



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**P & A NO. 250 OF 2014.**

**IN THE MATTER OF THE ESTATE OF WANJALA MUKUWA SASITA (DECEASED)**

**DORIS WANYAMA.....PETITIONER/RESPONDENT**

**VERSUS**

**FLORENCE NAMACHITU.....INTERESTED PARTY/APPLICANT**

**RULING**

1. The Applicant/Interested Party through a notice of motion application dated 2<sup>nd</sup> November, 2021 approached this court seeking the following orders:

**i. (Spent).**

**ii. That there be a temporary injunction barring the eviction of the family of the interested party/applicant's late son and tenants from land parcel No. E. BUKUSU/S. KANDUYI/8863 pending the hearing and determination of this application inter parties.**

**iii. That there be a temporary injunction barring the eviction of the family of the interested party's late son and tenants from the land parcel No. E. BUKUSU/S. KANDUYI/8863 pending the hearing and determination of the application for revocation of grant which is coming up for hearing on 15<sup>th</sup> November, 2021.**

**iv. That the costs of this application be provided for.**

2. The application dated 2<sup>nd</sup> November, 2021 is supported by the affidavit sworn by the Interested Party/Applicant on even date. The applicant's gravamen is inter alia; that on diverse months and years, her deceased son, Cleophas Webala Kere purchased land measuring 0.21 Ha which was to be excised from land parcel No. E. BUKUSU/S. KANDUYI/5966 from the late Wanjala Mukewa Sasita (deceased herein); that her late son was the legitimate owner of the parcel of land as evinced by a copy of land agreement marked as 'FN1-2'; that the subdivision gave rise to title No. 5970 which was again subdivided and gave rise to No. 670 and 6703 and that title No. 6702 gave rise to No. 8863 and 8864; that the land bought by her late son is comprised in the title No. E. BUKUSU/S. KANDUYI/8863 and that the confirmed grant made to the petitioner on 16<sup>th</sup> June, 2017 did not capture her late son's interest hence the present application herein; that the petitioner has an ill motive as she has purported to secretly fix new boundary beacons on parcel number 8863 and further purported to issue an illegal notice to vacate to the applicant's late son's tenants from rental premises erected on the plot. She urged this court to issue a temporary injunction against the Petitioner/Respondent barring her threatened eviction of her late son's family and tenants until determination of the application for revocation of grant dated 22<sup>nd</sup> May, 2020.

3. In response to the application, the Petitioner/Respondent vide a replying affidavit sworn on 8<sup>th</sup> November, 2021 deponed inter alia; that the Interested Party never lodged a notice of objection when she lodged this succession cause; that upon confirmation of grant she processed the titles to five beneficiaries as evinced in a copy of the official search certificate marked as 'len1'; that through the Chief Magistrate's Court at Bungoma in civil case No. 85 OF 2018 she petitioned the court and secured an order of eviction against the people who were staying on the land as they never bought from her husband as evinced by a copy of the amended plaint marked as 'len2'; that the Chief Magistrate's court issued a judgement in her favour in that the land parcel No. BUKUSU/S. KANDUYI/8863 is registered in the names of the Petitioner/Respondent and her 3 children and that the court further observed that from the 1<sup>st</sup> Agreement, the parcel number mentioned was E. BUKUSU/S. KANDUYI/5516 and not land parcel No. BUKUSU/S. KANDUYI/8863 which is the suit land herein and that the land sale agreements produced make no reference to the suit land; that the Interested Party/Applicant proceeded to file a stay pending appeal application, as evinced by a copy of the notice of motion application marked as 'len6' against the same Judgement which was dismissed by the court; that the Interested Party/Applicant proceeded to the High Court to appeal the orders of the trial court under appeal case No. ENV. & LAND Appeal No. 12 of 2020 as evinced by a copy of the Memorandum of Appeal marked as 'Len 8' where Justice A. Omollo of ELC Busia granted a temporary stay of execution for 14 days as evinced by a copy of the Court Orders marked as 'Len 9'; that the Notice of Appeal was later dismissed by Hon. Olao. It is the contention of the applicant that one cannot have two pending appeals simultaneously

before a court of equal jurisdiction and it is the view of the petitioner that the Interested Party/Applicant wants to play with the succession court and Environment and Land Court to see which one will grant favourable orders yet the Environment and Land Court has already dismissed the applicant's claim and thus they cannot come to the Succession court for the same orders.

