



REPUBLIC OF KENYA



KENYA LAW
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**Vikiru v Vikiru (Environment & Land Case E11 of 2021)
[2022] KEELC 3794 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E11 OF 2021
DO OHUNGO, J
JUNE 28, 2022**

BETWEEN

AGGREY MUDOTO VIKIRU PLAINTIFF

AND

TIMOTHY BUNYALI VIKIRU DEFENDANT

RULING

1. Parties in this matter are brothers. Efforts to get them to amicably settle the dispute between them through discussions as brothers and even a referral to mediation have all failed.
2. By Notice of Motion dated 16th August 2021, the plaintiff seeks the following orders:
 1. [Spent]
 2. [Spent]
 3. That this Honourable court be pleased direct the Manger of the National Housing Corporation Kakamega Branch to provide the Applicant with the loan Account Number 159510001 statement with regards to L.R. No. Isukha/Shirere /1693.
 4. [Spent]
 5. That pending the hearing and determination of the main suit, there be interim orders restraining the Defendant /Respondent by himself and/or through his servants agents and/or employees from constructing, entering, remaining, intermeddling, and/or dealing in any manner whatsoever with L.R. No. Isukha /Shirere/1693, 4886 and 6533, 6534 which are the resultant sub divisions of 4843.
 6. That the O.C.S. Kakamega Police station to enforce the compliance of these orders.
 7. Costs herein be provided for.



3. The application is supported by an affidavit sworn by the plaintiff/applicant. He deposed that he is the surviving eldest son in the family of the Herbert Vikiru Kinadira (deceased) while the defendant is the last born in the family of 11 children. That the deceased was the registered proprietor of L.R. No. Isukha/Shirere/4843, 2132, 2485, 4886, 1693 and 733. That prior to his death in the year 2020 and in consultation with the whole family, the deceased bequeathed L.R. No. Isukha/Shirere/2485 to the plaintiff's brother Stephen Vikiru, Isukha/Shirere/4886 to the plaintiff's two brothers Patrick Amata and Naftali Vikiru, Isukha/Shirere/4843 to the plaintiff, and half of Isukha/Shirere/2132 to the defendant where he has established an animal farm and the remaining half to be consolidated with L.R. No. Isukha/Shirere/1693 to form part of the ancestral land so as to cater for the all members of the family including the parties' sisters, while LR. No. Isukha/Shirere/733 was sold to the defendant's company for a consideration which is not yet fully paid.
4. The plaintiff went on to depose that L.R. No. Isukha/Shirere/1693 is ancestral land since the deceased bought it in 1974, after selling his ancestral land in Maragoli, Vihiga County. That he was surprised to note that the defendant has fraudulently registered himself in the ancestral land and he is on the verge and/or started to demolish the parties' parents' house which is being occupied by their unmarried sisters. That the defendant has taken over rent collection from all rental houses and shops while disinheriting other family members. That the defendant fraudulently subdivided L.R. No. Isukha / Shirere/4843 into two portions viz 6533 and 6534 which was supposed to be wholly the plaintiff's. That all the transactions were performed during the period the deceased had been incapacitated by illness and was of unsound mind. That when the deceased's condition deteriorated, the defendant took him to Nairobi since the year 2014 until he died in the year 2020 purportedly for medical purposes but that is when he took advantage of the deceased's condition and used undue influence upon him to scuttle his intestate estate against his will.
5. The plaintiff added that he intends to use the statement in respect of loan account number 159510001 in the main suit to demonstrate that the defendant did not purchase the ancestral land through auction but colluded with the loanee one Stephen Kinadira Vikiru after repaying the loan to fraudulently transfer LR. No. Isukha/Shirere/1693 into his names. That his late brother Patrick Amate was buried on L.R. NO. Isukha/Shirere/4886 and was survived by two children who are supposed to get a half of share of the said land parcel and a half share of the same goes to another brother one Naftali Vikiru, but the defendant fraudulently purported to purchase the land using proceeds from L.R. No. Isukha/Shirere/733 which proceeds were to be shared as a family. That if the defendant is left to continue with his fraudulent conduct regarding the deceased's estate, the plaintiff and other family members are likely to suffer irreparable lose and damage.
6. The defendant/respondent opposed the application through a replying affidavit in which he deposed that the plaintiff/applicant has referred to parties including the parties' 'unmarried sisters' who he has not bothered to join in the case. That while it is true that the deceased was the registered proprietor of the parcels of land cited by the applicant, the deceased disposed some of the parcels by sale and by gift to his children during his lifetime. That the deceased bequeathed Isukha/Shirere/4886 to Stanley and Naftali during his lifetime but, to date, the parcel remains registered in the deceased's name. Nevertheless, Stanley and Naftali settled on the parcels bequeathed to them. That the deceased subdivided Isukha/Shirere/4843 into Isukha/Shirere/6533 and Isukha/Shirere/6534 in his lifetime and gifted the defendant Isukha/Shirere/6534 which was subsequently registered in the defendant's name.
7. The defendant further stated that Isukha/Shirere/6533 remained in the deceased's name until his death. That he is aware that the applicant was bequeathed the said parcel and he even assisted the applicant to construct a house on the parcel during the deceased's lifetime. He further confirmed that



