



Ole Nampaso v Gilisho & 8 others (Environment and Land Appeal E007 of 2022) [2023] KEELC 946 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELC 946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E007 OF 2022
CG MBOGO, J
FEBRUARY 21, 2023**

BETWEEN

ANTHONY OLE NAMPASO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES KAPOLONTO NAMPASO, DECEASED) APPLICANT

AND

- PETER GILISHO 1ST RESPONDENT**
- WILSON KORIATA 2ND RESPONDENT**
- TITIMET OLE NAMPASO 3RD RESPONDENT**
- CHRISTINE CHEROP NGETICH 4TH RESPONDENT**
- ZABLON MWANGI 5TH RESPONDENT**
- SOUTH DISTRICTS 6TH RESPONDENT**
- ILKIMITARE PRIMARY SCHOOL 7TH RESPONDENT**
- SANAYET OLE PARMUAT 8TH RESPONDENT**
- DANIEL NAINGEJ KIPEEN 9TH RESPONDENT**

RULING

1. Before this court for determination is a notice of motion application dated July 5, 2022 expressed to be brought under Order 51 Rule 1 and Order 42 Rule 6 (6) of the *Civil Procedure Rules* and Sections 1A,1B,3A, 63, 75 (l) (h) and 78 (2) and 79 (b) of the *Civil Procedure Act* seeking the following orders: -

- 1. Spent.
- 2. Spent.



3. That until the disposal of this appeal or until further orders the respondents by themselves, their servants, agents or otherwise whomsoever be restrained, stayed or prevented from wasting, damaging, alienating, selling, subdividing or in any other manner disposing of any of the parcels of land comprised in Titles No. Cis Mara/Lemek/4260, 4261,4262,6933 to 6936 and 7079 to 7222.
2. The application is premised on the grounds inter alia that the applicant is the registered proprietor of the parcels nos. Cis Mara/Lemek/4259, 4260,4261, 4262 and 4263 and the respondents without lawful authority have adversely dealt with many of the aforesaid parcels of land. Further, that despite being supplied with sufficient evidence, the trial magistrate declined to grant the temporary injunction sought.
3. The application is supported by the affidavit of the applicant sworn on even date. The applicant deposed that more than a year after the death of Charles Kapolonto Nampaso, the respondents started subdividing and transferring land belonging to the deceased and he sought a temporary injunction which the court declined to grant. The applicant further deposed that the 1st respondent who claims to be a registered surveyor, encouraged by the decision of the trial court has once again moved to have the 6th respondent transfer the suit properties to 3rd parties which if allowed will render the suit merely academic.
4. Further, that he is willing to expedite the hearing of the suit at the trial court which can only be achieved if the suit parcels are preserved and an order of prohibition of registration of any dealings is granted pending the outcome of the suit. That the 7th respondent was registered as proprietor on July 8, 2021 after the death of Charles Kapolonto Nampaso.
5. The applicant further deposed that he was issued with letters of administration ad litem on September 17, 2021 and none of the respondents have ever sought or obtained any authority to deal with the suit properties of the deceased. Further, that he filed a suit on September 21, 2021 and during the pendency of the suit, the respondents have committed unlawful actions on the suit properties and being aggrieved with the decision of the trial court, he has complied with the procedure for instituting an appeal to this court.
6. The application was opposed by the replying affidavit of the 5th respondent sworn on November 14, 2022 on behalf of the 1st, 2nd and 3rd respondents. The 5th respondent deposed that the application is an abuse of the due process of the law for the reason that no memorandum of appeal has been annexed to the application and that the applicant is not an administrator of the estate of the deceased as per the letters of administration taken out in Succession Cause no. 105 of 2021.
7. The 5th respondent further deposed that members of the estate of the deceased and have no objection to the subdivision as the parcel in question was not in the name of the deceased but registered in his name on behalf of Enkeju Emutukaa Community. The 5th respondent outlined the history of the properties that were owned by the deceased and the events leading up to the filing of this case.
8. The 5th respondent further deposed that the trial court suit has no blessings of the deceased's family and that no cause of action has been shown by the applicant against the 1st, 2nd and 3rd respondents making the application frivolous, vexatious and an abuse of the court process.
9. The applicant filed a supplementary affidavit sworn on November 23, 2022. The applicant deposed that his advocates filed a memorandum of appeal dated June 23, 2022 and further requested for typed and certified copies of the ruling order and proceedings and paid for the same. The applicant reiterated



the contents of his supporting affidavit and deposed that he has complied with all the pre-trial steps and is ready to take the earliest dated the court may grant.

