



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI LAW COURTS**

**ELC SUIT NO. 168 OF 2018**

**OSMAN TAHIR SHEIKH SAID**

**AMINA TAHIR SHEIKH SAID (Suing as the Executors of the Will of**

**TAHIR SHEIKH SAID AHMED.....PLAINTIFFS**

**=VERSUS=**

**NOMAD ENERGY LIMITED .....DEFENDANT**

**SABIR TAHIR SHEIKH SAID & 5 OTHERS.....INTERESTED PARTIES**

**RULING**

1. This is a ruling in respect of two separate applications. The first application is dated 23<sup>rd</sup> March 2018. It is brought by the plaintiffs who are the executors of the will of Tahir Sheikh Said Ahmed (Deceased) . It seeks the following orders.

**1. Spent**

**2. Spent**

**3. There be a temporary injunction, pending the hearing and determination of the suit, restraining the defendant, its agents, employees, servants or assigns from trespassing on, entering into, remaining on, operating a petrol station or carrying on any other business or in any other way accessing any part of that parcel of land known as LR No.209/8009 Park Road Nairobi registered in the name of Tahir Sheikh Said Ahmed (deceased).**

**4. There be an interlocutory injunction pending the hearing and determination of the suit, compelling the defendant, its employees, agents and servants to forthwith remove all its structures, equipment ,unlawfully brought by the Defendant onto LR No.209/8009 and to grant the plaintiffs vacant possession of LR No.209/8009 registered in the name of Tahir Sheikh Said Ahmed (deceased).**

**5. In default of compliance with order 4 above, the plaintiff be at liberty, without need to apply, to enforce compliance through the court bailiff and the officer Commanding Pangani Police Station to provide security during the enforcement of the orders.**

**6. The costs of this application be awarded to the plaintiffs.**

2. The second application is dated 15<sup>th</sup> May 2018. It is brought by six intended interested parties who are seeking to be enjoined in this case as interested parties. The application seeks the following orders:-

**1) Spent**

**2) That this Honourable Court be pleased to grant the applicants leave to be enjoined in these proceedings as interested parties.**

**3) That this suit be dismissed and or the proceedings herein be stayed.**

**4) Spent**

5) Spent

6) *That the costs of this application be in the cause.*

3. The applicants in the first application and the 1<sup>st</sup> to 5<sup>th</sup> interested parties are all children of the deceased whereas the 6<sup>th</sup> intended interested party is one of the widows of the deceased. The deceased was and is the registered owner of **LR No.209/8009** situate along Park Road, Ngara in Nairobi (suit property).

4. The deceased died on 10<sup>th</sup> January 2017 leaving behind a will which is being contested by the intended interested parties in the High Court in Mombasa. The applicants in the first application are two among three named executors of the will of the deceased.

**First application:**

5. The applicants contend that the deceased constructed a Petrol Station on the suit property. This station was being run for the benefit of the deceased and his beneficiaries. When the deceased died, the applicants as executors of his will started negotiations with players in the petroleum industry such as Gulf Energy and Total Kenya with a view to granting them a lease for the benefit of the estate of the deceased. As the negotiations were going on, the applicants were surprised to notice that the defendant respondent, M/s Nomad Energy Limited had moved to the suit property and branded the petrol station with its colours.

6. When the applicants sought to know on whose authority the defendant/respondent was acting, they were informed that the defendant/respondent had a lease from Capital Oil Limited. The applicants state that as the time this suit was filed, no lease had been registered in favour of Capital Oil Limited and therefore there was no basis upon which the defendant/respondent could claim to have a sub-lease. The applicants therefore contend that the defendant /respondent is a trespasser on the suit property. It is on this basis that the applicants are seeking the orders as set out in paragraph 1 hereinabove.

7. The defendant/respondent opposed the applicants' application based on a replying affidavit sworn on 24<sup>th</sup> May 2018. The respondent contends that the applicant lacks locus standi to institute this suit on behalf of the estate of the deceased as they have not obtained grant of probate. The respondent further states that prior to the death of the deceased, the petrol station was being run by Capital Oil Limited who have since leased it to them for 10 years.

8. The respondent further states that it has a valid lease with Capital Oil Limited and that they should not be dragged into infighting between the siblings of the deceased over control of the estate of the deceased.

9. In a further affidavit shown on 29<sup>th</sup> May 2018, the applicants contend that the lease to Capital Oil Limited was registered 16 days after this suit was filed and that the lease between Capital Oil Limited and the respondent was entered into in December 2017 after the demise of the deceased and this therefore amounted to intermeddling in the affairs of the estate of the deceased.

10. I have considered the applicants' application as well as the opposition to the same by the respondent. I have also considered the submissions filed herein. The issues which emerge for determination are firstly whether the applicants have locus standi to bring this suit as well as the application. Secondly whether the applicants have met the threshold for grant of both interlocutory prohibitory injunction and mandatory interlocutory injunction.

