



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCA E068 OF 2021

JAMES WAWERU NJOROGE (Suing as the administrator of the Estate
of WANGUI NJOROGE (Deceased).....PLAINTIFF/APPLICANT

VERSUS

STANLEY NDUNGI TICHA.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect to the Plaintiff/Applicant's Notice of Motion application dated 14th December, 2021. The said application is expressed to be brought under Article 165(6) and (7) of the Constitution of Kenya 2010, Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Sections 3 and 13 of the Environment and Land Court Act, Order 40 rule 1, 2, 3 and 4 and 51 rule 1 of the Civil Procedure Rules, 2010.

2. The application is filed under certificate of urgency and seeks the following orders:

i. Spent.

ii. Spent.

iii. THAT this Honourable Court be pleased to order that there be a stay of further proceedings in Nakuru Chief Magistrate's Court Succession Cause No. 19 of 2018 pending the hearing and determination of this application *inter partes*.

iv. THAT this Honourable Court be pleased to issue a temporary injunction restraining the Defendant whether by himself, his employees, servants, agents or otherwise howsoever from entering, occupying, carrying on any development, disturbing the Plaintiff's quiet possession or dealing with all that parcel of land known as plot No. 180 Missouri Farm or any portion thereof in any manner prejudicial to the interest of the Plaintiff/Applicant pending the hearing and determination of this suit.

v. THAT this Honourable Court be pleased to order that there be a stay of further proceedings in Nakuru Chief Magistrate's Court Succession Cause No. 19 of 2018 pending the hearing and determination of this suit. (Same as iii above)

vi. THAT the costs of this application be borne by the Defendant/Respondent.

3. The application is based on the grounds on its face and supported by the affidavit sworn by one James Waweru Njoroge. The Supporting affidavit is sworn on the 16th of December, 2021.

FACTUAL BACKGROUND.

4. This suit was commenced by way of Plaintiff dated 1st September, 2021 and filed on 16th September, 2021. In the Plaintiff, the Plaintiff is seeking among other orders a declaration that Wangui Njoroge (Deceased) is the sole owner and/or proprietor of all that parcel of land known as Plot No. 180 Missouri Farm in Naivasha.

5. The Defendant filed his defence and counter-claim dated 27th October, 2021 on the same day where he denies that Wangui Njoroge (Deceased) is the sole owner of Plot No. 180 Missouri Farm and prays that the court grant him 9 ½ acres of the suit property. He also avers that the instant suit is res judicata having been dismissed by the high court on 10th September, 2015 for want of prosecution.

PLAINTIFF/APPLICANT'S CONTENTION.

6. Plaintiff/Applicant contends that the Defendant/Respondent commenced Nakuru CMC Succession Cause No. 19 of 2018 to compel him to commence succession proceedings in respect of the estate of Wangui Njoroge (Deceased) and that the same is still ongoing.

7. It is the Plaintiff/Applicant's contention that this court should first pronounce itself on the ownership of the suit property before succession and that stay of proceedings should be granted.

8. The Plaintiff/Applicant further contends that sometime in May, 2021 the Defendant/Respondent invaded the suit property and uprooted beacons and trees he had planted and that the Defendant/Respondent has been visiting the suit property since then.

9. The Plaintiff/Applicant avers that if the Defendant/Respondent is not restrained, the Defendant/Respondent will continue to interfere with the suit property during the pendency of this suit and the Plaintiff/Applicant stands to suffer irreparable loss and damage.

10. He ends his deposition by stating that it is only just and fair that the application is allowed.

RESPONDENT'S RESPONSE.

11. In response to the application, the Defendant/Respondent filed a replying affidavit dated 18th January, 2022 where he deposes that he is a shareholder of Missouri Safari Farmers Company Limited having been listed as joint owners of 204 shares together with the Plaintiff/Applicant's mother Wangui Njoroge (Deceased) each having 102 shares.

12. He deposes that the records of Missouri Safari Farmers Company Limited show that Wangui Njoroge (deceased) and him are listed as joint holders of 204 shares each having 102 shares. A copy of the share certificate is annexed as proof.

13. He deposes that he became a shareholder after he paid Kshs. 2,040 and which Wangui Njoroge (Deceased) did not have and therefore he is entitled to 6.4 acres of the suit property.

14. The Defendant/Respondent lists properties which he became entitled to as a co-owner on payment of kshs. 2040 and on being granted a share certificate. They are

a. One half Plot No. 180 Measuring 12.8 acres

b. One half of Parcel no. 498 in Missouri farmers Section B

c. One half of the 50 x 100 plot in Missouri Famers area C.

15. It is his deposition that Wangui Njoroge (Deceased) had attempted to renege on the agreement and the fact that he had become a shareholder on the deceased's invitation to pay Kshs. 2040 to help complete payment of her share in Missouri Safari Farmers Company Limited. He confirms that this issue was the subject matter in Nakuru HCC No. 498 of 1993 which suit was dismissed.

16. He further deposes that his attempts to have the Plaintiff/Applicant file a succession cause after his mother's demise bore no fruit and he had to file a citation in Nakuru Chief Magistrate's Court Cause No. 19 of 2018. That the Plaintiff/Applicant was ordered to file a succession cause which he failed to do but instead took a temporary grant to enable him file the current suit.

17. The Defendant/Respondent avers that it is unfair for the Plaintiff/Applicant to seek stay of proceeding in the succession cause yet he knows that the deceased was a joint share holder with him at Missouri Safari Farmers Company Limited.

18. The Defendant/Respondents deposes that the issues in this suit can only be dealt in a succession cause, where he would have to file an objection in the event that he is left out during distribution. He added that the Plaintiff/Applicant has failed to take out letters of administration.

19. The Defendant/Respondent deposes that this court cannot pronounce itself in this suit without resolving the fact that the Plaintiff/Applicant's mother is deceased and that she co-owns shares with the Defendant/Respondent.

20. The Defendant/Respondent deposes that it would be unjust for the court to stop him from using his land which the Plaintiff/Applicant has attempted to sell and has since received a considerable amount of money. He further deposes that he removed the illegal beacons installed in the suit land and urges the court to dismiss the Plaintiff/Applicant's application.

PLAINTIFF/APPLICANT'S FURTHER AFFIDVIT.

21. The Plaintiff/Applicant filed a further affidavit sworn on 25th January, 2022.

22. He deposes that the question of whether the Defendant/Respondent purchased land and/or shares from his deceased mother can only be determined after a full trial.

23. The Plaintiff/Applicant reiterates that the dispute between his deceased mother and the Defendant/Respondent started in the 1980s and was never determined on merit during his mother's lifetime and that the dispute culminated into the filing of Nakuru HCCC No. 498 of 1993.

24. He deposes that the Defendant/Respondent has never been in possession of the suit land and that his claim against the estate of his deceased mother is that of a third party and not a beneficiary.

25. He deposes that the dispute is not a succession matter but a dispute over ownership and occupation of land within the jurisdiction of this court and the probate court lacks the said jurisdiction. He further deposes that until this Honourable Court pronounces itself over the rights of the parties herein. The probate court lacks jurisdiction over the suit.

26. He further deposes that in Nakuru Chief Magistrate's Court Succession cause no. 19 of 2018 he has been ordered to commence succession proceedings with a view of distributing the suit land adding that if the proceedings in the subordinate court are not stayed, he stands to be accused of being in contempt as he pursues justice in this court.

27. The Plaintiff/Applicant deposes that this suit should take precedence over the succession proceedings to avoid an instance where two courts give contradictory orders.

ISSUES FOR DETERMINATION

28. The Plaintiff/Applicant filed his submissions on 27th January, 2022 while the Defendant/Respondent filed his submissions on 7th February, 2022.

29. In my view the following issues are for determination:

a. Whether an interlocutory injunction should issue against the Defendant.

b. Whether proceedings in Nakuru Chief Magistrate's Court Succession Cause No. 19 of 2018 should be stayed pending the hearing and determination of this suit.

c. Who bears the costs of this application?

