



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 19 OF 2020

NANCY JEPKURUI TALAI.....1ST PLAINTIFF

JOSHUA TALAI KIBOR.....2ND PLAINTIFF

VERSUS

HON. SUDI OSCAR KIPCHUMBA.....DEFENDANT

RULING

This ruling is in respect of an application dated 17th March 2020 by the plaintiff/applicants seeking for the following orders:

a. Spent

b. That pending the hearing and determination of this application inter partes a temporary order be and is hereby issued directed at the defendant HON. SUDI OSCAR KIPCHUMBA restraining the defendant by himself his agents representatives in interest or anybody acting under his instructions, heirs, assigns from trespassing into, ploughing, fencing, selling a share, the whole and/or portion of the suit property herein, known as LR 7991, Kesses, situate at Kesses next to Moi University.

c. That pending the hearing and determination of the main suit a temporary order be and is hereby issued directed at the defendant HON. SUDI OSCAR KIPCHUMBA restraining the defendant by himself his agents representatives in interest or anybody acting under his instructions, heirs, assigns from trespassing into, ploughing, fencing, selling a share, the whole and/or portion of the suit property herein, known as LR 7991, Kesses, situate at Kesses next to Moi University.

d. Costs and incidentals be borne by the defendant.

This matter was filed under certificate of urgency during the COVID 19 pandemic that had restricted the normal court operations. The matters had to be heard virtually. The court heard the application and gave interim orders of injunction and ordered that the applicant serves the respondent with the application together with written submission which were duly.

PLAINTIFF/APPLICANTS' CASE.

The court had ordered that the parties file their responses together with submissions and the same were duly filed. The court will therefore rely on affidavits filed together with the submissions by counsel.

The application was based on the annexed affidavits of Nancy Jepkurui Talai and Joshua Talai Kibor. The applicants gave a brief background of the case that they are the administrators of the suit land known as LR 7991 KESSES situate at Kesses next to Moi University. The applicant averred that on 1st March 2020 the defendant came to the land illegally and forcefully gained entry into the suit land in the company of 30 young men who beat up the applicant Joshua Talai.

It was the applicants' case that the defendant having forcefully gained entry into the suit land, ploughed the land using a tractor registration No KTCB 276X and further that he was planning to plant on the suit land. The applicant annexed photographs showing the tractor ploughing the suit land.

The applicant further averred that a surveyor came to the suit land on 16th February 2020 on the instruction of the defendant to survey the suit land. The applicant stated that on 29th February 2020 two young men uprooted the and stated that they had been instructed by the defendant.

It was the applicant's case that the defendant has no right over the suit land as the High Court in Succession Cause No 50 of 2014 gave orders on 18th April 2016 and confirmed on 24th October 2016 whereby the court restrained the beneficiaries of the estate of Kibor Talai from intermeddling with the estate pending the hearing and determination of the case. They urged the court to grant the orders as they will suffer irreparable harm if the orders are not granted.

Counsel for the plaintiff/applicant submitted that the applicants have locus standi as they are administrators of the estate of the late Kibor Arap Talai. That the respondent should not be allowed continue with acts of illegalities and cited the case **Mistry Amar Singh v. Serwano Wofunira Kulubya 1963 EA 408** where the court held as follows

Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

Further that the court should always give a bow to the law by enforcing the law and frowning upon any act tainted with illegality as was held in the case of **Standard Chartered Bank Kenya Ltd V Intercom Services Ltd & 4 Other [2004]Eklr.**

Counsel submitted that it is not in dispute that the applicants are biological children of the late Kibor Arap Talai and that they are administrators as demonstrated by the annexed ruling of the High Court. That the plaintiffs have met the threshold for grant of an injunction as the land belongs to the applicants and that the defendant should not be allowed to carry any illegalities on the suit land.

It was counsel's further submission that the defendant is neither a beneficiary of the estate nor a bona fide purchaser and therefore a stranger. Further that the defendant has encroached on the suit land as shown vide the photographs annexed to the application.

Finally, counsel submitted that the balance of convenience lies in favour of the plaintiff hence the interim orders should be confirmed.

DEFENDANT/RESPONDENT'S SUBMISSIONS

Counsel for the defendant respondent filed a replying affidavit together with submissions as was directed by the court. It was counsel 'submission that the court does not have jurisdiction to grant the orders as sought in the application and the main suit owing to a consent order issued in ELDORET HIGH COURT SUCCESSION CAUSE NO 50 OF 2014 permitting the beneficiaries to utilize the suit property. That the orders were as follows:

- a. That each of the deceased beneficiaries shall continue to occupy the parcels of land they occupied as at the date of the deceased's death.
- b. That the parties are restrained from selling, altering or charging any land comprising the estate until the application is heard and determined.

