



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 987 of 2012

NAOMI JELIMO KATAM.....PLAINTIFF

VS

RUTH KIPLAGAT.....DEFENDANT

(Application for injunction; principles to be applied in an application for injunction ; plaintiff widow to one David (deceased) ; deceased entitled to suit land by virtue of confirmed grant ; grant confirmed in 1998; claim by defendant that suit barred by limitation of time; defendant mother in law to plaintiff; alleged interference by defendant on possession of the plaintiff; applicant seeking defendant be restrained from further interference; applicant having filed suit without a grant of letters of administration but later obtained a grant ad litem; whether court has discretion to accept out of time; application for injunction allowed).

RULING

The application before me is the Motion dated 31 July 2012. It seeks the following orders :-

- (I) *That service of this application be dispensed with in the first instant.*
- (II) *That pending the hearing of this application inter partes there be temporary injunctive orders stopping the respondents actions of blocking the applicant from utilizing 85 acres from parcel of land No. L.R 4403/2 and farm implements being tractor Registration No. KUY 619 Ford 5600, Baldan planter from maize, Agro master planter for wheat, 3 disc plough Nardi and sprayer. And further temporary injunction and/or prohibiting any sales, transfer of that portion of 85 acres from the parcel of land No. LR 4403/2 and farm implements being tractor Registration No. KUY 619 Ford 5600, Baldan planter for maize, Agro master planter for wheat, 3 disc plough Nardi and sprayer.*
- (III) *That there be an injunction order for preservation of the above mentioned properties in terms of prayer (ii) above pending the hearing and determination of this application.*
- (IV) *That costs of this application be provided for.*

It would appear that the applicant failed to set out a prayer for an injunction pending the hearing and determination of this suit but I will regard the substance of the application as seeking such prayer.

This being an application for injunction I will follow the principles in the case of **Giella vs Cassman Brown (1973) EA 358**. First I need to be satisfied that the applicant has set out a prima facie case with a probability of success, secondly, consider that an injunction will not be normally granted if damages can be adequate remedy, and finally if in doubt decide the matter on a balance of convenience.

The suit herein was commenced by Plaintiff filed on the 16 August 2011. The defendant is the mother in law to the plaintiff, the plaintiff having been married to her son, one David Kiplagat (now deceased). It is the plaintiff's case that David Kiplagat inherited 85 acres of land out of the Estate of his late father, Changwony Kiplagat, in LR No. 4403/2. David Kiplagat died on 16.12.2010. It is the plaintiff's case that upon the demise of her husband, the defendant blocked her from utilizing their portion of 85 acres and for this reason she has been unable to undertake any meaningful agricultural exercise. She has in her suit sought for orders of permanent injunction to restrain the defendant from interfering with her portion of 85 acres. The plaintiff in her plaint described the defendant as administrator of the estate of Changwony Kiplagat.

Upon being served, the defendant duly entered appearance and filed defence on 16 September 2011. At paragraph 3, she has admitted that she is the administrator of the estate of Changwony Kiplagat but has denied being mother in law to the plaintiff. She has also denied that the plaintiff was married to her son David Kiplagat (Deceased). She denied ever interfering with her possession. Further she pleaded that the plaintiff has no capacity to bring this suit as she was not the administrator of the estate of David Kiplagat. In her Reply to Defence filed on 21 September 2011, the Plaintiff inter alia pleaded that her marriage to David was a matter within the province of the defendant. Nothing much seems to have transpired in the suit until this application was filed on 30 July 2012 which as I had stated earlier is an application for injunction.

The grounds upon which the application are founded are that the defendant has inter alia prevented the plaintiff from utilizing the 85 acres entitled to her late husband. Significantly as part of her grounds, the plaintiff has stated that she is the administratrix of the estate of David Kiplagat. To her application, she has annexed a limited letters of administration ad litem issued on 6 June 2012. Also annexed to the supporting affidavit is a copy of the Certificate of Confirmation of a Grant for the Estate of Changwony Kiplagat. The same shows that the Grant was confirmed on 2nd June 1998. In the distribution of the Estate of Changwony Kiplagat, the Grant provides that David Kiplagat was to inherit 85 acres out of LR NO.4403/2, 3.1 acres out of Mosop Cherorget/50, and a Combine Harvester Reg. No.KZE 491 to be owned jointly with Peres J. Kiplagat and Everlyne Jepchirchir. The applicant further annexed a Certificate of Marriage indicating that she got married to the deceased on 6 December 2007 under the Marriage Act (CAP 150) at the District Commissioner's office Uasin Gishu District and a letter from her chief confirming that she is indeed the wife of David Kiplagat and that they had two issues aged 10 years and 7 years as at April 2012.

