



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ELC E015 OF 2021**

**JOSEPH NDWIGA IRERI.....PLAINTIFF/APPLICANT**

**VERSUS**

**SIMON NJERU SAMWEL.....DEFENDANT/RESPONDENT**

(Suing as the administrator of the estate of Samwel Kanambiu Njeru)

**RULING**

1. What is before the court for determination is a notice of motion dated 3<sup>rd</sup> June, 2021 and filed by the plaintiff on even date. The Application is expressed to be brought under **Article 40(2) (a) & Article 162(2)(b) of the Constitution of Kenya, Order 50 rule 10 of the Civil Procedure Rules, Section 1A & 3A of the Civil Procedure Act and all other enabling provisions of Law.**

**APPLICATION**

The Applicant - **JOSEPH NDWIGA IRERI** – is the plaintiff in the suit while the Respondent - **SIMON NJERU SAMWEI** – is the defendant and is sued in his capacity as administrator to the Estate of Samwel Kanambiu Njeru (Deceased).

2. The motion came with four (4) prayers but prayer 1 is now moot. The prayers for consideration are therefore three (3) – prayers 2, 3 and 4 – and they are as follows:

Prayer 2: That this Honourable Court be pleased to make an order that pending hearing and determination of the suit that the Defendant/Respondent either by themselves or their agents be stopped from charging, leasing, selling or transferring the Land Parcel GATURI/NEMBURE/3413 to a 3<sup>rd</sup> party.

Prayer 3: That this Honourable Court be pleased to make an order that pending the hearing and determination of this suit, that there be a stay of proceedings in Embu Chief Magistrate court, Succession cause no. 19 of 2019, Estate of Samwel Kanambiu Njeru (Deceased).

Prayer 4: That costs of this application be provided for.

3. The application is anchored on grounds, inter alia, that the applicant had bought 0.20HA of land parcel Gatari/Nembure/3413 from the Respondent's father. He claims that the land was included in Embu Succession Cause No. 19 of 2019 filed by the respondent. It is his assertion that his application to be joined in the succession cause was dismissed. It is his contention that if the land is sold before he is granted his share, then he will suffer imminent loss. He averred that it was in the interest of justice and also

to avert hardship that he has filed this application before the court.

4. The application came with a supporting affidavit filed on 4.6.2021 which reiterates the grounds in support of the application. It is averred that the applicant and the respondent's father entered into an agreement for sale of 0.20HA to be hived off from land parcel Gaturi/Nembure/3413. The consideration for the land was Kshs. 300,000/= and a deposit of Kshs. 280,000/= was paid. The balance of 20,000/= was to be paid upon completion of the transfer process. According to the applicant, the respondent's father had initiated the transfer process but died before completion.

5. He avers that the respondent has been uncooperative and is not willing to settle the matter amicably. He claims to have filed for citation in Misc Succession Application No. 43 of 2007 where he was allowed to take out letters of administration in respect of respondent's father's estate but according to him, before he could take out the letters of administration, the respondent secretly filed for succession.

6. The applicant avers that the succession proceedings have been ongoing and he is apprehensive that once the grant is confirmed and the land subdivided it will be transferred to third parties thus making it difficult for him to defend his rights. The applicant has accused the respondent of attempting to transfer the land to third parties and is imploring the court to allow his application as prayed.

### **RESPONSE**

7. The application is responded to by way of replying affidavit dated 6.10.2021 and filed on 14.10.2021, which is sworn by the respondent who denies knowing the applicant. According to the respondent, the applicant's averments are untrue and he avers that his father has never informed the beneficiaries of the land transaction alluded to by the applicant. It is his averment that his father Samwel Kanambiu Njeru is the registered owner of the suit land and questions why the applicant never claimed the land when his father was alive. It is his further averment that the applicant is a stranger and they have therefore never met to discuss settlement of the matter out of court.

8. The respondent alleges that the applicant illegally obtained letters of administration to his father's estate through citation proceedings yet he is not a beneficiary. The respondent confirms having filed for succession and being issued with letters of administration to his father's estate, but maintains that he had a right to file for succession without informing the applicant, who he terms as a stranger and one with no right to benefit from the estate.

9. The respondent protests that he is not the registered owner of the suit parcel of land and that other beneficiaries are also inheriting from the deceased estate and should be made parties to the suit. A prayer has been made for the court to order that they join the suit. It is the respondent's assertion that none of the beneficiaries witnessed the sale agreement and reiterates that the beneficiaries have a right to deal with the property as they wish. He says that the beneficiaries to the estate will suffer irreparable loss and damage if the applicant gets a share of the suit parcel of land. Ultimately, he urged the court to dismiss the application with costs.

