REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 14 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE GATHUA NGURU MURIITHI-DECEASED

ANN WAIRIMU WACHIRA.....…….....APPLICANT

VERSUS

JERIOTH WANGUI MAINA..…….…...……1ST RESPONDENT

FRANCIS WACHIRA GATHUA.....2ND RESPONDENT

SAMUEL NJIRU GATHUA.....3RD RESPONDENT

RULING

By an application dated 16th November 2015, **Ann Wairimu Wachira** (hereinafter referred to as the applicant) moved this court under certificate of urgency seeking orders *inter alia* that:-

i. ***Spent*** .

ii. ***That*** *this honourable court do issue an order of injunction directed against the Respondents herein and any beneficiary who by way of the grant herein and or transmission has taken benefit of land parcel* ***L.R. Iriani/Cheche/1454*** *from in any way evicting, wasting, entering upon and disturbing the status quo ante the confirmation of grant pending the hearing and determination of this application in the first instance and the summon for revocation of grant.*

iii. ***That*** *the orders of prohibition do issue, barring the registration of transmission pursuant the grant, registered against all properties in the estate of the deceased pending, the hearing of this application.*

iv. ***That*** *the Costs of this application be provided for.*

The applicant has not specified the Rules under which the application is expressed. However, I am alive to the fact that the application cannot be defeated on account of the said omission. Under Article **159 (2) (d)** of the Constitution of Kenya 2010, the court is enjoined to administer justice without undue regard to procedural technicalities.

Section **47** of the Law of Succession Act[1] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act[2] and pronounce such decrees and make such orders therein as may be expedient. Further under Rule **73** of the Probate and Administration Rules it is provided:-

> *"73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

Also, Rule **49** of the Probate and Administration Rules provides that:-

"A person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit"

Essentially, the grounds in support of the application are stated on the face of the application and the supporting affidavit. These are summarized below:-

i. ***That*** *the applicant is a daughter of the deceased and that she was completely left out in the distribution of the estate.*
ii. ***That*** *the grant was issued without her knowledge as she was not involved.*
iii. ***That*** *she stands to suffer if the current position remains.*

The applicant further states in her supporting affidavit as follows:-

i. ***That*** *the deceased had two wives and he divided his land into **7** portions and left one portion for himself.*
ii. ***That*** *the deceased clearly stated that in the event that one of his married daughters is divorced or separated, she would revert to the said parcel of land.*
iii. ***That*** *the first Respondent had left her husband's home and went to live on the said portion, and at the time of the confirmation of the grant she sought to have the same registered in her name stating that she would hold it in trust for the other girls, but in the confirmed grant, the property was vested in her name absolutely.*
iv. ***That*** *the above was deceitful and had the effect of disinheriting the other girls.*

Also attached to the said affidavit are proceedings in respect of succession cause number **61** of **2001**, Resident Magistrates Court, Karatina relating to the deceased estate, notable among them is a ruling delivered on **11th** June **2013** the crux of which was a review of the judgement delivered in the said succession cause the effect of which was to *"review the aforesaid judgement to the extent that land parcel number **Iriani/Cheche/1451** registered in the name of **Jerioth Wangui Maina** and **Annah Wairimu Wachira** to hold in trust for themselves and on **behalf of Lucy Wangui Mwai, Margaret Wanjiru, Nyawira Maina and Njoki Maina** all in equal shares."*

The Respondent filed a Replying affidavit dated 15th February 2016 and averred *inter alia* as follows:-

i. ***That*** *the applicant has all through participated in this case and cannot be heard to claim she has been left out and in fact annexed a copy of a memorandum of appearance dated 11th October 2001 filed in the said cause and an application for review dated 15th September 2012 also filed in the said cause.*

ii. ***That*** *the applicant is currently living with her husband and does not currently utilize any portion of the said land and that the applicant does not meet the tests for grating an injunction.*

iii. ***That*** *the subject matter has been litigated in the above succession cause and that the application is an abuse of the court process. In fact, annexed to the affidavit is a ruling rendered by **Justice Ngaah** in P & A Appeal No. **3** of 2013 which overturned the decision rendered on review referred to above.*

Curiously, the applicant did not mention the said appeal in her affidavit nor is it annexed to the application together with the other relevant proceedings. In my view, a party is under a duty to disclose to the court all relevant information even if it is not to his or her advantage. In *Brinks-Mat Ltd vs Elcombe*,[3] discussing what constitutes material non-disclosure, the court had this to say:-

*"**(i)** The duty of the applicant is to make a full and fair disclosure of the material facts. **(ii)** The material facts are those which it is material for the judge to know in dealing with the application made; materially is to be decided by the court and not by the assessment of the applicant or his*

*legal advisers. **(iii)** The duty of disclosure therefore applied not only to material facts known to the applicant but also to any additional facts which would he would have known if he had made inquiries, **(iv)** The extent of inquiries which will be held proper, and therefore necessary, must depend on all the circumstances of the case including **(a)** The nature of the case which the applicant is making when he makes the application, **(b)** The order for which application is made and probable effect of the order on the defendant, and **(c)** .....The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. ...."*

In *Republic vs The Independent and Boundaries Commission & 2 Others ex-Parte Ibrahim Hussein Washenga*[4] **Muriithi J** held that an *ex parte* applicant is obliged to make full and frank disclosure of the case and where the applicant conceals material facts, the court will refuse to deal with the merits of the case and discharge any order or remove any benefit that the *ex parte* applicant would have received on account of the concealment or non disclosure of material facts.[5]

On 8th March 2016, both counsels appeared before me and at their request I granted them **14 days** to file and exchange their written submissions. The **14 days** lapsed on **22nd March 2016** and by the close of business on the said date, none of the parties had filed their submissions or sought extension of time, hence I proceeded to write this ruling the absence of the said submissions notwithstanding.

