



REPUBLIC OF KENYA



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In re Estate of Kipchumba Toroitich Kiptengwa (Deceased) (Succession Cause 190 of 1998) [2022] KEHC 16629 (KLR) (23 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 190 OF 1998
RN NYAKUNDI, J
DECEMBER 23, 2022
IN THE MATTER OF THE ESTATE OF KIPCHUMBA
TOROITICH KIPTENGWA (DECEASED)**

BETWEEN

SELINAH TINGO KIPCHUMBA PETITIONER

AND

CHARLES KIMURGOR KIPCHUMBA OBJECTOR

RULING

1. Before me are summons dated June 15, 2022 in which the applicant seeks orders that: -
 1. Spent.
 2. That a temporary injunction and or prohibition be issued restraining the petitioner either by herself or agents/ servants from offering for sale, transferring or otherwise in any manner, alienating that parcel of land known as known as Sergoit/Elgeyo Border (Beliomo)/19 pending the hearing and determination of this application inter-partes or until further orders.
 3. That the certificate of confirmation of grant issued on March 4, 2020 and dated October 22, 2020 in respect of the estate of the late Kipchumba Toroitich Kiptengwa issued by this Honourable Court be amended by indicating that the property known as Sergoit/Elgeyo Border (Beliomo)/19 shall vest on Selinah Tingo Kipchumba for her benefit and as a trustee of Charles Kimurgor Kipchumba.
 4. That in the alternative, a declaration be made that the petitioner is not entitled to dispose by way of sale the parcel of land known as Sergoit/Elgeyo Border (Beliomo)/19, without the consent of the applicant and leave of this court being sought and obtained.



2. The application is supported by the affidavit of Charles Kimurgor Kipchumba, in which he deposed that that the grant of representation of the estate of Kipchumba Toroitich Kiptengwa was issued to him and the petitioner and was confirmed by this honourable court on the October 4, 2020 in the following terms;
3. The applicant deposed that from the foregoing, it is evident that the estate of the deceased only had two beneficiaries being the petitioner and himself. He further deposed that the petitioner is a widow to the deceased whereas he is an only child of the deceased.
4. The applicant maintains that at the time of confirmation of grant he had physical and actual possession of the property known as Sergoit/Elgeyo Border (Beliomo)/19 where he has developed semi-permanent structures. The applicant deposed that the petitioner was and still resides on another parcel of land and not on the subject parcel. The Applicant is not opposed to the petitioner/respondent enjoying a life interest in the parcel of land known as Sergoit/Elgeyo Border (Beliomo)/19.
5. According to the applicant the petitioner/respondent is entitled to: -
 - a. The personal and household effects of the deceased absolutely
 - b. A life interest in the whole residue of the net estate.
 - c. That the interested so vested would automatically determine on the death/ remarriage of the widow.
6. The applicant maintains that although the petitioner is entitled to the interest set herein above the same is subject to the following restrictions;
 - a. She not entitled to sell any property, but with consent of the children of the deceased.
 - b. She is not entitled to sell the immovable property of the estate without the consent of the children of the deceased and leave of court.
7. The applicant contends that on June 7, 2022 and on several days thereafter in the month of June, the petitioner hired goons who moved to unlawfully demolish his houses and destroyed his crops on all that parcel of land known as Sergoit/Elgeyo Border (Beliomo)/19 . The applicant maintains that the action by the petitioner is premised on the mistaken belief that her rights on the subject land are absolute.
8. The applicant further deposed that on inquiring from the petitioner the reasons of the said hostility, it became apparent that the petitioner was seeking vacant possession of the parcel of land known as Sergoit/Elgeyo Border (Beliomo)/19 purposes of disposing it off by way of sale. The applicant deposed that is evidenced by the number of people who have visited the subject land with the intention of purchasing the same.
9. The applicant contends that his consent as the only child of the deceased has not been sought nor obtained. The applicant further contends that leave of the court has also not been sought nor obtained.
10. According to the applicant, unless the orders sought are granted then there is real danger that the estate of the deceased shall be deprived of its immovable property being parcel of land known as Sergoit/Elgeyo Border (Beliomo)/19.
11. The applicant seeks to amend the confirmed grant so as to have the petitioner registered as a trustee of the parcel of land known as Sergoit/Elgeyo Border (Beliomo)/19. In the alternative, the applicant was a declaration made that the petitioner is not entitled to dispose by way of sale the property known as known as Sergoit/Elgeyo Border (Beliomo)/19 without his consent and leave of the court.



12. The applicant argues that unless the orders are issued then the estate stands to suffer irreparable loss and damage.
13. In opposing the application, the respondent filed a notice of preliminary objection dated July 1, 2022. The notice of preliminary objection is anchored on grounds that;
 1. That the said application offends the mandatory provisions of Order 9 rule 5 and rule 9 of the *Civil Procedure Rules*.
 2. That the issues raised in the application are merit based decisional re-engagement and a judgment having been made on the same, the court is functus officio.
 3. That the said application and the issues raised therein are res judicata by dint of section 7 of the *Civil Procedure Act*.
 4. That the raised in the application does not meet the threshold for rectification of grant within the meaning of section 35 and 37 of the *Law of Succession Act*.
 5. That the said application is abuse of the court process, once an appeal is preferred, review is ousted, the applicant is seeking to review of the judgment of the court disguised as rectification as such the applicant having preferred an appeal against the said judgement ousts the jurisdiction of the court to entertain an application for review disguised as amendment and or rectification of judgment or grant.
 6. That the court lacks jurisdiction to make and or pronounce orders relating to and or in creation of a trust as the orders ought to be sought before the Environment and Land Court.

