



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 141 OF 1991

IN THE MATTER OF THE ESTATE OF KIGEN CHEBOI KIPCHORSOI (DECEASED)

IN THE MATTER OF AN APPLICATION FOR PRESERVATION OF THE ESTATE OF THE DECEASED

BETWEEN

SANIEKO KIGEN.....OBJECTOR/APPLICANT

AND

CHRISTOPHER KIPYEGO KIGEN.....1ST PETITIONER/RESPONDENT

ALFRED KIMUTAI LAGAT *alias*

MICHAEL KIGEN.....2ND PETITIONER/RESPONDENT

RULING

[1] The Notice of Motion dated 2 February 2021 was filed herein by the objector pursuant to Section 3A of the Civil Procedure Act, Order 40 Rule 3 and Order 51 of the Civil Procedure Rules as well as Sections 45 and 47 of the Law of Succession Act, Chapter 160 of the Laws of Kenya and Rules 59 and 73 of the Probate and Administration Rules. She seeks orders that:

[a] Spent

[b] Spent

[c] Pending the hearing and determination of the main suit, an order of temporary injunction be issued restraining the petitioners/respondents herein, by themselves or through their agents, servants, officers or otherwise from attaching, selling, disposing off, alienating, transferring or interfering with those parcels of lands known as IRONG/KITANY/721, 722, 723, 724, 725 and 726 and TEMBELEO/ELGEYO BORDER BLOCK 13(KAPLOGOI)/31.

[d] The titles of those parcels of land known as IRONG/KITANY/721, 722, 723, 724, 725 and 726 and TEMBELEO/ELGEYO BORDER BLOCK 13(KAPLOGOI)/31 held by the petitioners be deposited in this Court for preservation.

[e] This Court be pleased to issue an order for cancellation and revocation of those titles known as IRONG/KITANY/721, 722, 723, 724, 725 and 726 and reversion of the same to the estate of the deceased.

[2] The application was premised on the grounds that the petitioners have fraudulently procured the title deeds over the parcels of land known as IRONG/KITANY/721, 722, 723, 724, 725 and 726; which allegedly arise from the subdivision of IRONG/KITANY/173 and IRONG/KITANY/175. It was further the contention of the objector that, in perpetuation of the said fraud, the petitioners intend to fraudulently dispose of the estate of the deceased to third parties to defeat the cause of justice and the interest of the petitioner; and that she stands to suffer irreparable and substantial loss unless the prayers sought herein are granted.

[3] In support of the application, the objector relied on her Supporting Affidavit, sworn on 2 February 2021 and the documents annexed thereto. She averred therein that the deceased was the registered owner of the parcels of land known as IRONG/KITANY/173, IRONG/KITANY/175 and TEMBELEO/ELGEYO BORDER BLOCK 13(KAPLOGOI)/31; and that, during his lifetime, the deceased and

his 2 wives from the 3rd and 4th houses lived in TEMBELEO/ELGEYO BORDER BLOCK 13(KAPLOGOI)/31 where his remains were interred. She complained that, upon the death of the deceased, the two petitioners forcefully evicted her from the portion she occupied and utilized and have since proceeded to subdivide the property without her involvement.

[4] The objector is apprehensive that the petitioners may dispose of the estate property before her application for revocation can be heard and determined, with a view of defeating the cause of justice and to the detriment of some of the beneficiaries of the deceased. She accused the petitioners of greed and sought the intervention of the Court in forestalling the petitioners' unlawful maneuvers. She took the position that the Will that the petitioners are purportedly enforcing is a fraudulent document; and that it is only fair and just that the orders she has prayed for be granted pending the hearing and determination of the revocation application.

[5] In response to the application, the two respondents filed a joint affidavit on **15 June 2021** confirming that they are sons of the deceased, and therefore have the right to administer the estate in accordance with his Will. They accordingly averred that the allegations of fraud are not only spurious but also do not fall for determination in a matter such as this. According to them, the objector ought to have filed a criminal complaint with the relevant authorities instead. They further posited that the objector is dishonest, untruthful and biased and has brought her two applications with the ulterior motive of causing disharmony in the deceased's family. They urged for the dismissal of the instant application as it is nothing but a waste of precious judicial time.

[6] Directions were given herein on **19 April 2021** that the application be disposed of by way of written submissions. In her written submissions filed herein on **2 June 2021**, **Mr. Kibii** reiterated the objector's stance that she seeks to challenge the validity of the Will allegedly written by the deceased as per the Summons for Revocation of Grant dated **18 November 2021**; that she is apprehensive that the petitioners may proceed to dispose of the estate during the pendency of her application; and that the fact that the two parcels known as IRONG/KITANY/173 and IRONG/KITANY/175 have been subdivided into 6 separate pieces is proof enough of their intentions. He consequently urged the Court to make such orders as would preserve the substratum of the dispute pending the final determination of the revocation application.

