REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 786 OF 2015

In the Matter of the Estate of SILAS GITUMA MUSA MUTUARUCHIU (DECEASED)

GEDION MWORIA .....APPLICANT

AND

1. MARGARET KANYUA GITUMA

2. JOHN WYCLIFFE MURITHI GITUMA .....RESPONDENTS

RULING

1. Before me is a Motion on Notice dated 31st January, 2017. The same is brought under Rules 49 and 73 of the Probate and Administration Rules and Section 68 of the Land Registration Act. The Motion seeks to injunct the administrators of the estate of the late Silas Gituma Musa Mutuaruchiu ("the deceased") from dealing with various specified properties belonging to the estate. There is also a prayer to inhibit any dealing with all titles to those properties amounting to nine (9) in number. Those properties are known as:

(a) Nthimbiri/Igoki/42

(b) Nthimbiri/Igoki/265

(c) Nthimbiri/Igoki/361

(d) Ntima/Ntakira/37

(e) Ntima/Ntakira/106

(f) Ntirimiti/Settlement Scheme/162

(g) Ntirimiti/Settlement Scheme/249

(h) Ntirimiti/Settlement Scheme/1836

(i) Ruiri/Rwarere/547

2. The grounds for which the Motion was made were set out in the body of the Motion, the Supporting and Further Affidavit of Gideon Mworia sworn on 31st January, 2017 and 7th March, 2017, respectively. These were that; the Applicant had entered into an agreement for the sale by the deceased and his beneficiaries of an Unsurveyed Industrial Plot in Thika Municipality in 2010 for KShs.13 million out of which the Applicant had paid the deceased KShs.2,503,000/-; that the deceased and the beneficiaries breached that agreement for which the Applicant had sued them in NBI ELC case No. 1035 of 2014 which was later changed to HCCC No. 143 of 2015 (hereinafter "the said proceedings") for, inter alia, the sum of KShs. 60 million; that the deceased passed away on 14th October, 2014 while the said proceedings were still pending. That the Applicant was aware that the Respondents had embarked on disposing off the deceased's estate to prospective buyers; that unless restrained, the Respondents would discipate the estate whereby the said proceedings would be greatly prejudiced. The Applicant therefore prayed that the application be allowed in order to preserve the estate of the deceased.

3. The Respondents opposed the application vide the Replying Affidavit of John Wycliffe Mureithi Gituma sworn on 13th February, 2017.

They contended that the Applicant was a stranger to the estate of the deceased; that the agreement was between the Applicant and Mpuri Maize Millers Limited which is a separate entity in law from the deceased; that the land, the subject of the agreement was not part of the estate of the deceased. The Respondents further contended that the Applicant was not a creditor of the estate nor was there any judgment to warrant the Applicant to make the present application under Section 68 of the Land Registration Act. In the premises, the Respondents contended that the Applicant was in the wrong forum as this is not the proper forum for recovery of civil debts.

4. In a rejoinder, the Applicant swore a Further Affidavit stating that the original sale agreement was turned into a sale of shares agreement in the said Mpuri Maize Millers Limited and the deceased and the beneficiaries received the proceeds thereby in their personal capacities; that the deceased owed the Applicant monies making the Applicant a creditor to the estate; that if the assets of the estate are distributed the judgment in HCCC No. 143 of 2015 would only amount to a paper judgment. That in conclusion, the estate would suffer no prejudice as the property will continue to be put in full use.

5. The respective Counsels filed their written submissions. Mr. Wandabwa for the Applicant submitted that under Section 66 (d) of the Law of Succession Act Cap 160 of the Laws of Kenya (hereinafter "the LSA"), the Applicant was creditor; that debts due from the estate must be settled first before distribution and that a debt of a deceased attaches to the estate. The case of ***Re Tankard (1942) Ch. 69*** and Section 51 (2) (b) of the LSA were relied on in support of that submission. It was further submitted that there was no bar on this court to entertain the Applicant's application and the Court of Appeal cases of ***Simon Kamundi v Tabitha Gatina Maingi & 3 Others (2016) eKLR*** and ***Rubo Kipngetich Arap Cheruiyot v Peter Kiprop Rotich CA No. 128 of 2008*** were relied on in support of that proposition. Mr. Wandabwa concluded that on the authority of ***Films Rover International (1986) 3 ALL ER 722***, the Court should take whatever course that appears to carry the lower risk. Counsel urged that the application be allowed.

