



REPUBLIC OF KENYA

High Court at Eldoret

Probate & Administration 84 of 2009

IN THE MATTER OF THE ESTATE OF KIMETO ARAP KILIDECEASED

HELLEN CHEPTUM KEBENEIAPPLICANT

AND

PASCALLY SIRTUIRESPONDENT

RULING

Before me is an application for a preservative order restraining the respondent or any of his agents from interfering with a portion comprising 16½ acres of land parcel number **Nandi/Motwot/203** (hereinafter “**the Suit Land**”). The application is expressed to be brought under sections 45 and 47 of the Law of Succession Act and Rules 59 and 73 of the Probate and Administration Rules. The application is by **Hellen Cheptum Kebenei**, the widow of **Thomas Kebenei**, the original petitioner (now deceased) against the respondent **Pascally Sirtui**.

The grounds for the application are that before the demise of the said **Thomas Kebenei**, the applicant was living on and utilizing a portion comprising 16½ acres of the suit land. But after the demise of Kebenei, the respondent dislodged the applicant on the basis of a contested Will allegedly made by the deceased herein. That action, according to the applicant, is unfair and malicious and should be restrained by a preservative order.

The application is supported by an affidavit sworn by the applicant in which, the above grounds are reiterated. The application is opposed on the basis of a replying affidavit sworn by the respondent. In the affidavit, the respondent has deponed, *inter alia*, that the applicant and her family live in Uasin Gishu on a piece of land given them by the deceased and does not and has never lived on the suit land; that the late **Thomas Kebenei**, the husband of the applicant during his life time, attempted to invade the suit land without success; that there have even been Tribunal Proceedings culminating in favour of the deceased; that the deceased made a Will which is the subject of another Probate and Administration Cause which Will has not been successfully challenged; that in any event, the suit land is no longer in the name of the deceased and that a visit to the *Locus in Quo* will confirm the position on the ground.

When the application came up for hearing before me on 30th July, 2012, counsel agreed to file written submissions which was done by 15th October, 2012. The submissions reiterated the parties’ stand-points taken in their respective affidavits.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. Even though this is a succession cause, the principles for the grant

of an interlocutory injunction are the same. They were crystalized in the case of **Giella –vrs- Cassman Brown & Company Limited and Another [1973] E.A. 358** . They are as follows:-

Firstly, the applicant must show a prima facie case with a probability of success at the trial, but if the court is in doubt, it should decide the application on a balance of convenience. Secondly, normally, an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages. It must also be appreciated that an interlocutory injunction is a discretionary remedy and accordingly, the same will not be granted where it is shown that the applicant's conduct with respect to the matters pertinent to the suit does not meet the approval of a court of equity.

In the application at hand, the applicant appears to suggest that the respondent has taken over her portion of land to which she is entitled as the widow of the late **Thomas Kebenei** and has done so forcefully. So, the applicant in reality seeks a mandatory injunction without expressly saying so. A mandatory injunction will only issue under very special circumstances which circumstances do not obtain herein (see **Locapail International Finance Ltd =vrs= Agro export [1986] 1ALLER 901**). Further all the allegations made in the supporting affidavit have been rebutted by the respondent in his replying affidavit. The respondent has in addition expressly deponed that the applicant has never been in possession of the suit land and that he (the respondent) has been in exclusive possession thereof. He has further deponed that the applicant lived with her deceased husband on a 150 acre piece of land in Uasin Gishu and she continues to reside thereat to date. Those averments are serious in nature and cloud what should be preserved. Yet, the applicant did not seek leave to file a supplementary or further affidavit to respond to the same. The respondent went further and seeks court visit to the *locus in quo* to confirm the status on the ground. The applicant said nothing on that invitation.

In all those premises, I have come to the conclusion that the applicant has not demonstrated a prima facie case with a probability of success at the trial with regard to the prayer for preservatory orders. He has also not demonstrated the conditions for the grant of a mandatory injunction as laid down in the case of **Locabai International (Supra)**. That being my view of the matter, the fate of this aspect of the application is sealed. It has no merit and is dismissed. As the parties are related, I make no order as to costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 5TH DAY OF NOVEMBER, 2012

**F. AZANGALALA
JUDGE**

Read in the presence of:

Karuga for the respondent.

**F. AZANGALALA
JUDGE
5/11/2012**