Mr. A.K. Mutai, learned counsel for the plaintiff took me through the application, the supporting affidavit and the Plaint, and urged me to allow the application for injunction. He stated that as wife to David Kiplagat (Deceased), the plaintiff is entitled to occupy and enjoy the land that was inherited by her late husband. That she and her family are entitled to enjoy the same without interference by her mother in law, the Defendant. He averred that if the orders of injunction are not granted, the applicant and her children will be unable to utilize their portion of 85 acres and will suffer irreparably as it is their only source of livelihood. He relied on the case of ***Re Estate of George M'Mboroki Meru Succession Cause no. 537 of 2004 (unreported)*** to support his case.

On the other hand, Mr. Nyambegera, learned counsel for the respondent urged me to dismiss the application. He first stated that the defendant has been wrongly sued as she is not the administrator of the Estate of Changwony Kiplagat and that the correct person/s to sue are the administrators of the said estate. He also argued that the plaintiff has no locus in this suit as the letters of administration ad litem that she holds were issued after the filing of the present suit. He has argued that the plaintiff ought to have withdrawn this suit and filed a new one after obtaining the grant of letters ad litem. It was his argument that the grant ad litem was improperly issued as it ought to have been issued to the applicant jointly with another person as the applicant has minors. He also argued that so far, the land in question has not been subdivided and that the portions of the beneficiaries of the estate of Changwony Kiplagat have not yet been ascertained. He stressed that the plaintiff has not been truthful on what was inherited by David Kiplagat as she has added other assets not distributed to David. Mr. Nyambegera in his written submissions also argued that the plaintiff's claim was barred by limitation as the grant was confirmed on 2 June 1998 and cannot therefore be enforced 14 years down the line. He argued that under Section 4(4)

of the Limitation of Actions Act, (CAP 22), an action on a judgement is time barred after 12 years and referred me to the authority in **Civil Appeal No. 2 of 1980, Malakwen arap Maswai vs Paul Kosgei (unreported)**. He urged me to dismiss the application.

As I stated earlier, this being an application for injunction I will follow the principles in **Giella vs Cassman Brown**. I also need to be alive to the principle that the purpose of an injunction is to preserve the subject matter of the suit pending the full hearing on merits.

To determine whether one has established a prima facie case, the applicant's case cannot be taken in isolation and must be gauged against the case of the respondent.

The plaintiff's case is fairly simple. That her husband inherited inter alia 85 acres of the suit land from his late father and that the defendant has been interfering with her occupation of this portion. The respondent has raised the issue that this suit must fail as the plaintiff has no locus to file it having obtained the grant of letters of administration ad litem on 16 June 2012 yet this suit was filed on 16 August 2011. This is a valid argument. However, a careful look at the Complaint reveals that the plaintiff filed suit in her own capacity and not as Administrator of the estate of David Kiplagat. It appears that to buttress her position, she later sought a grant of letters of administration ad litem of the Estate of David Kiplagat. It is now not clear whether she intends that this suit should be deemed as a suit to preserve the estate of David Kiplagat or whether she is still suing in her own capacity. Strictly, if she is suing on behalf of the Estate of David Kiplagat, she ought first to have obtained a grant of letters of administration before the filing of the suit. This is an anomaly which ordinarily would entitle the court to strike out the suit, but given the circumstances of this case, I hesitate to strike out the suit on this argument. First if the plaintiff is suing in her own capacity I cannot strike out the suit on the basis that she does not hold a valid grant of letters of administration. Secondly, if the intention was to sue on behalf of the Estate of David Kiplagat, I feel that it would be harsh to have this suit struck out and for the plaintiff to file a fresh suit when she has cured her incapacity to sue on behalf of the estate of the deceased. This will cause unnecessary hardship on the part of the applicant. I think the court has discretion depending on the nature and circumstances of the matter to cure such anomaly on the strength of the provisions of Article 159 (d) of the Constitution. For the special circumstances of this case I will utilize the discretion given to me by Article 159 (d) of the Constitution. I will therefore allow the Complaint to stand irrespective of whether the suit is filed by the plaintiff in her own capacity or in the capacity of administratrix ad litem of the estate of David Kiplagat.

