



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 40 OF 2017

CLARA JERONO:.....:PLAINTIFF

VERSUS

EMMANUEL KIPLETING MUTAI:.....:1ST DEFENDANT

NAOMI TOO:.....:2ND DEFENDANT

JUSTUS ROTICH:.....:3RD DEFENDANT

RULING

This is a ruling in respect of an application brought by way of notice of Motion dated 6th February 2017 where the plaintiff/applicant is seeking for the following orders:

1. THAT the application be certified as urgent and service be dispensed with in the first instance.
2. THAT the Honourable court do issue orders of temporary injunction against defendant/respondents, their servants and or agents restraining them from encroaching upon, cultivating, trespassing or developing on or from any other way utilizing the parcel of land known as NANDI/LELMOKWO/399 pending the hearing and determination of this application inter partes.
3. THAT the Honourable court do issue orders of temporary injunction against defendant/respondents, their servants and or agents restraining them from encroaching upon, cultivating, trespassing or developing on or from any other way utilizing the parcel of land known as NANDI/LELMOKWO/399 pending the hearing and determination of the main suit
4. THAT costs of this application and the main suit be borne by the defendant/respondents.

This matter came up on 15th February 2017 for hearing of the application whereby the court ordered that the status quo obtaining be maintained pending the inter parte hearing of the application. The matter was later listed for hearing on 5th April whereby counsels agreed to canvass the application by way of written submissions.

Plaintiff's Counsel's Submissions

It was the plaintiff/applicant's Counsel's submission that the application herein was brought by the plaintiff in her capacity as the administratrix of the estate of the late **JEPKETER BARNO** whereby she is

seeking for a temporary injunction restraining the defendants from encroaching, cultivating, trespassing or in any manner utilizing land parcel **NO. NANDI / LELMOKWO/399**. The applicant relied on her supporting affidavit dated 11/3/2017 and on the grounds on the face of the application.

Counsel reiterated that facts as deponed in the supporting affidavit giving the brief facts of the case. She stated that the plaintiff herein filed suit and the instant application after the 2nd and 3rd defendants entered into the suit land and fenced off a portion measuring 2 acres. It was her submission that the defendants' action was premised on their claim that they had purchased the land from the 1st defendant. It was the plaintiff's averment that the said action amounted to intermeddling and/or illegal dealing with the estate of the deceased.

Counsel submitted that the 1st defendant did not have capacity to sell the land and/or transfer property that would enable the 2nd and 3rd defendants have such dealings with the land.

Miss Adhiambo Counsel for the plaintiff submits that the depositions of the replying affidavit are an afterthought and are aimed at confusing issues before the court. She urged the court to find that vide the annexed letters which stand uncontested, the plaintiff has proved on a balance of probability that there was conflicting action on the ground that demands the court to intervene and stop dealings with the suit land. She also submitted that the 2nd and 3rd defendants are strangers to the estate of the deceased as they are neither beneficiaries nor dependants. Further that the grant of letters of administration has not been confirmed nor has the estate of the deceased been distributed and/or title passed to the 1st defendant/ vendor so as to transfer such interests to the 2nd and 3rd defendants.

In response to the issue of court's jurisdiction to hear and determine the current application, counsel submitted that the application was properly before the court under the provisions of Order 40 rule 1 and 2 of the Civil Procedure rules. She stated that it is trite law that orders under the law of Succession Act are limited to the conservatory orders and are aimed at preserving the estate. Counsel also submitted that Courts have similarly held that the wording, letter and spirit of the rules do not presuppose an injunction and as such the succession court lacks jurisdiction to issue temporary injunction. She relied on Succession **CAUSE 409 / 2007 Lydiah Karimi & another v Joanina Kaimuri Mbwiria & 2 others [2014] eKLR** and the case of RE-ESTATE OF KULINGU (DECEASED) 20 02 Eklr 136 where Hon. J. Khamoni, J (as he then was) held :-

“While Section 47 of the LSA and Rule 73 P & A rules gives the High Court inherent powers to make such orders as may be necessary for the ends of justice to prevent abuse of court. In the same way as Section 3A CPA CAP 21 Laws of Kenya. However cautioned that Rule 73 cannot be used to do what the LSA does not allow the court to do..... that it has to be used to do what is lawful only and thus cannot be invoked to apply for temporary injunctions and interlocutory orders of the CPR in probate matters”

In Joel Oichoe Oisebe v Bilia Bosibori Oisebe [2014] Eklr Kisii Succession Cause 30/2014 Justice R. N Sitati. The court held *inter alia* that Rule 63 of the Probate and Administration Rules imports several provisions of the civil procedure rules. The provisions imported do not include those that provide for injunctions. The fact that **ORDER 40** has not been imported into the probate practice means that there was no intent at all to empower the court to entertain injunctions in probate and succession matters. The prayer for injunction was declined in the succession court.

