



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 53 OF 2016**

**IN THE MATTER OF THE ESTATE OF CECILIA WANJIRU KIBICHE (DECEASED)**

**R U L I N G**

1. Before the court is a Chamber Summons filed on 8<sup>th</sup> March, 2018 brought under Rules 45, 47 and 83 of the Law of Succession Act and Rules 49, 59 and 73 of the Probate and Administration Rules. The Applicant sought in the main that the court be pleased to issue an order restraining the administrators from interfering with and/or wasting the “physical landscape” in respect of the land parcel described as **Longonot/Kijabe Block 4/528** which forms part of the estate of the deceased. Such order falls within the provisions of order 40 R 1 of the Civil Procedure Rules which is applied to succession causes by Rule 63 of the Probate and Administration Rules.

2. The application is premised on the ground that the Administrator/Respondents herein have not taken lead to distribute the estate since the grant was confirmed on 23<sup>rd</sup> September, 2016 and appear keen on wasting the said estate.

3. **Faith Nyambura Gakuha** swore a supporting affidavit as the Applicant herein. She deposed that she is Peter Gakuha Kibiche’s daughter and a beneficiary to the estate of **Cecilia Wanjiru Kibiche(deceased)** together with Eliud Gakuha Kibiche, Cecilia Stellan Wanjiru, Cecilia Wanjiru and Loise Kanyi pursuant to the ruling delivered on 23<sup>rd</sup> September, 2016 by **Musyoka J.** She contended that since the grant was confirmed on 23<sup>rd</sup> September, 2016, no steps of administration have been taken by the administrators and if anything, administrators are wasting the said estate by setting up a quarry, leasing the properties forming part of the estate and alienating part of the estate. She further deposed that the administrators have refused to execute documents necessary to facilitate distribution and therefore the vast estate is going to waste.

4. The administrators, **Alice Wamaitha** and **Harriet Wanjiru Githinji** filed their grounds of opposition on 15<sup>th</sup> March, 2018. To the effect the Applicant’s intention is to frustrate their attempt to lodge their intended appeal. The bulk of the material contained in the grounds properly belongs to an affidavit being factual matters.

5. **Alice Wamaitha** filed a replying affidavit on her own behalf and on behalf of her co-administrator **Harriet Wanjiru Githinji**. She deposed that the grant herein was confirmed on 23<sup>rd</sup> September, 2016 and they were dissatisfied with the mode of distribution therein and have since lodged an appeal. She denied that she and her co-administrator, have wasted the estate and asserted, that the instant application is brought in bad faith as they are only trying to get some economic benefit on account of the estate through the activities complained of. She admitted that the Administrators have leased out a portion of the subject asset to **China Wu Yi Ltd** for purposes of mining of materials such as stones. Finally, she urged court to dismiss the application as any order tending to limit the powers of the administrators without proper basis is untenable.

6. The application was canvassed by way of oral submissions. Counsel for the applicant argued that the administrators have leased the subject land parcel to a Chinese entity and the Applicant is apprehensive that delay in the administration of the estate will allow dissipation of the estate. He contended that the Administrators are in breach of Section 83 of the Law of Succession Act and also placed reliance on the case of **Charles Gitonga Thuku v Bernard Ngatia Thuku & another (2016) eKLR.**

7. Counsel for the Administrators opposed the application and stated that the Administrators have lodged an appeal which will be rendered nugatory if the court allows the application. She submitted that the application relates to land that is not arable, which is vast and that the same has always been leased out to third parties. She contended that the Applicant’s mother having failed to prove her dependency is using the Applicant as a proxy to hinder distribution. Finally it was submitted that the Administrators would suffer irreparably damage if the lease to **China Wu yi Ltd** is cancelled. The Administration relied on the case of **Giella Cassman Brown Ltd & Co. Ltd. [1973] EA 358.**

8. The court has considered the material canvassed in respect of the Summons as well as arguments made by the parties for and in opposition thereto. The history of this matter is captured in the latest rulings of this court as delivered on 23<sup>rd</sup> September 2016 (**Musyoka, J**) and on 8<sup>th</sup> February 2018 (**Ngugi, J**). The record is replete with applications and counter – applications.