10. By a further affidavit dated 15.11.2021 the applicant responded to the averments in the replying affidavit. He reiterated the contents in the supporting affidavit and claimed that the issue of sale of the suit parcel of land was dealt with in Embu Msc Succession Cause No. 43 of 2017, where the court is said to have determined that there was a sale contract. It is his position that an appeal challenging the said ruling was dismissed at the high court.

11. The application was canvassed orally in court on 24.1.2022. Counsel for the applicant submitted first. He relied on the application, the further affidavit and the annexures in support of the application. His submissions were basically a summary of the case. He further submitted that the respondent had tried to transfer the land to a third party and according to him the reason why the transfer was not successful was because the land is registered in the respondent's father's name. Counsel prayed for the application to be allowed in order to safeguard the applicant's interest in the land.

12. The respondent's also submitted. He equally relied on the averments in his replying affidavit. He stated he is opposed to the issue of leasing. This prompted applicant's counsel to abandon the leasing issue in prayer number two in the application.

### **ANALYSIS AND DETERMINATION**

13. I have considered the application, the response made, rival submissions by the parties, together with the material on the court record. The applicant has brought his suit before the court claiming ownership rights over 0.20 Ha of land parcel Gaturi/Nembure/3413. According to him, he purchased the suit parcel of land from one Samwel Kanambui Njeru for a consideration of KShs. 300,000/=. It is his case that the respondent died before he could transfer the land to him and upon his death he has tried to claim his rights over the land from the estate of the deceased but his efforts have proved futile.

14. In the application, the applicant seeks two orders: The first is an order of injunction and the second is an order for stay of proceedings in Succession Cause No. 19 of 2019 Estate of Samwel Kanambui Ngari pending determination of the suit. I will proceed to determine each prayer separately.

**A. Whether the court should grant orders for injunction pending hearing and determination of the suit"**

15. The principles for the grant of an interlocutory injunction were set out in the case of **GIELLA V CASSMAN BROWN & CO. LTD 1973 E.A. 358** which are:

1. The Applicant must show the existence of a prima facie case with a probability of success at the trial.
2. A temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages, and;
3. If in doubt, the Court will determine the application on the balance of convenience.

16. What is a Prima facie case was described in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & Others** Civil Appeal No. 39 of 2002, as:

**"In civil case, 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter"**

17. In the application, the applicant seeks interim orders of injunction pending hearing and determination of the suit. It is his case that he purchased land from the respondent's father but transfer of the land had not been effected upon the demise of vendor. The assertions and claim by the applicant are strongly denied. The respondent avers to have known nothing about the sale and that his father had not informed him or any of the other beneficiaries of the sale.

18. The respondent in his response seems to call upon the court to make a determination on the ownership right of the property. I wish to point out from the onset that this being an interlocutory application, my obligation is not to determine whether there was a sale, or the validity of any sale or ownership rights to the property. My duty is limited to the application before me.

19. I have looked at the documents filed in support of this application. The applicant has in his case annexed several documents among them a sale agreement executed between himself and one Samuel Kanambui Njeru. There is also a judgment with regard to citation proceedings the applicant had filed to compel the beneficiaries of the vendor to take out letters of administration, and a ruling in Succession Cause No. 19 of 2019 in which the applicant had filed for protest claiming purchaser's interest from the estate. Having had a look at the application and the relevant annexures as stated above, I am convinced that the applicant has established a prima facie case with a probability of success. It is my finding therefore that the applicant has satisfied the first condition under the Giella case.

20. In the Court of Appeal decision in **Hassan Huri & another v Japhet Mwakala [2015] eKLR**, which cited with approval the case of **Kenya Commercial Finance Co. Ltd v AfraLMha Education Society [2001] 1 EA 86**, the court pronounced itself as follows:

**"If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other**

words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

21. It therefore follows that the three conditions set out in the Giella case are all inclusive and the court has a duty to determine all the conditions set before coming to the conclusion that a party is deserving of the order for injunction.

22. I will therefore move to the second condition on whether the applicant would suffer irreparable loss if the injunction sought is not granted which cannot be compensated by way of damages. In the case of **Nguruman Limited Vs Jan Bonoe Nielson & 2 Others; CA No. 77 of 2012**, the court expressed itself clearly on the issue of irreparable damage and stated as follows:

"... the applicant must establish that "he might otherwise" suffer irreparable injury which cannot be adequately compensated in damages in absence of an injunction. This is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of injury.

Speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial, and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

23. The applicant in his pleadings has averred that the suit parcel of land is at risk of being sold out to third parties before the case is determined. He claims that the respondent has attempted to transfer the land to third parties and has attached a copy of a sale agreement between the respondent and a third party for sale of a share of the suit parcel of land. The respondent on his part has not denied such sale. If anything, he averred that he has every right to deal with the land as he wishes including but not limited to selling it. It is evident from the pleadings that the respondent might dispose of the land including the applicant's alleged share before the case is determined.

24. In the court's view, if an injunction is not granted and the suit parcel is disposed, damages may not be an adequate remedy for the applicant. The court finds that the applicant has demonstrated that he stands to suffer irreparable loss which cannot be compensated by damages. He is therefore deserving of the court's protection by way of injunction until the court determines the suit before it.

25. The third condition of the Giella's case is that, when the court is in doubt, it should decide the application on a balance of probabilities. Having looked at the application, I am convinced that the balance of probability tilts in favor of granting the injunction as opposed to not granting it. Furthermore the inconvenience to be suffered by the Applicant in the absence of the injunction seems greater than that to be borne by the Respondent. It is trite law that an injunction is usually granted to preserve the subject matter pending the hearing and determination of the action. In the case before me, there is clear need to preserve the suit property to prevent it from being alienated pending determination of this suit.

26. Having therefore established that the applicant has satisfied the three conditions as set out in the Giella case, a grant of injunction is hereby issued pending hearing and determination of this suit.

**B. Whether the court should order a stay of proceedings in Embu Chief Magistrate court, Succession cause no. 19 of 2019, Estate of Samwel Kanambiu Njeru (Deceased).**

27. The applicant has sought for stay of proceedings in the succession cause no. 19 of 2019. He avers that the suit parcel of land is included in the said succession proceedings and is apprehensive that once the grant is confirmed and the land subdivided it will be transferred to third parties making it difficult for him to defend his rights.

28. Stay of proceedings is a serious order to be issued in a suit as it interferes with the right of a party to have their case expeditiously determined. It essentially discontinues certain proceedings before the court until another matter is heard and

determined. Such orders therefore should only be issued in clear circumstances when a party's rights will be gravely prejudiced if the particular case proceeds.

29. The court, in the case of **Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000**, addressed its mind to this and stated as follows:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

30. As stated above, stay of proceedings is a matter of discretion and such discretion should be exercised in the interest of justice. I wish to reiterate, that in matter before us the applicant has alluded to the fact that the suit property before the court is part of the estate in Succession Cause No. 19 of 2019. It is not disputed that the Succession proceedings are ongoing and pending confirmation of grant. The applicant has expressed his fears that once the grant is confirmed there is a likelihood that the land will be subdivided and transferred to third parties making it difficult for him to defend his rights.

31. The respondent on the other hand, going by the annexures before the court, is alleged to have entered into a sale agreement for sale of a share of the suit parcel of land. I note that this has not been denied. In fact, the respondent has stated that he has a right to deal with the suit parcel of land as he pleases. In the circumstances, there is therefore a high likelihood that the suit property will be disposed if the grant is confirmed before this suit is determined.

32. I have considered the prayer by the applicant for stay of proceedings. It is not disputed that the applicant, prior to filing this case, had filed for citation in which orders were granted to him to obtain letters of administration to the respondent's father estate. But the respondent filed for succession before the applicant could obtain such letters of administration intestate. The applicant has also stated that he made an application to be joined in the succession proceedings to pursue his alleged purchaser's right but his application was declined. It seems to me that the applicant has tried all other avenues to pursue his rights to no avail. Based on the circumstances before the court, it is my considered view that it would be in the interest of justice to grant stay of proceedings in the Succession court.

33. The upshot of the foregoing is that the court finds merit in the application. With regard to the injunction order sought in prayer 2 of the application, the court notes that the applicant had conceded to abandon the prayer for leasing in his application. The prayer for injunction is therefore allowed but the respondent is at liberty to lease the suit parcel of land. Prayer 3 of the application is also allowed as prayed.

34. The costs of this application shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9<sup>TH</sup> DAY OF MARCH, 2022**

In the presence of Kiunga for Muchangi for plaintiff/Applicant and defendant/respondent present in person.

Court Assistant: Leadys

**A.K. KANIARU**

**JUDGE**

**09.03.2022**



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