



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC APPLICATION NO. E003 OF 2020

SAMSON KIRIMI KIMOTHO.....INTERESTED PARTY

VERSUS

BEATRICE CIAMWARI KIMOTHORESPONDENT

(Being the ADMINISTRATOR TO OF THE ESTATE OF M’KIMOTHO M’IRIMBA (DECEASED))

R U L I N G

INTRODUCTION

1. Before this court is a Notice of Motion application dated 06/10/2020 filed under a Certificate of Urgency. The application is instituted by one Samson Kirimi Kimotho (the Interested Party in Succession Case no. 97 of 2016 - Chuka) and seeking orders against his mother, Beatrice Ciamwari Kimotho (the administrator of the Estate of M’Kimotho M’rimba (Deceased)). The application seeks for ORDERS:

- 1) **THAT** this Application be certified as urgent, service be dispensed with and the same be heard at the first instance on a priority basis.
- 2) **THAT** pending hearing of this Application inter-partes, the Respondent be and is hereby restrained by herself, her officers, employees, agents, servants and/or any other person whomsoever from carrying out any activities on the properties known as **MAGUMONI/RUBATE/103** and **MAGUMO/ITUGURU/73**.
- 3) **THAT** the Respondent be restrained by way of a temporary injunction by herself, her agents and or servants from entering, trespassing, fencing, developing, subdividing or in any other way interfering with properties known as **MAGUMONI/RUBATE/103** and **MAGUMO/ITUGURU/73** pending hearing and disposal of the suit.
- 4) **THAT** a temporary injunction do issue restraining the Respondent by herself her servants, employees, workmen, agents, heirs, personal representatives or otherwise however from selling, leasing, charging, pledging, offering the Title thereof as lien or any form of security, evicting, demolishing, conveyance, transfer, arbitrary registration or in any other manner interfering with the properties herein, pending the hearing and determination of this suit.
- 5) **THAT** costs of this Application be provided for.
- 6) **THAT** this Honourable court be pleased to issue any order it deems fit and just to grant.

2. On 08/10/2010, the instant application was certified as urgent and interpartes hearing set on 13/10/2010. The Applicant was ordered to serve the Respondent with the application.

3. On 13/10/2010, the Respondent sought to more time to respond to the application as they had been served with the same on the previous day. It was mutually agreed between the parties that the court grant prayer no. 2 of the application in the interim and an injunctive order for 14 days was granted regarding the said prayer.

4. The matter was mentioned on 12.11.2020 when the Respondent confirmed filing of her response to the application. Both parties indicated that they did not wish to file submissions. The court gave directions that the ruling would be given on 09.02.2021 and extended the interim orders.

Applicant's Case

5. The Application is supported by the Affidavit sworn by the Applicant and premised on the grounds that:

- a. The Applicant is the son of the late M'Kimotho M'rimba (deceased) and therefore a beneficiary in line with the provisions of the Law of Succession Act.
- b. The Applicant is reasonably apprehensive that the Respondent, intends to undertake sub-division in the absence of her co-administrator with the sole intention of disenfranchising other beneficiaries.
- c. Unless this Court intervenes, there is an eminent danger that the Respondent will continue with subdivision slated for 14.10.2020 to the detriment of other beneficiaries of the estate and thereby occasioning them great prejudice.
- d. The Respondent will not suffer any prejudice if the orders prayed in this application are granted.
- e. It is in the interest of justice and fairness that the Orders sought in this application are granted.

6. In brief, the Applicant depones that:

- a. He is the son of the deceased.
- b. He was served with a letter dated 30.09.2020 from the National Sub-Counties Office in Chuka which intimated that surveyors from the office would be visiting land parcels **MAGUMONI/RUBATE/103** and **MAGUMO/ITUGURU/73** (the suit land).
- c. The Respondent and the Applicant's brother, Armstrong Ndeke Kimotho (hereinafter referred to as the "**Co-administrator**") were duly appointed as the administrators of the subject estate.
- d. The Co-administrator has never been consulted on any matter pertaining to the estate including the alleged intended subdivision of the suit land.
- e. Due to ill-health, the Co-administrator is unable to travel or take part in any proceedings in this matter.
- f. He is apprehensive that if the sub-division slated for 14.10.2020 proceeds in the absence of the Co-administrator, the beneficiaries of the estate risk to suffer prejudice.
- g. The Respondent filed Summons General dated 04/02/2020 seeking orders authorizing the Executive Officer of Chuka Law Courts to execute all the relevant documents on behalf of the Co-administrator to facilitate full administration of the subject Grant but the Court declined to grant the said orders.

7. From the grounds in support of the said Summons General application, the Respondent avers that she is unable to administer and distribute the subject estate as the Co-administrator had refused to execute the necessary documents to effect full registration and implementation of the Grant.

Respondent's Case

8. In response to the instant application, the advocate for the Respondent filed a Replying Affidavit on 23.10.2020 and on behalf of the Respondent and deponed that:

- a. The subject estate was the subject of succession proceedings in Chuka CM Succession No. 97 of 2010 which proceedings have since been concluded.
- b. Grant of Letters of Administration were issued to the Respondent herein and the Co-administrator.
- c. The Certificate of Confirmation of Grant issued in this matter confirmed that the subject estate was to be distributed equally among all beneficiaries including the Applicant herein and no appeal was preferred by any of the beneficiaries against the said distribution.
- d. The Applicant and the Co-administrator have been frustrating the implementation of the subject Grant and the Respondent was forced to seek the intervention of the court which issued the following orders on 10.03.2010:
 - i. THAT the Executive Officer of the court be authorized to execute all the relevant documents to facilitate the full administration of the grant issued by the court and particularly in relation to subdivision, registration and transmission of resultant parcels as per the certificate of confirmation issued on 08.10.2019 and in respect of Land Parcels nos. **MAGUMONI/RUBATE/103** and **MAGUMO/ITUGURU/73**.
 - ii. THAT the Land Control Board Meru South do dispense with the presence of the Co-administrator.

iii. THAT the OCS Chuka Police Station do provide security during the surveying, demarcation and subdivision of the suit land of Land Parcels nos. **MAGUMONI/RUBATE/103** and **MAGUMO/ITUGURU/73**.

iv. THAT the costs of the said application be provided for.

e. The instant application seeks orders staying the implementation of the subject Grant as per the orders of the Court.

ISSUES ARISING FOR DETERMINATION

(a) Whether the instant application is competent; and if so,

(b) Whether the court should grant a temporary injunction restraining the Respondent from dealing in any way with Land Parcels no. **MAGUMONI/RUBATE/103** and **MAGUMO/ITUGURU/73** pending hearing and disposal of the suit.

ANALYSIS OF ISSUES

Competence of the Application

1. From the onset, I note from the heading of the instant application that the orders are being sought against one **Beatrice Ciamwari Kimotho** who is identified as the administrator of the Estate of M'Kimotho M'rimba (Deceased)). I however note from the copy of the Certificate of Confirmation of Grant annexed to the response of this application that the Grant of representation was issued to one **Briget Ciamwari Kimotho** and Armstrong Ndeke Kimotho (the Co-administrator). Although the issue was not raised by either of the parties, I take it that it was a clerical mistake that can be cured by amendment. I will invoke the provisions of **Article 159(2)(d)** of the Constitution by correcting the same and proceed to consider substantive justice in the matter by determining the real issue between the parties.

2. The Respondent claims that the granting of an order of injunction under **Order 40 of the Civil Procedure Rules** is premised on the existence of a suit and in the absence of any such suit, the instant application has no legs on which to stand and is therefore misplaced, unmeritorious, an abuse of court process and should therefore be dismissed with costs.

3. **Order 40 of the Civil Procedure Rules** provide for the procedure for the grant of temporary injunctions in civil matters. **Rule 1(a) & (b)** of the said Order 40 reads as follows:

“1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

4. It is notable, however, that the Applicant has not relied on **Order 40 of the Civil Procedure Rules** as a basis for the instant application. This application is said to be premised under the provisions of Articles 19, 22, 40 and 259 of the Constitution, Section 1A, 1B and 3A of the **Civil Procedure Act, Section 4(2) of the Land Act** and Section 68 of the Land Registration Act and all other enabling provisions of the law.

It is important to analyse these provisions which the applicant has relied on to bring this application.

5. Articles 19 of the Constitution recognizes the Bill of Rights and reads as follows:

19. (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

(2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the

extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

6. Article 22 of the Constitution provides for the enforcement of Bill of Rights and reads as follows:

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

7. Article 40 provides for the protection of property and reads as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation— (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

8. Article 259 outlines the manner in which the constitution is to be construed as reads as follows:

259. (1) This Constitution shall be interpreted in a manner that— (a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) If there is a conflict between different language versions of this Constitution, the English language version prevails.

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—

(a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;

(b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

(c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and

(d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

(4) In this Constitution, unless the context otherwise requires—

(a) if a word or expression is defined in this Constitution, any grammatical variation or cognate expression of the word or expression has a corresponding meaning, read with the changes required by the context; and

(b) the word **“includes”** means **“includes, but is not limited to”**.

(5) In calculating time between two events for any purpose under this Constitution, if the time is expressed—

(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included;

(b) as months, the time period ends at the beginning of the day in the relevant month—

(i) that has the same number as the date on which the period began, if that month has a corresponding date; or

(ii) that is the last day of that month, in any other case; or

(c) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began.

(6) If a period of time prescribed by this Constitution for any purpose is six days or less, Sundays and public holidays shall not count when calculating the time.

(7) If, in any particular circumstances, the period of time prescribed by this Constitution ends on a Sunday or a public holiday, the period extends to the first subsequent day that is not a Sunday or public holiday.

(8) If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.

(9) If any person or State organ has authority under this Constitution to extend a period of time prescribed by this Constitution, the authority may be exercised either before or after the end of the period, unless a contrary intention is expressly specified in the provision conferring the authority.

(10) Except to the extent that this Constitution provides otherwise, if a person has vacated an office established under this

Constitution, the person may, if qualified, again be appointed, elected or otherwise selected to hold the office in accordance with this Constitution.

(11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.

9. Section 4 of the Land Act provide for the guiding values and principles of land management and administration. Subsection 2 reads as follows:

(2) In the discharge of their functions and exercise of their powers under this Act, the Commission and any State officer or public officer shall be guided by the following values and principles—

- (a) equitable access to land; security of land rights;
- (b) security of land rights;
- (c) sustainable and productive management of land resources;
- (d) transparent and cost effective administration of land;
- (e) conservation and protection of ecologically sensitive areas;
- (f) elimination of gender discrimination in law, customs and practices related to land and property in land;
- (g) encouragement of communities to settle land disputes through recognized local community initiatives
- (h) participation, accountability and democratic decision making within communities, the public and the Government;
- (i) technical and financial sustainability;
- (j) affording equal opportunities to members of all ethnic groups;
- (k) non-discrimination and protection of the marginalized; and
- (l) democracy, inclusiveness and participation of the people; and
- (m) alternative dispute resolution mechanisms in land dispute handling and management.

10. Section 68 of the Land Registration provide for the power of the court to inhibit registered dealings and reads as follows:

68 (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.

11. Articles 19, 22, 40 and 259 of the Constitution as well as Section 68 of the Land Registration Act have sub-articles and sub-sections respectively, but the Applicant has not specified which sub-articles and sub-sections his application is grounded on. In my opinion, he cannot be basing the application on all the given sub-articles and sub-sections. In addition, the said provisions do not, in my view support the instant application seeking the grant of temporary orders. On this ground alone, it is my view that the instant applicant is incompetent. This is a technicality and I should therefore proceed to determine the merits of the application in line with **Article 159 (2) (d)** of the **Constitution**.

Merit of the Application

12. The principles for the Grant of a temporary injunction were laid out in the celebrated case of **Giella -v- 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 a balance of convenience.**

13. These principles were reiterated in the case of **East African Industries Ltd –v- Trufoods Limited 1972 E. A 420**. The Court of Appeal in the case of **Mrwao –v- First American Bank of Kenya Limited & 2 Others (2003) KLR 125** stated that:

“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.”

14. It therefore follows that the first issue to be considered is whether or not the Applicant has shown a prima facie case, with a probability of success. It is not in dispute that the Applicant is a beneficiary of the subject estate and that the Respondent together with the Co-administrator are the administrators of the said estate. It is also not disputed that a Certificate of Confirmation of Grant was issued in this matter which confirmed that the subject estate was to be distributed equally among all beneficiaries including the Applicant herein.

15. The gravamen of the Applicant’s contention is that the beneficiaries of the subject estate risk to suffer prejudice if the sub-division of the suit land proceeds in the absence of the Co-administrator. On the other hand, the Respondent contends that the Co-administrator has been frustrating the implementation of the said grant and it is for that reason that she sought the indulgence of the court to dispense with the requirement of presence of the co-administrator at the Land Control Board and to authorize the Executive Officer of the Court to execute all the relevant documents on behalf of the Co-administrator in order to facilitate full administration of the subject Grant.

16. The Applicant alleged in paragraph 9 of his affidavit in support of the instant application that the orders sought by the Respondent in the Summons General application dated 04/02/2020 were not granted. This allegation is disproved by the Respondent who annexed to her Replying Affidavit a court order that is dated 13/10/2020 and that was issued on 10/10/2020. The validity of the said court order has not been challenged. The averment by the applicant are therefore most likely made in ignorance or he has deliberately chosen to mislead the court. The order is still valid as it has not been set aside.

17. It is trite that when an order is made by court, each person bound by the order must follow it. In the English case of **Hadkinson v Hadkinson [1952] 2 All ER 567**, it was held that: **“It was plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment...”**. The court in that case maintained that court orders must be obeyed whether one agrees with them or not and where one is in disagreement, he/she ought to move the same court to discharge them otherwise ignoring the same is to belittle the purpose for which the court is set up.

18. It follows that since there is a valid court order dispensing with the presence of the co-administrator in execution of the relevant documents. A court of law does not act in vain. The applicant seeks orders of injunction prevailing the hearing and determination of the suit and yet he has not filed any suit other than the present application. It is trite that a party can seek a permanent or a temporary injunction. In this case the applicants seeks temporary injunction pending the determination of a none existent suit. It is a vain application.

I find that:-

- a. The court order issued by the court on 10/10/2020 warranted the Respondent to proceed with the distribution and sub-division of the estate which was slated for 14/10/2020.
- b. The Applicant cannot use the instant application to review or set aside valid court orders.
- c. the Applicant has failed to establish a prima facie case to warrant the interim orders of injunction.

CONCLUSION

In conclusion, I note that Prayers No (1) and (2) of the present application are spent and with regard to the remaining orders, it is my view that the Applicant’s Notice of Motion application dated 06/10/2020 and filed on 07/07/2020 is misconceived and unmerited. It is also an abuse of court process as there was an attempt to mislead the court. It is also brought under provisions of law whose relevance was not disclosed. This application is only good for dismissal without further orders. I dismiss the application with costs.

Dated, signed and delivered at Chuka this 4th days of March 2021.

L. W. GITARI

JUDGE

4/3/2021

The Ruling has been read out in open court.

L.W. GITARI

JUDGE