9. Regarding the present application, there is no dispute that the Administrators have not commenced the administration of the estate in accordance with the orders of **Musyoka J.** Their subsequent application for stay pending appeal was rejected but leave to appeal was allowed. It is admitted by the Administrators that they have allowed third parties, including **China Wuyi Ltd** to embark on mining and

quarrying activities on a portion of one of the assets of the estate, namely, **Longonot/Kijabe Block 4/528**, on the basis of what they refer to as a “short term lease”.

10. Their justification is that the intention is to obtain some “economic benefit for the estate” and that such activities are not new as they have been going on even during the life time of the deceased. To the Administrators, the only novelty is that the current lessee is using mechanized equipment and that besides, as Administrators, they will eventually account for the income thereby generated. The Administrators also reiterate that they are intent on pursuing their appeal regarding the decision dismissing their claims to the estate herein.

11. The duties of personal representatives are fiduciary in nature. Section 83 of the Law of Succession Act provides that:

**“Personal representatives shall have the following duties:**

**(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;**

**(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;**

**(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);**

**(d) to ascertain and pay, out of the estate of the deceased, all his debts;**

**(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;**

**(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be; [Rev. 2012] Law of Succession CAP. 160 L13-33 [Issue 1] (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;**

**(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;**

**(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration”**

12. While the Administrators claim to have administered the deceased’s estate “faithfully” for 13 years, they provide no evidence that they have carried out any of the responsibilities set out in this section. The record contains no accounts filed by them in respect of their said administration. And while it is true that they cannot be accused of intermeddling while acting on the authority of their appointment, and in light of their powers under Section 82 of Law of Succession Act, the Administrators by their affidavit do not evince any eagerness to complete the administration. On the contrary, they appear bent on delaying the same as they pursue their own appeal in the Court of Appeal. The beneficiaries are therefore caught up in an unenviable position; the persons responsible for distributing the estate are themselves pursuing a challenge to the determined distribution, which challenge seems adverse to the beneficiaries’ present interests.

13. Meanwhile, the Administrators admit to have allowed a third party to undertake extensive mining and quarrying for stones and other material on a part of the stated asset of the estate. The principles guiding the grant of an interim injunction are well settled. The successful Applicant must establish a prima facie case with a probability of success, and demonstrate likelihood of irreparable damage. In case of doubt the court will consider the balance of convenience. See *Giella v Cassman Brown & Co. Ltd.* [1973] EA 358. As to what constitutes a prima facie case, the Court of Appeal expressed itself as follows in **Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] e KLR:**

“Recently, this court in **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others** [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

**“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.”**

We adopt that definition save to add the following conditions by way of explaining it. 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."

14. The Court further stated that the three considerations governing the grant of injunctions at interlocutory stage are considered as sequential hurdles

15. In this cause, the court has already determined that the Applicant and others like her are the only beneficiaries entitled to share in the not-so meagre estate of the deceased. It appears that the Administrators are aggrieved that they were by the said decision excluded from benefitting from the estate and have preferred an appeal to the Court of Appeal. On the face of it, their interests are in direct competition with those of the declared beneficiaries. Secondly, the Administrators have evinced an intention to allow third parties to mine the land using heavy equipment, an action that may permanently alter or degrade the affected asset, to the detriment of the beneficiaries. At this stage, this court cannot determine whether the said land is arable or useful for other activities besides mining. Further, it cannot be predicted with certainty when the intended appeal will be concluded and whether by that date the asset will retain any value if the mining is allowed to continue.

16. The court also notes that there is no order staying the distribution of the estate, and in the result is satisfied that a case has been made out for the issuance of a temporary injunction in terms of prayer (2) of the Summons, pending the distribution of the estate in accordance with the judgment of **Musyoka J.** Moreover, in view of the obvious disinclination by the Administrators to administer the estate to completion, this court directs pursuant to Section 83 (g) of the Law of Succession Act, that the Administrators do proceed with the administration of the estate to completion, within a period not exceeding 6 (six) months of today's date, and to produce to the court a full and accurate account of the completed administration on or before the 15<sup>th</sup> of October, 2019.

17. In light of the above directions prayers 4, 5, 6 and 7 are not granted. Moreover, Prayer (3) cannot be granted in an interlocutory application and is rejected. Parties will bear own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 5<sup>TH</sup> DAY OF APRIL 2019**

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**C. MEOLI**

**JUDGE**

**In The Presence of:-**

Miss Kori holding brief for Applicant and Respondents counsels

Mr. Mirie and Miss Wambua, respectively

Court Clerk - Kevin