REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 19 OF 2016

IN THE MATTER OF THE ESTATE OF BENSON MAINGI MULWA- (DECEASED)

JOSEPH MULWA MAINGI...APPLICANT

VERSUS

PHILIP MAINGI WAMBUA.....................................1ST RESPONDENT

ALEXANDER PAUL MAINGI.................................2ND RESPONDENT

JACOB NZEKI MAINGI...3RD RESPONDENT

PAULINE MUMBUA MULI.......................................4th RESPONDENT

SIMON MWAULA..5TH RESPONDENT

JONATHAN MUMO MUIA.......................................6TH RESPONDENT

JACINTA NZILANI RICHARD................................7TH RESPONDENT

BONIFACE NDOLO KISINGU.................................8TH RESPONDENT

STEPHEN MASAI...9TH RESPONDENT

RULING

1. By Summons dated 2nd July, 2020, the Applicant herein seeks the following orders:

a) Spent

b) A preservative order do issue restraining the Respondents by themselves, their agents or servants, employees or any other assigns or representatives from intermeddling in any way with the estate of the deceased pending hearing and determination of this application and confirmation of the Grant

c) An order do issue declaring that the sale to the 5th -9th Respondents of portions of land otherwise known as Machakos/Matuu/4671,4672,4673,4674,4675,4676,4677,4666 and 4667 allocated by the deceased to other beneficiaries in the estate was illegal hence null and void.

d) Spent

e) The costs of this Application be provided for.

2. According to the Applicant, on 6th February, 2019, this court revoked his appointment as an administrator of the deceased's estate and since then no application has been made for the appointments of administrators to the said estate. It was deposed that though some beneficiaries are uncooperative on the persons to be appointed as administrators, since the deceased had three wives, the others have agreed

to having **Joseph Mulwa Maingi, Alexander Nyumu Maingi** and **Julius Mutua Kiio**, who are sons and grandson of the deceased, as administrators to represent their respective houses.

3. It was however averred that the 1st to 4th Respondents have intermeddled with the deceased estate by selling portions of land Machakos/Matuu/4671, 4672, 4673, 4674, 4675, 4676, 4666 and 4667 to the 5th to 9th Respondents which were allocated to other beneficiaries thereby disinheriting them. This action, the applicant averred was admitted by the Respondents in their replying affidavits. It was averred that though the deceased had, prior to his demise shared out his estate, the portions sold to the 5th to 9th Respondents were sold by persons not entitled to the said portions.

4. According to the applicant, land parcel nos. Machakos/Matuu/4672 and 4673 were sold to **Jonathan Mumo** by **Philip Maingi** who is in the house of **Hannah Mutave** but belongs to the house of **Esther Mbithe**. Further, the portions sold to **Simon Mwaula** by **Philip Maingi, Alexander Paul** & **Jacob Nzeki** who are members of the 1st house being Machakos/Matuu/4666, 4667 and 4668 belong to the second house of **Monica Muthee**. In addition, the portion of land sold to **Jacinta Nzilani** and **Boniface Ndolo** being Machakos/Matuu/4671 by **Pauline Mumbua** who is of the first house belong to the Third House.

5. According to the applicant, the first house is in a spree to waste the deceased's estate and disinherit other beneficiaries as they have sold almost all their shares of the deceased's estate which he was not contesting.

6. The said 5th to 9th Respondents, it was deposed, have started developing the portions they have bought, an action that, in the applicant's view, threatens the proprietary rights of other beneficiaries with a likelihood of breach of peace.

7. It was the applicant's apprehension that unless restrained by orders of this court, the Respondents will continue with acts of wanton wastage of the deceased's estate thus disinheriting other beneficiaries. That action, it was deposed, would lead to irreparable loss as there is no other land belonging to the first house left behind capable of compensating them.

8. It was submitted on behalf of the applicant that from the pleadings on record it is not in dispute that the Applicant is a son to the deceased and that there is a consent dated 02/10/2020 signed by beneficiaries from the 2nd House and 3rd house. In this regard the applicant relied on S**ection 66(a)-(d)** of the ***Law of Succession Act*** as regards the priority in applying for grant of letters of administration. He also relied on **Rule 26(1) and (2) of the *Probate and Administration Rules***, for the same purpose.

9. *It was submitted that* it is all clear and not in dispute that the deceased's wives are all deceased and that the Administrators appointed by the court on 14/12/2020 are all children and grandchild representing the three houses with **Alexander Nyumu** representing the 1st House which is comprises of the 1st – 4th Respondents, **Joseph Mulwa** representing the 2nd house and **Julius Mutua Kiio** representing the 3rd house. In addition, the members of the 2nd and 3rd House have signed a consent authorizing the Applicant to proceed with the matter on their behalf by allowing alongside others to be appointed as the administrators of the deceased's estate. Based on the foregoing, it was therefore submitted that the Applicant has the *locus standi* to file the instant application.

