



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 202 of 2011

MICHAEL KIMAIYO:.....PLAINTIFF

VERSUS

DAVID CHERUIYOT:.....DEFENDANT

RULING

This application is by the plaintiff against the defendant. It is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules. It seeks the following order:-

- 1) **That pending the hearing and determination of this suit proceedings in P & A Cause No. 152/2002 be stayed;**
- 2) **That there be order restraining the defendant from wasting alienating selling disposing transferring by transmission or otherwise interfering with the plaintiff's land measuring 6 acres pending, the hearing of this suit.**

The application is based on the grounds that the defendant has threatened to interfere with the plaintiff's occupation and use of **Kaptagat Settlement Scheme Plot No. 150** (hereinafter "the suit Land"); that the defendant has wasted the property by felling the plaintiff's trees; that the plaintiff's rights stand to be prejudiced if the grant of Letters of Administration in the succession cause are confirmed; that this suit will be rendered nugatory if the estate of **Cheruiyot** the deceased in the succession cause is distributed and that the defendant is in the process of alienating the suit land and does not recognize the plaintiff's interest.

The application is supported by an affidavit of the plaintiff sworn on 18th November, 2011. It is deposed in the affidavit, *inter alia*, that the plaintiff's late father, **Kimaiyo Samoei** and the defendant's late father, **Cheruiyot Kimaiyo**, were brothers who jointly acquired the suit land from Settlement Fund Trustees, that his late father then occupied a portion of the suit land on which he raised his family including the plaintiff and that after the demise of his father, the defendant filed the said succession cause without recognizing the plaintiff's interest.

The application is opposed and there is a replying affidavit sworn by the defendant. The gist of the defendant's response is that the suit land was not acquired jointly by their fathers; that there have been decisions of tribunals which have been successfully challenged by the defendant; that a stay of the succession proceedings will affect others who are not joined in this suit; that the plaintiff's late father never laid any claim over the suit land during his life time and that the plaintiff should pursue the property

of the estate of his late father.

When the application came up before me for hearing on 2nd May, 2012, counsel agreed to file written submissions which submissions were duly in place by 25th July, 2012. Those submissions reiterated the parties' positions taken in their respective affidavits.

I have considered the application and the submissions of counsel. Having done so, I take the following view of the matter:- In his plaint dated 18th November, 2011 the plaintiff seeks two main reliefs namely:-

(i) A declaration that the defendant holds Uasin Gishu/Kaptagat/150 in trust for the Estate of Kimaiyo Samoei.

(ii) A declaration that the plaintiff is entitled to 9 acres of all that land known as Uasin Gishu/Kaptagat/150 and that 7 acres be exercised and be transferred to the plaintiff.

The plaintiff has pleaded, in paragraph 3, that the suit land is registered in the name of the late **Cheruiyot Kimilot**. If the suit land is so registered, the reliefs sought by the plaintiff in his plaint, cannot be granted as the defendant does not hold the suit land at all in any capacity. The only way the defendant may be registered as proprietor of the suit land is by transmission vide the succession cause. Yet it is that succession cause which the plaintiff wants stayed. That means that if the proceedings in the succession cause are stayed the plaintiff's claim in this suit will remain in limbo as the suit property would remain registered in the name of the deceased. The eventual success of the plaintiff in this suit cannot therefore be rendered nugatory if this application is declined. Indeed, in my view, the plaintiff's claim will largely depend on the conclusion of the succession cause.

Besides, the succession cause involves more persons than just the defendant who would be affected by an order of stay yet they are not parties to these proceedings.

In the premises, the plaintiff's prayer for stay of proceedings of the succession cause is declined.

The plaintiff also prays for an order restraining the defendant from wasting alienating, selling, disposing transferring by transmission or otherwise interfering with the plaintiff's land comprising 6 acres, pending the hearing and determination of this suit. The material availed to the court indicate that both the plaintiff and the defendant are not the registered proprietors of the suit land. The same material further show that the plaintiff's claim is predicated on an alleged resulting trust first in favour of his deceased father and on his demise, in the plaintiff's favour.

That is the claim the plaintiff will have to establish, on a balance of probabilities at the trial of this suit. I have however already, on a *prima facie*, basis observed that the plaintiff's claim is unlikely to succeed given that the defendant is not the registered proprietor of the suit land. That being my view of the matter, the fate of the prayer for an interim injunction is sealed. I say so, because if the parent suit is unlikely to succeed, the plaintiff has accordingly failed to demonstrate a *prima facie* case with a probability of success at the trial. So, the plaintiff has not established the 1st pre-requisite for an interim prohibitory injunction as crystallized in the case of **Giella -Vs- Cassman Brown & Company Limited [1973] E.A 358.**

That is not however, the end of the road for the plaintiff. He is at liberty to revisit his claim once, the suit land or the portion he is interested in is registered in the name of a person with capacity to be sued.

In the end, I am not persuaded that any of the order sought in the application dated 18th November, 2012 is deserved. The application is dismissed.

Each party to bear his own costs of the application.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 18TH DAY OF SEPTEMBER, 2012.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Ayuma H/B for Ms. Mufutu for the Applicant and

Mr. Tarus for the Respondent.

**F. AZANGALALA
JUDGE**

18TH SEPTEMBER, 2012