



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Civil Suit 89 of 2011

RAFFAELLA ADIYAKHISO NTOTOI.....PLAINTIFF

VERSUS

ROBERT OBRIAN LENGURO.....DEFENDANT

RULING

The applicant through an application dated 4th July, 2011 brought under Order 40 Rules 1(a) and 2 of Civil Procedure Rules and Section 1A, 3 and 3A of Civil Procedure Act seeks to be granted an order of temporary injunction restraining the defendant/respondent by himself, his agents, servants or anybody else acting on his behest from constructing any building or structure or any other way whatsoever interfering with plot No.53B situated at Loiyangalani in Marsabit county Council pending hearing and determination of this suit. The applicant further seeks that the court do direct the OCS Loiyangalani Police Station to ensure compliance of the orders that may be granted by the court. The grounds in support of the application are stated on the face of the application. The application is further supported by the annexed affidavit of the applicant dated 4th July, 2011 and annexures attached thereto. The application is opposed. The respondent swore a replying affidavit in opposition to the application dated 28th July, 2011 and relied on attached authority.

That when the matter came up for hearing on 7/5/2012 and 3/7/2012 this court heard oral submissions of the learned advocate Mr. H. Gitonga for applicant and Advocate for the respondent Miss Omwenge and on 3.7.2012 Miss Kinyua, the learned Advocate who held brief for Miss Omwenge. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issues for determination is whether the applicant has laid down sufficient basis for this court to grant injunction orders.

Further whether the plaintiff's application is fatally defective as the suit and the application was filed in the name of one of the Administrators.

In the instant case the dispute is over No.53B at Loiyangalani in Marsabit, which plot was allocated to Samwel Ntotoi Bulyaan, as per full council minutes NO.5/1992 annexed and marked as "RA2". The plot measures 5 acres. The allottee who is now deceased took actual possession of the 5 acres and commenced developments thereon by planting various types of trees and had the plot registered in his name as per exhibit "RA3". The plot was subsequently registered as Plot No.53B. That on 1.3.1998 Samwel Ntotoi Bulyaar passed on and 26.1.1999 the applicant herein, widow to Samwel Ntotoi Bulyaar was issued with a grant of letters of administration of the estate of Samwel Ntotoi Bulyaar jointly with Andrew Harun Bulyaar as per annexed copy of the grant of letters of administration marked "RAI". That meanwhile the

administratrix and the administrator had all land rents paid as of 2011 as per receipt marked "RA5". That in October, 2010 the defendant/respondent with his agent attempted to curve out of the suit property a portion measuring 100'x100'. The applicant had demand letter issued by her advocates M/S Ogoti Okello & co. Advocates leading to the respondent's withdrawal from trespassing upon the suit property. However on 25th June, 2011 the defendant/respondent is alleged to have led a group of persons to the deceased plot and curved off a portion measuring 100'x100' and erected a perimeter fence around it and stationed his agents on the portion to guard it and have violently prevented the applicant from entering the said plot. The applicant has further deponed that the respondent has now deposited building materials therein preparation to commence erecting structures on the deceased land. Applicant has further deponed that the respondent has no interest whatsoever over the portion of plot No.53B situated at Loiyangalani in Marsabit County Council and unless orders sought are granted the applicant and other defendants of the deceased and the estate of the deceased shall suffer irreparable damage.

The respondent on the other hand, has opposed the application and submitted that the same is made in bad faith, is bad in law, misconceived, frivolous and an abuse of the court process. The respondent contend that plot No.53B is not located anywhere in Loiyangalani and further that he has no interest over the alleged plot and that he has never trespassed on the alleged plot. That in 1987 the respondent applied for plot as per annexure "ROL1". That the respondent was allocated plot No.85 as per minute No.5/87 of 1988 annexed and marked "ROL2". That the respondent's plot measures 50'x100'. That respondent upon being allocated plot No.85 paid Kshs.1660/- as per annexure "ROL3" and has since then been paying land rent as per annexure "ROL4".

