



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 82 OF 2016

PHILIP CHEPKWONY.....PLAINTIFF/APPLICANT

VERSUS

BENJAMIN TARUS.....1ST DEFENDANT/RESPONDENT

ISAAC CHEPKWONY.....2ND DEFENDANT/RESPONDENT

DORCAS JEMELI.....3RD DEFENDANT/RESPONDENT

BOAZ KOSACHTAL.....4TH DEFENDANT/RESPONDENT

DAVID NGETICH.....5TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION

This ruling is in respect of the plaintiff’s application dated 14th April 2016 brought by way of Notice of Motion under Certificate of Urgency seeking for orders:

1. THAT this application be certified as urgent and service of the same be dispensed with in the first instance.
2. THAT a temporary injunction do issue restraining the defendants jointly and severally their servants, agents and/or assigns from in any way dealing with and/or leasing out and/or trespassing, encroaching, transferring and/or interfering with the parcel of land known as, Moi’s Bridge/Moi’s Bridge Block 3(moogon) plot 2 and pending the hearing and determination of this application inter-parties.
3. THAT a permanent injunction do issue restraining the defendants jointly and severally their servants, agents and/or assigns from in any way dealing with and/or leasing out and/or trespassing, encroaching, transferring and/or interfering with the parcel of land known as, Moi’s Bridge/Moi’s Bridge Block 3 (moogon) plot 2 and pending the hearing and determination of this suit.
4. THAT costs be provided for.

This matter was placed before me on 6th February 2017, a certificate of urgency having been filed to Fast Track the application. The Court directed that the application be served on the respondent for inter parte

hearing on 1st March 2017. The Plaintiff's Counsel Mr Nyandoro filed another certificate of urgency urging the court to grant an earlier hearing date as there were new developments on the suit land that needed Courts attention. The court ordered that the application be heard on 23rd February 2017. Counsels for both parties agreed to canvass the application by way of written submissions and a mention date was given for 20th March 2017 to confirm that submissions had been filed. Counsels were also to highlight the submissions on the same date.

The application is premised on 10 grounds and the supporting affidavit of Philip Chepkwony sworn on 14th April, 2016.

Background of the case.

By a plaint dated 14th April 2016 and filed in court on the same day, the plaintiff herein sued the defendants for an order of a permanent injunction restraining the defendants their servants and or agents from entering into, occupying, transferring, encumbering or in any other way interfering with the deceased estate.

The plaintiff contemporaneously filed an application on the same day under certificate of urgency seeking for a temporary and mandatory injunction against the defendant from interfering with the suit land.

On 14th April 2016, the court gave granted an order for a temporary injunction restraining the Defendants from interfering with the parcel of land known as MOI'S BRIDGE /MOI'S BRIDGE BLOCK 3 (MOOGON) PLOT 2 pending the hearing and determination of this application inter partes.

On 17th May 2016 the defendants filed a Notice of preliminary objection to the effect that the court does not have jurisdiction to hear and determine this matter as it is a succession matter. The preliminary objection was heard on 19th May 2016 and a ruling on the same read in open court on 8th June 2016. The ruling dismissed the preliminary objection as the court found that it had jurisdiction to hear and determine the matter.

The plaintiff averred in his supporting affidavit that he is a son of the late Tarus Malakwen Kimugu who died intestate on 15th August 2014. He annexed copies of the death certificate and letters of Administration ad litem. He further averred that the 1st 2nd and 3rd defendants have leased out 34 acres of land to 4th and 5th defendants without the consent of the family members. He urged the court to stop the 1st 2nd and 3rd defendants from leasing the suit land.

Plaintiff's Counsel's Submissions

Plaintiff's Counsel filed his submissions on 8th March 2017 whereby he submitted that the plaintiff filed the current application in order to protect and preserve the estate of the deceased from wastage and encroachment until this suit is heard and determined. Counsel further submitted that the replying affidavit dated 18th May 2016 by the defendant did not respond to the plaintiff's application as it only dealt with issues of jurisdiction which were dismissed by the court. He stated that the said will has never been read to the family members or made public. The said will was only raised when the plaintiff filed this case.

Counsel stated the defendants did not deny that they were intermeddling with the estate of the deceased and therefore urged the court to allow the plaintiff's application.

Defendants' Counsel's Submissions

The defendants Counsel Miss Chesio filed her submissions on 9th March 2017 whereby she elaborated the background of the case. She submitted that there is a succession cause No 29 of 2016 in respect of the estate of Malakwen Tarus which is still pending before the court.

