



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 16 OF 2020

CATHERINE WAIRIMU KIGERA.....PLAINTIFF

-VERSUS-

JULIA NJOKI KIGERA.....DEFENDANT

RULING

1. By a Notice of Motion dated 7th May 2020 made under Order 40 Rule 1, Order 51 Rule 1, of the Civil Procedure Rules and Section 1A,1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law, the Plaintiff/Applicant seeks orders that:-

i. Spent

ii. Spent

iii. That pending the hearing and determination of the main suit the honorable Court be pleased to grant an injunction restraining the Defendant either by herself or servants agents or auctioneers or any of them or otherwise from entering upon selling leasing alienating, and/or carrying out any construction and/or interfering in any manner whatsoever with all that property known as Nanyuki Land reference number B12/2/2787/X11/40 situated at Nanyuki.

2. The said application was supported by the grounds on its face and an Affidavit sworn on the 7th May 2020 by Catherine Wairimu Kigera, the Plaintiff/Applicant herein.

3. On the 8th May 2020, there were ex-parte interim orders obtained in that parties shall maintain the status quo pending as at 8th May 2020 in that there shall not be any interference with the suit land until the above captioned application was determined.

4. There were further orders to the effect that the application be served upon the Respondent within the next 7 days and thereafter, parties shall file their written submissions electronically within the next 14 days.

5. That on the 29th May 2020 when the matter came up for mention to confirm compliance, the Court noted that the said orders had not been complied with but the Plaintiff/Applicant had instead has filed yet another application dated the 27th May 2020 seeking that the Respondent /Defendant herein be cited for contempt of Court orders of 8th May 2020.

6. The Court then directed that both the application dated the 7th May, 2020 and the subsequent application dated the 27th May, 2020 be disposed of by way of written submissions. Further that the application dated the 27th May, 2020 be served upon the Respondent wherein she shall file her responses to both the applications dated the 7th May, 2020 and 27th May, 2020 within 14 days upon service (electronically) and thereafter parties shall file their submissions (electronically) to both the applications.

7. The Respondent filed her Replying Affidavit dated 9th July 2020 on the 13th July 2020 wherein she deponed that she and the Plaintiff who were siblings, were beneficiaries of the properties of the estates of their late parents and had equal rights to work and use any of the properties as long as they did not dispose it or deplete it to the detriment of other beneficiaries.

8. That it was not true that she had sold the suit property being Nanyuki LR No. B12/2/2787/X11/40(Title IR No.7337) to third the parties since she had no authority to do so as they were joint owners with the Plaintiff.

9. That the issues raised by the Plaintiff are issues to be canvassed in a Succession Cause and therefore the said suit before this Court was

unfounded, malicious, and baseless and out to frustrate her.

Plaintiff/Applicants Submissions to the Application dated the 7th May 2020.

10. The Plaintiff's submission was to the effect that pursuant to obtaining interim orders of status quo on the 8th May 2020 to the effect that there should be no interference with the suit land until the application was determined, they had extracted the said orders and served them electronically upon the Respondent/Defendant accompanied with the duly filed pleadings through her the e-mail addresses of kigerajulia@gmail.com and juliakigera@gmail.com.

11. That after service of the order and pleadings the Defendant /Respondent did not file her Memorandum of Appearance, Replying Affidavit or Statement of Defence but instead went ahead to defy the Court orders requiring parties to maintain status quo and not interfere with the suit property, which led to the filing of the second application that she be cited for contempt of Court orders of 8th May 2020.

12. That on the 9th July 2020 the Respondent filed her Replying Affidavit to the effect that the plot she was using and developing was described as LR No. 2787/40/X11 (Title IR No.7337) and not LR No. B12/2/2787/X11/40 as described in the Plaintiff.

13. The Applicants sought to rely entirely on the Notice of Motion and Supporting Affidavit sworn on 8th May 2020 as well as the Supplementary Affidavit sworn on 3rd September 2020 and the annexures attached there to.

14. In relation to the application dated 27th May 2020 it was the Plaintiff/ Applicant's submission that a vide a confirmation of Grant made in Nairobi Succession Cause No. 2097 of 2014 regarding the estate of Jane Njeri Kigera on the 7th May 2018, the suit property vested in both she and the Defendant in equal shares and that the legal position therefore was that until the grant issued was revoked, the properties in the Grant had already vested in the beneficiaries.

15. That further before revocation of such a grant was heard and determined, none of the parties was to interfere with the properties in a manner that would jeopardize the proceedings of the Court or in a manner that was likely to interfere with the final verdict of the Court.

