



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 473 OF 2009
IN THE MATTER OF THE ESTATE OF JOSEPH KAARIA NGEERA(DECEASED)

ERICK KINYUA NGEERAPETITIONER/RESPONDENT

VERSUS

VALLEY DEVELOPMENT LIMITEDRESPONDENT/APPLICANT

R U L I N G

The Chamber Summons dated 17th January, 2011 Erick Kinyua Ngeera who describes himself as the Petitioner/applicant, seeks the following orders:-

- “1. This application be heard ex-parte in 1st instance and service of the same be dispensed with in the 1st instance.***
- 2. The Hon. Court be pleased to issue an order restraining the respondent herein, its directors, agents, servants, employees and/or any other person connected therein from entering, alienating, fencing, utilizing, and/or interfering with land parcel No. NYAKI/CHUGU/504 now illegally and fraudulently subdivided into NYAKI/CHUGU/811 until the hearing and final determination of this cause or until further orders of this court.***
- 3. The court do issue further orders that may meet the ends of justice in this matter.***
- 4. Costs of this application be provided for”.***

The Chamber summons purports to be brought under the provisions of Rule 49 and 73 of The Probate and Administrative Rules Cap.160 Laws of Kenya.

Rule 49 and 73 of The Probate and Administration Rules provides:-

RULE 49 of The Probate and Administration Rules:-

“A person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit”.

RULE 73 of The Probate and Administrative Rules:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders or may be necessary for the ends of justice to prevent abuse of

the process of the court”.

The Chamber Summons is based on grounds listed in the Chamber Summons and dated 17th January, 2011. The grounds in support of the Chamber Summons are stated as follows:-

“(i) This applicant is the administrator of the estate of Joseph Kaaria Ngeera having been issued with a grant herein.

(ii) The respondent who is a stranger to the estate wants to enter the suit land by force”.

In the supportive affidavit dated 17th January, 2011 he states, Joseph Kaaria Ngeera died on 19th March, 2000 at Miriga Mieru East Division and attached copy of death Certificate marked “EKWI”. That the deceased died intestate and was survived by sons and daughters as per paragraph 5 of petitioners affidavit dated 17/1/2004 and left NYAKI/CHUGU/504, the property in dispute in this application amongst three parcels of lands being, Mbeu Swamp scheme No.85; plot NYAKI/MUNITHU/22B AND EX-LEWA Settlement Scheme/527.

That his deceased brother Elvis Mugambi Ngeera was married to one Florence Tatu Amimu, sister in law, to the petitioner/applicant herein. That Florence Tatu Amimu and applicant’s brother Patrick Kithinji petitioned for a limited grant under H.C Succ. 1642/2008(Nairobi) alleging she wanted to sue the bank to prevent the said bank from selling land parcel No. NYAKI/CHUGU/504 which had been charged by applicant’s mother to service a loan.

The application for issuing letters of administration *ad litem* is annexed and marked as EKW 2(a) and Limited grant of letters of administration *ad litem* annexed and marked EKW 2(b). The applicant further states that the sister –in-law and his brother managed to transfer to themselves and another person by the name Valley Development Limited the suit premises. The company herein alleged to have purchased the said land. The applicant has annexed EKW 3(a), (b), and (c), being title deed, consent and application for Land Control Board.

That the purchaser attempted to enter into the land parcel No. NYAKI/CHUGU/504 by force. Applicant in his affidavit avers that Florence Tatu and Patrick Kithinji never consulted other beneficiaries of the deceased when they purported to sell the deceased land and had they done so the applicant and others would not have agreed.

That Florence Tatu Amimu and Patrick Kithinji disappeared to Nairobi after committing the said fraud. He further stated under paragraph 17 of his affidavit that he needed limited grant to enable him file an application for restraining orders against the alleged purchaser as land parcel No. NYAKI/CHUGU/504 forms part of the estate of the deceased one Joseph Kaaria Ngeera. He further stated that the deceased estate has never been distributed as this is the only succession cause pending and intended for that distribution and that he doesn’t know how the respondent and the sister – in-law and his brother sold the land to the respondent and managed to have sub-division and a portion transferred to the respondent. He stated under paragraph 17 of his affidavit that the respondent must have committed fraud.