On the argument that the right to enforce the order of confirmation of grant has lapsed by time, I think this suit is not for the enforcement of the confirmed Grant issued in 1998. This is not an action on the judgement of the court in the succession cause but an action founded on trespass which trespass occurred in the year 2011-2012 and which has not been overtaken by time. I would still doubt that the grant as confirmed is not enforceable after 12 years as that is what disposed of with finality the distribution of the estate of the late Changwony. It is probably a variation of that grant after 12 years that would be barred by limitation. This suit in my view is not barred by limitation of time.

Mr. Nyambegera also argued that the defendant was not the right person to be sued but that it is the administrators who ought to have been sued. I think this is not a suit against the administrators of the estate of Changwony but a suit of unlawful interference by the defendant. The plaintiff has no gripe with the administrators of the estate of Changwony but with the individual interference of the defendant in the portion bequeathed to David Kiplagat. There would therefore be no cause of action against the administrators but the cause of action is personal against the person interfering.

So has the plaintiff set out a prima facie case? I think she has. As the legal wife to the deceased, the plaintiff has the first right of occupation of the property of her late husband to the exclusion of all others. She can defend this right in her own personal capacity. She also has a right, nay a duty, to preserve the said property for the estate and potential beneficiaries of her deceased husband. The defendant in my view has not demonstrated that she has an equal right to occupation and possession of the property bequeathed to David Kiplagat. She has indeed not set up any competing claim in the form of a counterclaim. In her Replying Affidavit, the respondent has stated that the applicant has attempted to sell the portion of 85 acres but due to her intervention she abandoned the transactions. I do not think that the plaintiff as she

stands has capacity to sell any of the property of David Kiplagat and any person purchasing cannot have good title. The plaintiff's actions however do not call for interference with her occupation. On this score, I am of the view that the plaintiff has laid out a prima facie case against the defendant with a probability of success. In his submissions, Mr. Nyambegera stated that the defendant has not interfered in the portion of 85 acres bequeathed to David Kiplagat. If that is so, then I am sure she has no problem with the injunction being issued. If I am wrong on whether or not the plaintiff has set out a prima facie case I am allowed to decide the application on a balance of convenience. The balance of convenience in my view favours the plaintiff. She has been in occupation and use of the 85 acres bequeathed to her husband. Should I disturb this possession in favour of the defendant? I do not think so as this will disturb the balance created in the suit land which is fairly expansive.

It will be noticed that in her application, the plaintiff also sought orders to restrain the defendant from blocking the applicant from utilizing a tractor Registration No. KUY 619 Ford 5600, Baldan planter for maize, Agro master planter for wheat, 3 disc plough Nardi and sprayer and also an injunction to restrain these implements from being sold. I do not think that I have jurisdiction to grant or refuse these prayers as they do not touch on land. But even if I had jurisdiction, I would not grant these prayers as the plaintiff has not demonstrated the basis upon which she claims the same. These movables are not part of the assets bequeathed to David Kiplagat and the plaintiff has not shown that they are properties belonging to David or to herself by any other mode of acquisition. The respondent has deponed that the tractor KUY 619 was owned by David but that she is the one who bought the tractor in 1990 from R. M Patel and Partners. She has deponed that it is used by all family members for farming activities. Without deciding the point, and without making any specific order, it may be prudent for the parties herein to negotiate on its use. On the other implements, the respondent has stated that they belong to her and they have always been in her possession and used by the entire family members. If this is so, then again the parties can enter into negotiations on their use but I refrain from making any specific order on the same.

In light of the above, I issue the following orders.

1. That pending the hearing of this suit, the defendant be and is hereby restrained from interfering with the portion of 85 acres bequeathed to David Kiplagat in LR No.4403/2 .
2. That costs of this application be awarded to the applicant.

Finally, I must state that I have reached the above decision with a fairly heavy heart. The parties herein are daughter and mother in law. It does not augur well for them to be clashing with each other. I encourage them to sit together, negotiate, and agree on how to live together as a family. It does not benefit anyone to be at loggerheads with the other family members . It is best if the two parties herein put to rest whatever differences they have between them. I hope that my sentiments will ignite the ambers of reconciliation. Indeed it is my hope that it will not be necessary to hear this suit on merits. Of course I will have to hear it if need be but it is a task that I wish the parties will lift from my shoulders.

DATED AND DELIVERED THIS 18TH DAY OF DECEMBER 2012

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in open court in the presence of

J.M. Alwanga holding brief for R.K. Limo of M/s Limo R.K & Co Advocates for the plaintiff/ applicant.

Miss Z.K. Maroko holding brief for M/s Nyambegera & Co for the defendant/respondent.