/666; and***
 - iii. ***That the costs of this application be provided for.***

2. The application is premised on the following grounds.
 - i. ***THAT the applicant has canes growing on land parcel No. Bunyala/Nambacha/665 and Bunyala/Nambacha/666;***
 - ii. ***THAT the estate of the deceased is yet to be distributed by the court;***
 - iii. ***THAT in the meantime the applicant natured (sic) canes to growing on Land Parcel No. Bunyala/Nambacha/665 and Bunyala/Nambacha/666 to maturity and is ready for harvesting only to be met by hostility from the responden;***
 - iv. ***THAT the applicant was left by the deceased utilizing and living on Land Parcel No. Bunyala/Nambacha/665 and Bunyala/Nambacha/666;***
 - v. ***THAT the balance of convenience lies with the applicant; and***
 - vi. ***THAT if the orders sought are not granted the applicant stands to suffer irreparably as his canes have overgrown and losing (sic) weight.***

The applicant's submission.

3. Parties proceeded by way of written submissions. The applicant relied on the supporting affidavit of James Nato Etete dated 2nd February, 2015 and his supplementary affidavit dated 23rd March, 2015.
4. Ms. Muleshe, learned counsel for the applicant, filed written submissions on 24th March, 2015, stating that the application filed by the applicant is merited and ought to be allowed as the applicant has proved to the court that he has been utilizing land **parcel Nos. Bunyala/Nambacha/665 and Bunyala/Nambacha/666.**
5. Ms. Muleshe further submitted that the appellant nurtured the canes growing thereon to maturity and has been harvesting the said cane for over 12 years. She submitted that the applicant provided a "Farmer's Statement" showing that he has been utilizing the said parcels of land while the respondent has been utilizing Land Parcel No. **Bunyala/Nambacha/311** (sic) which he should continue harvesting cane from.
6. She also submitted that the balance of convenience rests with the applicant and that the respondent did not deny being violent to the applicant or having restrained the applicant from harvesting cane on land parcel Nos. **Bunyala/Nambacha/665 and Bunyala/Nambacha/666.** It was submitted for the applicant that the respondent has not denied being the one utilizing Land parcel **No. Bunyala/Nambacha/311** (sic). Ms. Muleshe urged the court to allow her client's application.

Respondent's submissions.

7. The respondent opposed the application through a replying affidavit dated 12th February, 2015. Mr. Nandwa, learned counsel for the respondent, filed written submissions on behalf of the respondent on 15th May, 2015. He submitted that the "sharing document" attached to the applicant's affidavit as **JNE 3** does not constitute a will under the provisions of section 3 of the Law of Succession Act.
8. He submitted that although the applicant stated that he has been utilizing the two disputed pieces of land since the year 2002 when the deceased passed away, the applicant attached exhibit No. **JNE 1** which shows his use of the land from the year 2010.
9. The respondent contested the averment by the applicant that the respondent has been in use of **LR No. Bunyala/Nambacha/311** (sic) since the year 2002, as exhibit **JNE 2** attached to the applicants supplementary affidavit shows the respondent's use of the land for the years 2012, 2012 (sic) and 2014 but not for the years before that.
10. It was submitted that the respondent's interest is in land reference **No. Bunyala/Nambacha/665** of which he retained with his brother William Ngao Mwombe. It was submitted that the sugarcane was planted by their late father and that the applicant wasted his sugarcane plantation on land parcel **No. Bunyala/Sidikho/311** which he failed to nurture.
11. The submissions for the respondent indicate that the parties hereto are wrangling over the deceased's estate and until their shares are determined by the court, they have equal shares and rank equally in consanguinity and therefore the applicant cannot bar anybody from enjoying the rights which he is himself enjoying out of the deceased's estate. Mr. Nandwa relied on the authority of **Giella vs. Cassman Brown** to show that the applicant does not meet the conditions set for the grant of an injunction.

Determination of the application

12. In making its consideration and decision in this matter, this court is guided by the authority cited

by Mr. Nandwa, in the case **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358** which set the principles for grant of a temporary injunction as:-

- i. *A prima facie case must be established with a probability of success;*
- ii. *The applicant must establish that he will suffer irreparable damage that will not likely be compensated by an award of damages;*
- iii. *If the court is in doubt, it will decide the application on the balance of convenience.*

13. In the Court of Appeal decision in **Guruman Ltd. Vs. Jan Bonde Nelson & 2 others, Civil Appeal No. 21 of 2014 (UR)**, the court held thus:-

“It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd vs. Afraha Education Society (2001) Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted however strong the applicants’ claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without hurdles in between.”

14. This court has considered the submissions of both counsel and the averments in the affidavits of the applicant and the respondent. The annexure marked **JNE 1** in the replying affidavit of the applicant shows that he has been selling cane to Mumias Sugar Company from Nambacha Mumias sub-location. This in essence means that the cane harvested originates from the parcels of land situated at Nambacha. It is however difficult to tell if the harvests have been from **Bunyala/Nambacha/665 or Bunyala/Nambacha/666** or from both parcels of land.

15. The applicant attached the annexure marked **JNE 2** to show that the respondent has been supplying sugar cane to Mumias Sugar Company Limited from land situated in Sidikho Mumias sub location.

16. This court notes that the application herein is grounded on **rules 49, 59 and 73 of the Probate and Administration Rules**. These provisions do not support the granting of orders which can be granted in a suit under order 40 of the Civil Procedure Rules. Rule 73 of the Probate and Administration Rules provides that:-

“Nothing in these rules shall limit or otherwise affect the inherent powers 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.”

17. Justice Khamoni in the matter of the Estate of **Erastus Njoroge Gitau (deceased) Nairobi High Court Succession Cause No. 1930 of 1997** held that *“the inherent powers of the court under rule 73 is to be used only in deserving cases where no specific provisions exist to deal with the situation in question. It is not an omnibus provision which allows the court to entertain all manner of applications. Rule 73 only relates to gaps in the law of Succession Act and the Probate and Administration Rules”*.

18. Several provisions of the Civil Procedure Rules apply to the Law of Succession under rule 63 thereof. Order 40 of the Civil Procedure Rules is not one of them. This court is therefore not seized of the powers to grant orders of injunction in succession matters.

19. I therefore decline to grant the orders sought. The ex parte orders issued on 27th February, 2015 are hereby reviewed and set aside.

20. I hereby make an order that the status quo obtaining as at the time the petition of letters of administration was filed, be maintained pending the confirmation of grant and distribution of the deceased's estate herein. In any event, this court doubts that sugarcane that was planted way back in the year 2002 is of any economic value in the year 2015.

21. Costs in the cause.

DELIVERED, DATED and SIGNED at KAKAMEGA on this 18TH day of DECEMBER, 2015

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Applicant.**

..... **for the Respondent.**

..... **Court Assistant.**