On 31/01/2011 the respondent filed a lengthy Replying Affidavit stating under Paragraph 3 of its affidavit that in May, 2009 the respondent entered into sale agreement with one Florence Tatu Amimu for the sale of the parcel of land being NYAKI/CHUGU/811. The respondent stated that he exercised due diligence and a search at Meru Lands Registry revealed that Florence Tatu Amimu was the sole registered proprietor (annexture VDLI) of the land. He annexed to his affidavit a copy of the title showing her as the registered proprietor. That therefore consent to transfer the land to the respondent was applied for and granted; which the company annexed to the affidavit as “VDL2”.

The respondent stated that the parcel of land was transferred to her as per annexture “VDL3”. That the respondent claimed to have taken possession of the suit premises and fenced it using chain link wire and planted various crops. The respondent claimed to have taken possession of such premises in September, 2009.

The respondent under paragraph 10 of its affidavit stated that as it is already on the suit plot it cannot be enjoined from entering, fencing, and developing the land as this would amount to evicting the respondent. It is claimed that the applicant has misled the court by concealing vital facts of the respondents; occupation of the suit land.

The respondent states if there was any fraud as concerns title number NYAKI/CHUGU/504 which the respondent has denied the respondent was not party to it and is completely unknown to it. It further stated title NYAKI/CHUGU/504 has not been annexed to the applicant's application and particulars of the alleged fraud have not been tabulated in the application. The respondent claims to be an innocent purchaser for value consideration. The company further averred that all documents in Meru Land Registry were in the seller's name and there was neither a caveat nor caution to warn the respondent of any dispute if any existed. The respondent further states the applicant has acted in bad faith in bringing up this application as he has always been aware that title in the suit plot passed to the respondent way back in 2009. It is further averred if there was any fraud the applicant ought to have sued his brother Patrick Kithinji Ngeera and sister-in-law Florence Tatu Amimu. The respondent under paragraph 16 of its affidavit stated that it purchased the suit land from the Florence Tatu Amimu and has no privity of contract with the applicant. The respondent referred to paragraph 21 of its affidavit and averred the applicant has made this application with unclean hands due to non disclosure of vital material facts concerning the history of the land (Title No. NYAKI/CHUGU/504). The respondent further averred that the applicant do not live on the respondent's land. The respondent further under paragraph 24 of its affidavit averred that the suit premises was sold by the bank from which title No. NYAKI/CHUGU/811 was excised/Sub-divided from, and to which applicant is said to have no claim in this succession cause.

The applicant filed further supporting affidavit dated 4th February, 2011, and in his further affidavit denied that the respondent is in possession of the disputed land as when he tried to take possession the applicant claim to have repulsed him using force. The respondent then caused the applicant to be arrested in June, 2010 and locked at Chugu Police post and thereafter released without any charges being preferred against him and that is the time the respondent started fencing this land but has not taken possession since then.

The applicant stated the respondent does not live in Meru but Nairobi and only visits the land over a weekend in order to force possession. The applicant claims to be the one in possession. He further averred the land has not been sold by the bank and that the alleged vendors had only sought limited grant for the purposes of filing suit against the bank and not to sell the land. The applicant referred to application marked "EKWI" dated 15/7/2008 in which one Florence Tatu Amimu and Patrick Kithinji Ngeera sought the following orders:-

- 1. That I intend to file a civil suit in this Honourable court under provisions of the Law Reform Act(Cap.26) on behalf of the estate of the deceased.**
- 2. I present this petition in my capacity as DAUGHTER- IN-LAW and son of the deceased respectively.**
- 3. That a grant of administration ad litem do issue limited for the purposes of filing suit.**
- 4. That I have no powers to distribute an estate under this grant".**

The applicant under paragraph 8 of his affidavit dated 4th February, 2011 states that mysteriously that limited grant was confirmed and annexed "EKW2" being application dated 8th January, 2009 filed by the purported petitioners; Florence Tatu Amimu and Patrick Kithinji Ngeera for orders:-

- 1). That the grant of probate(or letters of administration intestate made to the said Florence Tatu Amimu and Patrick Kithinji Ngeera in this matter on 30th July, 2008 be confirmed.**
- 2). That the costs of this application be costs in the cause".**

The applicant under paragraph 10 of the further supporting affidavit avers that his advocate has advised him that in the High Court file No.1642 of 2008(Nairobi) there is no order for confirmation as the last

order on the file cover is that of limited grant above-mentioned and that he cannot apply to revoke that which does not exist. Applicant therefore challenged the vendor's powers to distribute the estate under the limited grant. The applicant admitted that NYAKI/CHUGU/504 in which he lives has been sub-divided to bear NYAKI/CHUGU/811 and NYAKI/CHUGU/812. The new titles are annexed and marked as EKW3. The applicant further stated that he has been pursuing limited grant so as to sue the alleged vendors. The applicant under paragraph 15 of his further affidavit stated that he has disclosed everything and that respondent is not an innocent purchaser for value as he had initially explained to the respondent that land did not belong to the vendors but he ignored. The applicant under paragraph 16 of his further affidavit averred that the respondent has not been to the land since 12th December, 2010.

Whilst the purported petitioner/respondent's application dated 17th January, 2011 was pending, the respondent/applicant filed application on 19/09/2011 dated 19th September, 2011. That on 19th September, 2011 my sister Lady Justice Kasango directed that both Notice of motion dated 19th September, 2011 and Chamber summons dated 17th January, 2011 be heard together on 19th October, 2011.

The Notice Motion brought by respondent/applicant under Section 3A of the Civil Procedure Act, and all enabling provisions of the law seeks the following orders:-

“ 1. That the Honourable court grants leave to the respondent/applicant; Valley Development Limited to institute contempt proceedings as against the petitioner/respondent Erick Kinyua Ngeera.

2). That this Honourable court be pleased to issue orders for the arrest and detention of the petitioner/respondent Erick Kinyua Ngeera in prison for a term not exceeding six(6) months for contempt of court.

3). That in the alternative, the Honourable court be pleased to order the petitioner/respondent Erick Kinyua Ngeera's moveable properties to be attached forthwith for disobeying the court's order of maintenance of status quo issued on 12th April, 2011.

4). That the petitioner/respondent Erick Kinyua Ngeera do pay the costs of this application”.

The respondent/Applicant's motion is based on grounds tabulated in the Notice of Motion and Supporting Affidavit. The respondent/applicant states that the respondent/applicant purchased suit land from the beneficiaries after a confirmed grant and took possession. That the petitioner/respondent made an application to court for an injunction and the court issued orders of status quo on 12th April, 2011. That the petitioner has contravened court's orders by destroying the applicant's fence, trees and is in process of leasing the suit land to a third party. That orders of status quo given by Honourable court meant that the applicant remains in occupation until the court decides the matter. That petitioner/applicant interference with suit premises is a total disobedience of Honourable court. That the petitioner/applicant has adamantly refused to obey the court orders of status quo issued on 12th April, 2011. That petitioner continues to claim the suit property and has and is still threatening, trespassing and constructing on the applicant's land thereby interfering with respondent/applicant quiet enjoyment of the suit land. The respondent further stated that the power and authority of the court is being undermined by the petitioner/applicant in outright defiance of the court order.

The respondent/applicant in his affidavit dated 19th September, has repeated the grounds in the body of the Notice of Motion dated 19th September, 2011 and by his affidavit added that it purchased suit land from Florence Tatu Amimu being her late husband's share of the estate. It further stated that the said Florence Tatu Amimu and Joseph Kaari Ngeera obtained Limited grant to the estate of the deceased and that on 5th March, 2009 obtained certificate of confirmation of grant in Administration cause NO.1642 of 2008 at Nairobi and annexed copy of the full proceedings and certificate of confirmation of a grant marked “MMI” . That the limited grant issued was duly confirmed on 5th March, 2009, copy of Limited grant marked “IMM2”. That it is further stated that petitioner cannot purport to ignore the confirmed

grant issued by a court of competent jurisdiction and take out another concurrent grant. That under paragraph 7 of the respondent/applicant affidavit it is purported that in the confirmed grant Florence Tatu Amimu got 1.646 Hectares of land out of which the respondent/applicant only purchased a small portion of 0.809 Hectares. That the petitioner/applicant should sort out any problems he has with his sister-in-law and not involve the respondent/applicant. The respondent/applicant claimed to be an innocent purchaser of suit premises. He further averred the petitioner/applicant has no *loci standi* to bring forth this application as he obtained second limited grant when there was an earlier grant taken out by Florence Tatu Amimu and Patrick Kithinji Ngeera. That its trite law that numerous grants cannot be issued to subsequent applicant's while an earlier one that has been confirmed still subsists.

That the respondent/applicant has annexed purported photograph of the suit land marked "IMM3", "IMM4", "IMM5" and "IMM6" to show interference with suit premises by the petitioner/applicant.