4. The application was canvassed by way of written submissions. Both parties have filed and exchanged their submissions.

5. The Interested Party/Applicant filed her submission on 17/11/2021 where she submitted that the purpose of the current application is essentially to seek conservatory orders since the disputed subject matter is currently occupied by the family and tenants of the Interested party's late son. It was submitted that subject to section 76 of the Law of Succession Act where the law makes it clear that a grant of representation, whether or not confirmed, may at any time be revoked or annulled on application by any interested party. The applicant finally urged this court to allow the application for temporary injunction and give directions for disposal of the revocation application by way of *vivo voce* evidence.

6. The Petitioner/Respondent through her submissions filed on 17<sup>th</sup> November, 2021 submitted that the applicant should proceed to the Court of Appeal and not this Succession Court to seek similar orders that were dismissed in the Environment and Land Court. She submitted that the Environment and Land Court in Case No. 12/2014 did not find the sought orders worthy of conservatory orders and dismissed the same and further that the trial court similarly dismissed them and that the High Court in case No. 12/ 2020 also dismissed the application for stay of execution. She finally submitted that the limited grant of letters of administration *Ad Litem* granted to the interested Party/Applicant was limited for the purposes of representing the deceased in **Bungoma C.M.C NO. 85/2018** and not any other case and thus they have no capacity to proceed with this matter. She urged this court to dismiss the application with costs.

7. I have given due consideration of the Application, rival affidavits and submissions. The Interested Party/Applicant is seeking temporary injunction to be granted pending hearing and determination of the application for revocation of grant dated 22<sup>nd</sup> May, 2020. The issue for determination is whether the applicant has presented sufficient reasons to merit the grant of conservatory relief pending the determination of the applicant's summons for revocation of grant dated 22/5/2020.

8. Under the **Constitution of Kenya (Protection of Rights and Fundamental freedoms practice and Procedure Rules 2013) Rule 2** defines 'interested party' as: -

**“A person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceeding or may not be directly involved in the litigations.”**

**Gitari J.** in the case of **AMM vs JMN [2019] eKLR** had this to say about an interested party: -

**“An interested party is one who has a stake in the proceedings, though he was not party to the cause *ab initio*. He is one who will be affected by the decision of the court when it is made, either way. The court should not act in vain by enjoining a party that clearly would have no interest in the subsequent proceedings”**

9. From the court records, it is quite explicit that the trial court determined that the Interested Party lacked any vested interest in the subject land since the attached sale agreements made reference to land parcel No. **E. BUKUSU/S. KANDUYI/5516** and not land parcel No. **BUKUSU/S. KANDUYI/8863** which is the suit land herein. It is also clear that the appeal lodged by the Interested Party/Applicant herein was dismissed due to lack of merit.

10. 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.”

11. 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.

12. In this case, the Applicant's case is that the parcel of land in question was the property of her deceased son and that the Petitioner/Respondent's confirmed grant was fraudulently acquired as it did not capture her deceased's son interest. However, that interest depends on whether the property the subject of this application falls under the estate of the deceased herein. According to section 3 of the Law of Succession Act, "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is the land parcel **No. E. BUKUSU/S. KANDUYI/8863** and not the land parcel **No. E. BUKUSU/S. KANDUYI/ 5966** which was the alleged subject matter of the land sale agreement.

13. In **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the learned Judge observed that:

**"This Court's view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution."**

14. It is therefore clear that any parcel of land or property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate. **Section 109** of the **Evidence Act**, provides that: -

**"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person."**

15. The burden, in this instant case, is therefore upon the Interested Party/Applicant to prove that the said parcel of land not only belonged to her deceased son but that by the time of his death, the deceased's interests therein had not been terminated and that he was the competent owner.

