



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 27 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE

MOSES CYPRIAN KIMANJUI NGURU..... DCD

SABENA WAIRIMU KIMANJUI.....APPLICANT

V E R S U S

MARY SABENA WANJIKU.....1ST RESPONDENT

JUDITH WAMBUI GACHENGE.....2ND RESPONDENT

PASQUELINA MURINGO NGURU.....3RD RESPONDENT

RULING

1. The applicant has filed an application dated 02/03/2018 seeking temporary injunction against the 1st respondent, her agents and anyone claiming through her from interfering, transferring, collecting rent and/or committing acts of waste on **Plot No. 9 Baricho** and **Plot No. 28 Kagio** pending hearing and determination of the cause. In addition that she produces an account of all rent received from **Plot No. 9 Baricho** and **Plot No. 28 Kagio**. The application was based on the ground that the Plots are subject of the succession cause and the 1st respondent has been interfering by collecting rent and currently attempting to sell the same.
2. The respondent filed a response stating that the application is premised on wrong provision of the law for **Order 48 & 7 of the Probate and Administration Rules** does not exist and does not support the application. That the applicant is forum shopping since there are 7 cases pending in various courts involving the same Plots with interlocutory application pending. That she is the legal owner of the said Plots and enjoys right of ownership under **Sections 24, 25 and 26 of the Land Registration Act**. That there is no evidence to demonstrate that the said Plots form part of the deceased's estate under **Section 34 of the Law of Succession Act**.
3. The application proceeded by way of written submissions. The applicant submits that the properties plot No.28 Kagio and Plot No. 9 Baricho belong to the estate of the deceased and injunction should be issued to preserve the properties.
4. For the respondent it is submitted that the application is defective as it was premised on wrong provisions of the law. That the applicant is out on Forum shopping for favourable determination. That this is because there are several matters pending in court with several interlocutory applications pending before various courts of competent jurisdiction. On the subject plots No. 9 Baricho and Plot No. 28 Kagio. That the applicant has concealed material facts from the court for the purpose of obtaining interim orders. That a person who comes to court of equity must come in clean hands as stated in the case of **Mary Wambui Kamau & 2 Others –v- Richard Karimi Kinoti (2015) eKLR** where the court observed that injunctive relief is indeed an equitable remedy/relief based on equitable principles. That the applicant has come to court with unclean hands.
5. It is further submitted that the 1st respondent is the legal owner of the said plots and is bound to enjoy the rights of a legal owner as stipulated under **Section 24,25 & 26 of the Land Registration Act**. The respondent became the registered owner long before the death of the deceased and are not free property of the deceased as provided under **Section 3(1) of the Law of Succession Act**.
6. She further submits that she has been collecting rent from the said plots since 2009 when the deceased was still alive.
7. It is further submitted that the application has not met the legal threshold for the grant of an injunction and more so the court has no jurisdiction to determine disputes touching on ownership of land. That an injunction cannot be issued against a registered owner of land as

held in the case of Virginia Wanjiku Mwangi –v- David Mwangi Jonathan Kamau (2013)eKLR.

8. I have considered the application. The issue which arises is the grant of a temporary injunction. The respondent has also raised the issue of jurisdiction.

Temporary Injunction

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

“1. 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.”

9. The principles for the Grant of a temporary injunction were laid out in the celebrated case of Giella –v- Cassman Brown.(1973)E. A 358 where it was held that a party wishing to get an order of injunction must –

- **Establish a prima facie case with a probability of success.**
- **That he will suffer irreparable loss if the injunction is not granted and the loss cannot be compensated by an award of damages.**
- **That if the court is in doubt, it will decide the application on a balance of convenience.**

10. These principles 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 Mrwao –v- First American Bank of Kenya Limited & 2 Others (2003) KLR 125.

“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 latter.”

11. A prima facie is one which is not frivolous and one which is easily discernable from the pleadings even before the party is heard as it will show a right exists which maybe infringed if an injunction is not issued. It is the applicant who must establish in prima facie case.

