



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

SUCCESSION CAUSE NO. 50 OF 2015

IN THE MATTER OF THE ESTATE OF LUCAS WATTA WANAMBISI.....DECEASED

AND

SOFIA NEKESA WATTA.....1ST PETITIONER/RESPONDENT

ANNA NALIKA WATTA.....2ND PETITIONER/RESPONDENT

ROSEMARY MUSUNDI WATTA.....3RD PETITIONER/RESPONDENT

MARY NAFULA SIMIYU.....4TH PETITIONER/RESPONDENT

AND

1. SYLVIAH WATTA NAMISI WANAMBISI.....1ST BENEFICIARY/APPLICANT

2. GEORGE SICHANGI WANAMBISI.....2ND BENEFICIARY/APPLICANT

3. LEVIS WANAMBISI WATTA.....3RD BENEFICIARY/APPLICANT

VERSUS

BENSON WANAMBISI WATTA.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 10th July 2020 premised on the provisions of Section 45 and 82 of the law of Succession Act. The application is brought by;

- 1. Sylvia Watta Wanambisi**
- 2. George Sichangi Wanambisi**
- 3. Levis Wanambisi Watta**

against Benson Wanambisi Watta the Respondent seeking the following orders;

(a) THAT the Honourable court be pleased to restrain Nzoia Sugar Company Limited from releasing Sugarcane proceeds in respect of field numbers 45200214472 and 45200214470 to BENSON WANAMBISI WATTA or any other person, pending hearing and determination of this application interparties.

(b) THAT this Honourable court be pleased to restrain Nzoia Sugar Company Limited from releasing Sugarcane proceeds in respect of field numbers 45200214472 and 45200214470 to BENSON WANAMBISI WATTA or any other person, pending confirmation of the grant herein.

The application is premised on the grounds that the applicants are beneficiaries of the estate of Deceased Lucas Watta Wanambisi. That the deceased was the registered owner of East Bukusu/South Nalondo/1447 on which sugar cane was placed and contracted to Nzoia Sugar Company registered as filed No.45200214472 and 45200214470.

That sugarcane from deceaseds' farm was delivered to Nzoia Sugar Company and the proceed amounting to about 6,500,000/= is likely to be paid to the Respondent to the exclusion of other beneficiaries. The application is supported by the affidavit of SYLVIA WATTA NAMISI NAMAMBISI the applicant and daughter of the deceased LUCAS WATTA WANAMBISI who reiteration the grounds of the application and further depones that the said payment was for cane harvested and delivered two weeks prior to the date of swearing the affidavit on 10.7.2020.

The Respondent Benson Wanambisi Watta opposed the application. He filed a Replying Affidavit sworn on 16th July 2020 where he depones that his father the deceased died in 2014 and was owner of the Parcel of land. In 2015, the Respondent saw that the land was disused and spent millions of shillings to put the farm to accommodate modern Agriculture. In 2016 he planted maize, millet and greengrams. In 2018 he entered into a contract with Nzoia Sugar Company to plant cane which he annexed Marked BWWN 1. In 2020 the cane was ready for harvesting which he did and supplied to Nzoia Sugar Company. He annexed delivery notes in his name "BWW 2". He depones that the amount due from the contract is not part of the estate, of the deceased because the deceased who died in 2014 had his own contract and that the amount due is for cane delivered in 2020 under his contract. Indeed he depones that the applicants too have their own contract with Nzoia Sugar Company and that they have not stated that they are part of the estate. He depones;

1. **THAT** all the applicants have also planted sugarcane in their farms and I have not interfered with them. Some of them are:

- a) 45200415905 **CALEB WATTA,** **3.09Ha**
- b) 45200214475 **DUNCAN N. WATTA,** **1.11Ha**
- c) 45200216076 **CAROLINE N. WATTA,** **1.08Ha**
- d) 45202414200 **ANNE W. WATTA,** **0.08Ha**
- e) 45200415907 **GEORGE S. WANAMBISI** **2.00Ha**

By Consent the application was canvassed by way of written submission. Both Counsel filed their respective submissions. M/s Mumalasi for the applicant submitted that the issue in this application is whether the money due for payments in regard of sugarcane proceeds from Nzoia Sugar Company Limited form part of the estate of the deceased and whether the same can be used by the Respondent alone to the exclusion of the other beneficiaries before the grant is confirmed. Counsel submits that the sugarcane payments is part of the estate and should be paid to the Legal representative and for distribution after confirmation. Counsel submits that the Respondent is not a legal representative and that any handling or receipt of the money will be intermeddling with the estate of the deceased person.

Mr. Makori for the Respondent submitted that the Respondent is not seeking to be paid any cane proceeds belonging to the estate of the deceased. He submits that it is true that the land East Bukusu/South Nalondo/1447 belongs to the deceased. However he submits that the deceased died in 2014 and any farming done on the land after his death cannot be said to have been done by him, and any such proceeds to belong to the estate of the deceased. He submits that proceeds for the cane deliveries made in 2020 can only be made to the person who planted and harvested the cane. He submits that the applicants have also planted sugarcane on the land which still belongs to the deceased estate and have entered into contract with Nzoia Sugar Company but none has interfered with their proceeds.