The applicant states that the grant was issued without her knowledge. However, the memorandum of appearance annexed to the Replying casts doubts on this assertion. Secondly, the applicant applied for review of the lower courts judgement and even participated in the above mentioned appeal. This confirms, that the applicant was at all the material times aware of the succession proceedings and it's not clear why she never raised a claim in the lower court. There is nothing to show that she filed a protest as the confirmation stage.

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 evidence and sound legal principles. In the celebrated case of *Giella Vs Cassman Brown and Co .Ltd.* ***[6]***the Court set out the Principals for Interlocutory Injunctions (preservation orders).These principles are:-

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 above principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald vs. Canada (Attorney General)****[7]***where the three part test of granting an injunction were established as follows:-

i. *Is there a serious issue to be tried?;*
ii. *Will the applicant suffer irreparable harm if the injunction is not granted?;*
iii. *Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").*

Also of useful guidance in the application before me is the criteria considered in granting an injunction laid down in the decision in *American Cynamid Co. vs Ethicom Limited*[8]which established the test in the English courts in deciding if an injunction should be granted. This test was followed in Ireland in the case of *Camus Oil vs The Minister of Energy*[9]. The test has three elements:-

i. *there must be a serious/fair issue to be tried,*
ii. *damages are not an adequate remedy,*

iii. *the balance of convenience lies in favour of granting or refusing the application.*

The said principles have been reiterated in numerous cases in Kenya. In *Mbuthia vs Jimba Credit Corporation Ltd*[10] **Platt JA** echoed the position adopted in the *American Cyanamid* case cited above and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only *needs to weigh the relative strength of the parties cases.*

In *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others* ***[11]*** the court while making a determination on the issue of a *prima facie* case with a probability of success cited the Court of Appeal decision in the case of *Mrao Ltd Vs First American Bank of Kenya and 2 others* ***[12]*** where the Court of Appeal held that:-

> *"A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".*

In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*[13] *Bosire J* held that *"to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."*

Also *Bosire J in Njenga vs Njenga*[14] held that *"an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."*

It is important to recall that the applicant successfully applied for review in the lower court. But the ruling was appealed against and the High Court as observed above overturned the said ruling. Rule **63 (1)** of the Probate and Administration Rules provides that:-

> *"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, X1, XV, XV111, XXV,* ***XL1V****, and XL1X, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules."*

As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act[15] are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, **review** and computation of time. [16]

Clearly, Order **45** relating to review is one of the Civil Procedure Rules imported into succession practice by rule **63** of the Probate and Administration Rules.[17]An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order **45** of the Civil Procedure Rules.[18]

But more important is the fact that the applicant has the option of appealing against the High Court Ruling. The applicant has not done so. She has instead filed a application for revocation of the grant dated 16th November 2015 and in the present application, the applicant seeks the orders sought pending the hearing of the aforesaid application for revocation of the grant.

Since the application before me is for a injunction, the tests for granting injunctions as enumerated above do apply, among them is whether the application for revocation brings out a good case with probability of success. The applicant has not either in the grounds or the affidavit expounded on whether or not she has a good case with a likelihood of success. In fact there was no attempt at all to highlight this point, even in the slightest manner.

This is a serious point of law which goes to the root of the case and on this ground alone, I am afraid, it cannot be said that the applicant has a *prima facie* case with a probability of success. Similarly the facts as pleaded, do not in my view disclose a *prima facie* case as defined above, namely:-

> *"It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".*

The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in *Halsbury's Laws of England*[19] is instructive. It reads:-

> *"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"*

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[20] But what exactly is *"irreparable harm"?*. **Robert Sharpe**, in *"Injunctions and Specific Performance,"**[21]* states that *"irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."* The applicant has not argued this point nor has she demonstrated that she will suffer irreparable harm if the orders are not granted.

Where any doubt exists as to the applicants' right, or if his right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on the other hand, would suffer if the injunction was granted and he/she should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he/she should ultimately turn out to be right.[22] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.[23]

The applicant did not address this issue at all. But from the Replying affidavit, the Respondent is in occupation of the land and there is nothing to show that the applicant is in occupation. In fact it is alleged that she lives elsewhere. Thus, in my view, the balance of convenience remains in favour of the current *status quo*.

In conclusion I find that the applicant has not satisfied the tests for granting an injunction as prayed. Consequently, I dismiss the application dated 16th November 2015. I make no orders as to costs.

Right of appeal 30 days

Signed, Dated and delivered at Nyeri this 1st day of April 2016

John M. Mativo

Judge

[1] Cap 160 Laws of Kenya

[2] Ibid

[3] {1988} 3 ALL ER 188

[4] {2013}eKLR

[5]See R vs The Kensington General Commissioners for purposes of Income Tax ex parte Princes Edmund de Polgnac {1971} 1 KB 486

[6] {1973}{EA358

[7] {1994} 1 S.C.R. 311

[8] {1975} A AER 504

[9] {1983} 1 IR 88

[10] {1988} KLR 1

[11]High Court ELC case Number 514 of 2013

[12]{2003} KLR125

[13] {1990} K.L.R 557

[14]**{1991} KLR 401**

[15] Cap 160, Laws of Kenya

[16]See more at: http://www.kenyalawresourcecenter.org/2011/07/probate-succession.html#sthash.4aLT92zr.dpuf

[17] See W. M. Musyoka, Law of Succession, law Africa, at page 191.

[18] Ibid, at page 191

[19]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[20] Supra note 3

[21] Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27

[22] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[23] Ibid