In response to the issue that this matter is sub judice, Counsel submitted that the provisions of Section 6 of the Civil Procedure Act relate to stay of suits where a similar suit exists and which relates to the same subject matter, same parties and litigates on the same issues/ claim. She stated that the instant suit, the

plaintiff's claim is against the 2nd and 3rd defendants who are not party to the succession cause. That the claim before the court raises a distinct issue of purchase of land and/or purported transfer of proprietary rights in land by the 1st defendant and the use of land by the 2nd and 3rd respondents.

Counsel therefore submitted that the plaintiff/applicant had established a prima facie case against the defendants and that unless the orders sought herein are granted the estate stood to suffer irreparable damage and loss. Miss Adhiambo, Counsel for the plaintiff also submitted that the plaintiff had satisfied the standards set out in the case of *Giella- Vs- Cassman Brown* and the guiding principles of granting temporary injunction. She relied on the Court of Appeal case of **Mrao Ltd Vs First American Bank of Kenya and 2 others** that held that :-

“A Prima facie case in a civil application includes but is not confined to a genuine and 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.”

In **Kenleb Cons Ltd – Vs- New Gatitu Service Station Ltd & another**, Bosire J held that *“to succeed in an application for injunction, an applicant must show he has a legal or equitable, right which requires protection by injunction.”*

Counsel urged the court to allow the plaintiff's application as prayed.

Defendants' Counsel's Submission

Counsel for the defendants relied on the supporting affidavit sworn by EMMANUEL KIPLETING MUTAI the 1st defendant herein. He stated that the applicant did not plead that there is a succession cause no. 349 of 2014 which cause is dealing with land parcel Nandi/Lelmokwo/399. Mr. Nyamweya Counsel for the defendants submitted that the orders sought in the current application could have been issued in the said succession Cause. Counsel cited section 6 of the Civil Procedure Act which deals with stay of suits and provides as follows:

“no court shall proceed with trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, which such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Counsel submitted that from the annexures it is clear that the defendants are parties to the succession cause No 349 of 2014 and that this matter should be heard within the said succession cause. Mr. Nyamweya, Counsel for the defendants further submitted that the applicant has not availed any evidence to prove that the defendants have intermeddled with the suit land. There is no evidence of agreements of sale as claimed by the applicant. Counsel therefore urged the court to dismiss the application with costs to the defendants and the main suit stayed pending the determination of succession cause No. 349 of 2014.

Analysis and determination

This is an application for grant of temporary injunction. The principles of granting temporary injunction are very clear and well enunciated in the celebrated case of **Giella v. Cassman Brown**. I need not reinvent the wheel. Apart from the principles for grant of injunction, the jurisdiction of this court to handle

the current application including the suit has been questioned. I will therefore deal with the question as to whether the court has jurisdiction to entertain this application and the suit.

The Constitution in Article 162 (2) (b) provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts. The jurisdiction of the said courts is found in section 13 of the Environment and Land Court Act of 2012 which provides that the court shall hear disputes relating to :

(a) environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) compulsory acquisition of land;

(c) land administration and management;

(d) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

The Act clothes the Environment and land Court with wide power to deal with matters listed above. The court notes that from the Plaint that the Plaintiff also seeks for declaration that the purported sale of portions of the suit property be declared null and void apart from the injunction restraining the defendants from intermeddling with the estate of the deceased.

Courts have pronounced themselves in many cases touching on injunctions restraining parties from intermeddling with suit land which is subject to succession causes. I agree with the authorities cited above by Counsel for the plaintiff on the issue that "Rule 73 in LSA does not allow the court to do That it has to be used to do what is lawful only and thus cannot be invoked to apply for temporary injunctions and interlocutory orders of the CPR in probate matters" I therefore find that the application for injunction is proper before the court.

I have considered the application, the supporting affidavit together with the replying affidavit and the annexures thereof. I have also considered the submissions for both counsels for the plaintiff and the defendants herein and I have come to the conclusion that the suit land is the subject of **Succession Cause No. 349 Of 2014. In the Matter of the Estate of Jepketer Barno- (Deceased)** which is still pending.

I therefore make an order that this suit is hereby stayed pending the hearing and determination of Eldoret Succession Cause No 349 of 2014- **In the Matter of the Estate of Jepketer Barno** or until further orders. I also order that during the period of stay, the status quo be maintained by the parties as ordered on 15th February 2017 by the court.

Costs of this application be in the cause.

Orders accordingly.

Dated and delivered at Eldoret on this 24th day of July, 2017.

M. A ODENY

JUDGE

Read in open court in the presence of:

Mr. Nyamweya for the Defendant/Respondent

Miss Adhiambo for the Plaintiff/Applicant.

Mr. Koech – Court Assistant.



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