10. Regarding the question of intermeddling, it was submitted that the 1st-4th Respondents have intermeddled with the deceased's estate wherein the 1st -4th Respondents have illegally and irregularly sold portions of land otherwise known as Machakos/Matuu/4671, 4672, 4673, 4674, 4675, 4676, 4677, 4666 & 4667 without due legal process to succeed the deceased's estate has been finalized. While acknowledging that the deceased had distributed his estate before his demise, the Applicant exhibited a list showing how the estate was distributed, a list that is disputed by the 1st -4th Respondents, who insist that the list is not as per the distribution by the deceased and that they sold what was given to them. The applicant in the converse argues that the 1st -4th Respondents have sold what belongs to other beneficiaries in total disregard of the distribution made by their deceased father.

11. The applicant based his submissions on Sections 45 and 82 (b) of the ***Law of Succession Act*** and the case of **Virginia Mwari Thuranira vs. Purity Nkirote Thuranira [2017] eKLR,** where **Gikonyo, J**, observed that;

> **"The said sale agreement is null and void for violating Section 82 (b) (ii) of the Law of Succession Act, as the said Julia Thuranira had not obtained Letters Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court. In this case, there is not a will and so the principle of relation back does not apply. Under Section 80 (2) Law of Succession Act, Cap 160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity."**

12. He also relied on **Re Estate of Paul M'Maria (Deceased) [2017] eKLR**, where the Court held that;

> **"The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tinctured with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that:- 40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. Therefore, applying the law and the Constitution, the sale of Plot 18A MITUNGUU MARKET on 12th July 2004 was in contravention of the Law of Succession Act and therefore vitiated by that illegality. It is thus invalid, null and void**

transaction. Such contract is ex facie illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute"

13. Taking into account the foregoing and the fact that even the 5th -9th Respondents out rightly admit to have bought the land parcels knowing that the sellers had not taken out letters of administration is a clear admission of an illegality as it amounts to intermeddling with estate to the detriment of other beneficiaries.

14. It was therefore submitted that the Summons are merited and that the court should declare that the sale to the 5th-9th Respondents of portions of land otherwise known as Machakos/Matuu/4671, 4672, 4673, 4674, 4675, 4676, 4677, 4666 & 4667 allocated by the deceased to other beneficiaries in the estate was illegal hence null and void. He also seeks to have a conservatory order issued to restrain the Respondents from intermeddling with the deceased's estate further.

15. In response to the Summons, the 2nd Respondent averred that he had discussed this matter at length with the 3rd and the 4th Respondents herein and they were of the view that the application herein is frivolous, vexatious and an abuse of court process. In their view, the Applicant has approached this court on the basis of misrepresentation, non-disclosure of material facts and outright falsehoods.

16. According to him, the estate land herein had long been shared out by the Deceased and everyone entitled to a share was settled on his or her own share and there exists clear boundaries on the land for each individual portion of land. This, according to him, was confirmed by the Respondent (sic) on 13th July 2018 who stated that all the estate had been shared out by the deceased before his death and there is no dispute or complaint.

17. According to the 2nd Respondent, if anyone has sold any part of his land, that should not be an issue as whoever has done so is only affecting his own share of the estate. It was his view that the applicant is unhappy after the court revoked the grant of letters of administration that had been issued to him and this application is intended to unfairly delay the matter.

18. It was deposed that the 1st to the 4th Respondent have not bought any portions of land as alleged and that although it is true that the Deceased had shared out all his land, it is not true that the land was shared out in the manner suggested by the applicant since the deceased demarcated portions of land to each household but did not use the titles listed. According to him, the document annexed by the Applicant as the wishes of the deceased is a forgery which has been peddled by the Applicant with various variations, some with a date and stamp and others without.

19. It was averred that the deceased divided his land in 1984 and since then the boundaries have never been changed and there is no boundary dispute between family members hence it is not possible for one member to sell portions belonging to other beneficiaries as everyone knows the boundary to their respective parcel of land. According to him, the 5th to the 8th respondents had already developed the disputed parcels of land as far back as 15th July 2017 and that no complaint was raised by other family members.

20. It was noted that the applicant appears to be pleading matters on behalf of others yet he has not annexed any authority showing that he is authorized to do so. It was revealed that the 1st Respondent herein having died on 12th July 2018 was not a proper party before court.

21. In opposing the Summons, the 5th Respondent averred that since he is neither a member nor a beneficiary of the deceased's family, he ought to be excluded from these proceedings as his dealings with members of the family are between him and the affected members. He disclosed that he was aware that different beneficiaries of the estate of the deceased had sold part of their inheritance to different respondents including non-parties to these proceedings on the understanding that upon distribution to them of their respective shares of the state and completion of the succession proceedings they would transfer their interests to the said purchasers. According to his information, the deceased had, prior to his death, settled his three households on their respective parcels of land each house occupying and utilising distinct portions. Based on the said family agreement, the 5th – 8th Respondents have ben utilising and cultivating their respective portions of land from their respective dates of purchase without any interference and that was the position as at the time the Applicant petitioned for the grant. He confirmed that he bought parcels of land the 1st, 2nd and 3rd Respondents which were excised from the clearly demarcated portions as shared out by the family of the deceased which portions were being exclusively utilised by the said respondents. On 20th December, 2018, he sold to the 9th Respondent three acre parcel of land which he had earlier bought from the 3rd Respondent.

22. The 5th Respondent disclosed that he was aware that the applicant had sold part of his beneficial portion comprising Machakos/Matuu/4667 to a church, African Brotherhood Church, Matungulu. He therefore sought that the application be dismissed.

23. The 6th Respondent reiterated the averments of the 5th Respondents anad disclosed that he purchased various portions of land from the 1st and 4th Respondents who were beneficiaries and dependants of the deceased. According to him the Applicant has filed the application too late in the day as he had completed construction of his residential home therein in the year 2008 and has heavily invested therein to the tune of Kshs 23,000,000/- without any complaint from the Applicant.

24. Apart from averring that he also bought a parcel of land from the 4th Respondent, the 8th Respondent similarly reiterated the averments made by the 5th Respondent.

25. On behalf of the Respondents it was submitted that the orders being sought from this court raise a number of serious and fundamental legal challenges in the manner the application has been drafted and presented to court and the scope of the orders sought. The first fundamental issue is whether the citing of the 5th to the 9th Respondents in the summons is proper and procedural? It was submitted that since the primary purpose of succession proceedings is to determine beneficiaries of the estate and to distribute the estate, there is therefore no legal basis to drag the 5th to the 9th Respondent into the succession cause herein as they are neither beneficiaries to the estate, nor relatives

of the Deceased. According to the Respondents, the only other people that can be enjoined in a succession cause are creditors of the deceased's estate. However, the issue raised in this application relates to a contract that was entered into before the succession cause herein was instituted. They relied on the case of **Owners of The Motor Vessel "Lillian S" –Vs- .Caltex Oil Kenya Limited (1989)KLR** and the preamble to the ***Law of succession Act*** deals with matters of probate and intestate succession. Based on **Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR**, it was therefore contended that issues of ownership of land and declaration of parties' interests are matters which do not fall under the preamble of the ***Law of Succession Act*** and must be filed as separate suits in the Environment and Lands Court. This submission was based on **Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** and **Monica Wangari Njiiri & 4 others vs. Eunice Wanjiru Igamba & Another (2016) eKLR**

26. It was submitted that the Applicant seeks sweeping declarations and an order to annul and cancel a contract between the Respondents. According to them, a succession cause is not the right forum to determine whether a contract is null and void or just voidable. For the court to issue such declaratory orders the court would be forced to consider whether the Applicant himself has any *locus standi* to challenge a contract that he is not party to; whether the Applicant is himself affected in any way by the contract sought to be nullified; and whether this court is in a position to issue declaratory orders on the basis of an interim application.

27. According to the Respondents, since the applicant himself is not privy to the contracts between the Respondents herein, there is no basis for the Applicant to request this court to nullify agreements entered into by the Respondents. In their view, the Respondents entered into agreements based on genuine assumptions that the Respondents were beneficial owners of the parcels of land that they were disposing off.

28. It was submitted that the Applicant was not an administrator at the time of filing of the summons and the court would again be forced to first consider under what capacity and authority has the Applicant brought this Application? The Applicant is making the application on behalf of undisclosed beneficiaries and not on his own behalf yet the Applicant has not disclosed his source of authority to move the court on behalf of the other beneficiaries. It is also an undisputed fact that the Applicant has not named any of the alleged beneficiaries whom have been deprived of their portions of land.

29. The court should also note that it is an undisputed fact that all the land belonging to the Deceased was shared out by the Deceased himself before his death and everyone entitled to a share has already settled on his or her portion, with boundaries clearly demarcated. It is also an undisputed fact that there has not been any boundary dispute between the beneficiaries to the estate and there is therefore no basis for the current application as it does not relate to the applicant's own portion of land. It is also an undisputed fact that most of the transactions now challenged took place several years back. The question we ask is why did the applicant wait for several years before moving the court?

30. The prayers sought presupposes that there is an agreement by the parties herein that beneficiaries have already become entitled to specific titles which is not the case in this matter.

31. According to the Respondents, the Applicant is estopped from relying on section 45 of the ***Law of Succession Act*** when he is in contravention of the said section having also sold a parcel of land to a third party being African Brotherhood church, Matungulu when he was not authorised to do so by the law a fact he has not refuted. It was submitted that the issuance of orders that determine the proprietary rights of the 5th-9th respondents at this stage would amount to eviction of the respondents from the suit properties and some of the respondents have carried out extensive developments over the years for instance the 6th respondent who has constructed a permanent residential home on parcel number Machakos/ Matuu/4680.

32. As regards the applicant's allegation that the 1st-4th Respondents have sold what does not belong to them and intended to be inherited by other beneficiaries is an issue that can only be determined at the stage of confirmation of grant in respect of the estate of the deceased. This is an issue that can be appropriately, adequately and legitimately addressed during confirmation proceedings which is the appropriate procedure when one is contesting distribution proposal since the only point of disagreement between the parties seems to be what was bequeathed to each household by the deceased.

33. It was noted that the Applicant's chamber summons application herein on the face of it does not state the provisions of the law invoked and this is not just a mere irregularity in form but goes to the substance of the application and renders the chamber summons ex-facie incompetent since the jurisdiction exercised by a probate and administration court is confined to the ***Law of succession Act*** together with the rules made thereunder. Based on Rules 49, 59 and 73 of the ***Probate and Administration Rules***, it was submitted that this application was brought by way of Chamber Summons which is not provided for under the rules and that the format of the application herein does not comply with the format of Form 104. Accordingly, the application does not comply with the mandatory requirements of the ***Law of Succession Act*** and is therefore fatally defective ought to be struck out on that account.

34. It was submitted based on Sections 42 and 45 of the ***Law of Succession Act*** that in the instant case the deceased had during his lifetime distributed his estate and on the ground the properties have been shared out to each of the three houses with each occupying distinct portions with boundaries clearly demarcated. Section 42 of the ***Law of Succession Act*** seeks to protect, respect and preserve the wishes and acts executed and undertaken by a deceased person during their lifetime and ought to be honoured and effected. It is on the basis of such settlement by the deceased that some of the beneficiaries of the deceased have sold some of their beneficial portions including the applicant herein. They submitted that the spirit behind sections 45 is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed and in the instant case the respective shares of each of the deceased's houses is identifiable and distinct.

35. The Court was urged to disallow the applicant's chamber summons application dated 2nd October 2020 especially the order sought to declare the sale to 5th -9th respondents illegal and null and void and hold that in consideration of Article 159 of the Constitution and as a problem solving court to substantive justice and in the spirit of Alternative dispute resolution order that the matter be resolved by agreement of the Parties as regards respondents who purchased portions of land from beneficiaries of the estate.

36. The Court was urged, in the circumstances for the purposes of preserving the social fabric, cohesion and peaceful co-existence of or end to disputes between parties herein to order that the current *status quo* be maintained as parties await the distribution of the estate and

confirmation of the Grant so that the beneficiaries who sold their beneficial portions can transfer their proprietary interests to the parties to whom they sold their shares.

Determination

37. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.

38. The instant application is based on alleged intermeddling with the estate of the deceased. It is however alleged that the applicant has no *locus standi* in the matter without an authority from the other beneficiaries. The law regarding intermeddling with the estate of a deceased person is well codified in the ***Law of Succession Act***. Section 45 of the said Act provides as follows:

> ***(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.***

39. According to **Musyoka, J** in **Veronica Njoki Wakagoto (Deceased) [2013] eKLR**:

> **"The effect of [section 45]…is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."**

40. In **re Estate of M'Ngarithi M'Miriti [2017] eKLR** it was held that:

> **"Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."**

41. In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is property entitled to protect his or her interest in the estate.

42. It is also contended that the 5th to 9th Respondents ought not to have been joined to these proceedings since they are neither beneficiaries nor dependants of the estate of the deceased. It is however my view that since the orders sought herein, if granted, will no doubt affect the interests of the said Respondents, it was only fair that they be joined so as not to issue orders adverse to them without them being afforced an opportunity of being heard.

43. In this case, the Applicant seeks, inter alia, an order for a preservative order restraining the Respondents by themselves, their agents or servants, employees or any other assigns or representatives from intermeddling in any way with the estate of the deceased pending hearing and determination of this application and confirmation of the Grant.

44. It is submitted that the Applicant has not cited the provision under which the application is brought. That may be so, but the issue is whether this Court has the jurisdiction to grant the orders sought in the body of the application.

45. Section 47 of the ***Law of Succession Act*** provides as follows:

> ***The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.***

46. In **The Matter of the Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself inter alia as follows:

“Rule 63 of the Probate and Administration Rules provides that the following provisions of the Civil Procedure Rules, namely Order 5, 10, 11, 15, 17, 25, 44 and 49 apply to proceedings under the Probate and Administration Rules. Clearly an injunction under Order 39 is not provided for. This application is not brought under Order 39, but under Rules 49 and 73 of the Probate and Administration Rules, which provides that a person desiring to make an application to court relating to the estate of a deceased person for whom no provision is made elsewhere in these Rules shall file a summons supported if necessary, by affidavit. That Rule envisages and appreciates that the Probate and Administration Rules does not and was not expected to make express provisions against all inconveniences. Rule 73 is the saving provision for the exercise by the court of its inherent powers. Section 47 of the Law of Succession Act provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees therein as may be expedient. That section therefore gives the High Court an unlimited jurisdiction to entertain any dispute arising under the Law of Succession Act. The interpretation that the High Court by dint of Rule 63 of the Probate and Administration Rules does not have jurisdiction to issue restraining orders or any other order not covered by Rule 63 would be contrary to section 47 of the Act as it tends to limit the Court’s inherent powers and in turn violates section 31(b) of the Interpretation and General Provisions Act Cap 2 which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act. Rule 63 is not inconsistent with section 47 as the former does not state that the High Court shall not entertain any application other than those specified in that rule. Restraining orders can be issued by the Court in a succession case in the exercise of its court’s inherent powers to act *ex debito justitiae* and to do real and substantial justice, so long as the application is not grounded on Order 39 of the Civil Procedure Rules, and each case being considered under its unique circumstances and facts. The undisputed fact in the instant application is that the suit land is at this stage the property of a deceased person. The applicant has only petitioned for letters of administration and the respondent objected. No order can be issued against or in favour of either party in respect of the suit land before a grant of representation is issued. Furthermore, in the light of the averments of the respondent, that he has been living on the suit land since he got married, the orders sought would have the effect of determining with finality the cause at an interlocutory stage and distributing the estate prematurely..”

47. It is clear that this Court has the powers to grant the orders sought. The fact that the provision under which the application is brought is not cited does not deprive this Court of such jurisdiction.

48. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a *prima facie* level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit *“leap-frogging”* by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

49. However, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition that she did not appear before an advocate to execute the charge and have the effects of the pertinent provisions of law explained to her.

50. It was therefore held by **Ringera, J** (as he then was) in **Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001**:

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

51. According to the Court of Appeal in **Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991**:

> "The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory…As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

52. What then constitutes *a prima facie* case? In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,** the Court of Appeal held as follows:

> "The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

53. While adopting the same position the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** added that:

> **"The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."**

54. In this case, all the parties are agreed that the deceased distributed his estate before his demise. What is in dispute is whether the manner in which the Respondents conducted themselves as regards the transactions entered into between them was consistent with the said distribution. That is clearly an issue that must await the confirmation of the grant. While reiterating the said principles, **Ringera, J** (as he then was) in **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002** stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in **Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR)** where it was stated:

> **"....I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein....."**

55. It is however not in dispute that the 5th to 9th Respondents are in possession of part of the estate and they have been therein for a considerable length hot time. The Applicant has not alleged that they lodged any complaint challenging their possession until now.

56. Since the issue of distribution is yet to be determined, this Court cannot at this stage of the proceedings nullify the titles of the Respondents, if at all such titles exist. The Respondents contend that titles have not been issued and the Applicant has not adduced any evidence to the contrary.

57. In those circumstances the order that commends itself to me and which I hereby grant is that there be an injunctions restraining the Applicant and the Respondents from further alienating or disposing of the properties forming the subject of the estate of the deceased until the grant herein is confirmed or until further orders of this court.

58. In the meantime, this matter is hereby referred to mediation for the purposes of the aforesaid confirmation of grant.

59. There will be no order as to costs.

60. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15TH DAY OF JUNE, 2021.

G V ODUNGA

JUDGE

Delivered in the absence of the parties

CA Geoffrey