



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIROMENT & LAND COURT CASE NO. 94 OF 2013

PIUS OIRERE ANGONGA.....PLAINTIFF

VERSUS

JOSEPH ONDIEKI ANGONGA..... DEFENDANT

RULING

1. The plaintiff and the defendant are brothers being the sons of one, John Angonga deceased, (herein after referred to as “**the deceased**”) who died on 24th May, 1989 leaving a parcel of land known as LR. No. Bassi/ Boitangare/ 1343 (hereinafter referred to only as “**the suit property**”) measuring approximately 3.92 hectares. The heirs of the deceased have not taken out letters of administration with respect to his estate for the purposes of administering and distributing the same. The suit property therefore remains registered in the name of the deceased. The Plaintiff brought this suit against the defendant on 8th March, 2013 seeking a permanent injunction to restrain the defendant from trespassing onto, interfering with and/or in any other manner whatsoever dealing with the portion of the suit property which is owned by the Plaintiff. The Plaintiff also sought an order of eviction to issue against the defendant. Together with the plaintiff, the plaintiff filed a chamber summons application dated 8th March, 2013 under certificate of urgency seeking interlocutory injunction to restrain the defendant from trespassing upon, and/ or otherwise interfering with the Plaintiff’s occupation and/or use of the suit property pending the hearing and determination of this suit. The plaintiff’s application was supported by the affidavit sworn by the Plaintiff on 8th March, 2013 (hereinafter referred to as “**supporting affidavit**”). The plaintiff’s case against the defendant as pleaded in the plaint and expounded in the supporting affidavit and witness statement filed in court by the Plaintiff is that the deceased died after he had informally subdivided the suit land on the ground among his three (3) sons, the Plaintiff and the defendant inclusive and that the three sons occupied peacefully after the death of the deceased definite and identifiable portions of the suit property which were clearly marked on the ground with well-established physical boundaries. The Plaintiff claimed that the defendant sold part of his share of the suit property and as a result thereof remained with a reduced portion thereof. The defendant thereafter started raising complaints that the Plaintiff had got a larger share of the suit property and that the suit property should be re-distributed equally between them. The parties tried unsuccessfully to resolve the dispute through Sameta Land Disputes Tribunal and the area chief. The Plaintiff claims that in furtherance of his claim to the portion of the suit property in occupation of the Plaintiff, the defendant entered thereon in January, 2013 and cut down tea bushes and sugar cane that the Plaintiff had planted on his portion of the suitproperty in an attempt to create a new boundary. The Plaintiff claims that the defendant has in the process chased away the Plaintiff and his family members from the disputed portion of the suit property and denied

them the use thereof. The Plaintiff claims that the defendant's actions aforesaid has interfered with his right to occupy his portion of the suit property and if not restrained will subject him to irreparable loss. The Plaintiff's application is opposed. Through a replying affidavit sworn on 13th March, 2013, the defendant has denied the Plaintiffs allegations. The defendant claims that the suit property that belongs to the deceased was shared out among the deceased's children by their mother with the assistance of the area chief and their relatives and that the said division of the suit property was approved by the Plaintiff. The defendant contends that he has remained on his portion of the suit property that was given to him as his share and has neither encroached on the Plaintiff's portion nor damaged any of the Plaintiff's crops as alleged. The defendant claims that this suit has been motivated by greed as the Plaintiff's aim is to acquire a larger portion of the suit property. The defendant contended that the Plaintiff has no better title to the suit property than the defendant and that the issues raised in this suit and application concern succession of the estate of the deceased and should be dealt with by the succession court under the provisions of the Law of Succession Act, Cap. 160, Laws of Kenya where the interest of each of the beneficiaries of the estate of the deceased on the suit property can be determined. The defendant contends that the orders sought by the Plaintiff if granted would result in his eviction from the suit property which is owned by the deceased and in which he has an interest.

