



RREPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO E10 OF 2020

WINFRED MUENI KATIKU..... 1ST PLAINTIFF/APPLICANT

JOSEPH KAVITHI KATIKU.....2ND PLAINTIFF/APPLICANT

VERSUS

NICHOLAS MUTISYA KATIKU.....1ST DEFENDANT

GODFREY MWONGELA KIMONDU.....2ND DEFENDANT

CHAIR MAKUENI LAND CONTROL BOARD.....3RD DEFENDANT

LAND REGISTRAR MAKUENI COUNTY.....4TH DEFENDANT

RULING

1. Before me is a Notice of Motion Application dated 29th of June 2021 brought pursuant to Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law wherein the Applicant is seeking for the following orders: -

a) Spent.

b) Spent.

c) Spent.

d) That pending the hearing and determination of this application and the main suit, the 1st and the 2nd Defendants herein NICHOLAS MUTISYA KATIKU and GODFREY MWONGELA KIMONDU be ordered to forthwith stop the alienation and/or transfer of interest in the portions of the suit land known as LR NO Makueni/Unoa/320 granted to them in the certificate of confirmation of grant dated 8th of May 2021 to wit 13 acres to NICHOLAS MUTISYA KATIKU and 3 acres to GODFREY MWONGELA KIMONDU.

e) That pending the hearing and determination of this application and the main suit, the 3rd Defendant herein CHAIR MAKUENI LAND CONTROL BOARD be ordered to forthwith suspend further engagements on portions of the suit land known as LR NO Makueni/Unoa/320 granted to NICHOLAS MUTISYA KATIKU and GODFREY MWONGELA KIMONDU in the certificate of confirmation of grant dated 8th of May 2021 to wit 13 acres to NICHOLAS MUTISYA KATIKU and 3 acres to GODFREY MWONGELA KIMONDU.

f) That pending the hearing and determination of this application and the main suit, the 4th Defendant herein LAND REGISTRAR MAKUENI COUNTY be ordered to forthwith maintain the restriction/caution on portions of the suit property known as LR NO Makueni/Unoa/320 granted to NICHOLAS MUTISYA KATIKU and GODFREY MWONGELA KIMONDU in the Certificate of Confirmation of Grant dated 8th of, May 2021 to wit 13 acres to NICHOLAS MUTISYA KATIKU and 3 acres to GODFREY MWONGELA KIMONDU.

g) That notwithstanding the foregoing, an injunction be issued against the 1st Defendant/Respondent barring him from alienating, selling, transferring and/or adversely dealing with the suit land pending the hearing and determination of the main suit which is premised on the generational trust.

h) That the Honourable court be pleased to declare that the alleged sale of 3 acres of land to GODFREY MWONGELA KIMONDU is illegal, null and void ab initio because the vendor NICHOLAS MUTISYA KATIKU was an intermeddler who lacked legal authority to sell.

i) That the costs of this application be provided for.

j) The application is premised on the grounds on the face of the application and on the supporting affidavit by the 1st Applicant sworn on his behalf and on behalf of the 2nd Applicant.

2. A summary of the grounds and the averments is that the suit property herein is the subject of contest in Succession Cause No 195 of 2020 (In the matter of the Estate of Kavithi Senge alias Kabithi Senge) before the Makueni Magistrate's court. The Applicant averred that as per the Certificate of Confirmation of Grant issued to their father the 1st Defendant herein, he was allocated 13 acres while the 2nd Defendant who is not a beneficiary of the Estate of Kavithi Senge alias Kabithi Senge was allocated three acres of land. That upon confirmation of the grant, the court lifted the restriction that had been placed on the suit property by the 2nd Applicant and their aunt one Cate Mbithe Kavithi.

3. He further averred that upon presentation of the application to revoke the grant, the court realized that the 2nd Defendant had been listed as beneficiary without their consent and that the suit property had been intermeddled with. That on those grounds, the court reinstated the restriction and directed the parties in the succession cause to resolve the matter within 30 days in default the Land Registrar would remove the restriction.

4. That despite the existence of the restriction ordered by the court, the 1st and 2nd Defendants instructed a surveyor to install beacons on the suit property. He further averred that the 1st and the 2nd Respondents, were unwilling to resolve the dispute so that they could take advantage of the grace period given by the court. He argued that they were apprehensive that their mother Joyce Kangwele who has dwelt in the suit property for over 40 years may evicted if their father sold the suit property.

RESPONDENTS CASE

5. Opposing the application, the 1st and the 2nd Respondents vide their replying affidavit sworn on 1st September 2021 averred that the Applicants lack the *locus standi* to institute the present application regarding the Estate of the late Kavithi Senge alias Kabithi Senge as they are not beneficiaries of the Estate. The 1st Respondent averred that the beneficiaries in the succession cause gave him consent to act for them as an Administrator and that they also consented to the mode of distribution of the Estate of Kavithi Senge alias Kabithi Senge which has since been executed. The Respondents contend that the application lacks merit and that the same should be dismissed.

6. The application was canvassed by way of written submissions.

SUBMISSIONS

7. The Applicants written submissions were filed on 20th of September 2021. Counsel for the Applicants identified the following issues for the court's determination;

a) *Whether the Plaintiffs/Applicants application has met the prerequisites of the grant of an interlocutory injunction.*

b) Who should pay the costs.

8. Counsel submitted that the Applicants had met the requirements for the grant of an injunction as laid out in Order 40 Rule 1 of the Civil Procedure Rules and on the conditions set out in the case of **Giella Vs Cassman Brown (1973) EA 358.**

9. Counsel submitted that the Applicants had demonstrated a *prima facie* case with a probability of success as they had demonstrated that they had proprietary interest in the portion of the suit land that was inherited by their father from their grandfather. He placed reliance on the case of **Mrao Ltd Vs First American Bank of Kenya Ltd (2003) eKLR** to support his submissions.

10. Counsel further submitted that the Applicants stood to suffer irreparable loss if the orders sought are not granted as there was a likelihood that the 1st Defendant who had already sold 3 acres of land to the 2nd Respondent would sell the suit property and render them homeless. He argued that the land in question was ancestral land and that unless restrained, the Defendant would sell the suit property.

11. On the issue of balance of convenience, Counsel submitted that it was in favour of the Applicants as they stood to suffer a bigger inconvenience if the orders for injunction are not granted. To buttress this point, counsel relied on the following case; **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR.**

12. The Respondents written submissions were filed on 1st of October 2021. Counsel identified the following issues for the court's determination;

i) Whether the applicant has established a prima facie case with a probability of success against the Respondents.

ii) Whether the Applicant stands to suffer irreparable loss and harm unless the orders sought are granted.

iii) On whom does the balance of convenience tilt upon.

13. Counsel submitted that the Applicants must satisfy the principles laid down in the case of **Giella Vs Casman Brown (1973) EA 358.**

14. As regards the first principle, Counsel submitted that the Applicants must first demonstrate that they have a prima facie case with a probability of success. To this end, Counsel argued that the 1st Defendant as an Administrator and beneficiary of the Estate of the late Kavithi Senge *alias* Kabithi Senge could not be an intermeddler as alleged by the Applicants. Counsel further submitted that the Applicants had not demonstrate a *prima facie* case as they were not beneficiaries of the Estate of Kavithi Senge *alias* Kabithi Senge nor had they put up any buildings on the suit property or proved that their mother was in danger of being distracted. He placed reliance on the case **Mrao Vs First American Bank of Kenya Ltd (2003) eKLR.**

15. On the second principle, Counsel submitted that the Applicant had not demonstrated that they would suffer irreparable loss if the orders are not granted.