The test for granting interlocutory injunction are set out in the often cited case of **GIELLA -V- CASSMAN BROWN & CO.LTD(1973). EA.358.**

The applicant must first show she has a prima facie case with reasonable probability of ultimately succeeding upon trial. Secondly, that in the event that injunction be refused she stands to suffer loss or damage of such a nature and magnitude that damage will not adequately compensate her.

Thirdly, that comparative mischief likely to result to her should the injunction be refused outweighs that which result to the opposite party should it be granted.

The applicant argued that she had demonstrated that the defendant has no right or interest over the suit property and that his entry in the suit property is illegal and intended to annex a portion of plot No.53B. The applicant has argued that she has established a prima facie case through the attached annexures and has shown plot No.53B exists and belongs to her late husband and as such the applicant is entitled to orders sought to preserve the estate. That the applicant stand to suffer irreparable loss if the respondent proceeds on to construct on the plot as the same would be alienated and she would stand to lose the plot. The counsel for the applicant further submitted that the balance of convenience tilts in favour of the applicant.

On the other hand, the learned Advocate for the respondent submitted that the application is fatally defective and both cannot stand as the suit and the application was not filed by both administratrix and the administrator.

Under Order 31 Rule 2 of Civil Procedure Rules it is provided:

"2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

"Provided that the executors who have not proved their testator's will, and trustees, executors, and administrators outside Kenya, need not be made parties."

In view of the above-mentioned order in case where there are several administrators it is mandatory all be made parties to a suit against one or more of them unless the administrator or executor is outside Kenya.

Besides the above under Section 81 of the Law of Succession Act it is provided:-

“81. Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him.”

Under the above-mentioned Section upon death of administrator(s) the surviving administrator(s) or executor(s). the surviving administrator(s) or executor(s) the powers and duties of the executor(s) or administrator(s) vests in the survivors or survivor of them; however where there has been a grant of letters of administration which involves any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or two more persons jointly with him.

In addition to the above the respondent’s advocate referred me to the case of **THE ATTORNEY GENERAL-VS-KENYA SCHOOL OF FLYING LTD CIVIL SUIT 215 OF 1999** in which Hon. Justice Ojwang stated:-

“Yet plaintiff’s exhibit No. produced by the plaintiff shows the grant to have been made to the plaintiff jointly with another; and the two undertake to faithfully administer the estate according to law and to render true and just accounts. Compliance with the Act would dictate, counsel submitted, that “action taken by one in the absence of the other does not qualify the one taking the action as a personal or legal representative under the law”, and such is the import of s.81 of the Law of Succession Act(Cap.160).

.....the plaintiff cannot have a cause of action in the tort of negligence unless first she establishes her competence in law to sue; and learned Counsel Mr. Makoloo contended that she lacks competence. Although this point had not been raised as a preliminary objection, its validity beckons out clearly. Whereas the plaintiff sues in name of the estate of the deceased, there are two persons(including herself) who are joint-holders of the letters of administration for the estate. She fails to comply with terms of S.81 of the Law of Succession Act(Cap.160) when she purports to conduct alone the affairs of the estate, in the absence of any evidence that the second administrator is no longer alive.”

In this application no evidence was offered as to why the 2nd Administrator one Andrew Harule Bulyaar has not been joined in this suit and subsequent application. There is no disclosure on evidence as to whether the 2nd administrator is either outside Kenya and/or whether he is dead.

The application cannot stand and as such I find that no prima facie case has been established with probability of success. As the plaintiff’s application and/or suit stands now without amendment it has no chance of success for failure to have the suit brought in joint names of the administrators unless there is only one surviving administrator and for which this court finds that there was no evidence that the 2nd administrator was not alive or was out of the country.

The upshot of this application is that the same is found to be incompetent and is struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 30th DAY OF JULY, 2012.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. H. Gitonga for plaintiff/applicant
2. Mose Mose Milimo for defendant(absent)

J. A. MAKAU
JUDGE