11. The respondent is contending that the applicants have no locus standi to bring this suit on behalf of the estate of the deceased because they have not filed for probate. In answer to the respondent's contention, the law is clear that executors of a will of a deceased are at liberty to file proceedings to protect the property of the deceased even before grant of probate. In the case of **Virginia Edith Wamboi Otieno Vs Joash Ochieng Ougo & another ( 1987) eKLR** the Court of Appeal while contrasting Section 80(2) and 80(1) of the Law of Succession stated as follows:-

***“ In contrast section 80(1) provides that a grant of probate shall establish the will from the date of death and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action because he derives title from the will and the property of the deceased vests in him from the moment of the intestate's death....”.***

12. The respondents also contend that the will of the deceased is being contested in court. Again the law is clear that even where the will of the deceased is being challenged, the executorship of the will cannot remain in limbo until the challenge fails. This was the holding in the case of **Sakina Sote kaittany & another Vs Mary Wamaitha 91995) eKLR where Lakha JA** held as follows:-

***“Secondly , it is urged that the will has been challenged and that until the challenge fails the executorship is in abeyance. That in my judgement, cannot per-se be correct having regards to the statutory provisions and case law above cited. I know of no authority ( and none was cited) in support of the proposition that when there is a challenge to a will the executorship remains in limbo until the challenge fails”.***

13. There is no doubt that the will of the deceased is being challenged in courts in Mombasa. The law as stated in the case of **Virginia Edith Wamboi Otieno and Sakina Sote Kaittany** (supra) is that an executor of a will of a deceased is free to bring proceedings even where the will is being challenged. I therefore find that the applicants have locus standi to bring the present suit and the application.

14. The next issue to be determined is whether the applicants have met the threshold for grant of both interlocutory prohibitory injunctions

and mandatory interlocutory injunction. The law is clear that before a prohibitory interlocutory injunction can be granted, the applicant must demonstrate that he has a prima facie case with probability of success. In grant of a mandatory injunction, the applicant must demonstrate that there are special circumstances which exist which calls for its grant. For example, the applicant is expected to show that the case is a clear one which can be remedied in a summary manner or that the respondent has tried to steal a match on the applicant.

15. In the instant case, it is clear that prior to the demise of the deceased, he had granted a general power of attorney to one Ahmedsahir Tahir Sheikh Said (Donee) over his properties. During the lifetime of the deceased, the donee granted a lease over the suit property to Capital Oil Limited for a period of 20 years. Capital Oil Limited then entered into a sub-lease with the respondent for a period of 10 years. The donee granted a lease to Capital Oil Limited before the demise of the deceased. Though the registration of the lease was done after the demise of the deceased, there was nothing wrong in this. The sub-lease between Capital Oil Limited and the respondent was entered into in December 2017 after the demise of the deceased. Again there was nothing wrong in this because already there was grant of lease for 20 years which had been executed by a person who had a power of attorney over the properties of the deceased including the suit property. The fact that there is no evidence that there was consent to sublet cannot defeat the sub-lease held by the respondent. This is an interlocutory application and nothing much can rest on grant or non grant of consent to sub-let. I therefore find that there is no basis upon which I can grant either a temporary prohibitory injunction or mandatory injunction. The first application must therefore fail. It is hereby dismissed with costs to the respondent.

It is so ordered.

**The second application.**

16. In this application, the sons of the deceased and one of the widows are seeking to be enjoined in this suit as interested parties. From the grounds in support of the application and the supporting affidavit, the applicants are seeking to come into this suit because they contend that the plaintiffs/respondents have no locus to bring this suit as they have not applied for probate. They therefore seek to come on board for purposes of seeking dismissal of this suit and for an injunction to restrain the respondents from interfering with the occupancy of the suit property by the defendant.

17. The applicants' application is opposed through a replying affidavit sworn on 29<sup>th</sup> May 2018. The respondents contend that the applicants are raising the issue of succession which is not within the jurisdiction of this court. The respondents also contend that no injunction can be granted in the absence of a suit and that the intended interested parties have not met the threshold for joinder as interested parties to this suit.

18. I have considered the applicants' application as well as the opposition to the same by the respondents. I have also considered the submissions by the parties. The issues which emerge for determination are firstly whether this court has the jurisdiction to determine the issue of succession; secondly whether the applicants are entitled to grant of injunction, thirdly whether this suit should be dismissed or stayed and lastly, whether the applicants should be enjoined in this case.

19. On the first issue, the applicants are clearly contending that the respondents have not taken grant of probate. I have already addressed the issue of locus while dealing with the first application. I do not wish to repeat what I said as regards locus standi. If the applicants think that the deceased's will is a forgery, that issue can only be dealt with by the Kadhi's Court or the Family Division of the High Court in Mombasa.

20. The applicants are seeking for an injunction. This injunction is sought for the benefit of the defendant in this case. The applicants cannot seek to litigate on behalf of a party who is capable of litigating on its own and is on record in this suit. In any case, the application for injunction has no basis as the applicants have no suit on which to base it.

21. The last two issues can be dealt together. Case law has developed the parameters upon which a party can be allowed into a suit. Some of these parameters are that it has to be demonstrated that the court cannot grant an effective remedy in the absence of the intended interested party. In the instant case the court can pass a decree without the presence of the intended interested parties. As I have said herein above, the intended interested parties are raising issues to do with succession. This is not the forum for such. The best forum is the succession court as demonstrated by the annexures to the applicants' application. There is therefore absolutely no merit in this application which is hereby dismissed with no order as to costs the parties herein are family members seeking to fight over the estate of the deceased.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 17<sup>th</sup> day of January 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Mwangi for Mr Ongele for Plaintiff

M/s Wanjiku for Mrs Morara for Defendant

Mr Okatch for 1<sup>st</sup> to 6<sup>th</sup> intended interested parties

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**