16. According to the trial court's judgement, the attached copy of official search posits that the owners of the subject parcel of land to this application are the Petitioner/Respondent and her three children and that the land reference number on the sale agreement is not the one on the official search.

17. 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."**

18. What then constitutes a *prima facie* case? 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."**

19. Accordingly, the Applicant, not a being beneficiary of the estate, had no interest therein as she had made reference to a land parcel that is not subject of these proceedings and didn't prove the existence of such a parcel. That issue does not constitute a prima facie case for the purposes of an injunction.

20. As regards the Interested Party/Applicant's claim that if they are evicted from the land which they purchased and have developed they stand to suffer great harm, I find that she has not provided any specific details of what substantial loss she will suffer. I am nonetheless

prepared to find in their favour that being evicted from land which they purchased thirty years ago and have extensively developed, would amount to substantial loss. The court in **Nguruman Limited case (supra)** expressed itself as hereunder:

**“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”**

21. In this case it is alleged that the Petitioner/Respondent is likely to be adversely affected. If the injunction is granted, it means that the interested party/Applicant is likely to benefit from a land parcel that did not even belong to her deceased son as she is clearly referring to a parcel of land that is not the subject matter of this instant application. In other words, the consequences will not have been the intended object of maintaining status quo but the opening of other fronts for fresh litigation.

22. This court is also, by virtue of section 1A (2) of the Civil Procedure Act, enjoined to give effect to the overriding objective as provided under section 1A (1) of the Civil Procedure Act in exercising the powers conferred upon it under the Civil Procedure Act or in the interpretation of any of its provisions. One of the aims of the said objective is the need to ensure equality of arms, the principle of proportionality. Therefore, in considering whether or not to grant an injunction, an equitable relief, it is my humble view that the principle of proportionality plays a not remote role. In **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. **Ojwang, AJ** (as he then was) expressed himself as follows:

**“...Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant.”**

23. In this case, it seems that the challenge to the disposal of the suit property is only from the Interested Party/Applicant. Her claim, should she succeed, would be in regard to the whole of the said property. It would be disproportional if the injunction was granted in those circumstances since her interest is none existent as the land sale agreement she makes reference to, quotes a land parcel reference that is not a subject matter in the application herein and as far as I am aware none existent as she has not attached any official search document on the land parcel **No. E. BUKUSU/S. KANDUYI/ 5516**.

24. In light of my finding above, I agree with the Petitioner/Respondent that in the event that the injunction sought is granted, this court will be overruling the dismissal orders of another court of concurrent jurisdiction since the ELC court by dint of article 162 (2) (b) of the constitution is a court of equal status to the High court. The proper thing to do was for the applicant to pursue an appeal to the higher court for redress namely the Court of Appeal. The lower court had made a determination regarding the dispute over the property which prompted the applicant to move on appeal to the ELC court at Bungoma High court which dismissed an application for injunction thereby leaving the appeal still pending determination. It is thus rather ingenious for the applicant to approach this court for similar orders of injunction which had been declined by a court of concurrent jurisdiction. I must agree with the petitioner that the applicant is out on a forum shopping and playing lottery with the justice system which is untenable. The applicant having filed her summons for revocation of grant should just proceed to set it down for hearing on priority basis as she is aware that she has already exhausted her avenues for seeking orders of injunction except the Court of Appeal. In that regard I find that the balance of convenience tilts in favour of the petitioner in that the order which commends itself to me is that the order of injunction ought to be declined. It is clear that land parcel **No. E. BUKUSU/S. KANDUYI/8863** is now registered in the names of the Petitioner/Respondent and her three children.

25. Accordingly, I find that the Interested Party/Applicant has failed to satisfy all the conditions necessary for the grant of the injunction sought. In the premises, the Notice of Motion application dated 2<sup>nd</sup> November, 2021 fails and is dismissed but with no order as to costs.

26. It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021.**

**D. Kemei**

**Judge**

**In the presence of:**

**Nanzushi for Petitioner/Respondent**

**Wakoli for Khakula for Interested Party/Applicant**

**Wilkister Court Assistant**