



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**SUCCESSION CAUSE NO 92 OF 2005**

**IN THE MATTER OF THE ESTATE OF GIDEON KIBITOK TARUS (DECEASED)**

**BETWEEN**

**SOPHIE JERUTO JERES.....OBJECTOR/APPLICANT**

**VERSUS**

**NICHOLAS BITOK.....RESPONDENT**

**RULING**

1. **Sophie Jeruto Jeres** (the Objector/Applicant) filed a notice of motion dated the 2<sup>nd</sup> of March 2021 and brought pursuant to *Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules* seeking *inter alia*, the following orders;

(a) That pending the hearing and determination of this application, this Court be pleased to grant a temporary injunction restraining the Respondent herein whether by himself, his servants, agents, employees and/or anyone acting on his authority from selling, disposing of, subdividing, alienating, wasting, planting, leasing or otherwise intermeddling with the property of the deceased referenced as **SOY/KAPSANG BLOCK 2 (SANIAK)/23** being a resultant parcel emanating from subdivision of the original parcel referenced into as **SOY/KAPSANG BLOCK 2 (SANIAK)/1**

(b) That pending the hearing and determination of the Summons for Revocation of Grant court be pleased to grant a temporary injunction restraining the respondent herein whether by himself, his servants, agents, employees and or anyone acting on his authority from selling, disposing of, subdividing, alienating, wasting, planting, leasing or otherwise intermeddling with the property of the deceased referenced into as **SOY/KAPSANG BLOCK 2 (SANIAK)/23** being a resultant parcel emanating from subdivision of the original parcel referenced into as **SOY/KAPSANG BLOCK 2 (SANIAK)/1**.

2. The application is supported by the affidavit of the applicant sworn on the 2<sup>nd</sup> of March 2021 wherein she depones that she is the daughter of the late Gideon Kibitok Tarus (deceased) whose estate these proceedings relate and that the deceased prior to his demise, had placed the applicant in possession of land referenced as **SOY/KAPSANG BLOCK 2 (SANIAK)/23**. However, the applicant depones that the respondent (her brother), has taken possession of the said parcel of land from her and proceeded to plough the same which the applicant contends amounts to interfering with the estate of the deceased as the respondent is not authorized to deal with the property of the deceased.

3. The applicant is apprehensive that the respondent may proceed to plant, alienate, lease, sell or otherwise intermeddle with the said parcel of land to her detriment should the court not issue the restraining orders.

4. The respondent has not filed any response despite being served with the application on the 12<sup>th</sup> of March 2021.

Subsequently on the 17<sup>th</sup> of March 2021, the court gave directions to the applicant to file and serve submission within 3 days from the said date.

5. The applicant reiterates the contents of her supporting affidavit and further submit that the application raises two issues namely;

**(i) Whether the application is properly before the Court**

**(ii) Whether the objector/applicant has satisfied conditions for the grant of an order of injunction.**

6. As regards the propriety of this application, the applicant relies on *Section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules* and the decision of the Court of Appeal in *Floris Piezzo & Another v Giancardo Falasconi (2014) eKLR* as quoted by court in *Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others (2018) eKLR* noting that the court is bestowed with all embracing powers to entertain any application including the current application and to make such orders as may be expedient and necessary for the ends of justice.

7. In relation to the issuance of injunction orders, the applicant relies on the principles set out in *Giella vs Cassman Brown and Company Ltd (1973) EA 358* and contends that she has met the threshold set in the case. In particular she submits that existence of prima facie case with high chances of success has been met as she has presented sufficient evidence to demonstrate that the respondent has infringed on her rights and that the estate of the deceased requires preservation. Secondly, she submits that the respondent's action amounts to intermeddling and relies on *Section 45 of the Law of Succession Act* and *In the Matter of the Estate of Veronica Njoki Wakagoto (2013) eKLR* to buttress this point.

8. She further submits that she will suffer irreparable loss which cannot be adequately compensated by an award of damages. In this regard, she relies on the case *In the Matter of the Estate of the Late Nzymi Muloi (Deceased) (2020) eKLR* and submits that the suit property has intrinsic and sentimental value that cannot be compensated by an award of damages if the same is left to be wasted and alienated by the respondent thus affecting the final distribution of the estate which stands being prejudiced.

9. On the question as to where the balance of convenience lies, the applicant submitted that the same lies in favour of issuing the order of injunction in order to preserve the suit property pending the hearing and determination of the summons for revocation of grant and the final distribution of the estate of the deceased. The applicant thus urged this court to find merit in the application.

#### **Analysis and Determination**

10. The main issue for determination is whether the applicant has made out a case for grant of the injunctive orders sought. In this regard, considering that the application has been brought pursuant to *Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules and Section 47 of the Law of Succession Act* provides: -

*The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.*

*Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.*

11. On the other hand, *Rule 73 of the Probate and Administration Rules* provides that: -

*“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

12. The two provisions cloth the High Court with wide discretion to do what is necessary to ensure that the ends of justice are met. In *Millicent Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others [2018] eKLR* the court affirmed that the two provisions grant the High Court powers to issue protective measures including injunctions for purposes of preserving the estate of a deceased person.

13. I consider the decision in *Floris Piezzo & Another –vs- Giancarlo Falasconi (2014) eKLR*, the Court of Appeal while considering whether an injunction can issue in a Succession Cause expressed itself as follows;

*“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause.*

*The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”*

14. The upshot of the foregoing is that the High Court has jurisdiction to issue all manner of orders including the issuance of conservatory and or injunctive orders where appropriate, to preserve and safeguard, the estate of a deceased person. Indeed, it is common ground that for an injunction to be issued, the applicant must satisfy the three requirements settled in *Giella v Cassman Brown [1973] EA 348* where the court held that an applicant must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour.

15. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown (Supra)* and further clarified that the conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. Consequently, if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.

16. What constitutes a prima facie case" The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR* explained that it is,

*“a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”*

17. It is apparent then that Prima facie case is therefore one that is not frivolous but one which is easily discernable from the pleadings even before the party is heard as it will show a right exists which may be infringed if an injunction is not issued and the onus of establishing the existence of a prima facie case lies with the applicant.

18. In the instant application, the applicant claims that the respondent has proceeded to plough the parcel of land and remains apprehensive that unless the court issues an injunction, the respondent will proceed to plant and or alienate the property much to her prejudice. In this regard, she alleged that the parcel of land in question was given to her by the deceased and has produced a letter from the **Chief Kapsang** dated the 1<sup>st</sup> of September 2020 and marked SJ 2 wherein the chief indicates that the applicant is the owner of the parcel of land **SOY/KAPSANG BLOCK 2 (SANIAK) Plot No.23.**

19. In addition, the applicant has produced three photographs marked as *SJ 3(a), SJ 3(b) and SJ 3(c)* that show a ploughed parcel of land and which she claims show that the respondent is ready to plant and or otherwise deal with the property in issue. Without getting into the merits of her claims, I take note that the evidence adduced shows a prima facie case that indeed the parcel of land belongs to and or has been curved out of the original parcel of land belonging to the deceased and secondly, that the parcel of land has been ploughed. On the other hand, the respondent has not provided any response that would warrant court not to reach the

conclusion that the applicant has established a prima facie case and that the estate needs protection.

**20. In Re Estate of Simon Kimendero (Deceased) [2020] eKLR**, the court noted that of specific significance to preservative order in respect of estate property is that: -

- a. The applicant has an arguable case;**
- b. The property is estate property; and**
- c. The property is likely to be dissipated or wasted away.**

**21.** In the instant application and as noted above, prima facie, the applicant has an arguable case considering that she is the daughter of the deceased and therefore having an interest in the property of the deceased.

Moreover, she has adduced evidence to the effect that the respondent has ploughed the land with the intention to plant and or otherwise deal with the property without proper authorization under the law.

**22.** There is no doubt that the land in question belongs to the deceased person and or forming part of the parcel of the deceased and therefore forming part of the estate of the deceased. The official search certificate dated the 8<sup>th</sup> of July 2015 and 2<sup>nd</sup> September 2020 and marked **SJ 1 confirm that the land measuring 3.237 HA** is registered in the name of the deceased as the absolute owner. I hold the view that the ploughing of the parcel of land by the respondent raises questions as regards intermeddling under **Section 45 of the Law of Succession Act**. In particular, Section 45 is to the effect that no person should handle, take possession, dispose off, or otherwise intermeddle with the free property of a deceased person unless authorized to do so or by a grant of representation. **Section 45(2)(a)** makes it a criminal offence to intermeddle with an estate without legal authorization and the same is punishable with a fine, imprisonment or both.

**23.** I make reference to two decisions which I found to be very instructive and supports the position taken by the applicant in this matter - *In the Estate of Veronica Njoki Wakagoto (Deceased) (2013) eKLR* the court stated: -

*“that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law...the law takes a very serious view of intermeddling and makes it a criminal offence”.*

**24. In Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J held: -**

**“A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act”**

**25.** In the instant case, there is no indication that the respondent has any authorization to plough or otherwise deal with the property and his acts amount to intermeddling under **Section 45 of the Law of Succession Act**. I am satisfied that if the restraining order so sought is not granted, there will be irreparable loss and a miscarriage of justice. In *Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others (2016) eKLR*, the court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages.

**26.** The applicant in her submission has indicated that the suit property has intrinsic and sentimental value to her and as such it cannot be adequately compensated by an award of damages if the same is left to be wasted and alienated by the respondent. She further submitted that she has a summons for revocation of grant and in the circumstance the said determination and final distribution of the estate the deceased is likely to be prejudiced if the activities of the respondent on the suit property are not checked. I agree with the applicant that land has certain intrinsic and sentimental value especially in the current circumstances that cannot be adequately compensated for by an award of damages due to the emotional attachment that one may have to property given to them by a deceased parent.

**27.** The applicant has satisfied that the principles for granting injunctions have been set out in the celebrated case of **Giella v**

**Cassman Brown & Co. Ltd 1973 (Supra).** In considering the pleadings, there does exist a serious issue to be tried, one that forms the subject matter of this suit and in preserving it, would only culminate in meeting the ends of justice as sought by the parties. The applicant seeks an injunction against the respondent so as to preserve the property of the deceased pending the hearing and determination of the succession cause.

28. Consequently, to meet the ends of justice, it is imperative and indeed merited that the orders for a temporary injunction restraining the Respondent whether by himself, his servants, agents, employees and or anyone acting on his authority from selling, disposing of, subdividing, alienating, wasting, planting, leasing or otherwise intermeddling with the property of the deceased referenced into as **SOY/KAPSANG BLOCK 2 (SANIAK)/23** being a resultant parcel emanating from subdivision of the original parcel referenced into as **SOY/KAPSANG BLOCK 2 (SANIAK)/1** pending the hearing and determination of this succession cause in order to protect and preserve the estate of the deceased.

29. Costs of this application shall be borne by the respondent

**VIRTUALLY DELIVERED AND DATED THIS 27TH DAY OF MAY 2021 AT ELDORET**

**H. A. OMONDI**

**JUDGE**

*Mr. Lagat for Objector Applicant*

*Mr. Kandie for Petitioner*

*Mr. Misoi absent at 2.55pm for the respondent*



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