12. The applicant’s claim is that the plots in dispute were not transferred by the deceased to the 1st respondent.

13. The respondent depones that the plots No. 9 Baricho and 28 Kagio were transferred to her by the deceased. She transferred the ownership and the particulars of business.

14. The applicant has not attached any evidence to her petition to prove that the plot belonged to the deceased. The law requires that only the free properties of the deceased form his estate as provided under Section 3(1) of the Law of Succession Act. The applicant needed to prove that the plots form the estate of the deceased. She has therefore not established a prima facie case with chances of success. Prima facie case must be established in the averments in the affidavit and supporting evidence.

15. The respondent has deponed that there is a pending case before Baricho Court which is still pending, No. 109/2015. As submitted there are several pending cases.

16. The applicant has not mentioned the cases in her affidavit. The submission on the cases is evidence from the bar. The applicant has not come to court in clean hands as she has concealed material facts from the court.

17. The averment by the respondent that the plot were transferred before the deceased died has not been rebutted. The applicant has not shown that he is likely to suffer irreparable loss. Such loss is one which cannot be quantified and cannot be compensated by an award of damages.

18. The respondent has said she has been collecting rent. Such rent can be quantified and accounted for and the applicant be compensated. The balance of convenience does not tilt in favour of the applicant. The contention by the respondent that the property was required before the demise of the deceased has not been rebutted.

19. The balance of convenience does not tilt in favour of the applicant.

20. The respondent deposes that she has registered the business in her name and has been collecting rent. The applicant has not availed documents of title but has demonstrated how the plots were transferred to her and that she collect rent. **Section 24 of the Land Registration Act** provides that a person who is registered proprietor is the absolute owner. The burden of proof was on the applicant to prove that the plots are owned by the deceased. **Section 107 of the Evidence Act** provides that he who alleges must discharge the burden of proof. The applicant has not presented any material facts before this court to establish a case against the respondent.

21. The supporting affidavit by Martin Waweru Nguru has shown that there are several cases pending in court involving the said subject matters. These are Civil cases No. 269/2013 and 109/2015. In Civil Case No. 269/2013 the plaintiff Martin Waweru was seeking an injunction against the respondent. While in 109/2015 the respondent was seeking an order of injunction. In both cases injunction was declined. The respondent has deposed that there has been several other matters including criminal cases. Where a party seeks an order from court with jurisdiction and is declined; the next option is to file an appeal or seek review. Filing a similar application in another court is an abuse of court process.

22. In this case as submitted, the applicant is forum shopping as if has been shown that there are several cases pending. I find that the applicant has not established grounds to warrant the grant of injunction.

23. The various matters pending in court are sub-judice. **Section 6 of the Civil Procedure Rule** provides:-

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.”

24. The party has to pursue that suit to its conclusion before proceeding in any other matter.

25. On the jurisdiction, the dispute is on two plots which the applicant has not tendered evidence to prove that they were owned by the deceased before he died. The Petitioner has not annexed documents to show that the plots were owned by the deceased at the time of his death. Unless the applicant proves this, the dispute must be considered as purely land matter which should be filed in the Environment and Land Court as that is the Court with jurisdiction.

26. I have also considered the submission that the application is fatally defective as it is brought under wrong and none existent provisions of the law. It is true that the application is brought under wrong provisions. However under **Section 1A & 1B of the Civil Procedure Act** which provides for the overriding objectives of the **Act** and **Article 159 of the Constitution**, the Courts are called upon to do substantial justice other than lean on procedural technicalities.

In **Githere –v- Kimungu(1976-1985) E.A 101** it was stated:-

“The relation of rules of practice in the administration of justice is intended to be that of a hand maiden rather than a mistress and that the court should not be too far bound and tied by the rule which are intended as general rules of procedure as to be compelled to do that which will cause injustice in a particular case”.

27. The respondent filed replying affidavit and submissions. She was not prejudiced in any way.

In Conclusion:-

The applicant has not established grounds for the Grant of temporary injunction. This matter is subjudice. The application is without merits and is dismissed.

Dated at Kerugoya 18th day of June 2019.

L. W. GITARI

JUDGE