



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC E13 OF 2020

DAVID NJUNU KOINANGE.....PLAINTIFF/APPLICANT

VERSUS

EDWARD KIBE WANJOHI.....1ST DEFENDANT/RESPONDENT

PETER MWANGI KAHETE.....2ND DEFENDANT/RESPONDENT

PHILIP LINOI SIMPILI.....3RD DEFENDANT/RESPONDENT

SAMSON KONENE NKURUNA.....4TH DEFENDANT/RESPONDENT

LEMONTOI OLE DIKIR.....5TH DEFENDANT/RESPONDENT

DENIS SANARE NKURUNA.....6TH DEFENDANT/RESPONDENT

RULING

Application

1. The applicant moved the court through notice of motion dated 5/11/2020 seeking the following orders:

(1) ...spent

(2) That this Honourable court be pleased to issue a temporary injunction restraining the respondents by themselves, their agents and their servants, together with persons claiming under them from erecting into, remaining onto, leaving out, cultivating, selling any portions of land or in any or at all in dealing with or interfering with land parcel No. 8669 Muthera Farm pending the hearing and determination of this application inter-parties. This order be implemented through and with the assistance of the Nakuru County Commander of the Police.

(3) That this Honourable court be pleased to issue an order of injunction restraining the respondents by themselves, their agents and their servants, together with persons claiming under them from erecting into, remaining onto, leaving out, cultivating, selling any portions of land or in any way or at all in dealing with or interfering with land parcel No. 8669 Muthera Farm pending the hearing and determination of this application inter-parties. This order be implemented through and with the assistance of the Nakuru County Commander of the Police.

(4) That the costs of this application be borne by the respondents in any event.

2. The application is supported by the affidavit sworn on 5/11/2020 by **David Njunu Koinange** where he deposed that he is the legal administrator of the estate of the late Mbiyu Koinange and also the eldest son; that by a judgment delivered by Muchelule J on 7/5/2020 at the High Court Family Division pronounced itself on several issues including the subject suit herein; that the applicant being unsatisfied by the court's decision, preferred an appeal; that an application for stay of execution was filed in **S.C. 527/1981** and that the instant application is premised on the grounds that 3rd parties in collusion with other family members have gone ahead to mutate, transfer or otherwise interfere with the suit property to the detriment of the estate beneficiaries which action has no sanction in the said judgment or in any law.

3. He further deposed that the respondents are in the process of taking over the estate of the deceased with full knowledge that they neither possess proprietary or legal right to the suit property; that the 1st, 2nd and 3rd respondents were without the administrators knowledge appointed Estate Manager, Estate Secretary and Security Manager respectively and that the 4th, 5th and 6th respondents intend to use the Maasai community to enter and forcefully occupy the suit property on **19/10/2020**; that over a duration of time, the respondents have

interfered with the management of the farm including allocating themselves proprietary rights to a land that is subject to prolonged litigation and without due consent of all the other administrators; the respondents have been allocated sections of the property to the detriment of the entire estate and their actions may increase litigation; that upon visiting the farm, there is evidence of wastage of soil and gravel excavations without the beneficiaries knowledge which must be stopped to preserve the estate; that he is apprehensive that if this court does not grant conservatory orders, the suit property will go to waste and create acrimony and disharmony among siblings and other interested parties.

4. He went on to depose that he has made this application with due speed noting that one of the administrators **David Waiganjo** died and the respondents were purportedly appointed by him without notice or knowledge of the other siblings and successors; that should this action proceed, it shall prejudice the applicant's appeal and occasion him substantial loss hence it would be in the interest of justice that he be accorded the opportunity to supervise the suit property. He finally deposed that the intended appeal in **SC 527/1981** has very high probabilities of success.

Response

5. The defendants/respondents filed grounds of opposition dated **19/11/2020** on **20/11/2020** stating that in the application **prayers 2 and 3** have since been overtaken by events and that similar injunctive orders already exists in favor of the defendants/respondent and **39** others in **Nakuru CM ELC E114/2020 - Edward Kibe Wanjohi & 39 others Vs David Njunu Koinange & 2 others** which proceedings touch on the suit property herein, further, that the application is subjudice and entertaining the same would only delay, embarrass fair trial and the court process as there is a possibility of two different courts rendering conflicting decisions.

6. The 4th defendant/respondent filed a replying affidavit dated **7/12/2020** sworn by **Konene Ole Nkuruna** where he deposed that he was not a trespasser as he was only acting under instructions from the administrators of the Estate of Mbiyu Koinange to provide security and ensure that the suit property is not interfered with, encroached or taken advantage of by strangers.

Submissions

7. The plaintiff/applicant and the defendants/respondents filed their written submissions on **30/11/2020** and **8/12/2020** respectively.

Determination

8. It is my considered opinion that two main issues arise for determination, one, whether the instant application is *sub judice* and two whether the plaintiff/applicant is entitled to the orders sought.

9. However before this court delves into the substance of the application there is a preliminary issue raised by the defendants in their grounds of opposition dated **19/11/2020** which deserves attention. **Ground No 2** states as follows:

“The application duplicates prayers 2 & 3 thereof, which will serve no purpose if granted and which prayers have since been overtaken by events as no such orders exists (sic) pending the hearing and determination of the application.”

10. This court cannot grant a prayer that has not been sought by the applicant. The applicant seeks relief pending the hearing and determination of the application. What about thereafter? There would be nothing to protect the applicant once the orders are granted. Their effectiveness would end the moment that the court reads the last word of the ruling, perchance they are granted.

11. It is regrettable that the manner of drafting of the application leaves the court with no choice but to strike out the application *in limine* at this late stage and without going into its merits while parties have already filed their submissions; however, as the issue has caught the attention of the court and the defendants and they have addressed it in their grounds and the submissions, the application dated **5/11/2020** must fail.

12. Consequently I hereby strike out the application dated **5/11/2020**. Each party shall bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 10TH DAY OF NOVEMBER, 2021.

MWANGI NJOROGI

JUDGE, ELC, NAKURU