he was allocated a portion of Isukha/Shirere/2132 where he established an animal farm but denied knowledge of the applicant's contention that the remainder of the parcel was to be consolidated with Isukha/Shirere/1693 to form part of the ancestral land. That despite the deceased moving to Kakamega, he did not sever links with his Maragoli roots and that the ancestral land remains registered in the name of the parties' grandfather.

8. The defendant went on to state that acknowledging that as a lastborn the defendant would inherit the family home, the deceased transferred Isukha/Shirere/1693 to the defendant. That the land that was sold to Ace Jawabu Enterprises is Kakamega/Shiswa/733. That the transaction towards the purchase was above board and that the applicant together with the other brothers signed an agreement disposing of their beneficiary interest in consideration for some monetary token. He urged the court to dismiss the application with costs.
9. The applicant filed an affidavit in response whose contents I have noted. The application was canvassed through written submissions which both parties duly filed. The applicant argued that he has a legal right over the suit properties pursuant to Section 45 of the Law of Succession Act and that the respondent intermeddled with the deceased's estate. That in view of the breach of the law, damages cannot be an adequate remedy. He concluded by arguing that he had satisfied the principles for granting an interlocutory injunction and urged the court to allow the application.
10. The respondent countered that the applicant had conceded that the respondent is the registered proprietor of several of the plots referred to and is in occupation and use thereof even before the deceased's death. That, consequently, the issue of intermeddling with the deceased's estate does not arise.
11. I have considered the application, the affidavits, and the submissions. The principles that guide the court when considering an application for an interlocutory injunction were enunciated in the case of *Giella -vs- Cassman Brown & Co. Ltd* [1973] E.A 358 and reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. Simply put, the applicant must establish a prima facie case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.
12. A perusal of the green cards availed by the parties reveals that the transactions that the applicant is complaining of took place during the lifetime of the deceased, some as far back as five years before the demise of the deceased who was the registered proprietor. In those circumstances, I do not see how the defendant can be accused of fraud. Further, the allegation that the deceased was of unsound mind has not been supported by any medical evidence. Regarding prayer 3 of the application, I note that neither the bank nor the account holder have been joined to the suit. It is a cardinal requirement of justice that orders cannot be issued against persons who have not been afforded an opportunity to be heard.
13. In view of the foregoing discourse, the applicant has failed to demonstrate a prima facie case. That being so, I need not consider irreparable injury and balance of convenience. In the circumstances, Notice of Motion dated 16th August 2021 is dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF JUNE 2022.

D. O. OHUNGO

JUDGE



Delivered in open court in the presence of:

The plaintiff

Mr Munyendo for the defendant

Court Assistant: E. Juma