The petitioner filed a Replying Affidavit dated 29th September. The petitioner/applicant denied there being any order issued against him on 12th April, 2011 and the order issued was for him to prevent the respondent from entering the suit premises. The applicant further stated that the documents annexed by respondent are a fabrication as no agreement could have been entered into in May, 2009 when vendor did not have a title to the said land until she forged one in September, 2009. The petitioner further stated that his advocate has advised him limited grant is never confirmed but is issued for a specific purpose. The petitioner/applicant denied being in contempt of an order in his favour. The applicant denied having destroyed the fence and trees indicated in the annexed in some blurred photographs. The petitioner denied having met and threatened the respondent. The applicant under paragraph 20 of his affidavit has stated that all throughout the respondent has never annexed any copy of the agreement between itself and the vendors.

The respondent's application dated 19th September, 2011 is challenged as being grossly, incompetent, bad in law and intended to prevent petitioner's earlier application.

Miss Mwangi Advocate in support of the petitioner/applicant's application repeated more or less; the averments in the affidavits of the petitioner/applicant, which I have elaborated at great length herein-above. The counsel highlighted on a few points; pointing out that limited grant in 1642/2008(Nairobi) was for the purposes of filing suit to restrain Bank from selling land L. R. No. NYAKI/CHUGU/504 now subdivided into NYAKI/CHUGU/811 and 812. That instead of filing suit the limited grant was confirmed and part of land sold to the respondent. Counsel averred the sale was void *ab initio*.

The counsel further argued the court could not be asked to confirm illegal contract and that limited grant cannot be confirmed. That application for confirmation of grant did not mention land NYAKI/CHUGU/504. That respondent claims he bought share from 504 which was subdivided into 811 and 812.

Respondent claimed to have bought Nyaki/Chugu/ 811. The counsel referred court to Section 54 of the Law of Succession Act which provides;-

" A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in fifth schedule".

The counsel also referred to S.55 of the Law of Succession Act which provides:-

" No grant of representation whether or not limited in its terms, shall confirm power to distribute any capital assets constituting a net estate or to make any subdivision of property unless and until the grant has been confirmed as provided by Section 71....."

and submitted that no limited grant can be used to distribute an estate of a deceased person. The counsel further submitted that under Section 67 of the Law of Succession Limited Grant is granted for the purposes of collection and preservation of estate of the deceased and cannot be used to confirm title on a beneficiary. The said Section 67 of the Law of Section Act provides:-

“1. No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objection thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.’

2. A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs”

The counsel stated the correct procedure would be in a situation in which Temporary Grant is issued in a succession cause, followed by an application for confirmation of grant, which court would issue if there is no objection. The court, counsel submitted, purported to confirm a limited grant to Florence Tatu who purported to use the limited grant to sell and transfer title.

The counsel further submitted that Section 76 of the Law of Succession Act the court has power to revoke or annul a grant of representation whether an application has been made or not; once court finds fraud has been committed in obtaining the grant.

The counsel faulted the respondent’s affidavit dated 31st January, 2011 in which under paragraph 21 the respondent by claimed the land was sold by bank for failure of the applicant to pay loan, yet the respondent under paragraph 16 of his affidavit he claimed to have purchased the land from Florence Tatu Amimu.

The petitioner/applicant counsel further stated that the petitioner/applicant has *loci stardi* to take action in this matter for he has limited grant. She reiterated document issued by my sister Lady Justice J. Gacheche cannot be a confirmed grant. The counsel averred there is nothing to protest against as the document is not genuine. Counsel stated that purchaser is not innocent purchaser for value as per affidavit dated 29th September, 2011 under paragraphs 14, 15 and 16.

The learned counsel for the respondent/applicant M/S Betty Rashid relied on affidavits filed on behalf of the respondent company and elaborated the ground relied upon in her submission during the hearing of the respondent’s application and in opposing the petitioner/applicant’s application.

The respondent’s counsel stated petitioner in his affidavit under paragraph 8 mentioned of the family desire to have limited grant in which his sister-in-law and his brother alleged they wanted limited grant to sue the bank to prevent it from selling land No. NYAKI/CHUGU/504.