Mr. Tororei counsel for the defendant submitted that the above orders are still in place and have neither been reviewed nor appealed against and that the defendant through his replying affidavit stated that he entered into a memorandum of understanding sometimes on 31st August 2017 with the deponent beneficiary where he was allowed to cultivate a portion of the suit land in exchange of financial aid for her children.

Counsel further submitted that the portion is comprised of the 80 acres which the deponent was apportioned by her late husband and was allowed by a consent order of the court to utilize. Counsel also stated that the MOU was entered into within the confines of the consent order as the same did not amount to selling, altering or charging of the suit land but rather utilization by the deponent.

Mr. Tororei therefore submitted that granting interim orders would be tantamount to overturning the consent order in the Succession Cause No 50 of 2014 when this court lacks jurisdiction to do so. Counsel cited the case of **Karisa Chengo & 2 Other V Republic [2015]Eklr** where the court gave a distinction of jurisdiction of Environment and Land Court, High Court and the Employment and Labour relations Court. That the Supreme Court affirmed the holding of the Court of Appeal on the jurisdiction of the court.

Mr. Tororei cited the Supreme Court case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] Eklr** where the court held that a court of law can only exercise jurisdiction conferred upon it by the Constitution, the statute or both. Counsel therefore urged the court to find that it does not have jurisdiction to hear and determine this matter.

On the issue of locus standi, counsel submitted that the applicants aver that they are owners of the suit land by virtue of being administrators and under section 82 of the law of Succession Act, for a party to institute a suit on behalf of the estate of the deceased one must have power to do so which power can be obtained through a grant of letters of administration or Limited grant.

Counsel relied on the case of **Troustik Union International & Another v Jane Mbevu & Another (2008) IKLR (G&F) 730** cited with approval in **Nyahururu ELC Case No. 265 of 2017, Beatrice Wambui Kiarie & 2 Others vs Tabitha Wanjiku Ng'ang'a & 9 others** that;

" To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone"

Section 82 (a) of the Law of Succession Act states that:-

"Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative,"

Counsel further cited the case of **Coast Bus Service Limited v Samuel Mbuvi Lai [1997]eKLR** where the court stated that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration and if he does then the suit would be incompetent. That the proposed administrators in the Succession Cause in the High Court are yet to be issued with a temporary grant of letters of administration pending the confirmation of grant as the objection proceedings have not been concluded. Counsel therefore urged the court to find that the applicants have no locus standi to institute the suit on behalf of the estate.

On the issue of issuance of a temporary injunction, counsel submitted that the applicants have not met the threshold for grant of injunction as per the criteria established in **Giella Casman V Brown Ltd Case [1973] EA 358**. That the plaintiffs have not demonstrated that their right has been infringed by the defendant so as to warrant a rebuttal.

It was counsel's submission that the defendant through the memorandum of understanding has been utilizing the suit land since 2017 and no irreparable harm has occurred.

On the issue of balance of convenience counsel relied on the case of **Nawaz Abdul Manji & 4 others v Vandeeep Sagoo & 8 others [2017] eKLR** where the court stated that the court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance of convenience is in favour of the opposite party. Mr. Tororei Counsel for the defendant submitted that the balance of convenience does not tilt in favour of the plaintiffs as they have not shown any inconvenience that they will suffer if the order is not granted. Counsel therefore urged the court to dismiss the application with costs to the defendant

ANALYSIS AND DETERMINATION

The issues for determination in this application are as to whether the court has jurisdiction to hear and determine the case, whether the plaintiffs have locus standi to file this suit and if so whether they have met the threshold for grant of temporary injunctions.

In a case where the jurisdiction of the court is questioned, the court must deal with that issue first and if it finds that it does not have jurisdiction then it should move no further with the case.

The jurisdiction of this court is provided for under article 162 (2) of the Constitution where it is provided that

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— environment and the use and occupation of, and title to, land”.

The jurisdiction of the court is further stipulated under section 13 of the Environment and Land Court Act where in subsection (1), it is provided that;

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2), (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land”.

Subsection (2) provides that in exercise of its jurisdiction, the court will have powers to hear and determine the following; Disputes;

(a) “Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) Relating to compulsory acquisition of land;

(c) Relating to land administration and management;

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.”