6. On his part, Mr. Mwirigi Learned Counsel for the Respondents submitted that Mpuri Maize Millers was a separate and distinct entity different from the deceased, and cited the case of ***Victor Maachi & Another v Nurtun Bates Ltd (2013) e KLR*** in support of that argument. That since the agreement was not with the deceased and that the property the subject of the agreement did not belong to the estate, this Court is not the proper forum to litigate the Applicant's claim. The cases of ***Rubo Kingetich Arap Cheruiyot v Peter Kiprop Rotich (2013) e KLR*** and ***In Re the Estate of Dorcas Wanjiku (Deceased) (2014) e KLR*** were cited in support of those submissions. Finally, Mr. Mwirigi submitted that since there was no decree in favour of the Applicant as against the deceased Section 68 of the Land Registration Act No. 3 of 2012 was not applicable.

7. I have considered the Affidavits on record, the submissions of Counsel and the authorities relied on. This is an application for injunction and inhibition against properties of the deceased. The principles applicable are well known as set out in the case of ***Giella v Cassman Brown (1973) EA****;* that the Applicant must establish a prima facie case with a probability of success; that the Applicant must show that if an injunction is not issued, the Applicant may suffer loss and damage that cannot be compensated by an award of damages and that if in doubt, the Court should determine the matter on a balance of convenience.

8. No doubt, prima facie case means a case which a tribunal directing itself properly on the material before it feels that a party has established an interest or right which has been violated or is about to be breached by another which warrant a rebuttal by that other. (See ***Mrao Ltd v First American Bank of Kenya Ltd and 2 Others (2003) KLR 125***). The Applicant's case is that in or about 2010, he entered into a sale agreement for the sale of some property being an unsurveyed Industrial Plot "B" Thika Municipality (hereinafter "the said property") for KShs.13 million. That he paid a sum of KShs.2,503,000/= for the said property. That however, instead of completing the sale, the deceased sold the said property to a 3rd party.

9. The Respondents' response is categorical. The agreement was between the Applicant and Mpuri Maize Millers Limited which is an independent and separate entity from the deceased. That the said property does not form part of the estate of the deceased. That in the premises, the Applicant is not a creditor to the estate of the deceased. This Court agrees with the Respondents that so long as the undated Sale Agreement produced as "GM1" by the Applicant was between Mpuri Maize Millers and the Applicant, the liability of the said company cannot be extended to its shareholders and/or directors. It is quite clear from that agreement that the parties thereto were, the said Company and the Applicant with a Muriuki Kijana Mworia. To that extent, the Applicant could not raise a claim against the estate of the deceased.

10. That however is not the end of the matter. In the Further Affidavit, the Applicant swore that because the said Company was unable to complete the said Agreement, that agreement was converted into a Sale of Shares Agreement. By that agreement, which was produced as "GM4", the shareholders in Mpuri Maize Millers Limited who were Silas Gituma, the deceased, (5000 shares) and the Respondents, Margaret Kanyua Gituma (2,500 shares) and John Murithi (2,500 shares). They bound themselves to sell their respective shareholding in that company for the same purchase price of KShs.13 million. The Applicant also swore that the sum of KShs.2,403,000/- was paid to the deceased and the 1st Respondent in their own personal capacities. He further swore that monies were loaned to the deceased to cater for his medication. The Applicant produced exhibit "GM3" being an Acknowledgement Receipt dated 17th June, 2010. In that acknowledgment, the deceased and the 1st Respondent acknowledged receipt of a total sum of KShs.2,403,000/- on various dates for the purchase of the said property.

11. It should be noted that, the latter averments by the Applicant were never controverted at all. Indeed, looking at the plaint in NBI HCCC No. 143 of 2015, the deceased and the Respondents were impleaded in that suit on the basis of the said averments. That the deceased and the respondents had assumed personal liability by virtue of the sale of shares agreement and receipt of the said money cannot be disputed. Prayer nos. (a) (b) and (c) of that plaint is claimed against the Company, the deceased and the Respondents jointly and severally. To that extent, I am satisfied that the Plaintiff's claim in the said proceedings is not as against the said Company alone but it includes or extends to the deceased. Accordingly, the case of ***Victor Mabachi & Another v Nurtun Bates Limited*** (Supra) is not applicable. The claim here extended to the deceased in his own personal capacity.

12. Further, to show that there is no dispute that the liability of the Company merged with that of the deceased and the Respondents herein, the Defence filed in those proceedings pleaded in Paragraphs 3 and 5 as follows:-

> ***"3. The defendant at the opportune time shall raise a preliminary point that the 1st defendant company was transferred to the***

plaintiffs wholly and the 2nd, 3rd and 4th Defendants are no longer directors of the 1st defendant company.

4. ….

5. The defendants admit the contents of Paragraph 4 of the plaint to the extent that there was an agreement for sale as described but shall aver that subsequently the terms of the agreement changed in that the defendants transferred the company that owned the sale plot to the plaintiffs which in effect transferred the sale property to the plaintiffs."

