



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISC. CIVIL APPLICATION NO. 5 OF 2007

IN THE MATTER OF THE ESTATE OF SOLOMON ODECHI – DECEASED

AND

**IN THE MATTER OF SENIOR RESIDENT MAGISTRATE’S COURT AT VIHIGA
SUCCESSION CAUSE NO. 69 OF 2006**

AND

IN THE MATTER OF REVOCATION AND ANNULMENT OF GRANT

BETWEEN

SARAH M'MBONE ZANGALA APPLICANT/OBJECTOR

VERSUS

LONIKA KADENYI ODECHI PETITIONER/RESPONDENT

(NOW DECEASED)

AND

MARGARET KINYANGIPETITIONER/RESPONDENT

RULING

This is a Succession matter. Letters of Administration were granted by the court initially at the SRM’s Vihiga. Later on 29th April 2010 the court ordered that fresh letters of administration be issued to Lonika Kadenyi Odechi and Sarah Mmbone Zangala jointly. The same have not been confirmed. One of the initial two administrators, Lonika Kadenyi Odechi is said to have now died. Margaret Kinyangi thereafter applied to court to replace the deceased administrator in 2011.

On 2/7/12 Sarah Zangala one of the administrators filed the present Chamber Summons which was undated. It is the application which is for decision today.

The prayers in the application are as follows -

1. An injunction (be issued) against the respondent Margaret Kenyanzi, her agents, representatives, assigns or any other persons acting through her directions from trespassing or ploughing the land,

- planting maize, bananas or in any way interfering with the applicant's/objector's land parcel No. **S. MARAGOLI/MAHANGA./724.**
2. An order of permanent injunction (be issued) against the respondent, her agents, representatives, assigns or any other persons acting under her instructions from trespassing, ploughing the land, planting bananas, maize in any way interfering with the applicant's land Parcel No. **S. MARAGOLI/MAHANGA/724.**
 3. Costs of this application.
 4. Any other order or relief that this Honourable court deems fit and just to grant in the interest of justice.

The application was filed with a supporting affidavit. It was deponed that after Leonika Kadenyo Ondechi obtained letters of administration from Vihiga court, she apportioned the deceased's parcel of land and gave it to Margaret Kinyanzi. That the applicant objected to this action. That the respondent Margaret Kinyanzi was ploughing, planting maize and bananas on this parcel of land and cutting down trees. That she was denying the applicant's family good use of the land, which has prompted the filing of this application for a temporary injunction.

The application is opposed. A replying affidavit sworn by Margaret Kinyanzi, the respondent on 24/1/14 was filed. It was deponed *inter-alia* that Margaret the respondent had been substituted for the original (deceased) petitioner on 23/2/12. That the application was not meritorious as the applicant had made a similar application dated 4/7/11. That the applicant was aware that the court had already issued restraining orders against her interfering with the respondent's use and occupation of half portion of L.R. No. S.MARAGOLI/724. That the applicant knew that each party had been using half of land L.R. No. S. MARAGOLI/724.

On the hearing date, the applicant appeared in person. Mr. Athung'a appeared for the respondent.

The applicant stated that her intention was to have the subject land divided among her children. She contended that the respondent was unlawfully occupying her land.

Learned counsel for the respondent Mr. Athung'a stated that his client had replaced a deceased administrator. No distribution of assets had been done. In counsel's view, the objector's intention was to bar others from using the subject land. Counsel submitted that the matter had already been addressed when the original petitioner had moved to court and obtained an order where the respondent and the applicant would use respective portions of the land. Counsel informed the court that a copy of the order of the court was annexed to the affidavit of his client. Counsel stated that this application was frivolous.

In response to the counsel's submissions, the applicant submitted that the land had been bought by her husband and that she had papers in support of that allegation.

This is an application for grant of injunctive orders. The parameters to be considered by the court in such an application were clearly stated in the now famous case of **Giella -vs- Cassman Brown Ltd. [1973] EA 358**. An applicant has to show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss as damage not capable of being adequately compensated in the form of an award or damages, the injunction is not granted.

Thirdly, if the court is in doubt it will determine the matter or that of a balance of convenience.

I have seen the order made by Ochieng, J. in 2009 on the same piece of land. The dispute then was between the applicant herein and the deceased administrator Leonika Kadenyi Odechi. The court made clear orders, which have not been appealed against or reviewed. The court stated as follows -

“1.The respondent (Sarah Mmbone Zangala) will be restrained until her application for revocation is heard and determined from selling, alienating, encumbering, disposing of or in any other manner whatever from interfering with the applicant's

use and use of one half portion of L.R. No. S. MARAGOLI/MAHANGA/724.

- 2. That for avoidance of doubt, this order is meant and intended to preserve the status quo on the ground as it existed prior to the respondent taking steps to reclaim more land than her family had been in occupation of prior to August, 2008.**
- 3. That costs of the application shall be in the substantive cause herein.”**

With the above order of the court in mind, the application by the applicant herein is misconceived. A decision has already been made by the court on the occupation and use of the land until the application for revocation of grant is determined.

The only options available to the applicant were either to appeal against that ruling, or apply for its review, or fix the application for revocation for hearing and determination. She cannot make a fresh application for injunction. She doesn't have any legal basis for doing so as the matter has already been dealt with by the court and the decision of the court is still on record and effective.

The applicant cannot claim to have a prima facie case for injunctive orders as a decision has already been made by the court on this issue. Consequently, I cannot say that she will suffer irreparable loss if a temporary injunction is not granted. Lastly, the balance of convenience is not on her side as her filing this application has ignored the existing and still effective orders of the court.

As I have said above, her options are either to challenge the decision which was made by the court in April, 2009 or fix the application for revocation of the Grant for hearing, the court having indicated that its orders made would stand until the application for revocation is heard and determined.

I have not been told that the application for revocation was heard and determined. I have not been told that the court varied its orders above.

For the above reasons, I find no merits in the application. The same is dismissed with costs to Margaret Kinyangi the respondent.

Dated and delivered at Kakamega this 3rd day of April, 2014

George Dulu

J U D G E