Miss Chesio further submitted that the plaintiff herein is named as a beneficiary to the will and has been included in the said Succession Cause which he is allowed to participate in. Counsel relied on several authorities issuance of interlocutory injunctions including the classical case of *Giella Vs Cassman Brown*. She also referred the court to several sections of the Succession Act Cap 160 on distribution of the estate and what constitutes intermeddling with the estate. Counsel further submitted that the plaintiff lacks locus standi to institute this suit. Counsel urged the court to dismiss the application as the plaintiff has not established a prima facie case with probability of success against the defendants.

Analysis

I have considered the submissions by both Counsels for the plaintiff/applicant and for the defendant/Respondents and the supporting documentation herein. I have also considered all the judicial authorities and other legal materials presented before me and I have come to the conclusion that the issues for determination are as follows:-

1. Has the Plaintiff made out a *prima facie* case with a probability of success?
2. Is the Plaintiff likely to suffer irreparable injury which would not be adequately compensated by an award of damages?
3. In whose favour does the balance of convenience tilt if the court is in doubt?

In granting interim injunctions, the court must exercise this discretion judiciously as was stated in the case of *Hasmukh Khetshi Shah Vs Tinga Traders Ltd*. Civil Appeal No. 326 of 2002 KLR 462.

The first question is as to whether the Plaintiff has established a prima facie case with a probability of success. The Defendant annexed a will which mentions the plaintiff herein as a beneficiary. Counsel also stated that there is a pending Succession Cause No 29 of 2016 in respect of the Estate of Malakwen Tarus whose estate is the suit land herein. I notice from the death certificate attached by the plaintiff that the deceased died on 15th August 2014. I also notice from the search certificate annexed by the plaintiff that he had lodged a caution on 17th June 2004 claiming beneficial interest which caution is still in place. This caution apparently was lodged before the deceased died. The plaintiff got letters of Administration Ad litem for purposes of filing this suit. The defendant claimed that the plaintiff lacked the locus to bring this suit as he is not one of the executors of the deceased estate. On the issue of locus, and whether the plaintiff concealed material facts to the magistrate who granted the limited grant, I find that those issues should have been raised in that court. As of now the plaintiff has authority to bring the suit before this court.

There is no evidence tendered before this court to help the court in arriving at a decision that the plaintiff has established a prima facie case with a probability of success. The plaintiff did not respond to the claim that there is a Succession cause No. 29 of 2016 which is pending before the court. The plaintiff did also not counter the annexed will and the fact that the said will appointed Executors of which he is not amongst them. This is land which has not been administered through a Succession cause to determine which beneficiary gets what. The title is still in the name of the deceased. Further the grant of temporary injunctions is discretionary. From the above analysis find that it would be difficult to say conclusively that the Plaintiff has established a prima facie case with a probability of success.

On the second limb as to whether the plaintiff would suffer irreparable injury which cannot be adequately compensated by an award of damages, the plaintiff deponed that the defendants have leased and or sold part of the suit property. The value of land and the amount for leasing the land can be ascertained by a valuer. I find that the plaintiff can be adequately compensated by way of damages if the need arises.

I am further guided by what was held in the case of **Wairimu Mureithi -vs- City Council of Nairobi Civil Appeal No. 5 of 1979 KLR 332, 396.**

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for

injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them”.

In answer to the question in whose favour the balance of convenience tilts in the event that the court is in doubt is very important in this case. The plaintiff has come to court for orders for preservation of the suit land which is subject of a succession cause No 29 of 2016. The court is aware that applications for injunctions must be filed in a suit as envisaged under order 40 of the Civil procedure rules. The proceedings under Cap 160 are not suits where one party is suing another. They deal with administration of estates of deceased persons. Musyoka J dismissed an application for an injunction in the Matter of the Estate of Ng’ang’a Njoroge Njuguna Deceased SUCC. Cause No. 1016 of 1993.

From the above analysis, I am inclined to find that the balance of convenience tilts in favour of the Plaintiff/Applicant.

I therefore order as follows;

- a) There is hereby issued a temporary injunction restraining the defendants jointly and severally their servants, agents and/or assigns from in any way dealing with and/or leasing out and/or trespassing, encroaching, transferring and/or interfering with the parcel of land known as, Moi’s Bridge/Moi’s Bridge Block 3(moogon) plot 2 until this suit is heard and determined.
- b) The issues in respect of the Estate of Malakwen Tarus be determined in a Succession Cause.
- c) The costs of the application are in the cause.
- d) It is so ordered

Dated and delivered at Eldoret on this 5th day of April, 2017.

M.A ODENY

JUDGE