Determination

14. Before I delve into the merits of this application, I will first address the notice of preliminary objection raised by the respondents herein. The preliminary objection if allowed may dispose off the entire suit without giving parties the opportunity to be heard. This has to be done with caution that the court has a duty to hear all parties and determine the case on merit.
15. The definition of a preliminary objection is well set out in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696.

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

16. Ojwang, J (as he then was) expressed himself as follows in *Oraro v Mbaja* [2005] 1 KLR 141 : -

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract-giving rise to the suit to refer the dispute to arbitration.... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.... The principle is abundantly clear.



A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from information, which stands to be tested by normal rules of evidence.”

17. I have looked at the points of law raised by the respondent’s preliminary objection and I note that although same touch on the competence of the applicant’s application, they need to be ascertained in order for the court to determine the matter and thus not pure points of law.
18. On whether a temporary injunction should be issued prohibiting the petitioner/respondent either by herself or agents/ servants from offering for sale, transferring or otherwise in any manner, alienating that parcel of land known as known as Sergoit/Elgeyo Border (Beliamo)/19. The applicant herein has not tendered any evidence whatsoever to prove that
19. The principles to be satisfied in granting of a conservatory order was expressed by Justice Onguto J (as he then was) in the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR are as follows;

”In summary, the principles are that the applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

20. The question that this court has to answer is whether the applicant has demonstrated a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger, he will suffer prejudice. The applicant herein however has not tendered any evidence whatsoever to prove that the petitioner wants to sale the subject land or is the process of transferring the subject parcel to a third party. It must be noted that court orders are not issued in vain and thus the court cannot grant the prayer sought.
21. Rectification of grants is provided for in section 74 of the *Law of Succession Act*, Cap 160, Laws of Kenya and Rule 43(1) of the *Probate and Administration Rules*. Section 74 provides as follows:

74. Errors may be rectified by court:

Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

Rule 43(1) provides as follows:

Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made,



he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made.”

22. From the language of section 74 of the *Law of Succession Act* and Rule 43(1) of the Probate and Administration Rules, the scope of rectification of grants of representation is limited to errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant. I may add that such other minor errors in that genre could also be rectified.

23. *In the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased)* [2013] eKLR:-

The law on rectification or alteration of grants is Section 74 of the *Law of Succession Act* and Rule 43 of the *Probate and Administration Rules*...What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general....

Where a proposed amendment of a grant cannot be dealt with under the provisions of section 74 of the *Law of Succession Act*, the applicant ought to approach the court under order 44 of the *Civil Procedure Rules*. A review under Order 44 of the *Civil Procedure Rules* may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision-Order 44 of the *Civil Procedure Rules* on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant.”

24. In the present case the applicants seek to rectify the certificate of confirmation of grant that was issued on March 4, 2020 with respect to the parcel of land known as Sergoit/Elgeyo Border (Beliamo)/19. The applicant wants the certificate of confirmation of grant rectified so as to indicate that parcel of land known as Sergoit/Elgeyo Border (Beliamo)/19 shall vest in Selinah Tingo Kipchumba for her benefit as a trustee of Charles Kimurgor Kipchumba . In the certificate of confirmation of grant dated October 22, 2020 the petitioner was supposed to get the whole of the subject land without the mentioning of her holding the said parcel of land in trust for the applicant herein.

25. In my view at this particular juncture, rectifying the certificate of confirmation of grant so as to indicate that the petitioner will hold the subject land in trust of the objector/applicant will be changing in totality the substratum of the said certificate. In my view the applicant is at liberty to seek an appeal so as to have the petitioner hold the said parcel of land in his trust. Having said so, it is my view that the rectification sought is not warranted.

26. For emphasis purposes I must also point out that all the beneficiaries of the deceased are to enjoy freely the resulting benefits from the deceased’s estate without any encumbrances from the rest of the beneficiaries. Since the widow/petitioner herein is still alive, under section 35 of the Act, she is entitled to the life interest in the whole residue of the net intestate. This position has been upheld by the courts. In the case of *Tau Kakungi v Margrethe Thorning Katungi & Another* [2014] eKLR, Musyoka J held that the purpose of section 35 of the Act was to prevent a spouse of the deceased from being impoverished after the demise of the other by distributing the entire estate to the children. The court stated: -

The effect of section 35 (1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property



crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate...The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance.”

27. The applicant also seeks that a declaration be made that the petitioner is not entitled to dispose of by way of sale the subject land without his consent and leave of the court.
28. It is trite law that he who alleges must prove. The applicant save for mentioning in passing that the applicant seeks to sell the subject land, has not tendered any evidence whatsoever to support the said assertion and therefore the said prayer cannot issue.
29. In the end the summons dated June 15, 2022 are hereby dismissed for lack of merit. This being a family matter each party shall bear its own costs.

It is ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022.

.....
R. NYAKUNDI
JUDGE

(nathantororei@gmail.com, kipeiledisha@gmail.com, koriradvocates@yahoo.com)

Coram: Hon. Mr. Justice R. Nyakundi

M/S Tororei & Co. Adv

M/S Bundotich Korir & Co. Adv

M/S Ledisha J.K Kitony & Co. Adv