DETERMINATION AND ANALYSIS.

30. I have read the application, affidavit in support of the application, replying affidavit, supplementary affidavit, further affidavit and their accompanying annexures.

31. I have also considered and weighed the rival submissions in this application as regards the grant of orders of temporary injunction and grant of orders of stay of proceedings. I have also taken into consideration the judicial decisions cited and attached.

Whether an interlocutory injunction should issue against the defendant.

32. The first issue for determination is whether the Plaintiff has met the criteria for the grant of an order of temporary injunction.

33. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited Vs Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR* where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially.”(emphasis is mine)

34. Consequently, the Plaintiff ought to, first, establish a prima facie case. In *Mrao Ltd Vs First American Bank Of Kenya Ltd (2003) EKLR* in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

“...in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

36. In support of his application, the Plaintiff/Applicant has stated that his deceased mother one Wangui Njoroge owns the suit property and

that there has been a dispute between the deceased and the defendant since the 1980's. He has made reference to a suit filed in Naivasha Chief Magistrate's Court which was subsequently transferred to Nakuru High Court. That suit, he submits was dismissed for want of prosecution.

37. It is evident that there has been a long standing dispute between the deceased and the defendant. The plaintiff has now taken over as an administrator of the estate of the deceased and filed this suit in an attempt to resolve this dispute.

38. The Defendant/Respondent, on the other hand, states that the suit property is owned by him and the deceased Wangui Njoroge in equal share on account of a joint purchase of shares of Missouri farm. He has attached a copy of the share certificate which is in his name and that of the deceased.

39. The Defendant/Respondent by his own admission at paragraph 24 of his replying affidavit, confirms that he indeed uprooted beacons which he describes as illegal and that the beacons were out up by strangers who purported to have bought his land; the suit parcel.

40. To this end, I am convinced that the Plaintiff has established a prima facie case; he has a legal right which has apparently been infringed by the defendant. The defendant confirms the fact of the dispute and has attempted to offer an explanation. This court, no doubt, needs to make a further enquiry into this dispute.

41. In my opinion, therefore, the Plaintiff has met the first criteria for grant of orders of temporary injunction.

42. Secondly, the Plaintiff has to demonstrate that irreparable injury will be occasioned to him if the order of temporary injunction is not granted. The judicial decision of Pius **Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** provides an explanation for what is meant by irreparable injury and it states;

“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.”

43. The Plaintiff/Applicant has stated that they their deceased mother was in possession of the suit land until her demise in 2003 and her children remained in possession and are in possession to date.

44. The Plaintiff/Applicant further submits that the suit land is being used by him and his siblings and that if the Defendant does not stop interfering in the suit property, they will lose their livelihood. This is contained in the submissions and not an averment in the supporting affidavit or grounds on the face of the application. Needless to say that submissions are not pleadings.

45. The Defendant has made attempts to explain that he too has been in occupation of the suit land and has over the years been growing crops. This, he submits, is evidenced in letters exchanged between him and the deceased. These letters form part of the Defendants list of documents filed in court. I am at this stage not able to rely on these letters as evidence for the reason that their veracity is yet to be tested. They are yet to be produced as exhibits and the Plaintiff is yet to cross-examine the Defendant on them. Had they been attached to the replying affidavit, the Plaintiff/Applicant would have had opportunity to comment on them and that would have aided my determination on the fact of occupation and use. In the circumstances, the letters will have to await trial.

46. I also note that the Plaintiff has not attached any evidence that the deceased is the owner of the suit land. The Defendant, on the other hand, has annexed a share certificate in his name and that of the deceased. He has also annexed a land sale agreement showing that the deceased in the year 1984 sold half of her entitlement to the Defendant. The Plaintiff/Applicant in his further affidavit has not responded to this particular averment.

47. There are photographs annexed to this application. These photos are meant to show evidence of uprooted trees and beacons on the suit parcel. In my view, they could be photos of any parcel of land. It is difficult for me to appreciate the nexus between the suit land and the photographs.

48. As things remain, I am unable to make a finding that the Plaintiff is the sole owner of the suit parcel. Invariably, I am unable to find that the Plaintiff/Applicant is bound to suffer irreparable loss or damage.

49. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in her favour. In the case of **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLR** which defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it.”

50. In the case of **Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue of balance of convenience expressed itself thus:-

"Where any doubt exists as to the Applicants' right, or if the 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 Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

51. In the decision of **Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR** where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated.

"The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

52. Bearing in mind submissions by the Plaintiff/Applicant on the third criteria relating to balance of convenience, the Plaintiff/Applicant has not been able to show that the inconvenience caused to him will be greater than that which may be caused to the Defendant, who has attached a share certificate in the joint names of the deceased and himself.

53. Based on the evidence produced, I am convinced that there is a lower risk in refusing to grant orders of temporary injunction than granting them, as I wait to hear the suit on its merits.

54. The Nguruman case (Supra) reminds me that the three conditions for the grant of an order of temporary injunction are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially.

55. The Plaintiff/Applicant has been able to surmount the first hurdle but has failed in the subsequent two relating to irreparable injury and the balance of convenience.

56. An injunction is an equitable remedy, which means that the court hearing the application has discretion in making a decision on whether or not to grant the application. The court shall, taking into account all relevant facts, consider if it is fair and equitable to grant the injunction.

57. After carefully analysing the facts and documents filed herein and upon due consideration of the rival arguments advanced by the counsels for the parties herein, I am persuaded that Applicant has not satisfied the tests for granting injunctions as enumerated above.

58. In view of the foregoing, I find that the Plaintiff/Applicant has failed to meet the criteria for grant of orders of temporary injunction as laid down in the cited judicial decisions.

Whether proceedings in Nakuru Chief Magistrate's Court Succession Cause No. 19 of 2018 should be stayed.

59. **Section 6 of the Civil Procedure Act**, provides for stay of suits. It is worded thus:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or

any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation. —The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

60. The above section is a bar to parallel prosecution of cases in two fora of equal jurisdiction.

61. *Halsbury's Law of England*, 4th Edition. Vol. 37 pages 330 and 332, sheds light on stay of proceedings and states thus:

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases..."

62. The Plaintiff/Applicant has made elaborate submissions on why this suit should be stayed. He seems to believe that if this suit is not stayed, there will be two contradictory orders emanating from this court. He relies on Article 165 (5) of the constitution.

63. The Defendant/Respondent states that the dispute in this suit does not relate to succession but is a dispute over ownership and occupation of land.

64. While it is true that the environment and Land Court exercises Jurisdiction over the subordinate courts, this jurisdiction is hinged on the subject matter jurisdiction of the court.

65. Section 13 of the Environment and Land Court Act states that this court has original and appellate jurisdiction to hear and determine all disputes (Emphasis is mine) in accordance with Article 162(2) (b) of the Constitution of Kenya 2010 and the provisions of this Act or any other law applicable in Kenya relating to environment and Land.

66. It is evident therefore that the Environment and Land Court does not exercise probate jurisdiction. This court therefore, has no power to stay proceedings in Nakuru Chief Magistrate's Court Succession Cause No. 19 of 2018.

67. I must mention, for what it is worth, that the Plaintiff/Applicant's apprehension is unfounded. The suit land, as long as it remains subject of an unresolved dispute before this court cannot form part of the estate of the deceased that might be available for distribution. I am confident that this legal position is well understood.

Which party should bear the costs of the application?

68. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the Provisions of Section 27 of the Civil Procedure Act (Cap. 21).

DISPOSITION.

69. The Upshot of the foregoing is that the Notice of Motion Application dated 14th of December, 2022 is dismissed with costs to the Defendant/Respondent.

70. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17TH DAY OF MARCH, 2022

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Omae for the Plaintiff/Applicant.

Nancy Njoroge for the Defendant/Respondent.

Court Assistant; Jeniffer.