The counsel in her submissions stated that limited grant was confirmed giving certain portion of land to petitioner/applicant’s sister-in-law. Annexure “FMMI” shows that Florence Tatu Amimu was allocated 1.646 Hectares together with the permanent building, Patrick Kithinji Ngeera, 0.823 hectares for himself and in trust for Erick Kinyua Ngeera in equal shares. The counsel asserted that the transfer was not based on limited grant and that the applicant and respondent are all indicated as beneficiaries.

It is conceded in the respondent’s counsel submission Florence Tatu Amimu sold 0.8 hectares leaving the rest of the land to herself and she now has 1.59 hectares in her name. The counsel for the respondent submitted that the respondent is an innocent purchaser for value. The counsel further submitted if the family has a problem they can settle the problem with Florence Tatu Amimu in respect of the remaining portion. The counsel stated further that as there was no caveat or caution to warn innocent purchaser and the purchaser having exercised due diligence the purchaser should be held to be an innocent purchaser for value consideration.

The respondent counsel stated that as there are two limited grant, one to Florence Tatu Amimu and another dated 20th December, 2010 issued to Erick Kinyua Ngeera, both limited grant of letters of Administration *ad litem* are over estate of Joseph Kaaria Ngeera and are granted for the purposes only of filing suit. The counsel submitted we cannot have two limited grant and the petitioner/applicant ought to have protested and not obtain another limited grant.

The counsel therefore submitted that the petitioner/applicant has no *loci standi* and application dated 17th January, 2011 should be dismissed. On application dated 19th September, 2011 the respondent/applicant sought leave to issue contempt proceedings. That the respondent counsel submitted that authorities relied upon by the petitioner can be distinguished. That vendor sold land on confirmed grant and not limited grant. The counsel relied on all affidavits filed on behalf of the respondent. The counsel without any elaboration stated that she was relying on Article 159(2) (d) of the Constitution which provides:-

“ 159(2) (d)

“ in exercising Judicial authority, the courts and tribunals shall be guided by the following principles:-

(d) Justice shall be administered without undue regard to procedural technicalities and.....”

The counsel in support of the application referred court to Section 93(1) of the Law of Succession Act which provides:-

“ 93(1) A transfer of any interest in immovable or movable property made to a purchaser or either before or after commencement of this Act by a person to whom representation has been granted shall be valid, not withstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act”.

It was further submitted by respondent's counsel the purchaser purchased the property confirmed in the grant and being property bank wanted to sell. It is further submitted that the grant cannot be invalidated for failure to join all parties and that the purchaser has no privity with the applicant. The counsel requested the court on its own motion to annul the second limited grant. It was further submitted the court is not sitting on appeal on its own ruling.

The application for contempt it was opposed on grounds that the order in question has not been extracted and served. The counsel referred court to several authorities which I will refer to later in my ruling. The application is challenged as counsel has not sought court's leave first before seeking orders in the same application.

The ruling in this matter concerns an application for interlocutory injunction and contempt of court. The subject matter of the suit and application is property known as NYAKI/CHUGU/504 now illegally and fraudulently subdivided into NYAKI/CHUGU/811. The application for interlocutory injunction is brought under Rule 49 and 73 of the Probate and Administration Rules Cap.168 Laws of Kenya.

The parties in this suit are intended petitioner of the estate of the late Joseph Kaaria Ngeera(deceased) and a purchaser of portion of land known as NYAKI/CHUGU/811 excised from NYAKI/CHUGU/504 part of the deceased estate. The purported petitioner Erick Kinyua Ngeera is one of the sons of the deceased Joseph Kaaria Ngeera(deceased). The suit property is an agricultural land. The purported petitioner's sister-in-law Florence Tatu Amimu and petitioner's brother Patrick Kithinji Ngeera obtained limited grant of letters of administration *ad litem* limited to the purposes only for filing suit on 30th July, 2008. The limited grant was said to be for filing suit against, undisclosed bank, to prevent the said bank from selling land parcel No. NYAKI/CHUGU/504 which had been charged by petitioners to secure a loan. That the said Florence Tatu Amimu and Patrick Kithinji Ngeera applied for confirmation of the limited grant on 8th January, 2009. That in scheme for distribution the parcel of land to be distributed was not shown. That the limited grant was confirmed on 5th March, 2009 in the Probate and Administration No. 1642 of 2008(Nrb) by Lady Justice Jeanne Gacheche over NYAKI/CHUGU/504 awarding Florence Tatu Amimu 1.646 hectares and Patrick Kithinji Ngeera 0.823 hectares for himself and in trust for Erick Kinyua Ngeera in equal shares.

