



REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO 117 OF 2017

ABDALLA KOMBO.....PLAINTIFF/APPLICANT

-VS-

1. TWALHA ABDALLA

2. ABUBAKAR KOMBO ABDALLA

3. MWIJUMA KOMBO ABDALLA

4. FATUMA KOMBO ABDALLA.....DEFENDANTS/RESPONDENTS

RULING

1. By a Notice of Motion dated 5th April 2017 brought under Sections 1A, 1B, 3, 3A & 63(e) of the Civil Procedure Act, Order 40 and Order 51 Rules 1 and 2 of the Civil Procedure Rules, the Plaintiff/Applicant is seeking an order of Temporary Injunction restraining the Defendants/Respondents from dealing, leasing, selling, wasting, damaging, intruding, trespassing, developing and/or interfering with the property known as **ROKA/UYOMBO/105** pending the hearing and determination of this Application and pending hearing and determination of this Suit. The Application is based on the grounds on the face of the motion and supported by the affidavit of Abdalla Kombo, the Applicant sworn on 5th April 2017.

2. Briefly the Applicant avers that he 1st Respondent is his step mother while the 2nd, 3rd and 4th Respondents are her children. The 1st Defendant is the widow to the late Kombo Abdulla Kombo (deceased) who was the father to the Plaintiff and the 2nd, 3rd and 4th Defendants. It is the Applicant's case that the parties underwent the process of succession at the Kadhi's **Court in Succession Cause No. 59 of 2006** wherein the beneficiaries of the estate were identified and properties of the deceased were to be distributed to the heirs as per the judgment delivered in the Kadhi's Court. The Applicant contends that before the properties could be distributed, the Respondents who have in possession of the Title documents have jointly and severally sold all the movable properties and are now selling off the properties for their own benefits without the consent of other family members and thereby prejudicing the Applicant and his siblings and which amounts to intermeddling with the deceased's estate. The Applicant further contends that the Respondents are in the process of selling the property known as **ROKA/UYOMBO/105**. It is the applicant's contention that unless the injunction orders are granted, the Applicant and his other siblings will suffer irreparable damage and the orders and judgment in Kadhi's **Cause Succession No. 59 of 2006** will be rendered nugatory.

3. The Application is opposed by the Defendants who filed grounds of opposition dated 4th July 2017. It is the Defendants contention that the Suit herein is bad in law as the Suit Property belong to a deceased person and the Applicant is not the Administrator and that Section 13 of the Environment and Land Court Act does not allow this Court to deal with probate, inheritance, succession and family matters. The Defendants state that the Suit herein should be stayed pending determination of **Succession Cause No. 59 of 2006** in the Kadhi's Court. They also want the Suit struck out for being frivolous and vexatious.

4. On 10th July 2017, the parties agreed to dispose of the Application by way of Written Submissions and the Court gave directions that parties file and exchange Written Submissions. However, only the Plaintiff filed his submissions on 19th September 2017. The Application ultimately came up for hearing/highlighting of submissions on 20th November 2017 when only Counsel for the Plaintiff appeared and adopted the Plaintiff's Written Submissions and urged the Court to grant the Interlocutory Injunction stating that there was no Replying Affidavit filed by the Defendants to controvert the facts stated by Plaintiff in his Supporting Affidavit.

5. I have read the Application as well as the Supporting Affidavit. I have also considered the submissions filed. Even though the Defendants never field a Replying Affidavit in answer to the Application and therefore the factual aspect of the case thus far remains uncontroverted, it must be noted that it was still incumbent upon the Plaintiff to satisfy the Court that he had a *prima facie* case and that in the absence of an injunction the Plaintiff stood to suffer irreparably: see **Giella –v- Cassman Brown & Co Ltd (1973 EA 358,) Mrao –v- First American**

Bank of Kenya Limited & others (2003) KLR 125.

6. The Plaintiff's main contention is that properties of the late Kombo Abdalla Kombo have been identified and the manner to be shared out among the beneficiaries spelt out in the Kadhi's Court in **Succession Cause No. 59 of 2006**. He contends that before the distribution is concluded, the Respondents have sold out some properties and are in the process of selling the property known as **ROKA/UYOMBO/105**, an act the plaintiff considers prejudicial to him and his other siblings.

7. It is not disputed that the succession proceedings in respect of the estate of the late Kombo Abdalla Kombo were taken out and are pending distribution of the properties in the Kadhi's Court, **Succession NO.59 of 2006**. From the judgment, the Plaintiff is listed as one of the legal heirs of the deceased. In its judgment, it is clear that the Kadhi's Court decreed that all the properties belonging to the deceased be distributed to the heirs and it was upon the heirs to suggest the mode of distribution. From the certificate of official search attached to the Plaintiff's affidavit and market "AK-4", it is clear that the property known as **ROKA/UYOMBO/105** is in the name of the deceased and therefore forms part of the estate of the deceased. The Plaintiff has stated that the Defendants are in the process of selling this property. The Plaintiff has exhibited agreements showing that the Respondents have already sold some of the properties of the estate of the deceased before the distribution is carried out as ordered by the Kadhi's Court.

8. The crucial issue for determination is whether the Plaintiff should be granted the order of injunction sought given the circumstances of this case. To my mind, the injunction sought is for purposes of maintaining the respective parties' positions in the Suit Property until the distribution is concluded as ordered by the Kadhis Court. Courts have now accepted that in dealing with an application for an interlocutory injunction, the court is not necessarily bound by the three principles set out in the **Giella –V- Cassman Brown** case. The Court may look at the circumstances of the case generally and the overriding objective of the law.

9. In the case of the **Suleiman –v- Amboseli Resort Ltd (2004) eKLR 589**, Ojwang Ag. J (as he then was) stated thus:

“Counsel for the Defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in Giella – v- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 780-781: - “A fundamental principle of --- that he Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’.... Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella –v- Cassman Brown, the Court has had to consider the following questions before granting injunctive relief:

- i. is there a prima facie case....**
- ii. does the applicant stand to suffer irreparable harm....**
- iii. on which side does the balance of convenience lie...**

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice.....if granting the Applicant's prayers will support the Motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the Applicant.”

10. In that case, the Court granted an injunction on the general principle that it is better to safeguard and maintain the *status quo* for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales. The Plaintiff is one of the legal heirs of the estate of his deceased father and there is a judgment decreeing that all the properties belonging to the deceased is to be distributed to his heirs. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined. If the Defendants went ahead with the intended sale, the Plaintiff, in my view stands to suffer irreparably as the land, which is his inheritance has an intrinsic value not comparable to ordinary chattels found in any commercial street notwithstanding the fact that it can actually be valued. In the instant case, the defendants have not denied the Plaintiff's averments.

11. I am thus satisfied that the facts as presented in this case demonstrate that the Applicant has a *prima facie* case. I am therefore inclined to grant an injunction as prayed.

12. In consequences, I allow the Application dated 5th April 2017 in terms of prayers 3 thereof. The Plaintiff will have the costs of the Application as well.

Delivered, signed and dated at Mombasa this 12th March, 2018.

C. YANO

JUDGE