13. The foregoing in my view buttresses the Applicant's contention that there was a subsequent sale of shares agreement in which the shareholders of Mpuri Maize Millers Limited now assumed liability for sale of their shares in that Company to amongst others, the Applicant. Clearly, in the circumstances it cannot be said that a case of personal liability had not arisen.

14. From the reading of the Plaint, the claim is for damages against all four (4) defendants in that suit including the deceased. On his demise, the claim against him survived as against his estate. This is the reason why in succession matters, a Petitioner is enjoined by law to disclose the assets and liabilities of the estate of the deceased in Form No. P & A 5. In the present case, Respondents disclosed in Form No. P & A5 only the assets of the estate but failed to disclose any liability. Obviously, the Applicant having staked a claim for, inter alia, KShs.60 million in the said proceedings against amongst others, the deceased, the estate has liabilities. To my mind, the Applicants claim against the deceased attached to his estate the moment he passed on. On that basis, I reject the Respondents contention that the Applicant is not Creditor.

15. It was the Respondent's contention that a civil debt is not to be proved in a family Court. That is the correct position of the law. Claims by 3rd parties are supposed to be lodged and proved before Courts of competent jurisdiction before they can be presented in a family Court against an estate of a deceased person. The correct position is that it is only after such claims have been proved, established and declared to be interests or rights in competent forums that they can be presented in a family Court against the estate as a debt. This is the position enunciated in the cases of ***Rubo Kipngetich Arap Cheruiyot v Peter Kiprop Rotich (Supra)*** and In ***Re the Estate of Dorcas Wanjiku (Supra)*** relied on by the Respondents.

16. In the present case however, I did not understand the Applicant as seeking to establish his claim against the estate. All he seeks is to restrain distribution or disposal of the identified properties in the estate pending the Applicant proving his claim in a Court of competent jurisdiction, i,e., the Civil Court in Nairobi. It is after he has proved it there that he can thereafter present it to the administrators in this Court as a debt against the estate.

17. The Applicant claimed that he had information that the Respondents intended to dispose off the properties forming part of the estate. The Respondents did not deny this fact. That averment remained unchallenged. Even if the Respondents had denied that fact, their conduct in this matter calls into question their sincerity. They failed to acknowledge that there was a claim against the deceased in **NBI HCCC No. 143 of 2015** in Form NO. P & A 5 as a liability. They returned a NIL result in the schedule for liabilities. To my mind, the Applicant is not a stranger in this Succession Cause. He is seeking the preservation of the estate pending the prosecution and conclusion of NBI HCCC No. 143 of 2015 before he can lodge his claim against the estate. He is not an inter meddler in the circumstances.

18. In the English case of ***Films Rover International Limited v Cannon Film Sales Limited (1986) 3 ALL ER 772*** at page ***780***, Hoffman J. Held:-

"The principle dilemma about the grant of interlocutory injunctions whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial), or alternatively in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry a lower risk of injustice should it turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle". (Emphasis added).

19. In the present case, what the Applicant is seeking is to postpone the distribution or any dealing with the estate property in a manner that would waste the same. The properties would remain preserved to await the conclusion of NBI HCCC NO. 143 of 2015. If the Applicant fails in that suit, the properties would still be available for distribution. On the other hand, if the orders are denied and the Applicant succeeded, it would be difficult to recover the properties if they would have been disposed off whereby that judgment would be rendered nugatory. That will be against Public policy. A court of law should always guard against any legal process being rendered nugatory.

20. In the circumstances, I am satisfied that under Section 47 of the Law of Succession Act Act, Cap 160 of the Laws of Kenya, the family Court has wide powers including those that enable the preservation of an estate of a deceased person to await a proper and just distribution. To my mind, the second limb of ***Gella v Cassman Case*** has been established since if the properties are disposed off, no amount of damages may compensate the Applicant. In any event, the balance of convenience tilts in favour of maintaining the status quo pending the Applicant concluding his aforesaid claim in Nairobi.

21. In this regard, I am satisfied that the application is meritorious. The orders that commend themselves to this Court is to grant prayer nos. 2 and 3 of the Motion for a limited period only. This is to guard against the Applicant going to slumber in the prosecution of NBI HCCC 143 of 2015.

22. Accordingly, prayer nos. 2 and 3 of the Motion dated 31st January, 2017 are granted for a period of twenty four (24) months. There be liberty to apply. The costs will be in the cause.

It is so ordered.

DATED AND DELIVERED AT MERU THIS 6TH DAY OF APRIL, 2017.

A. MABEYA

JUDGE

06/04/2017