



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 135 OF 2018

ZAMZAM YUSUFAPPLICANT/ APPELLANT

-VS-

ABDILLAHI IGGE1ST RESPONDENT

MOHAMMED IGGE2ND RESPONDENT

RULING

[1] The significant order sought in the Notice of Motion dated 17th December 2018 and expressed to be brought under **Order 42 Rule 6(1) and (6) and Order 51 Rule 1 of the Civil Procedure Rules 2010** is:-

1. A temporary injunction restraining the respondents from evicting the applicant from plot No. 414 Bula Pesa Isiolo or selling, leasing or in any other way interfering with the appellant's occupation of the said land parcel pending the hearing of this appeal.

[2] The reasons for applying as set out in the application and the supporting affidavit of Zamzam Yusuf sworn on 17th December 2018 are:-.

In 2009 the respondents filed Succession Cause No. 29 of 2009 in Kadhi's Court Isiolo where judgment was entered on 22nd October 2009. The judgment was entered against the applicant's brother MY in which the court ordered that plot Nos. 414 and 415 Bula Pesa be amalgamated and subdivided; their late mother to get 20% share while the respondents get 40% each. They argued that summons to enter appearance was never served on her but on her brother MY who is of unsound mind. In addition, that in July 2018 the court ordered for the eviction of her caretaker. She sought to have the said judgment set aside but her application was dismissed. Therefore, unless this court intervenes the said plot will be sold.

[3] The respondents opposed the application through a replying affidavit of Abdillahi Igge sworn on 16th January 2019. He averred that their sister who is the applicant's mother, Halima Igge, subdivided and transferred plot No. 1301 Bula Pesa to herself when he and the 2nd respondent were working in Saudi Arabia. She went ahead and took the bigger portion of the subdivision, plot No. 414, which she transferred and registered for herself and upon her demise left it to her son M.

[4] They stated that M, who is not of unsound mind was served with the summons but refused to enter appearance. Their father attended court on 13th October 2009 and sought an adjournment to call Amina and Zamzam Yusuf and inform them of the next hearing. Consequently, they were aware of the proceedings. Thus, according to him this application amounts to harassment and they will suffer prejudice if this application is allowed. Hence, it ought to be dismissed.

[5] The matter was canvassed by way of written submissions of which this court has given due consideration.

ANALYSIS AND DETERMINATION

[6] Is there enough material for me to restrain the respondents from evicting the applicant from plot No. 414 Bula Pesa or selling, leasing or in any other way interfering with her occupation thereof pending the determination of the appeal?

[7] I will not re-invent the wheel on temporary injunctions. The principles on grant of interlocutory injunctions as set out **Giella v Cassman Brown** have been developed further by case law and the prescription of principles of justice in the Constitution in order to meet dynamic and ever changing legal problems. See **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-**

‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, In Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-

“ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”

[8] Nonetheless, we should be guided by the traditional considerations set out in the case of Giella v Cassman Brown [1973] EA 358 at page 360 where Spry VP held that:

“... 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. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

[9] Visram J (as he was then) distilled the applicable principles applicable when a court is considering an application for an injunction pending appeal in Patricia Njeri & 3 Others -Vs- National Museum of Kenya [2004] eKLR. They are:

- a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous
- b. The discretion should be refused where it would inflict greater hardship than it would avoid
- c. The applicant must show that to refuse the injunction would render the appeal nugatory
- d. The court should also be guided by the principles in Giella v Cassman Brown [1973] EA 358

[10] I will apply the above stated threshold. The land in dispute originally belonged to the parent of the applicant’s mother and respondents. It was distributed in the Succession Cause No. 29 of 2009 Kadhi’s court Isiolo and judgment entered in 2009. However, in 2018 the applicant sought to have the judgment set aside but the court dismissed the application. It is significant to note that it has not been refuted by the applicant that she has been the one solely receiving and enjoying the proceeds from the land. Without preempting the outcome of the appeal, I am of the considered view that an injunction would inflict more damage for it will deprive the respondents the opportunity to enjoy their inheritance which is said to have been in the hands of the applicant solely. The decision by the Kadhi’s court distributed the Suit land amongst the three children of the original owner is still subsisting and the respondents have a right to enjoy the fruits of their judgment. That right is not the lesser.

[11] In the upshot, the application for injunction is dismissed. Costs be in the appeal.

Dated, signed and delivered in open court this 16th May 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Kaberia for Respondent

Kimaita for Mr. Nkunja for applicant

F. GIKONYO

JUDGE