Erick Kinyua Ngeera was not in attendance when order was made and no explanation for his non-attendance was given, but it was alleged he was in agreement with the distribution of the estate. That NYAKI/CHUGU/504 was subdivided into NYAKI/CHUGU/811 and 812. it is purported that Florence

sold NYAKI/CHUGU/811 sometimes in May, 2009. That consent of Land Control Board was applied for through application dated 11/09/2009 and granted on 3rd September, 2009. NYAKI/CHUGU/811 was on 24th September, 2009 registered in the name of Valley Development Limited. The purported petitioner repulsed the purchaser M/S Valley Development Limited by force when it attempted to take possession.

The respondent claims that he is an innocent purchaser for value and has title to the land and should be in possession to which the purported petitioner is opposed to.

The purported petitioner, petitioned for Letters of Administration, intestate on 2nd October, 2009 through HCSC. NO.473 of 2009 in the matter of estate of John Kaaria Ngeera. In form P & 5A under No.6 he has listed amongst the deceased estate plot No. NYAKI/CHUGU/504(which parcel was subdivided to NYAKI/CHUGU/811 and 811 and registered in the name of Valley Development Limited and Florence Tatu Amimu respectively).

I have perused the file and have noted that Section 67 of The Law of Succession requires that for grant of representation, other than a limited grant to be granted, there has to have been published notice of the application for the grant; inviting objections thereby to be made known to the court within a specified period of not less than thirty days from the date of the publication. The petitioners, petition has not been gazetted, as required under Rules 7 of The Probate and Administration Rules since filing.

The purported petitioner did not have grant of letters of administration of the deceased estate as he did pursue the gazetting of the grant after filing the same. The purported petitioner however obtained limited grant on 20th December, 2010 to the purposes only of filing suit. The limited grant issued to purported petitioner in HC. P & A 594 of 2010 at Meru has not been revoked and is valid for the purposes of bringing up suits to protect the deceased estate. I therefore hold the purported petitioner has *loci standi* in this matter.

The injunction application are provided for under Order 40 of Civil Procedure Rules. The Law of Succession Act has no provision for application for injunction as under Order 40 of Civil Procedure nor did the said Act have provision for granting injunction. Under Rule 63 of The Probate and Administration Rules the provisions of the Civil Procedure Rules which are applicable are orders V, X, XI, XV, XVII, XXV, XLIV and XLIX. Order 40 of Civil Procedure Rules being application, injunction orders cannot issue in a succession cause.

The applicant before me relies on The Probate and Administration Rules, rule 49 and 73. I have perused the said Rules and regret the same cannot be used for the purposes of issuing injunction orders in succession matter. In case I am found to be wrong in my holding, that injunction cannot issue in a succession case, I have now to proceed to consider the application on its own merits.

In an application for interlocutory nature the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction being a discretionary remedy it is granted on the basis of evidence and sound legal principles. In application of this nature care must be exercised to obviate infringing the jurisdiction of the trial Judge.

The tests for granting an interlocutory injunction are well settled. The principles are set out in case of **Giella – VS – Cassman Brown & Co.(1973) E.A 358**. The principles are that the applicant must establish a *prima facie* case with probability of success, show that he would suffer irreparable harm which cannot be adequately compensated by an award of damages and if court in doubt it should decide the application on the balance of convenience.

The jurisdiction of the court to grant Order under O.40 is specific. It cannot only be exercised where it is shown that the property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit or wrongfully sold in executing a decree.

There is no evidence before to show that there is any danger of suit property being sold in execution of decree(as the property in question was sold in 2009) and transferred. There is no further evidence of the

property being sold in the foreseeable future nor is there danger of it being wasted or damaged. The applicant instead of limiting his submission on the application before court dealt with a lot of matters not in issue before the court.

The counsel did not touch on the issue of there being prima facie case with reasonable probability of success. This principle I believe was important in this matter bearing in mind that the chamber summons dated 17th September, 2011 was not based on any pending substantive suit commenced in accordance with Civil Procedure Rules.

The purported petitioner on being issued with Limited Grant of letters of Administration Ad litem to file a suit he should have filed suit in accordance with Civil Procedure Rules. It was improper to bring Chamber Summons against the respondent in succession Cause No. 473 of 209.

