



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO.34 OF 2013

ALICE LABOSO

CALEB KIPRONO BETT (*Suing as the Administrators of the estate of the late*

KIBETT ARAP LABOSO (DECEASED).....PLAINTIFF/APPLICANT

VERSUS

GRACE TAPNYOLEI.....1ST DEFENDANT

EDWIN KOECH2ND DEFENDANT

RULING

1. This ruling relates to an application by notice of motion dated **29th May, 2013** in which the applicant seeks the following orders:

a) That this application be certified as urgent and its service be dispensed with in the first instance.

b) That pending the hearing and determination of this application inter parties this honourable court be pleased to issue a temporary injunction restraining the defendants/ respondents by themselves, their agents or any other person acting on their behalf from entering, cultivating, tilling, erecting structures or in any way interfering with Land Registration No. Kericho/ Cheptalal/631 (hereinafter referred to as the suit land)

c) That pending the hearing and determination of this suit inter parties this honourable court be pleased to issue a temporary injunction restraining the defendants/ respondents by themselves, their agents or any other person acting on their behalf from entering, cultivating, tilling, erecting structures or in any way interfering with the suit land

d) That costs of this suit be borne by the defendants/ respondents.

2. The application was based on the grounds on the face thereof and the supporting affidavit of the 1st applicant sworn and filed on the same **29th May, 2013**.

3. The application was opposed through a "a supporting affidavit", by Richard Kiplangat Bett (the vendor herein) sworn on **26th August, 2013** and filed on **12th September, 2013** and replying and further

affidavits by the 2nd respondent sworn on **26th July, 2013** and **11th September, 2013**.

4. The applicants are represented by the firm of Ngetich and Associates while the firm of Tengekyon & Koske represented the respondents.

5. When this matter came up for hearing before me on **31st October, 2013** there was common agreement between Mr Terer who urged the application on behalf of the applicants and Mr Koskei who urged the application on behalf of the respondents that the suit land was registered in the name of Kibett Arap Laboso (deceased) or put differently the suit land now belongs to the estate of the deceased, which includes the 2 acres which the 1st and 2nd respondents purchased from one of the beneficiaries, Richard Kiplangat Bett. Their point of departure is on the capacity of the vendor to enter into sale agreement and whether the applicants are properly the Administrators of the estate of the deceased.

6. The applicants view which was urged by Mr. Terer is that Kibett Arap Laboso who is the registered proprietor of the suit property died intestate in **1994**: that during his lifetime he did not transfer the suit land to any person and neither did he engage in any form of dealing with the said parcel: that in **2012** the family of the deceased learnt that one of the family members had colluded with the respondents and illegally sold and transferred 1 acre to each of the respondents who have refused to vacate the suit land despite notice to do so.

7. The 1st respondent did not enter appearance.

8. The 2nd respondent has a different view. The vendor of the suit land to him, Richard Kiplangat Bett in support of the 2nd respondent's case, states that he is one of the beneficiaries of Kibett Arap Laboso (deceased). That after their father's death, the estate was apportioned by the beneficiaries among themselves and he was apportioned three acres. It is from this apportionment that he sold the 1 acre to the 2nd respondent which sale agreement was executed before the area chief on **29th July, 2009** and witnessed by two of the beneficiaries Charles Bett and David Bett: that the 2nd respondent took possession of the suit land and has been in occupation with the knowledge and consent of all the beneficiaries including the administrators and it would only be fair if the estate was first distributed before this suit is heard as the sale has not prejudiced any beneficiary in any way.

9. The 2nd respondent challenges the legality of the applicants letters of administration which he deposes were obtained without the consent of all the beneficiaries and were obtained in the lower court contrary to **section 25** of the Law of **Succession Act Cap 160**. He denies that the suit land has been transferred to him and reiterates the contents deposed in the affidavit of Richard Kiplangat Bett.

10. The principles within which courts give temporary or interlocutory injunctions were settled in the *locus classicus* case of **Giella v Cassman Brown & Co. Ltd. (1973) EA 358**, namely that they have a *prima facie* case with a probability of success, that unless an injunction is granted, they might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.

11. As pointed out earlier, all the parties agree that the suit land belonged to Kibett Arap Laboso (deceased) and upon death, his estate. Consequently, this property being the estate of the deceased, is governed by the **Law of Succession Act**.

12. **Section 2 (1) of the Law of Succession Act Cap 160** provides that the **Law of Succession** applies to all cases of intestate or testamentary succession to the estates of deceased persons and to the administration of estates of those persons. An estate means the free property of a deceased person that is the property of which that person was legally competent, free to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. It is clear that at the time of his death the deceased was free to deal with the suit property as he wished, the same not having been legally transferred to a third party including the vendor.

13. There is no evidence adduced to show that the suit land belonged to the vendor and therefore he had capacity to sell the 2 acres to the respondents. By selling the said land, he was in fact intermeddling with the estate of the deceased. Any agreement for sale of the suit land entered into by any of the beneficiaries with a third party before the succession cause is heard and determined is *null and void ab initio*. See **section 45** of the of **Succession Cap 160**:

45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

14. The legality of the letters of administration and how they were obtained has been challenged. In my view this is an issue that should be raised in the family court that granted the letters of administration. In addition, in order to determine the suit, this court would be required to determine questions of whether the applicants and the vendor are beneficiaries of the deceased's estate and therefore entitled to his estate. The property and the issues to be determined in the suit fall under the realm of the Law of Succession Act.

15. The question then arises on whether this court has jurisdiction to hear and determine this matter.

The Environment and Land Court is a special court established under **Article 162 (2) (b)** and **Section 4 (1)** of the **Environment and Land Court Act No. 9 of 2011** and it has been established to deal with matters concerning the environment and the use and occupation of and title to land. However matters of ownership and entitlement to a deceased person's property, including land are governed by the Law of Succession Act and are to be determined by the Family Court. Thus by virtue of **Section 2 (1)** of the said **Act**, this court lacks jurisdiction to determine the same.

16. Jurisdiction of a court is fundamental and goes to the root of the matter and without it, the court cannot take any step, make any determination or issue any orders therein and the entire proceedings would be null and void *ab initio*. The Supreme Court in the case of **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others [2012] eKLR** held as follows on jurisdiction-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law”

17. Without jurisdiction, this court has nothing and cannot purport to make any other determinations in this matter including the question of *locus standi* of the applicants to prosecute the suit. From the pleadings, it has emerged that the applicants are concerned about wastage of the estate of the deceased. The **Law of Succession Act** at **Section 45** prohibits intermeddling with the estate which includes taking possession of or disposing of the estate of the deceased. The Family Court is therefore empowered **under Section 47** of the **Act** and **Rule 73** of the **Probate and Administration Rules** to issue such orders as may be necessary to preserve the estate pending distribution of the same.

18. Although this appears to be a simple application for injunction, the issuance of any orders by this court would have grave implications on the ground. It will be important for the vendor, Richard Kiplangat Bett to bring to the attention of the family court the agreement between him and the respondents so that their interests in the estate of Kibett Arap Laboso (deceased) can be protected.

19. For the above reasons, I find that the application dated **29th May, 2013** has no merit and is dismissed with no costs to either party. I also stay this suit until the succession cause in respect of the estate of the Kibett Arap Laboso (deceased) is heard and determined.

Dated and Signed this 11th day of February 2014

L WAITHAKA

JUDGE

Delivered by J.K Sergon J on behalf of Lady Justice L N Waithaka

PRESENT

Koskei for the defendant

Terer for the plaintiff

J K SERGON

JUDGE