The deceased Lucas Watta Wanambisi died on 21.5.2014. He left 4 widows and several children **(1) Sofia Nekesa (2) Anna Naliaka Watta (3) Rosemary Musundi Watta (4) Mary Nafula Watta** all who were on 29.11.2019 issued with grant of letters of administration to the estate. This cause had earlier been filed by Anna Naliaka Simiyu and Mary Nafula Simiyu in P & A 5 they listed the assets of the deceased as hereunder;

ASSETS:

(a) Cane contracts for which can payments are due:

i. *NSC Cane Contract Number 4522491470*

ii. *NSC Cane Contract Number 45232315906*

(b) Bank Accounts

i. *Kenya Commercial Bank Bungoma Branch Account*

No.1105645312

ii. *Co-operative Bank of Kenya Ltd. Bungoma*

No.01116425605100

(c) Commercial Land and Buildings

(i) Bungoma Municipal Plot No. 512

(ii) Bungoma Municipal Plot No. 021

(iii) Bungoma Municipal Plot No. 020

(d) Agricultural Land and Homesteads

i. East Bukusu/South Nalondo/1330 [3.6 Ha] presently under occupancy and use by Erick Sichangi

ii. East Bukusu/South Nalondo/1454 [3.2]

iii. East Bukusu/South Nalondo/1581 [3.2]

iv. East Bukusu/South Nalondo/1441 [3.4 Ha] presently under

occupancy and use by Samson Watta

v. East Bukusu/South Nalondo/1447 [28.5 Ha] main family land

vi. East Bukusu/South Nalondo/3158 [1.2 Ha]

vii. East Bukusu/South Nalondo/2712 presently under occupancy and use by James Chwala Watta.

The assets in respect to Nzoia Sugar Company are for the cane deliveries in respect cane contract No. 4522491470

No. 45232315906

These accounts were in the name of the deceased.

The applicants in this application are seeking injunctive orders in respect of contract No. 45200214472

No. 45200214470

These are contract in the name of the Respondent Benson Wanambisi Watta.

From the submissions by the parties, the issue for determination in this application is whether the proceeds from the contract No. 45200214472 and 45200214470 belong to the estate of the deceased, and if so whether the court ought to give injunctive orders as prayed.

(a) The principles for the Grant of a temporary injunction were laid out in the celebrated case of *Giella Vs. Cassman Brown* (1973) E. A 358 where it was held that a party wishing to get an order of injunction must;

- Establish a prima facie case with a probability of success.
- That he will suffer irreparable loss if the injunction is not granted and the loss cannot be compensated by an award of damages.
- That if the court is in doubt, it will decide the application on the balance of convenience.

(b) These principles were reiterated in the case of *East African Industries Limited Vs. Trufood Limited* 1972 E.A. 420 and The Court of Appeal in the case of *Mrwao Vs. First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 where the court stated.

“A prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case.’ It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

From the application and submissions, It is common ground that both the Applicant and the Respondent are children of the deceased. It is also not in dispute that they are all staying on land which was owned by the deceased; each doing his/her farming activities on the said land. It is also not in dispute that the subject cane delivered to Nzoia Sugar Company was farmed from the farm of the deceased. Lastly it is common ground that deceased died in 2014.

The issue is whether the cane delivered b y the Respondent was farmed/cultivated by the Respondent or the whole family so as to be part of the estate.

The respondent both in his Replying affidavit and submissions aver that he is the one who entered into a cane contract with Nzoia in 2018, 4 years after the deceased had died. The contract Annexure BWW1 shows that he is the contracted farmer. He also produced delivery notes Annexure BWW 2. These are deliveries made in 2020 with fact Silvia Watta Namisi in paragraph 5 of the supporting affidavit confirms. This therefore confirms that the deliveries were not cane farmed/grown by the deceased who had died 6 years earlier. The applicant have not submitted that any of them or other beneficiaries cultivated the sugarcane the subject of this application. The assertion by the Respondent that he is the one who cultivated the cane though on the deceased's land has not been challenged or controverted. The proceeds due to the estate of the deceased as indicated in P & A 5 were in respect of contract No. 4522491470 and NSC cane contract No. 45232315906. The contract entered into by the deceased and whose proceeds would be due to the estate is different from the ones in this application.

From the foregoing, I find that the applicant have not satisfied this court that the proceeds in respect of Contract No. 45200214472 and 45200214470 belong to the estate of the deceased. The cane was supplied under a contract with the Respondent 6 years after death of deceased. I therefore find no merit in this application which is hereby dismissed with costs.

Dated and Delivered at Bungoma this 4th day of February, 2021

S.N. RIECHI

JUDGE