In case of **Theuri VS – Law Society of Kenya(1988) KLR 334**; Court of Appeal in C.A.5 of 1985 went on to hold at P.337 to 338 :-

“ The grant of an interlocutory relief is an interim remedy and is normally sought during the pendency of a substantive suit. The law of this country is not deficient in providing the mode of which a civil suit may be commenced. Order 6 rule 1 provides in mandatory terms how such an action may be brought.

It says:-

“ Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed”.

Another method of seeking Judicial relief presented by the rules, is by originating summons under Order 36 in certain specified cases. The ambit of this order is not as wide as the requirement for a plaint.....it is clear to me that the method laid down by law for commencing that section is by plaint. If he did not bring a plaint, he could not have set on foot a competent action which he could base the claim for grant of interim relief”.

I find that the petitioner having failed to commence the suit as provided by Civil Procedure Rules the suit is incompetent and has no case with probability of success. That incase of injunction being refused, the petitioner wont suffer irreparable harm as he can be compensated by way of damages as all deceased’s estate has not completely been distributed.

Consequently, and on the basis of evidence before me, and the nature of the application brought under Rule 49 and 73 of The Probate and Administration Rules, I am constrained and driven to hold that this court cannot grant injunction orders in Succession Cause, however, court can during pendency of a succession matter grant preservation orders in the interest of justice.

In the event that I am wrong in the conclusions, I have arrived at above, the application fails for having been brought in this cause instead of HC. Part 1642 of 2008 which dealt with NYAKI/CHUGU/504 and confirmed the challenged limited grant. The issues concerning the confirmation of limited grant in HC. P& A 1642 of 2008, this court is of the opinion that though there might have been errors and /or omissions and overlooking the procedure in succession cause, the issues raised would best be dealt with in that cause but not this court. I am further unable to make any ruling on the issues raised concerning HC. P& A 1642 of 2008 as the matter before me is different and case file No.HC P& A 1642/2008 is not before me.

I would like to take this opportunity to point out that the application before me was for injunction and in it the learned advocates requested this court to make a number of orders including revoking or annulling limited grant of letters of administration *ad litem*, revoking and/or annulling confirmed grant, in P & A 1642 of 2008 which prayers have not been sought in the applications dated 17th January, 2011.

I have declined to be drawn into such issues and more so when the prayers sought , were sought from the

bar which were not issues on the record. In making such decision I am guided by decision of **Court of Appeal in Ole Nganai – VS – Arap Bor (1983) KLR 233** where Court of Appeal held that it was wrong for the judge to grant an order to the defendant which had not been asked for by that party.

In case of **Chalicha F.C.S Ltd – VS – Odhiambo & 9 others Civil Appeal No.27 of 1986** Court of Appeal held, that cases must be decided on the issues on the record. The court has no power to make an order, unless it is by consent, which is outside the pleadings. In this instance the issues raised by Judge and the other order therein was a nullity.

In my opinion the petitioner's counsel raised a number of issues, which raises triable issues and which issues can be dealt with in HC.P & A 1642/2008 and not in this application. I am of the opinion the petitioner should pursue the issue of revocation or annulment before HC. P& A 1642/08. The counsel may consider seeking preservation orders before the said court. The issue of whether limited grant can be confirmed or not should be canvassed before H.C. P & A 1642/2008 or the petitioner files suit to have title cancelled on alleged grounds of fraud.

The respondent/applicant moved this court through an application dated 19th September, 2011 pursuant to 3A of Civil Procedure Act for orders that court grants leave to the respondent to institute contempt proceedings against the petitioner, that court be pleased to order for arrest and detention of petitioner in prison for a term not exceeding six(6) months for contempt of court, in the alternative court order petitioners moveable properties to be attached forthwith for disobeying the courts order of maintenance of status quo issued on 12th April, 2011 and that petitioner do pay costs. The supportive affidavit is dated 19th September, 2011. the respondent/applicant has not attached any extracted decree nor affidavit of service to the affidavit in support.

The court's jurisdiction to punish for contempt is invoked as provided under Section 5 of the Judicature Act which provides:-

“ 5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power to upholding the authority and dignity of subordinate courts”.

The application before me is brought under S.3A of the Civil Procedure Act which provides:-

“ 3A.... Nothing in this Act shall limit or otherwise affect the inherent power of the court to make orders as may be necessary for ends of justice or to prevent abuse of the process of the court”.

My opinion from the provision of Section 3A is that in case of contempt of court, Section 3A is not applicable and one has to rely on Section 5 of The Judicature Act.

