REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT 342 OF 2008

MOHAMMEND T. KOMEN……..……...……..……1ST PLAINTIFF/APPLICANT

MAGDALINE T. KOMEN…….....…….2ND PLAINTIFF/APPLICANT

WILLIAM KIPROP KOMEN……..…..…..……..3RD PLAINTIFF/APPLICANT

***(Suing as the legal representatives and administrators of the estate of* KIBOWEN KOMEN DECEASED)**

VERSUS

ABDULGHANI MOHAMMED KOMEN…….…….1ST DEFENDANT/RESPONDENT

ABDULKADIR MOHAMMED…….……..…..…2ND DEFENDANT/RESPONDENT

SIMON MARIDANY……..……..…..…….3RD DEFENDANT/RESPONDENT

RULING

The applicants herein are the legal representatives and duly appointed administrators of the estate of the late Kibowen Komen. They filed this suit on 12th November 2008 seeking orders as follows:

1. That a declaration the property in L.R 10013/4 is vested in the plaintiffs by virtue of their position as the legal representatives and administrators of the estate of the registered proprietor and that the 1st and 2nd defendants have no right in law to lease the said property LR No. 10013/4 to the 3rd defendant.

2. That a permanent injunction do issue restraining the defendants by themselves, their agents, servants and or employees from entering into, remaining in, ploughing, hallowing, planting, cultivating, farming or in any other way interfering with the said parcel of land.

The 1st and 2nd respondents are the sons of the 1st applicant.

By a chamber summons dated 12th November 2008 and filed on the same date the applicants have sought an order for a temporary injunction restraining the respondents by themselves, their agents, servants

and/or employees from entering into, remaining in, ploughing, hallowing, planting or in any other way cultivating or farming on L.R. 10013/4 (Njoro) until the hearing and determination of the suit filed herein. It is in the said chamber summons that this ruling is delivered.

The grounds upon which the application is brought are, inter alia,

(i) *That the 1st and 2nd respondents have leased out the suit property to the 3rd respondent without the knowledge or permission of the applicants.*

(ii) *That the 3rd respondent has moved into the land and at the time of filing this suit he had ploughed more than 300 acres of the same.*

(iii) *That the respondents were engaged in the burning and destruction of hay, keiapple fence and blue gum trees on the said land.*

(iv) *That the applicants are likely to suffer irreparable loss not capable of compensation by way of damages in view of the fact that they have leased 220 acres of the said parcel of land for five years to a third party.*

Submitting on behalf of the applicants, learned counsel Mr. Mutonyi told this court that the applicants had established a prima facie case against the respondents by virtue of their standing as the administrators of the estate, with powers to administer the estate and to give due account of its affairs. He submitted that, unless the injunction sought is granted then their duties as administrators of the estate would be greatly compromised to the detriment of the estate and that the property risks being wasted by the respondents who have no legal right to deal with the said parcel of land. Mr. Mutonyi submitted further that not only is the estate likely to lose the benefit accruing from the five year lease that they have entered into, but as administrators, the applicants face a threat of legal prosecution and civil liability under section 94 and 95 of the Succession Act. The 2nd applicant who is the widow of the Intestate would also have no where to graze her 80 head of cattle if the respondents actions are not curtailed. Mr. Mutonyi also submitted that all factors taken into consideration the benefit of convenience favours the applicants.

In opposing the application the 1st and 2nd respondents filed a 30-paragraph affidavit which mainly challenges the application on technicalities without disputing the fact that the applicants are indeed the legal representatives and administrators of the estate. The 1st and 2nd respondent claim to have been given some 153.7 acres of the suit land by the deceased and that they are not trespassers but beneficiaries of his estate. They contend that there is pending litigation involving the same parties over the same land and that for that reason these proceedings should not be entertained. That the present suit was brought by way of plaint and not as an originating summons is also raised as a ground to oppose the present application.

The 3rd respondent denies being a trespasser citing a lease granted to him by the 1st and 2nd respondents over the suit property. He claims that that lease was for only one season or the equivalent of one year and that as he is not the only person who has leased part of the suit land then, in his opinion, the application herein is not brought in good faith.

Opposing the application learned counsel Mr. Kipkoech relied on the respondent's affidavits filed herein submitting that the application ought to be struck out for reasons that a fourth administrator has been left out in the institution of the suit which in any event ought to have been brought by way of Originating Summons under Order XXXVI Rule (1)(g) of the Civil Procedure Rules. Mr. Kipkoech submitted further that, there being other serious litigation over the suit land, citing in particular HCCC No. 34 of 2007, which is still pending, the present suit and application are an abuse of the process of the court. He concluded by submitting that no prima facie case had been established by the applicants, who in his opinion, lack capacity in the absence of the 4th administrator. In reply Mr. Mutonyi told the court that it was not mandatory for all administrators to collectively move the court in order to protect estate property since administrators are individually and severally accountable.

Section 79 of the **Succession Act** states that:

"***The executor or administrator to whom representation has been given shall be the personal representative of the deceased for all purposes of that grant and subject to any limitation imposed by the grant all the property of the deceased shall vest on the personal representative."***

The grant issued to the applicants on 10th February 2006 appointed them as administrators over all the estate of Kibowen Komen. Under it they are under a duty to faithfully administer the estate and to render a true and just account thereof. There can be no argument therefore that they are properly before this court which is a court of equity. The applicants would be failing in their legal duty not to seek to protect and preserve the estate when in their sole opinion the same is under threat of waste prior to the distribution of the same to all the beneficiaries entitled to inherit the same. That the 1st and 2nd respondents claim to be beneficiaries of the estate does not give them any legal power or authority to deal with the estate land until the same is distributed.

Order XXXVI rule 1 of the Civil Procedure Rules is quite clear on situations where Originating Summons will ordinarily be taken out as a way of obtaining relief from court. I see no issue relating to the actual administration of the estate of any trust in the present case. The issue in dispute is one of illegal possession, trespass and disposition of estate property while the same is under administration. I do not accept the respondent's contention that the applicants are busy bodies and do find that they have established a prima facie case against the respondents with a likelihood of success. That there is delay in the finalisation of the succession cause, as claimed by the 1st and 2nd respondent is no good reason for them to deal with the property when they do not have a legal right over the same. To allow them to continue with their actions would render the administration of the estate an exercise in futility with the possibility that once the issues affecting the finalization of the Succession Cause are determined the applicants would find themselves with no estate to distribute. There is no dispute that the property vests in the applicants by virtue of their appointment as administrators of the estate. Neither is the leasing out of part of the land by the 1st and 2nd respondent to the 3rd respondent disputed. I find that the matters raised by the respondents as regards the propriety or otherwise of the main suit are issues which the court can only deal with at the substantive hearing. In the circumstances therefore I am inclined to allow this application being of the view that the conditions under which an interlocutory injunction may issue have been fulfilled. I allow the application and order that the costs thereof shall be in the cause. The 3rd respondent is hereby allowed to harvest whatever crop he may now be having on the portion leased to him, if any before vacating.

Dated, signed and delivered at Nakuru this 10th day of July 2009

M. G. MUGO

JUDGE