2. The application came up for hearing before me on 18th March, 2013 when Mr. Kaburi appeared for the Plaintiff and Mr. Nyamurongi appeared for the defendant. Mr. Kaburi reiterated the contents of the Plaintiff's affidavit in support of the application which I have already highlighted hereinabove. Mr. Kaburi submitted that the physical boundaries of the Plaintiff and the defendant's portion of the suit property on the ground should be respected and maintained by the parties pending the hearing and determination of this suit. Counsel submitted that both parties have an interest on the suit property and as such should co-exist peacefully on the suit property. In his reply, Mr. Nyamurongi, advocate for the defendant submitted that what the Plaintiff is seeking in this suit is the distribution of property that belongs to a deceased person before the issuance of a grant of representation an act that amounts to intermeddling in the estate of a deceased person. Counsel took issue with the competency of this suit arguing that the limited grant issued to the Plaintiff by the Senior Principal Magistrate's Court at Ogembo on the strength of which this suit was filed is a nullity as that court could only issue grants with respect to estates the value of which do not exceed Ksh. 100,000.00 and that, in any event in a region where there is a High Court, all applications for a grant should be made in the High Court. Counsel submitted that the value of the deceased's estate exceeds Ksh. 100,000.00 and as such the grant with respect to his estate whether limited or otherwise could only have been issued by the High Court. Counsel submitted in the alternative that since Ogembo area is within Kisii region, the application for limited grant should have been at the High Court in Kisii in accordance with the proviso to section 48 of The Law of Succession Act, Cap. 160, Laws of Kenya. Counsel submitted that the Plaintiff's suit is incompetent for having been based on a grant of letters of administration which is null and void and as such cannot form a basis for an application for injunction. Mr. Nyamurongi also took issue with the form of the Plaintiff's application which he submitted should have been brought by way of notice of motion in accordance with Order 51 rule 1 of the Civil Procedure Rules and not through chamber summons. The application according to counsel was also brought under the repealed provisions of the law and as such the jurisdiction of the court was not properly invoked. In conclusion Mr. Nyamurongi maintained that the defendant had confined his activities to the portion of the suit property that he got pursuant to the division that was carried out by the area chief and which both parties had consented to. Counsel submitted that the process adopted by the Plaintiff herein to settle a succession dispute is null and void.
3. The principles for granting interlocutory injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1975] E.A. 358**, an applicant for the interlocutory injunction must prove that he has a prima facie case against the defendant with a probability of success and that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. The defendant raised some preliminary objections to the Plaintiff's application that I wish to dispose of first before considering the said application on merit. The first objection put

forward by the defendant was that this suit is incompetent and as such cannot be a basis for the present application for injunction. The defendant attributed the incompetency of the suit to the limited grant of letters of administration obtained by the Plaintiff at Ogembo Senior Principal Magistrate's Court on the basis of which this suit was instituted. The defendant submitted that the said grant was issued to the Plaintiff contrary to the provisions of section 48 of the Laws of Succession Act, Cap. 160, Laws of Kenya in that, first, the said Magistrate's court had no jurisdiction to issue the said grant because the value of the estate of the deceased is in excess of Ksh. 100,000.00 which is beyond the pecuniary limit of the Magistrate's court jurisdiction in Succession matters and, secondly, that since Ogembo Law Courts is within Kisii region where there is a High Court, the said court had no jurisdiction to issue the grant as the jurisdiction to issue grants where there is both the High Court and the Magistrate Court is reserved for the High Court. I am not in agreement with the defendant's arguments on both points for the following reasons. First, there is no evidence placed before the court as to the total value of the estate of the deceased. This court cannot therefore sustain the defendant's objection based on the value of the estate of the deceased merely on allegations, assumptions, imaginations or conjecture. This objection is therefore baseless. Secondly, Ogembo Law Courts where the Plaintiff applied for and obtained a limited grant has no High Court. In the circumstances, the proviso to section 48 of the Law of Succession Act, Cap. 160, Laws of Kenya is not applicable. Thirdly, the grant of letters of administration that was issued at the Senior Principal Magistrate's Court at Ogembo has not been revoked or set aside and no application has been made for that purpose. This court is therefore unable to find the same as null and void. The same remains valid until set aside or revoked. The other objection concerned the form of the application before the court. The first one was over the form in which the application was brought that was chamber summons instead of notice of motion as provided for in order 51 rule 1 of the civil procedure rules while the other objection on form concerned the provisions under which the application was brought. The Plaintiff brought the application for injunction under Order XXXIX of the old procedure rules instead of Order 40 of the new procedure rules. My take on these objections is that there was no indication given to the court of any prejudice or injustice that was suffered by the defendant by the manner in which the Plaintiff's application was brought. It is true that by an oversight or sheer negligence the Plaintiff's advocates brought the application in wrong form and cited repealed provisions of law. However in the absence of prejudice or miscarriage of justice to the defendant, these are procedural technicalities that this court will overlook in pursuit of substantive justice pursuant to the provisions of Article 159 (2) (d) of the Constitution. The disposal of these preliminary objections now paves the way for considering the Plaintiff's injunction application on merit. The Plaintiffs' claim against the defendant is based on the tort of trespass. In the book, **Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01**, trespass to land is defined as consisting of **"any unjustifiable intrusion by one person upon land in the possession of another."** In the same book, it is stated that trespass is actionable at the suit of the person in possession of the land (paragraph 18-10) and that proof of ownership is a prima facie proof of possession (paragraph 18-110). In this case therefore, the Plaintiff was under a duty to prove that the defendant had unjustifiably entered the portion of the suit property which was in his possession. The plaintiff has placed material before the court which shows that the suit property is registered in the name of the parties' deceased father, John Angonga. The estate of the deceased has not been administered as no application for letters of administration has been made by the heirs. The Plaintiff and the defendant are heirs to the estate of the deceased by virtue of being the sons of the deceased and as such have equal interest in the suit property which forms part of the estate of the deceased. The definite share in the estate of the deceased to which the Plaintiff and the defendant and other heirs of the deceased if any would be entitled can only be determined during the administration of the estate of the deceased. The Plaintiff herein cannot therefore validly lay a claim to any portion of the suit property which is owned by the deceased and which is subject to the administration of his estate. The Plaintiff has therefore failed to prove on a prima facie basis that he is the owner of a portion of the suit property as alleged in paragraph 3 of the Plaintiff. In the circumstances the Plaintiff cannot maintain a suit for trespass based on ownership. It is however not in dispute that the Plaintiff is in possession of a portion of the suit. Can the Plaintiff maintain a suit for trespass based on this possession? The Plaintiff claims that the deceased gave him this portion of the suit property as his share of the suit property and that he has planted tea and sugar cane thereon and

that the defendant entered this portion of the suit property and cut down his sugar cane and tea bushes. As I have stated above, both the Plaintiff and the defendant have equal interest in the estate of the deceased. Neither the Plaintiff nor the defendant has a better right than the other over the suit property. It follows therefore that the defendant would have no justification in causing destruction to the Plaintiff's crops planted on a portion of the suit property. I am of the view that the actions aforesaid attributed to the defendant if proved would amount to acts of trespass. Just like the Plaintiff, if the defendant is of the view that the Plaintiff is occupying more than his fair share of the suit property, his recourse should be to the probate and administration court for the distribution of the estate of the deceased. The defendant has however denied trespassing into the portion of the suit property and destroying the Plaintiff's crops as alleged. The Plaintiff on the other hand has failed to put any material before the court in support of this allegation. A report from an agricultural officer or an abstract of a report made to the police over the damage would have sufficed. The Plaintiff referred the Court to some photographs alleged to be evidencing the alleged destruction of crops but the court could not make any sense out of them because the said photographs were not self-explanatory and no reference whatsoever was made to them in the Plaintiff's affidavit in support of the application. Due to the foregoing I am in doubt whether the Plaintiff has established a prima facie case against the defendant with a probability of success. On the issue of irreparable loss, the Plaintiff having failed to prove the alleged destruction of his crops and the defendant's trespass upon or occupation of the portion of the suit property which he claims to belong to him, I am equally doubtful whether the Plaintiff stands to suffer any irreparable harm if the orders sought are not granted.

4. In view of the conclusions that I have arrived at above, the Plaintiff's application falls for consideration on a balance of convenience. As already observed, the Plaintiff and the defendant are heirs to the estate of John Angonga, deceased in whose name the suit property is registered. From the material on record, the Plaintiff and the defendant have been occupying different portions of the suit property. None of them denies that the other has a right to occupy the suit property. The dispute between the two is the extent of the suit property which each should occupy. As I have already stated above, that is a matter that would have to be determined in a succession court and the parties are advised to pursue that course of action. What is before this court is a complaint about an act of trespass and destruction of property. The court is unable at this stage to determine the exact boundary between the portion of the suit property under occupation of the Plaintiff and the portion occupied by the defendant. The division of the suit property amongst the sons of the deceased be it by the deceased as claimed by the Plaintiff or the area chief as claimed by the defendant were all informal. This court will however have to strike a balance to ensure that the interests of both parties in the suit property are preserved pending the hearing and determination of this suit. This will also ensure that peace and tranquility prevails awaiting the court's final word on the matter. Balancing the interests of the Plaintiff as against that of the defendant, the order that would be most appropriate in the circumstances is to preserve the status quo that was prevailing prior to the alleged trespass by the defendant upon the portion of the suit property that is said to be occupied by the Plaintiff. Since the defendant has denied the alleged trespass, I don't think that he will suffer any prejudice if the status quo prior to the alleged trespass is maintained. I therefore order that pending the hearing and determination of this suit, the parties shall maintain the status quo that prevailed at 31st December, 2012 as concerns possession and use of the suit property and where that status quo has been disturbed, it shall be reverted to. In view of the relationship between the parties and the nature of the dispute herein, the costs shall be in the cause.

Dated, signed and delivered at KISII this 14TH day of JUNE, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Sagwe holding brief for Kaburi for plaintiff

Miss. Sagwa holding brief for Nyamurongi for defendant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.