In cases of breach of court's order under Order 40 Rule 3(1) of Civil Procedure Rules it is provided:-

“ 3(1) in cases of disobedience, or of breach of any such terms the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime he directs his release”.

It seems to me from the above quoted Order 40 Rule 3(1) of Civil Procedure Rules that once a complaint of disobedience or of breach is before the court which had granted an injunction, the court can properly proceed to hear and deal with the complaint on affidavit or any other evidence and determine the matter and may, issue an order for detention of the person guilty of disobedience or breach or make an order for determination.

The respondent alleges the order said to be disobeyed is of this court and was made on 12th April, 2011. I

am therefore of the view that no leave of this court is necessary before the case of disobedience or of breach can be listed before court granting the injunction.

The application for contempt has been opposed on ground that leave was not granted. That the application is misconceived and bad in law for no order was made in favor of the applicant.

I have perused the court record and have found that on 19th January, 2011 my sister Lady Justice Kasango on being moved by counsel for the petitioner the court granted interim injunction orders against the respondent/applicant. That on 12th April, 2011 it was the interim orders that were extended. The respondent did not obtain any order on 12th April, 2011 against the petitioner/applicant. The respondent has not extracted and annexed any order to the application.

The petitioner/applicant counsel has referred me to the case of **Victoria Pumps Ltd – VS – Kenya Ports Authority & 4 others(2002) 1 KLR 708.**

This is a judgment of Otieno J, as he then was, suffice it to point out straightaway there being a High Court decision it is not binding on my court, however, it provides a very useful guide. Otieno J on page 715 said:-

“The next aspect I want to consider is whether there was any personal services as required by law. It is not in dispute that the law in such a case as this where a party is seeking committal to civil jail against the other party on grounds that the order delivered by court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must also have a penal notice appended to it”.

I have also have been referred to case of **Kaberia M’Kuchiana – Vs – Peter Kamanja HCCA No. 103 of 2003(Meru).** This is a judgment by J. Anyara Emukule,J in which he held that an order for contempt to be served personally on person against whom committal is sought with notice of penal consequences.

The petitioner counsel also referred me to the case of:- **Nyamondi Ochieng-Nyamogo Michael S. Gachamu Njeru – Vs – Kenya Posts & Telecommunications Corporation C.A No. NAI 264 of 1993(NAI.264 of 1993(NAI 114/93 U.R)** Court of Appeal on Page 13 states:-

“ The consequences of a finding of disobedience being penal, the party who calls upon the court to make such a finding, must show that he has himself complied strictly with the procedural requirement and his failure to so comply cannot be answered by merely saying that the other side was aware or ought to have been aware of what the order required him to do”.

Having gone through the **Victoria Pumps Ltd & Another – Vs- Kenya Power Authority Ltd and 4 others & Kaberia M’Kuchiana – Vs – Peter Kamanja** I find myself guided by the said decisions and I am in agreement with the same. I have also considered the case of **Nyamondi Ochieng, Nyamogo,Michael S. Gachau Njeru – Vs – Kenya Posts & Telecommunications Corporation,** which is binding upon this court and note the applicant in this application for contempt has failed to extract the order,(if any), has failed to serve the order and failed to exhibit any evidence of existence of any order. In actual fact the court record is clear that no order was made as purported against the petitioner and as such no order could be served and or disobeyed.

The respondent’s application is otherwise an abuse of court process. I have gone through the chamber summons asking for an injunction which is an interim remedy and is normally sought during the pendency of a substantive suit commenced in accordance with Civil Procedure Rules.

I find the chamber summons to be incompetent and wanting. I am therefore left with no alternative but to dismiss the petitioner’s chamber summons dated 17th January, 2011 with costs to the respondent/applicant.

The respondent/applicants application dated 19th September, 2011 was filed in spite of there being no order in favour of the respondent as alleged. The respondent did not bother to extract the order nor bother to serve any. There was no order that petitioner disobeyed. The application was filed to prevent early disposal of the earlier application. I find this application to be an abuse of court process. I shall proceed therefore to dismiss the respondent/applicants application with costs to petitioner/applicant at higher scale.

DATED AND DELIVERED AT MERU THIS 19th DAY OF DECEMBER, 2011

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

- 1. Miss Mwangi for applicant**
- 2. M. Kariuki for Betty Rashid for respondent**

J. A. MAKAU
JUDGE