16. On the third principle, Counsel submitted that the balance of convenience was in favour of the Respondents because the suit land had gone through the succession process and all the beneficiaries were satisfied with the mode of distribution. He submitted that if the orders are granted the 1st and 2nd defendant would be greatly prejudiced. He relied on the case of **Paul Gitonga Wanjau Vs Gathuthi Tea Factory Company Ltd & 2 Others (2016) eKLR.**

17. The law governing the grant of injunctions is to be found in Order 40 Rule 1 of the Civil Procedure Rules which provides as follows: -

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

18. The principles applicable in an application for an injunction were laid down in the celebrated case of **Giella Vs Cassman Brown & Co Ltd (1973) EA 358** where the court held that in order to qualify for an injunction;

ü First the applicant must show a prima facie case with a probability of success.

ü Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.

ü Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

19. The first issue for determination is whether the Applicants have established that they have a *prima facie* case with a probability of success.

20. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** as follows;

“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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

21. It is not in dispute that 1st Respondent is the Administrator of the Estate of the late Kavithi Senge alias Kabithi Senge. It is also not in dispute that the grant of the letters of administration issued to the 1st Respondent was confirmed and a certificate of confirmation issued on 4/12/2021, I have looked at the Certificate of Confirmation of grant and I note that it has spelt out the mode of distribution of the estate. It is clear from the certificate of confirmation of Grant that the 1st Defendant was allocated 13 acres while the 2nd Defendant was allocated 3 acres. Although the Applicants averred that they had filed an application to revoke the grant, the said application was not annexed to their supporting affidavit. As rightly stated by the Respondents, it is evident that the Applicants are not beneficiaries to the Estate of the late Kavithi Senge alias Kabithi Senge. The Applicants claim on the suit property is based on proprietary interest based on generational trust. In the case of **Mbuthia Vs Jimba Credit Finance Corporation Ltd [1988] eKLR**, the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties’ cases.”

22. Similarly, in the case of **Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002** the court held that;

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

23. The court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy.

24. The main issue for determination is whether there exists a generational/customary trust with regards to the suit property. These are issues that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage the court is not required to determine the issues which will be canvassed at the trial.

25. The issues on whether the restriction placed on the suit property should be maintained and the Chair Land Control Board to suspend further engagements on the contested suit land can only be determined in a full trial where the parties will have the opportunity call evidence and have the same challenged by way of cross examination. As regards the prayer sought by the applicant to declare the sale of 3 acres of land to Godfrey Mwangela Kimondu as illegal null and void since the vendor is an intermeddler of the Estate and lacks authority to sell, I find that it is not in the province of this court to hear and determine succession matters as the court has no jurisdiction in this regard.

26. In the case of Virginia Edith Wambui Vs Joash Ochieng Ougo civil Appeal No. 3 of 1987 eKLR, the Court of Appeal held that;

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

27. In the present case, it is not in dispute that the Respondent is the Administrator and beneficiary of the estate. It is evident that the Applicant’s proprietary claim over the suit property is anchored on a generational trust. On the basis of the material that is on record, I find that the Plaintiffs/Applicants have not established a prima facie case with a probability of success.

28. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

29. The Court of Appeal in Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR held that: -

“On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an 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 stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”

30. On whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, it is not in dispute that the 1st and 2nd Respondent are beneficiaries of the Estate of Kavithi Senge alia Kabithi Senge. The Applicants alleged that since the 1st Respondent has been allocated 13 acres and has sold 3 acres to the 2nd Respondent, he may evict their mother from the suit land attempt to alienate or even sell the suit land. The 1st Respondent averred that the Applicants do not reside on the suit property. The court is far from being convinced that the Applicant stands to suffer irreparable loss that cannot be compensated by way of damages.

31. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the injunction, against the hardship to be borne by the Respondents by granting the injunction. On the issue of balance of convenience, I find that it tilts in favour of the Respondents as they are the beneficiaries of the Estate of Kavithi Senge alias Kabithi Senge.

32. In light of the foregoing, I find that the Applicants have not met the threshold for the grant of a temporary injunction. Consequently, the application dated 29th June 2021 is dismissed with costs to the 1st and the 2nd Respondents.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF APRIL 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Mohammed

Grace Katasi for Applicant



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