16. That the Defendant had unilaterally decided to develop the property that the Plaintiff had equal interest in wherein she thus stood to suffer irreparable damage as it was clear that the Defendant had not involved her in the decision to develop the suit property.

17. Plaintiff then wondered as to how the Respondent/Defendant who claimed not to be in gainful employment and had painted a picture of herself as a destitute who was unable to make ends meet was able to construct on the suit property which evidentiary involved a magnitude of the expenditure.

18. That it was without a doubt that the Respondent/Defendant had borrowed money from third parties and nobody knew the extent of exposure that the Applicant/Plaintiff could face in case the Respondent/Defendant defaulted in paying whosoever was investing in the property.

19. That since the Respondent had sought for revocation of the grant that had vested the suit property in her and the Plaintiff in equal shares, she lacked the moral or legal authority by operation of law to purport to develop the property that she herself was contesting in the manner in which it was vested.

20. The Plaintiff further submitted that pursuant to the orders made on 11th May 2020 and 29th May 2020 there was no doubt that the Respondent was duly served as she had confirmed finding the Order under her door. That it was therefore incumbent of her to comply with the Order but she had instead continued with the construction which was now complete. The Plaintiff sought for her application to be allowed.

Defendant /Respondent's submission.

21. The Respondent's submission was to the effect that she and the Plaintiff who were siblings were beneficiaries of the properties of the estates of their late parents and had equal rights to work and use any of the properties as long as they did not dispose it or deplete it to the detriment of other beneficiaries.

22. That the plot in Nanyuki herein referred to as the suit property that she was using and developing was LR No. 2787/40/X11 (Title IR No.7337) and **not** LR No. B12/2/2787/X11/40 as described by the Plaintiff in the Plaintiff and which property she had not sold to third parties as she had no authority to do so since they were joint owners with the Plaintiff.

23. The Defendant/Respondent submitted that the suit property was family property of the estate of their parents and which matter was a subject of the High Court Succession Cause No. 2097 of 2014 upon which she had filed summons for revocation of grant and which matter was pending determination and therefore the filing of the same matter before the Environment and Land Court was an abuse of the Court process as the Court had no jurisdiction. Reliance was placed in the case of **Re Estate of Alice Mumbua Mutua (deceased)[2017] eKLR**

24. That the dispute arising herein exists between the personal representatives of the deceased, the survivors, the beneficiaries and the dependents of the estate and that it was not a claim by and against 3rd parties and therefore should be resolved within the framework set out in the Law of Succession Act and the Probate and Administration Rules as was held in the case of **Samuel Kamuau Macharia & Another vs. Kenya Commercial Bank & 2 Others [2012] eKLR**.

25. When submitting on the application dated 7th May 2020 which sought for a prohibitory injunctive orders, it was the Respondent/Defendant's submission that pursuant to the **Giella vs. Cassman Brown** case it was held that for an application for an injunction pending the hearing of a suit to succeed, an Applicant ought to;

- i. Establish a Prima facie case with high chances of success
- ii. Must show that he shall suffer irreparable damage if the order is not granted
- iii. Must show that an award for damages shall not be an adequate remedy, and
- iv. If the Court is in doubt then it shall decide the issue on a balance of convenience

26. On the first condition as to whether the Applicant had established a Prima facie case, it was that the Respondent's submission that both she and the Applicant were joint beneficiaries and administrators of the suit property via a grant of representation made on 7th May 2018 and were therefore owners of the suit property in equal shares.

27. That although the Applicant averred that she had information that the Respondent had sold the property to third parties, there was no evidence to support the allegation as the Respondent had not disposed of the property to anyone as she had no capacity to sell it since it was jointly owned. That she was only improving the property so that she could derive an income and eke a living.

28. That the Plaintiff /Applicant had not proved that there existed a superior right over the suit property to that of the Defendant and apart from showing that the Defendant was working on the suit property, the Applicant/Plaintiff had not shown that her rights and/or interest in the property had been infringed. The Respondent relied on the decided case in **Naftali Ruthi Kinua vs Patrick Thuita Gachure & Another [2015] eKLR** to submit that the Applicant had not established a prima facie case.

29. On the issue of irreparable damages, the Respondent/Defendant relied on the decided case in **Lucy Wangui Gachara vs Minudi Okemba Lore [2015] eKLR** to submit that it was not enough to only establish a prima facie case as sufficient basis to grant an interlocutory injunction, as in this matter the suit premises belonged to both the Defendant and the Plaintiff and had not been sold but was being developed and improved to generate an income to which the Plaintiff had not proved what kind of loss she would suffer if the Respondent continued to use the property.

