



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

LAND CASE NO. 49 OF 2020

REUBEN ROTICH CHELUGO.....PLAINTIFF/APPLICANT

VERSUS

JERUGUT BOWEN & KENNETH KIPSIR BOWEN

Sued as the Administrators of the estate of the late)

WILSON ROTICH -DCD.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application by the plaintiff respondent dated 1st September 2020 seeking for the following orders:

- a) Spent
- b) THAT the Respondents by themselves , servants, and/or agents be restrained by means of a temporary injunction from dealing, interfering, alienating, selling and/or otherwise disposing of the 14 acres from the suit property being Land parcel Number LR NO.BARINGO/KEWAMOI "A' 2220 measuring 28 or thereabouts(hereinafter referred to as the suit property) originally known as Baringo /Kewamoi "A" 1003 situate in Baringo County within the Republic of Kenya pending hearing and determination of this application interparties and subsequently pending hearing and determination of this suit.
- c) THAT the O.C.S. KABARNET Police Station be directed to oversee compliance of this order.
- d) THAT costs of this application be provided for.

The applicant was granted temporary orders of injunction and counsel agreed to canvass the application vide written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

It is the applicant's case that he is the legal beneficial and/ or equitable owner of 14 acres portion thereof from that piece of land known as Land parcel No. **L.R NO. Baringo/ Kewamoi "A" 2220** measuring 28 acres or thereabouts originally known as **Baringo/Kewamoi "A" 1003** held in trust by the late Wilson Rotich.

The applicant averred that the late Wilson Rotich was registered as the owner in trust for him after he made direct monetary contribution towards the purchase of the suit property and thus he has proprietary interest through constructive trust.

The applicant further stated that the defendants are the administrators of the estate of the late Wilson Rotich who have colluded and illegally in breach of trust fraudulently caused 14 acres belonging to the applicant to be listed as properties belonging to the late Wilson Rotich in **Eldoret Succession Cause No. 69 of 2014** with a view of dispossessing him.

Counsel relied on the **Giella Casman Brown** case on injunctions and urged the court to find that the applicant has established a prima facie case on the grounds that he is the legal beneficial and/or equitable owner of 14 acres of the suit land.

It was further counsel's submissions that the late Wilson Rotich was registered as an owner of the suit land in trust for the applicant as he had made direct monetary contributions. That the respondents had filed Eldoret Succession Cause No.69 of 2014 and included the suit land as one of the assets to be administered in order to disposes the applicant and that the Environment and land Court has the jurisdiction to handle this dispute.

On the second limb as to whether the applicant will suffer irreparable harm, Counsel relied on the case of **FRANCIS GITHINJI KAROBIA v STEPHEN KAGENI GITAU Civil Case No 53 of 2005 (Unreported)** where the court stated that:

This court notes that land being unique in nature and character, damages in certain instances would not constitute an adequate remedy

Counsel submitted that the applicant will suffer irreparable harm if the orders sought are not granted and urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

The respondents opposed the application vide a replying affidavit which was very elaborate detailing the Succession Cause, the affidavits filed, the rulings delivered dismissing the application by the applicant for annulment of grant on the ground that the applicant did not establish any interest, the Land Registrar's ruling on the removal of caution lodged by the applicant on the ground that he is not a beneficiary, the case filed by the applicant being Eldoret E& L Case No 283 of 2013 where an order of injunction was granted.

Counsel submitted that the above scenario demonstrates that the applicant has not established a prima facie case against the respondent and that the balance of convenience tilts in favour of allowing the respondents to execute the orders issued in the Probate and Administration Cause which the applicant attempted unsuccessfully to set aside. That the applicant cannot seek to set aside the orders of another court with equal jurisdiction.

Counsel therefore urged the court to dismiss the application with costs to the respondents.

ANALYSIS AND DETERMINATION

I have considered the pleadings filed by the parties to this application in support of their respective opposing positions. I have also considered the rival submissions filed in court and come to the conclusion that the issue for determination is whether the plaintiff/applicant has laid sufficient basis for grant of an injunction.

The principles to be considered in determining whether or not to grant an injunction are as was laid down in the case of **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

*"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (**E.A. Industries v. Trufoods, [1972] E.A. 420.**)"*

The applicant claims to be a beneficiary of 14 acres out of the suit land which is being administered by the respondents. The applicant also admits that he had filed an application for revocation of grant which was dismissed on the grounds that he had not established any beneficial interest in the estate of the late Wilson Rotich.

The applicant further stated that he had filed Eldoret E & L Case No. 283 of 2013 whereby he was granted similar orders of injunction pending the hearing and determination of that suit. The applicant has not told the court the whereabouts of that case or whether it was determined and if so what was the outcome of the case.

On the limb of establishing a prima facie case, the court must look at whether there is a serious issue to be tried at that stage as was held in the case of **American Cyanamid Co. vs Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely:

- a) *There must be a serious/fair issue to be tried,*
- b) *Damages are not an adequate remedy,*
- c) *The balance of convenience lies in favour of granting or refusing the application.*

The applicant must prove that the property in dispute is in danger of being wasted, damaged or alienated by the respondents or any other party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property.

If the applicant establishes the above, then the court is enjoined to grant a temporary injunction to restrain the respondents from doing such acts. In the instant case, there is no evidence that the suit property is in danger of being alienated by the respondents.

I find that the applicant has not proven that he has a prima facie case with a probability of success. What is the serious issue to be tried? The applicant's application for annulment of grant was dismissed by the court and the applicant filed another case seeking for the same orders in this current case which were granted but the applicant has not told the court why he is not using those orders.

Having found that the applicant has not established a prima facie case, I will not belabor going to the other limbs of the requirement for temporary injunction as this is the most important limb of the 3. I find that the application lacks merit and is therefore dismissed with costs.

The earlier interim orders granted are therefore discharged.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE