



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA A

T KERUGOYA

CIVIL APPEAL NO. 80 OF 2019

(From original civil suit no. 73 of 2018 at Kerugoya)

SUSAN MICERE MBOGONYE.....APPLICANT

VERSUS

TERESIA MANOI MUGAMBI.....RESPONDENT

RULING

1. The application pending before this court is the one dated 13/11/2019 wherein the applicant seeks orders inter alia that:-

a) An order of injunction do issue restraining the respondent from selling, charging, transferring or alienating land parcel number Inoi/ Kiamburi/ 673 pending the hearing and determination of this application.

b) An order of injunction do issue restraining the respondent by herself, her servants, agents, relatives and /or anybody else claiming through her from entering, cultivating, leasing or any other way interfering with land parcel number Inoi/Kiamburi/673 pending the hearing and determination of this application.

c) An order of injunction do issue restraining the respondent from selling, charging, transferring or alienating land parcel number Inoi/ Kiamburi/ 673 pending the hearing and determination of the appeal.

d) An order of injunction do issue restraining the respondent by herself, her servants, agents , relatives and /or anybody else clamming through her from entering, cultivating, leasing or any other way interfering with land parcel number Inoi/Kiamburi/673 pending the hearing and determination of this appeal.

e) The O.C.S Sagana police station to ensure compliance with the court orders.

2. The application is supported by the affidavit of Susan Micere Mbogonye who is the applicant.

3. The application was filed under a certificate of urgency seeking some interim orders before the hearing and determination of the application interparties. A temporary injunction was issued in terms of prayer No. 2, 3, & 4 pending the hearing and determination of the application inter parties.

4. The application is supported by the affidavit of the applicant sworn on 13/11/2019. She contends that she was the second wife of the late Mbogonye Gichuki who passed away in 2005. That the said deceased had two wives, that is herself and Mary Wakiaga who had Four children 2 sons and two daughters the respondent being one of the daughters. She avers that she had six children, three (3) daughters and 3 Sons.

5. It is her contention that the deceased had settled her on 8.5 acres while the second house was settled on six(6) acres. She avers that the land had been demarcated and surveyed by the deceased and the portions issued to his sons. That the respondent was already married as at that time as she had been married since the 1960's. The deceased left a portion of one acre where he lived with the applicant and the applicant lives there todate.

6. The applicant contends that the respondent filed Kerugoya Succession Cause No 73/2018 after obtaining a Chief's letter from a different location. The respondent failed to disclose to the court that the applicant and her children are beneficiaries. By the time the applicant came to learn about the succession the grant had already been confirmed.

7. The applicant filed submissions and submits that the appeal raises serious issues of law for determination by this court. He submits that the deceased was polygamous and **Section 40 of the Law of Succession Act** applies. That the respondent failed to disclose to the court that the deceased was survived by other beneficiaries and yet the trial magistrate held that the application had no merits.

8. The applicant submits that the appeal raises serious issues of law and the application seeks to preserve the suit property so that it is not sold or charged and to protect the applicant from harassment.

9. The applicant submits that the court has jurisdiction to grant the orders and relies on **In Re Estate of Francis Muriuki Muchera (deceased)** a decision of this court which cited the Court of Appeal decision in **Floris Piero –v- Giancarlo Falasconi**, where it was held:-

“Indeed Section 47 of the Law of Succession Act gives the court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunctive orders. In other words, we are of the firm view that Section 47 of the Act gives the court all embracing powers to make necessary orders including injunctions where appropriate to safeguard the deceased’s estate”.

1. RESPONDENTS CASE

The respondent in her replying affidavit sworn on 27.1.20 confirmed that the deceased had two households. She averred that the land parcel in dispute *parcel no. Inoi/Kiamburi/673* belonged to the deceased.

The Respondent claimed the appellant’s household was entitled to 7 1/2 acres while her mother’s household was entitled to 7 1/8 acres. She claimed that both her parents are buried on the suit property, that the appellant was allowed to utilize the suit land temporarily since she was in Kagio.

The respondent claimed that through the grant she was able to obtain the property registered in her name, that an injunction would prejudice her and would deem the appeal as determined.

In her submission dated 6.5.20 she claimed that the appellant had not adduced evidence of being in occupation of the suit land, and that the title was already in her name. That she would be denied her proprietary rights and that the appellant had not established she would suffer irreparable damage which cannot be compensated by damages. She relied on the conditions for the granting of injunctions as set out in **Giella vs Cassman Brown 1973 EA 358 and Mrao vs First American Bank of Kenya Ltd 2003 KLR 125.**

2. ISSUES

i. Whether the application for injunction has merits.

3. ANALYSIS

The application was brought under **Order 42 Rule Civil Procedure Rules(6), Section 3A of the Civil Procedure Act and section 47 of the Law of succession Act and Probate and Administration Rules 49 and 73.** The applicant was not seeking stay of execution pending appeal but an injunctive relief pending determination of the appeal.

Nevertheless, jurisdiction of the High Court to issue orders for injunction in succession cause can be deemed to fall as part of the inherent powers of the court in section 47 Law of Succession Act. In the case of **Floris Piero & Another –vs- Giancarlo Falasconi (2014) eKLR, (supra)** the Court of Appeal held that the High Court has jurisdiction to issue injunction orders under **Section 47 of the Law of Succession Act and rule 73** Probate and Administration Rules, where it is appropriate to safeguard the estate of the deceased. **Section 47 of the Law of Succession Act** provides:-

“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: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

While **Rule 73 of Probate & Administration Rule** provides as follows:-

“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. The applicant seeks an order of injunction pending hearing and determination of the appeal. The conditions for the grant of interlocutory injunctions are as settled in the case of **Giella –v- Cassman Brown** as follows:-

“The conditions for the grant of an interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”

In short the three principles that govern the grant of an injunction are:-

- Prima facie case
- Irreparable injury
- Balance of convenience.

The procedure for the grant of temporary injunction is provided under **Order 40 of the Civil Procedure Rules – Rule 1a & b** which provides:-

“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.”

11. The Law of Succession Act in the Probate and Administration Rules has laid down the Civil Procedures Rules which will apply in succession matters. This is because the Law of Succession has its own elaborate rules of procedures. **Order 40 of the Civil Procedure Rules** is not one of the orders which is applicable in the Law of Succession matters. **Rule 63(1) of the Probate and Administration Rules** excludes **Order 40**. However the Court of Appeal in the case of **Floris Pierro –v- Giancaro Falasconi (Supra)** has held that the Section 47 gives the court jurisdiction to issue orders and reliefs including injunctions. It follows that the court will apply the procedure under **Order 40 Civil Procedure Rules** where it is expedient to grant a temporary injunction.

12. The principles for the grant of an injunction 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 **Mrao Limited –v- First American Bank off Kenya Limited and 2 Others (2003) KLR 125** has 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 letter.”

13. A prima facie case is one which is not frivolous. It must be easily discernable from the pleadings even before the party is heard as it will show that a right exists which maybe infringed if an injunction is not issued. It is the applicant who must establish a prima facie case. An injunction being a discretionary remedy is granted on the basis of evidence as well as on sound legal principles.

14. In this case the applicant has established a prima facie case with chances of success as she is the second wife of the deceased who owned the land parcel in dispute. She therefore has a legitimate claim to the estate of the deceased. She has been living on the suit land and utilizing it, a fact which is admitted by the respondent. She is likely to suffer irreparable loss if the respondent is not restrained by this court as the land may be transferred to 3rd parties and she be evicted before the appeal is heard and determined. The balance of convenience tilts in favour of the applicant.

15. In conclusion I find that the application has merits. The appeal raises substantial issues of law on the manner in which the grant was obtained which ought to be determined by this court. I order that the interim orders of injunction are confirmed. There be an order of injunction as prayed in prayer No. 4, and 5 of the application. Costs to the applicant.

Dated at Kerugoya this 15th day of September 2020.

L.W. GITARI

JUDGE