10. This court directed that the application be canvassed by way of written submissions. The applicant filed written submissions dated November 23, 2022. The applicant submitted that the annexures in the application illustrate the numerous instances of transfer of the subject parcels of land after filing of the suit in the trial court and even after filing an amended plaint, the respondents were undeterred. The applicant relied on the cases of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR and *Mawji v US International University & another* [1976] KLR 185.
11. The 1st, 2nd, 3rd and 5th respondents filed written submissions dated January 11, 2023. The 1st, 2nd, 3rd and 5th respondents submitted that the duty is upon the applicant to demonstrate that he has prima facie claim/right to the parcel of land in question and that the respondents have trespassed on the said parcel of land. Further, that the applicant is not a legal representative of the estate of the deceased and that none of the parcels listed by the applicant in this appeal forms part of the estate of the deceased and neither are they the only properties of the deceased for which letters of administration have already been lodged and are awaiting confirmation.
12. The 1st, 2nd, 3rd and 5th respondents further submitted that they do not lay claim to the deceased's property but are carrying out his wishes as demonstrated by the deceased's execution of conveyance documents in favour of officials elected by the community, he was part of. That having demonstrated that the applicant has no prima facie right over the estate of the deceased, there cannot be a question of irreparable loss or inadequacy of damages.
13. I have considered the application, replies thereto and the written submissions filed by both parties and the issue for determination is whether the applicant is entitled to the orders of temporary injunction.
14. Order 42 Rule 6(6) of the *Civil Procedure Rules* provides as follows;

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
15. The principles for grant of temporary injunction pending appeal are settled. In the case of *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR, the court gave the following principles as governing grant of temporary injunction pending appeal;
 - a. “An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict great hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.”
16. In the case of *Giella v Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by



an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

17. A *prima facie* case was defined in the case of *Mrao Limited v First American Bank of Kenya & 2 others* [2003] eKLR as below;

“ A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

18. In the instant case, the applicant contended that the trial court despite being supplied with sufficient evidence, declined to grant a temporary injunction and which gravely affects the applicant’s suit and have made a mockery of the sanctity of the rule of law. Among the documents attached to the application is a Limited Letter of Administration Ad Litem issued by the court on September 17, 2021 wherein the applicant is granted limited authority to file and defend suit on behalf of the estate of the deceased. The 1st, 2nd, 3rd and 5th respondents deposed that the letters of administration in the estate of the deceased have already been taken out in CMCC Succession Cause No. 105 of 2021 and the applicant’s name is not featured anywhere. It is worth to note that the 1st, 2nd, 3rd and 5th respondents have not tendered evidence that they have authority to deal with the estate of the deceased save for a P&A form 5 which is not significant at this stage. It was also the 5th respondent’s averment that the they have no interest in the estate of the deceased save to carry out the wishes of the deceased and that the suit has no blessings of members of the deceased family and that the applicant is working on his own.
19. The trial court in its ruling delivered on May 31, 2022 stated as follows in part:- “ His failure (applicant in this case) to respond to the issues raised by the defendants as stated earlier means that it is only after the evidence has been adduced will this court be in a position to determine the merit or otherwise of his claims against the defendants”
20. The trial court went ahead and dismissed the application for failure to prove the requisite conditions to secure the injunctive reliefs sought in the notice of motion application dated March 23, 2023.
21. I would wish to point out first and for all, that in an application brought under Order 42 Rule 6 (6) of the *Civil Procedure Rules*, the court can consider the said application provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with. In this case, the application falls short of this requirement. The applicant filed a memorandum of appeal dated June 30, 2022. There is no record of appeal, typed proceedings, application filed in the trial court culminating into the ruling and so on. In the absence of the said documents, it would be impossible for this court to make a conclusion.
22. Being mindful of the import of sections 1A and 1B of the *Civil Procedure Act* to ensure the ends of justice are met in a manner that is just, expeditious, proportionate and affordable, and taking into consideration the interests of the parties herein, this court hereby issues orders of status quo to be maintained pending the hearing and determination of the appeal. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 21ST DAY OF FEBRUARY, 2023.

HON. MBOGO C.G.

JUDGE

21/2/2023.

In the presence of:-



C/A. Timothy Chuma