[7] **Mr. Tunoi**, learned counsel for the petitioners, relied on his written submissions dated **5 June 2021**. He was of the view that the allegations of fraud being criminal in nature, ought to have been made by way of a complaint to the relevant state agencies for investigations and appropriate action. He relied on **R.G. Patel vs. Lalji Makanji** [1957] EA 314, **Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another** [2000] eKLR, **Central Bank of Kenya Limited vs. Trust Bank Limited & 4 Others** [1996] eKLR and **Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another** [2016] eKLR, as to the applicable standard of proof in civil cases hinged on fraud, and argued that all the objector did herein was to allege fraud without any tangible evidence to support those claims. Consequently, counsel urged the Court to dismiss the objector's application with costs.

[8] By dint of **Section 47** of the **Law of Succession Act**; the Court has powers to make such orders as are necessary for the ends of justice herein. It provides that:

"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..."

[9] Similarly, **Rule 73** of the **Probate and Administration Rules**, which is one of the enabling provisions cited by the applicant, provides that:

"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

[10] In addition to the foregoing provisions, **Rule 63(1)** of the **Probate and Administration Rules** recognizes that:

"Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), ... shall apply so far as relevant to proceedings under these Rules."

[11] The instant application having been brought pursuant to **Order 40 Rule 1(a)** of the **Civil Procedure Rules**, it is well within the jurisdiction of the Court to handle and it is therefore imperative to consider whether the objector has made a good case for the issuance of a temporary injunction to preserve the estate pending the hearing and determination of her application for revocation; for that provision states thus

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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."

[12] The prerequisites guiding the exercise of discretion in an application such as this remains **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358 wherein it was held that:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a 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."

[13] And in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** the Court of Appeal held that:

"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."

[14] A perusal of the court record confirms that there is a pending application filed by the objector for revocation of Grant of Probate made herein on **28 February 1992**. She contends that a significant number of the dependants of the deceased, including herself, were not provided for in the Will alleged to have been made by the deceased. She in fact alleged fraud against the two petitioners and therefore prayed for preservation of the estate pending the hearing and determination of her application. On the other hand, the petitioners urged the Court to dismiss the application, faulting the objector for failure to prove her allegations of fraud to the requisite standard.

[15] While it is true that allegations of fraud in civil matters require proof beyond a preponderance of evidence, this is not the occasion for it. In considering whether or not a *prima facie* case has been made out, the Court is not required to go into an exhaustive evaluation of the merits of the objector's revocation application. This caution was aptly expressed by the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** thus:

"... 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."

[16] Accordingly, and in the light of the foregoing provisions, I have given consideration to the instant application; particularly the averments set out in the objector's affidavit and the annexures in support of the assertions. She stated that she is one of the widows of the deceased and that she has not been provided for by the petitioners. She annexed to her affidavit copies of Green Cards and Certificates of Search to confirm that two of the estate assets have already been subdivided and new parcel numbers assigned to the subdivisions. She is apprehensive that the petitioners may dispose of the properties before her application is heard and determined.

[17] The petitioners did not refute the assertion that the objector is a widow of the deceased. In fact, it was conceded at paragraph 7 of the petitioners' Replying Affidavit, wherein she was accused of having filed the application to create disharmony in the family. It was likewise not refuted that she was not provided for in the alleged Will of the deceased. Hence, it is manifest that the objector does have a genuine grievance to ventilate and that her application for revocation of grant is not frivolous. It is likewise plain that the objector stands to suffer irreparable harm should the estate be distributed before the pending application is heard and determined. Moreover, the balance of convenience is in favour of the current status quo being maintained pending a merit consideration of the application for revocation of grant.

[18] In the premises, the orders that commend themselves to the Court, and which I hereby grant are as hereunder:

[a] Pending the hearing and determination of the objector's application for revocation of grant dated **18 November 2020**, an order of temporary injunction be and is hereby issued restraining the petitioners/respondents herein, by themselves or through their agents, servants, officers or otherwise from attaching, selling, disposing off, alienating, transferring or interfering with those parcels of lands known as IRONG/KITANY/721, 722, 723, 724, 725 and 726 and TEMBELEO/ELGEYO BORDER BLOCK 13(KAPLOGOI)/31.

[b] Costs of the application be costs in the cause.

[19] The rest of the objector's prayers are premature and/or warranted and are therefore declined for now.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2021

OLGA SEWE

JUDGE