REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 1044 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE MANASE OMULAMA NANDUKULI alias MANASE MULAMA

BETWEEN

SHIKANDA MULAMA …..... APPELLANT

VERSUS

ERNEST NYERERE OLAKA ……..…..…….. 1ST RESPONDENT

KENNEDY AKOOLO ……..…..…….. 2ND RESPONDENT

RULING

This is a succession matter in which Letters of Administration were issued to Ernest Nyerere Olaka, Kennedy Akoolo, and John Shikanda on 12.3.13. Following the issuance of the letters Administration, the applicant herein Shikanda Mulama filed an application on 3.7.13 by way of Summons dated 2.7.13 for revocation or annulment of grant, seeking the following orders-

1. That the grant of letters of administration intestate to Ernest Nyerere Olaka, Kennedy Okoolo and John Shikanda made on 12.3.13 be revoked or annulled.

2. That Letters of administration intestate be issued to Shikanda Mulama.
3. That costs of this application be provided for.

A replying affidavit was filed in opposition to the application. It was sworn on 14.11.13 by Kennedy Akoolo on behalf of the respondent.

Before the above application for revocation or nullification of grant was heard, the same Shikanda Mulama filed the present application seeking interlocutory orders. The prayers in this application dated 13.1.2014, which is the subject of the present ruling are as follows -

1. That the Honourable court be pleased to issue a temporary order restraining the respondents or agents and/or any other person acting in their capacity or through them from , leasing out and/or intermeddling with the deceased estate comprising parcel No. Marama/Shiraha/560 pending the hearing and determination of the application dated 2.7.13 and the main succession cause.
2. That the status quo subsisting on the ground before the 4.1.14 be maintained pending the hearing and determination of the application dated 2.7.13 and the main succession cause.
3. That the costs of this application be provided for.

The application has grounds on the face of the Summons. It is alleged in the grounds that the respondents without any legal basis have purported to demarcate and put up boundaries on the land before determination of the application dated 2.7.13. Lastly, that the respondents were intermeddling with the estate of the deceased.

The application was filed with a supporting affidavit sworn by the applicant on 13.1.14. The affidavit says that the respondents were grandsons to the deceased and that therefore did not have priority to issuance of letters of administration; that they had started ploughing the land by force and had threatened to harm the applicant and that they had threatened him with dire consequences in the event that he stepped in the area which they had allocated to themselves.

Before service and hearing the parties, the court granted an ex-parte order for maintenance of the status quo subsisting on the ground before 4.1.2014, till the determination of this application. The court also ordered that the application be served.

After service, the respondents filed a replying affidavit sworn by Ernest Nyerere on 30.1.14. The affidavit opposed the application and gave reasons for so opposing. It was deponed that the applicant was not farming the land when the actual owner died. It was also deponed that the whole problem arose because the applicant had allocated part of the land to his sons to develop. In response to the replying affidavit, the applicant filed a further affidavit annexing copies of search certificates obtained from the Lands Office.

On the hearing date, Mr. Balongo, learned counsel for the applicant submitted in support of the application. Counsel emphasized that the respondents and their brothers had invaded the said parcel of land while they were infact in occupation of two pieces of land they inherited from the deceased estate through their respective fathers. Counsel stated that the respondents should remain in their respective parcels of land. The applicant should remain in parcel no.560 pending the determination of the application dated 2.7.13. Counsel stated that, if the orders sought were not granted, the whole proceedings herein in the succession cause would be rendered nugatory.

The 1st respondent submitted that his father had obtained land of his own. However, as a descendant of his grandfather, he was entitled to share is parcel number 560. In his view, all parties should be restrained from farming on parcel No. 560 the land in dispute.

The 2nd respondent, stated that the applicant was cheating the court. He alleged that the applicant was not the last born of the deceased as alleged. He went further to state that when their grandfather died 1991, the applicant was not farming any portion of the land in dispute. In his view, the whole dispute had arisen because the applicant has refused to subdivide the land and was now dividing the same to his children to farm. He stated that everybody should be restrained from using the land.

In response, Mr. Balongo for the applicant stated that the children of the applicant could be restrained from carrying out construction. However, the applicant had been in occupation and was cultivating an area which was about 11 acres. Counsel suggested that the respondents should cultivate their father's land which was about 5 acres.

This is an application for a temporary injunction. The parameters to be taken by a court in such an application were clearly stated in the case of ***Giella -vs-Cassman Brown & Sons Ltd. [1973] EA 358.*** An applicant has to show a prima facie case with probability of success. Secondly, an injunction will not normally be issued unless he will suffer irreparable loss if the injunction is not granted, that is that an award of damages will not be adequate compensation. Thirdly, if the court is in doubt, it will determine the matter or application on the balance of convenience.

Does the applicant have a prima facie case? It is admitted that the applicant is the son of the deceased who was the owner of the land. It is also admitted that the respondents are grandchildren of the deceased. Both claim to have an interest in the subject land. In my view, they all have an interest or a claim on the subject land, the extent of which can only be determined either by agreement or after a full

hearing.

A prima facie case is one which may or may not succeed. I find that the applicant has such a case in the present proceedings. He has a prima facie case. This satisfies the first requirement for the grant of an interlocutory injunction.

With regard to irreparable loss, I have considered the position advanced both by the applicant and the respondents. The respondents maintain that the applicant has wrongly claimed the whole land, and was busy dividing it to his children to develop. The applicant on the other hand, agrees that his children be restrained from developing the land, but maintains that he be left to occupy the whole land and use it as he wishes pending determination of the dispute.

In my view, the applicant is overstretching logic. It was clear from the documents filed and submissions that the respondents got concerned because the applicant was not using the whole land but was now giving part of it to his children to develop. In my view, the applicant will suffer irreparable loss only if he is prevented from using the area he has been personally using. He cannot claim to suffer irreparable damage beyond that area. In my view, also, the area he has been giving his children to develop does not fall within the category of something that can make him suffer irreparable loss if an injunction is not granted. I therefore find that he can only suffer irreparable loss if he is prevented from using the area of land where his house stands and he is farming and not the area he is giving to his children and as well as the area allegedly invaded by the respondents.

Based on my above finding, therefore I can only grant an injunction with regard to that part of the subject land which the applicant occupies and is using.

As for the balance of convenience, it is in favour of the applicant only to the extent of the area that he has built a house and is cultivating, not the area he purportedly dished out to his sons as well as the area purportedly invaded by the respondents.

In the result, I allow the application and grant the following orders.

1. That an interlocutory injunction be and is hereby issued against the respondents, their agents, or any other person acting in their capacity or through them from forcefully preventing the applicant from using or occupying the area of land in parcel No. **Marama/Shiraha/560** which does not cover the area he purportedly divided to his sons and the area allegedly invaded by the respondents pending the hearing and determination of the application dated 2.7.13.
2. That neither the applicant nor his children nor the respondents will use or occupy the area of the land purported to have been given by the applicant to his children for development nor the area that has purportedly been invaded by the respondents, pending the hearing and determination of the application dated 2.7.13.
3. Costs will be in the cause.

Dated and delivered this 6th ^{day} of March, 2014

George Dulu

J U D G E