



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 31 OF 2021

DAVID MBUGUA KANG'ONG'A (Suing as Administrator of the Estate of

SALOME WANJIKU KANG'ANG'O.....PLAINTIFF

VERSUS

STEVE KARANJA KANG'ONG'A.....1ST DEFENDANT

DAVID MUCHIRI.....2ND DEFENDANT

KIOKO.....3RD DEFENDANT

RULING

The Application

1. By Notice of Motion dated 4/5/2021 and filed in court on 5/5/2021 brought under **Section 1A, 1B, 3, 3A & 63(e)** of the **Civil Procedure Act, Order 40 Rule 2 and 4(1)** of the **Civil Procedure Rules, Article 159(2) (d)** of the **Constitution**, the plaintiff/applicant sought for the following orders:

a. ...spent

b. That pending the hearing and determination of this application *inter partes* this court be pleased to issue a temporary injunction restraining the defendants, their agents and servants or any other person claiming to be on the suit property by the defendants' authority from trespassing in, occupying, dealing in, constructing, continuing with the construction and/or in any manner interfering with the suit land title number KITALE MUNICIPALITY BLOCK 4/182 and the premises therein belonging to the late SALOME WANJIKU KANG'ONG'A.

c. That pending the hearing and determination of the suit herein this court be pleased to issue a temporary injunction restraining the defendants, their agents and servants or any other person claiming to be on the suit property by the defendants' authority from trespassing in, occupying, dealing in, constructing, continuing with the construction and/or in any manner interfering with the suit land title number KITALE MUNICIPALITY BLOCK 4/182 and the premises therein belonging to the late SALOME WANJIKU KANG'ONG'A.

d. That the order issued herein be served upon the OCS Kitale Police Station to ensure compliance.

e. That the costs be in the cause.

2. The application is supported by the affidavit of the plaintiff sworn on 4/5/2021.

The Response

3. The defendants filed their replying affidavit on 17/5/2021.

4. The defendants further filed notice of objection on 17/5/2021 raised *in limine*, seeking the striking out of the suit herein by reason that the pleadings disclose a succession dispute between siblings/beneficiaries over the estate of their mother Salome Wanjiku Kang'ong'a and that the matter is fit to be handled by a succession court and no succession cause has so far been filed.

Submissions

5. The parties did not file any submissions.

Analysis and Determination

6. I have perused the application, the supporting affidavits, the replying affidavit and the preliminary objection.

7. I must dispose of the preliminary objection first because jurisdiction is the first and most important issue in any matter and where the court lacks jurisdiction it ought to down its tools immediately.

8. The gravamen of the respondent's submissions is that the matter should be dealt with by a succession court. The plaintiff describes himself as the son of the deceased Salome Wanjiku Kang'ong'a and an administrator to her estate which is yet to be distributed and of which the suit land comprised of **Land Title Number Kitale Municipality Block 4/182** forms a part; according to the plaintiff the estate needs protection from intermeddling by the defendants, the first of whom has sold or leased the suit land to the **2nd** and **3rd** defendants without the plaintiff's consent. The defendants have taken possession of the suit land and are constructing structures thereon, and have further prevented the plaintiff from ingress thereto. The suit seeks eviction and a permanent injunction against the defendants and costs.

9. Attached to the plaint is inter alia a copy of a Grant of Letters of Administration Ad Litem in **Ad Litem Cause No. Kitale CMCC 27 of 2021** issued to the plaintiff to file suit.

10. On the basis of the grant I find that the plaintiff has proper standing to institute the instant suit.

11. However the defendants have filed an affidavit sworn by the **1st** defendant raising stiff opposition to the application, alleging that the plaintiff and one of his brothers forcefully took over the properties of considerable value belonging to the deceased's estate which are referred to in the affidavit, that they gain financially from income from the same without accounting for any proceeds therefrom or sharing the same with the **1st** defendant; that the **1st** defendant is only in occupation of one property being the suit property, which the deceased had occupied before her demise, and from which no income had been derived at all, and which he has leased to the **2nd** and **3rd** defendants who are currently operating business thereon for the consideration of monthly rental sum of **Kshs. 40,000/=**; that the structure on the suit land was duly approved by the County Government; that a temporary injunction should only preserve the *status quo*, and that the dispute can only be sorted out by distribution upon obtainance of a substantive grant in contrast to the ad litem grant now utilized by the plaintiff to file suit. He avers that he has been oppressed by his two brothers by being denied any share of the income for his sustenance.

12. Having considered the application and the response, this court finds that the deceased expired on **22/12/2019** and that no substantive Grant of Letters of Administration has been raised to her estate up to the current date hence the dispute.

13. This court also finds that if it grants the injunction over just one of the many properties the begging question is what happens to the other properties that the plaintiff and his brother are in possession of, and the rightful role of their other disclosed and apparently neglected siblings who appear missed out on, taking sides, becoming embroiled in this unbecoming imbroglio.

14. While not agreeing with the defendant's proposition that a beneficiary to an estate can not be guilty of intermeddling with the estate of a deceased person, I note that in an application and suit of this nature, all the parties must be treated equally in this matter and this would be by considering that for now they all have an equal entitlement to access to what consists of the properties of the deceased before distribution. The plaintiff appears to be at a loss as to what to say in response to the allegations that he and his brother have been dealing with numerous properties of the deceased without the involvement of the **1st** defendant who has now decided against any further acquiescence to their actions

15. **Section 45 of the Law of Succession Act** states as follows:

“45.No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

16. In the instant case the only authorization available is the *ad litem* grant to the plaintiff and it clearly does not enable him to undertake disposal of income from the estate of the deceased which this court, noting his lack of denial of the defendants' allegations, reasonably assumes such disposal has possibly occurred. The applicant is clearly within his rights as an administrator *ad litem* to apply to this court for relief, and this court would be right in granting the instant application, but his power being that limited by the grant and the **1st** respondent

being a fellow beneficiary to the estate, this court finds that a grant of the orders sought may not cure the root cause of this dispute but possibly exacerbate the familial dissension evinced herein to the acme of toxic animosity, for such orders would plainly appear to bar the 1st defendant from the estate while condoning the plaintiff's own alleged little failings which this court would lack jurisdiction to try. Justice must not only be done but must also be seen to be done, and this court will not countenance such an absurd result that may subject our justice system to disrepute and ridicule.

17. In asking myself the question therefore whether there is need to grant the orders even when the applicant merits them, I find that it would not be in the best interests of justice, since this court can not go beyond the injunction order to distribute the estate.

18. While not declining jurisdiction in this matter at all for the reason that a plaintiff holding an *ad litem* grant is entitled to some remedies under **Section 13** of the **Environment and Land Court Act**, I find that it would be best that the parties approach a court of competent jurisdiction to obtain a Grant of Letters of Administration with the ultimate aim of final distribution which this court can not give. It affords this court much relief that the High Court would even in a succession matter be better placed to issue an injunction in this matter that steeply inclines to the realm of succession dispute.

19. In this curious litigation, where an order will be denied at the interlocutory juncture, the same grounds defeating the application dictate that the suit should fail *in limine*, for it would be futile to imagine that an interlocutory injunction that would mandatorily rob the defendant-beneficiary of his customary and undisputed place of abode can be issued while distribution has not been legally undertaken pursuant to a confirmation, or that there is anything beyond an interlocutory preservation order to be agitated by any party.

Conclusion

20. The upshot of the foregoing is that both the application dated **4/5/2021** and the plaint dated **4/5/2021** are hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 9TH DAY OF JUNE, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.