From the pleadings of both the plaintiffs and the defendant, it is not in dispute that there is a pending Succession Cause being Eldoret High Court Succession Cause No. 50 of 2014. It is also not in dispute that the applicants are the children of the late Talai Arap Kibor. What is in dispute is as to whether they are administrators of the estate of the deceased.

In the case of Salome **Wambui Njau(suing as administratrix of the Estate of Peter Kiguru Njuguna (Deceased) -vs- Caroline Wangui Kiguru, ELC (2013) eKLR Nyamweya J** held that ;

“In matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of the Constitution and

the High Court as the Succession Court under Section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.”

The court then concluded that:-

“It is thus my finding that since the dispute herein is one between the personal representatives of the deceased and the survivors, beneficiaries and dependants of the deceased, it is a succession dispute to be determined solely within the framework of the law of succession

The jurisdiction of the Environment and Land Court under Article 162 (2) (b) of the Constitution is limited to hearing and determining disputes relating to-

the environment and the use and occupation of, and title to, land.

The jurisdiction of the High Court in succession matters is limited to disputes between the personal representative of the deceased and the deceased’s survivors, beneficiaries, dependants and creditors. Where other parties such as purchasers are involved then the matter falls out of the realm of the succession court and should be heard before the Environment and Land Court. It has been recognized that both the High Court and ELC have concurrent jurisdiction in matters concerning land.

It is further not in dispute that there was a consent recorded by the beneficiaries in Succession Cause No 50 of 2014 whereby the beneficiaries were allowed to occupy the parcels of land they had occupied as at the date of death of the deceased, and that the parties were restrained from selling, altering or charging any land comprising the estate until the application is heard and determined.

The succession cause involves the beneficiaries and the distribution of the estate. The beneficiaries were restrained by a court order from selling, altering or charging the suit land. How do you deal with a third party who is neither a beneficiary nor a party to the Succession Cause? How can orders be granted in a Succession cause where such a person is not a party. Having looked at the relevant law on the court’s jurisdiction I find that this court has jurisdiction to hear and determine this matter as administrators must protect the estate before distribution against encroachment by 3rd parties and amongst themselves. If the dispute is between the beneficiaries themselves then it would be in the realm of the Succession Court.

In the case of **In re Estate of Andrea Ooko Tianga (Deceased) [2019] eKLR** Justice J. Njagi observed as follows

“The Law of succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules”.

The defendant herein is not a beneficiary and there would be no way of dealing with the dispute in the Succession cause pending before the High court.

On the issue whether the applicants have locus standi, from the documents annexed it is clear that the applicants are administrators therefore have authority to bring this suit to protect the interest of the estate. The consents recorded in the succession cause and the order dated 4th August 20a6 is clear that the applicants are administrators.

The last issue for determination is whether the applicant has met the threshold for grant of temporary injunctions. The principles on grant of temporary injunctions are as was stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**. For an applicant to qualify of an injunction, such applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court is in doubt, it may decide on the balance of convenience.

The applicants have annexed photographs of the suit land being ploughed together with the evidence of the tractor on site. The applicant also stated that there was altercation and he was injured and a report filed with the police vide OB No. 09/01/03/2020. There is also a cutting from the newspaper detailing the dispute over the suit land This shows that there is a *prima facie* case that need to be adjudicated and an injunction granted to preserve the substratum of the suit.

The respondent has also admitted in his replying affidavit that he entered in an MOU with one of the deponent who is a wife to one of the late sons of the deceased Arap Talai. The MOU is to the effect that she was to allow the defendant to cultivate a portion of the suit land in exchange of financial aid for the children. This goes against the order of the court that the beneficiaries should not sell, charge or alter any land comprising the estate until the suit is heard and determined. It is evident that this MOU is not in compliance of the order. This amounts to altering the estate and hence the applicant will suffer irreparably if the injunction is not granted.

The MOU amounts to a sale as the financial aid is in exchange of land which has not been distributed. I find that the balance of convenience

les in favour of the plaintiffs. I therefore find that the applicants have met the threshold for grant of injunctions and the application is allowed as prayed with costs to the applicants.

I further order that this matter be mentioned within 60 days pending the outcome of the distribution of the estate in Succession Cause No. 50 of 2014.

DATED and DELIVERED at ELDORET this 28TH DAY OF MAY, 2020

M. A. ODENY

JUDGE