



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1044 OF 2010**

**IN THE MATTER OF THE ESTATE OF THE LATE NJAU KANYORIA Alias NJAU S/O KANYORIA-(DECEASED)**

**PAUL GITHUMBI NJAU.....APPLICANT**

**-versus-**

**SAMUEL KANYORIA NJAU.....RESPONDENT**

**R U L I N G**

The Application before me is the Notice of Motion brought by Paul Githumbi Njau (the applicant) dated 9<sup>th</sup> May 2018 under Rules 43 and 73 of Probate and Administration Rules and Section 74 of the Law of Succession Act (Cap 160). He seeks orders:-

- a) THAT Pending the hearing and determination of this application inter-parties an interim injunction be granted against the Respondent restraining the Respondent by himself and/or acting through his servants and or agents from partitioning L.R.NO MAHIGA/MUNYANGE/263.
- b) THAT Pending the hearing and determination of this application an interim injunction be granted against the Respondent restraining the Respondent by himself and/or acting through his servants and or agents from partitioning L.R.NO MAHIGA/MUNYANGE/263.
- c) THAT such other orders as this Honourable Court may find necessary to preserve the suit property.
- d) THAT costs of this suit be provided for.

It is supported by the applicant's affidavit sworn on 9<sup>th</sup> May 2010.

Counsel Muchiri wa Gathoni for the respondent and Warutere for the applicant agreed to dispose of the application by way of written submissions.

This application was provoked by orders issued ex parte by this court in the Summons General dated 25<sup>th</sup> January 2018, where the Samuel Kanyoria Njau sought the assistance of this court to allow the Deputy Registrar to execute the transmission documents on behalf of the applicant herein and other beneficiaries whom it was claimed were un cooperative. This was with regard to the property Mahiga/Munyange/263. The applicant therein demonstrated that the grant was issued on 5<sup>th</sup> April 2011 and confirmed on 27<sup>th</sup> July 2012, yet the administrator had only partially effected the grant but refused to effect the rest.

Now the main ground for this application is that there is a pending Summons for rectification of grant dated 7<sup>th</sup> February 2017 which upon perusal is seeking to bring on board an additional beneficiary by the name DUNCAN NJAU GITHUMBI who is alleged to be entitled to 1.2145 acres out of the suit land. That if the subdivision of the same is allowed to go on without the hearing and determination of the Summons for rectification of the grant, the wishes of the deceased will not have been respected and the said Duncan Njau will be denied his inheritance.

The application is opposed through Grounds of Opposition dated 22<sup>nd</sup> May 18 for being an abuse of the court process because it does not disclose a cause of against the Respondent and frivolous and vexatious in that it is not clear as to the relief the applicant is seeking for.

The applicant reiterated his payers in submissions dated 13<sup>th</sup> June 2018.

The Respondent in his submissions dated 7<sup>th</sup> June 2018 accused the Applicant of approaching court with unclean hands. In that as administrator of the deceased's estate and since confirmation of the grant in 2012, he had notoriously been reluctant to administer the estate

to rightful heirs prompting the Respondent to seek the impugned orders to have the Deputy Registrar of this Court to sign all the relevant transfer documents in place of the Applicant.

I have considered the application, the affidavits, the grounds of opposition and the rival submissions.

The issues for determination are:

1. Whether the applications drawn discloses any cause of action or relief capable of being granted?
2. whether the applicant meets the threshold for grant of injunction against the Respondent.

First, the basis for the grant for an interim or interlocutory injunction are the principles set out in **Giella v Cassman Brown and Co .Ltd (1973)(E.A) 358 .**

- i) **The Plaintiff must establish that he has a prima facie case with high chances of success.**
- ii) **That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.**
- iii) **If the court is in doubt, it will decide on a balance of convenience.**

The applicant does not state on the face of the application what will happen if the respondent is not restrained from partitioning the property, except that he will suffer 'irreparable loss and damage'. This alleged loss and damage is not demonstrated in the supporting affidavit except for the mention of the pending application for rectification. If you notice it seeks two similar orders in prayer 1 and 2 '**... interim injunction pending the hearing and determination of this application**'.

The application is not pending hearing and determination; it has already been heard. Obviously the applicant made an error that could cost him dearly as the prayer b and c are not capable of being granted at this stage. Hence to that extent the application is incompetent and ought to be thrown out in its entirety. Nevertheless, it may be argued that under the provisions of Article 159(1) of the Constitution, in the interests of justice, and in order to do substantive justice in the matter, the court ought to 'see' what the applicant is asking for from the totality of his pleadings. What do I say but that it is the obvious blunder of an advocate in drafting, and failing to see and rectify the mistake in good time?

Suffice it to say that the applicant also seeks ***any such order as the court may deem necessary to preserve the suit property.***

In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of law and evidence. The applicant has been accused of seeking an equitable remedy yet he comes with unclean hands. His conduct as an administrator is questionable taking into consideration the time it has taken for him to bring up the issue of an alleged additional beneficiary.

To the merits of the application.

What evidence is before me to support the application for the injunction?

The applicant has not demonstrated that he will personally suffer any loss or damage if the injunction is not granted to enable him pursue the application for rectification of the grant where he intends to demonstrate that has not transferred the shares of the property to the beneficiaries owners as he alleges that the mode of distribution will change when an omitted beneficiary, Duncan Njau Githumbi, is included as a beneficiary for 1.2145 Acres of part of the property, L.R.MAHIGA/MUNYANGE/263.

It is his position that it is only fair that his application dated 7<sup>th</sup> February 2018 be heard first before the orders of court issued on 6<sup>th</sup> February 2018 are executed allowing the partition of the suit property.

The applicant has dragged his feet in transmitting the estate,

Be that as it may I find that it is in the interests of justice to let him prosecute the pending application for rectification of the grant. That, and the fact that the orders for the Deputy Registrar to execute the transmission documents were granted ex parte though due to his laxity to transmit the estate, the balance of convenience tilts in his favour.

The respondent is restrained from partitioning L.R Mahiga/Munyange/263 pending the hearing and determination of the application for rectification of grant dated 7<sup>th</sup> February 2018.

The applicant to fix it for hearing within 30 days hereof.

Costs to respondent.

**Dated, delivered and signed at Nyeri this 16<sup>th</sup> day of November 2018.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Court Assistant: Ester

Muthee holding Brief for Warutere for the applicant

Muchiri wa Gathoni for Respondent

By consent hearing on 20<sup>th</sup> December 2018