



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO.133 OF 2007

IN THE MATTER OF THE ESTATE OF PAUL KIPNGENO CHUMO (DECEASED)

BETWEEN

KIMETO KIBET PETER.....APPLICANT/ADMINISTRATOR

AND

STANLEY KIPLANGAT KIMETO.....RESPONDENT

RULING

1. Before me is an application dated 28th March 2019 brought by way of Chamber Summons seeking the following orders:-

1. Service of the application be dispensed with in the first instance.

2. The court be pleased to grant a temporary prohibitory injunction restraining the respondent, his servants, agents, assignees, representatives or nominees from entering into, trespassing into, plucking any tea from the farm, cultivating, tilling and or dealing with all that parcel of land known as L.R Kericho/Kipkellion Barsiele Block 1 (Kaula)/65 (hereinafter referred to as “the suit property”) pending the hearing and determination of this application *inter-partes*.

3. This court be pleased to grant a temporary prohibitory injunction restraining the defendant/respondent, his servants, agents, assignees, representative or nominees from entering onto, trespassing onto, plucking any tea from the farm, cultivating, tilling and or dealing with all that parcel of land known as L.R. Kericho/Kipkellion Barsiele Block 1 (Kaula)/65 (hereinafter referred to as “the suit property”) pending the hearing and determination of this Succession Cause. The status quo be restored as it were before the Respondent, his agents, servants or assignees trespassed into all that parcel of land known as Kericho/Kipkelion Barsiele Block 1 (Kaula)/65 until the succession is heard and determined.

4. The status quo be restored as it were before the Respondent, his agents, servants or assignees trespassed into all that parcel of land known as Kericho/Kipkelion Barsiele Block 1 (Kaula)/65 until the Succession Cause is heard and determined.

5. This Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

6. The cost of this application be in the cause.

2. The application is based on grounds on the face of the Chamber Summons and is supported by the affidavit of Kimeto Kibet Peter the administrator, sworn on 23rd March 2019, in which it was deponed that the Respondent on 11th March 2019 came onto the land with barbed wire and posts and intimated that he had come to subdivide the deceased’s land as the Succession Cause was taking too long to finalise, and when the Applicant expressed his views, the respondent drew a machete and aimed at his head and inflicted injuries on him. That the Respondent brought a surveyor who divided the land disentitling the Applicant the portion he used to cultivate.

3. In response, the Respondent filed grounds of objection dated 23rd April 2019 on the basis that the application is bad in law as the Applicant could not restrain a co-beneficiary also a son of the deceased and of equal status, from use and occupation of deceased’s estate, and that the orders sought would have the effect of evicting the Respondent from the land; and that the applicant fraudulently obtained letters of administration without consent, and without first obtaining representation of the estate of the late Samuel Kipkemoi Ngeno the former administrator.

4. The application proceeded by way of written submissions. The Applicant through counsel filed submissions dated 25th April 2019. In the

said written submissions the applicant's counsel Motanya & Company Advocates stated that the Applicant had been keen to make sure that all parcels of land forming the estate of the deceased Paul Kipngeno had been identified and consolidated, but before the finalization of the cause, the respondent with the assistance of the Provincial Administration had forcefully encroached on the part of the land which the applicant occupied on Kericho/Kipkelion Barsele/Block 1(Kaula)/65 and had thus rendered the applicant destitute, and that for peace and harmony to be maintained, that the prayers sought be granted as the Applicant did not intend to disinherit any of the beneficiaries of the estate.

5. The respondent through counsel Kipkorir Tele & Kitur also filed written submissions dated 15th may 2019 and contended that injunctive relief could not be issued against a beneficiary. In particular counsel felt that the Applicant had not satisfied the requirements set in the case of **Giella -vs- Cassman Brown EA Ltd [1973] EA 358**. According to counsel the Respondent had lived on the land for a life time and should not thus be evicted and stated that in terms of section 45 (1) of the Law of Succession Act (cap.160), the status quo at the time of the death of the deceased should be maintained. Counsel also submitted that the respondent was not a competent administrator of the estate, as the application through which he was appointed administrator was not consented to by the beneficiaries.

6. I note that an application dated 10th May 2019 related to have the present application has not been determined. However, the parties counsel having filed written submissions, the application dated 20th May 2019 is in my view spent, and I mark it as spent.

7. With regard to the issues raised herein, the respondent cannot challenge the appointment of the applicant as administrator by encroaching on land or forcefully taking land. The legal avenue to challenge the appointment of an administrator is through an application for revocation nor nullification of grant. As for now the applicant is still the administrator appointed by the court, unless a proper challenge to his appointment is made and the court removed him.

8. This application will however, not succeed, as in my view the Applicant is guilty of non-disclosure of material facts, which makes this court not be able to exercise its discretionary jurisdiction to grant equitable restraining or injunctive orders. He does not state why from 14th February 2017 he has not applied for confirmation of grant of letters of administration, and what specific steps he has taken to apply for same, in view of the legal requirement that an administrator is statutory required after six (6) months to apply for confirmation of grant. He does not say where the respondent and other brothers were living or farming before 11th March 2019, and he does not say if the Respondent and other siblings are using any of the deceased's land, nor does he disclose the status of the land when the deceased died.

9. Equitable remedies are meant to serve the broader interests of justice, and not to create or perpetrate an illegality or irregularities or benefit a person who does not come to court with clean hands.

10. In my view, if the applicant wants to finalise this matter, he should apply as the law requires him to do for confirmation of grant, and if the beneficiaries or any of them has a dispute, the court will make a decision in the matter.

11. This Succession Cause has been pending in court since 2007, more than eleven (11) years now.

12. I dismiss the application for non-disclosure of material facts on the actual situation on the ground. I order that the Applicant applies for confirmation of grant within the next sixty (60) days from today, and any dispute be raised in that application and it will be dealt with by the court appropriately.

Dated at Kericho this 18th June 2019.

George Dulu

JUDGE