30. That the value of the suit land was easily quantifiable and could be determined and an award for damages made to the Plaintiff if her claim succeeded. The Repondent also opined that the Applicant could also take a similar plot being LR No. 2787/64/XII Nanyuki, develop and use the same for her own purpose instead of wasting energy and resources on unwarranted litigation.

31. On the third issue of where the balance of convenience tilted, the Respondent's submission was that the same tilted in her favour in that she was a co-owner of the suit property, that she could not disposed any interest in the property without the input of the Applicant, that she had equal rights to use the property as the Applicant, that she was developing the property so as to derive an income from it and that she had not denied the Applicant the use of the suit property and/or any other property they owned together and therefore the granting of an injunction restraining her from entering upon the property that she was also entitled to was not only a travesty of justice but was also not within the realm of this Court.

32. The Respondent's submission in relation to the Application dated the 27th May, 2020 seeking that she be cited for contempt of Court orders of 8th May 2020 was that for such an application to be allowed, there were essentially four elements that ought to be proved hence;

- i. The terms of the order on injunction undertaking were clear and unambiguous and were binding on the Defendant
- ii. The Defendant had knowledge of or proper notice of the terms of the order
- iii. The Defendant acted in breach of the terms of the order
- iv. The Defendant's conduct was deliberate

33. It was their submission that the Respondent mostly resides in one of the properties within the estate of their deceased parents in Nanyuki and partly in Nairobi.

34. That on or about 20th June 2020 during the Government's lock down due to the covid-19 pandemic, she had gone to Nairobi to seek medical checkup. That upon her return to Nanyuki she had found a copy of the order dated 29th May 2020 placed under her door, which order did not contain the particulars of the Applicant's advocates. The said order was not served upon her personally but had indicated that parties maintain the status quo pending as at 8th May 2020 prior to which time she had already developed the suit property for she had reasonably believed she had a rights to do so and by virtue of being it's co-owner.

35. That the Applicant had not proved that the Respondent had acted in breach of the status quo order or that she had deliberately failed to comply with the same thereby belittling the authority of the honorable Court.

36. That she was working on the property as an owner and had not interfered with the Applicant's interest. Further that when she became aware of the Court order, she had already developed suit property but had subsequently ceased further developments while awaiting the

outcome of the suit. She sought for the application to be disallowed with costs.

Determination

37. The matter before Court is one that pities one sibling against the other as co-administrators to the estate of their deceased parents and in relation to LR No. B12/2/2787/X11/40 (Title IR No.7337) situated in Nanyuki.

38. The Applicant herein seeks for interim injunctive orders against the Respondent as well as for orders citing the Respondent for contempt of Court orders of 8th May 2020.

39. I have gained site of the annexures herein and note that this case was first commenced as Succession Cause in the High Court of Kenya sitting at Nairobi in Succession Cause No. 2097 of 2014 in the Matter of the Estate of Jane Njeri Kigera deceased wherein pursuant to the confirmation of the grant, the Respondent herein had sought for revocation or annulment of the same via her application dated 27th September 2018 citing the fact that the grant had been obtained fraudulently and that some of the assets included therein did not belong to the deceased. The matter is pending determination before the said Court.

40. I find that the pending Miscellaneous Application filed by the Respondent herein for revocation of a grant issued to the parties in this suit is purely a Succession Cause, within the jurisdiction of the High Court which is seized with the requisite jurisdiction to conclude the matter, and not the Environment and Land Court.

41. Indeed the Court of Appeal in the Case of **Rajesh Pranjivan Chdasama vs Sailesh Pranjivan Chudasama [2014] eKLR** in dealing with whether the **Law of Succession Act** and the **Probate & Administration Rules** made thereunder allow the granting of injunctive orders stated as follows:

In Floris Piero V Giancarlo Falasconi, Civil appeal No. 145 of 2012 (UR) pronounced itself as follows:

“The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunction in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunctive orders. In other words we are of the firm view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”

Accordingly, we reiterate the view that injunctive reliefs are available in succession causes”.

42. The decision is binding on this Court, and in the light of the above, and further pursuant to the provisions of Section 47 of the Law of Succession Act and Rule 73 of the probate rules I find that this Court has no jurisdiction to preside over this matter given the fact that the matter is awaiting determination of the grant in the estate of the deceased. Injunctive relief is available in succession cause and I find that there are issues which need to be determined in the pending application for revocation of grant.

43. In the case of **The Owners of MV Lillian “S” V. Caltex Oil Kenya Ltd [1989] KLR 1** at pg 14 the Court held that;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

44. In essence therefore both the Applications dated the 7th May, 2020 and 27th May, 2020 lack merit and the same are hereby dismissed with costs.

Dated and delivered at Nakuru this 17th day of December 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE