



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 53 OF 2020

IN THE MATTER OF THE ESTATE OF KITUR CHEPSUNGULGEI

(DCD)

JACKSON BETT & 11 OTHERS.....APPLICANTS

-VERSUS-

GIDION KIBITOK & 2 OTHERS.....RESPONDENTS

RULING:

1. The applicants through the 1st Applicant, Jackson Bett, moved this honorable court vide chamber summons dated the 18th of December 2020 and brought pursuant to **Rule 3 of the High Court Practice and Procedure Rules, Sections 47 and 76 of the Law of Succession Act and Section 44(1), 49, 63(2) and 73 of the Probate and Administration Rules** seeking the following orders:

- a. THAT this honorable court be pleased to certify this application as urgent and service of the same be dispensed with in the first instance during the High Court Vacation
- b. THAT preservative orders do issue restraining the 1st and 3rd respondents either by themselves, their servants, or any other person acting from their authorization or control be restrained from intermeddling with the estate by constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties, discussing the facts of this case outside the jurisdiction of this court, or undertaking or continuing to carry out of any further development in the said property namely **L.R No Nandi/Cheptil/24, or otherwise contracting with third parties over land parcel number Nandi/Cheptil/24** pending the hearing and determination of this application.
- c. THAT preservative orders do issue restraining and/or stopping the 2nd respondent either by themselves, their servants, or any other person acting from their authorization or control from intermeddling with the estate or utilizing the estate to the disadvantage of the applicants.
- d. THAT an order do issue to Nandi County Land Registrar stopping any dealings with the register of all that parcel of land known as **Nandi/Cheptil/24** pending the hearing and determination of the succession proceedings
- e. THAT the 2nd petitioner be compelled to deposit the original title in court so as to stop any further processes aimed at curtailing the court process
- f. Any other order that may be just and in the interest of preservation of the estate or properties of the deceased.
- g. THAT cost of this application be provided for.

2. The application is supported by the affidavit of the 1st applicant Jackson Bett on behalf of the applicants, dated the 18th of December 2020. The applicants aver that the 1st respondent is currently constructing permanent structures on **L.R No. Nandi/Cheptil/24** (hereinafter suit property) to the detriment of the other beneficiaries. To this end, the applicants have attached a bundle of photographs marked XYZ that show ongoing construction of permanent structures. Furthermore, the applicants aver that the 1st respondent is an administrator of the estate of the deceased but the applicants have raised objections over the same. Finally, the applicants aver that the 1st and 3rd respondents are intermeddling with the estate of the deceased by utilizing the land at the disadvantage of the applicants and threatening to lease off portions in the asset forming the subject matter of the estate to third parties.

3. The 10th applicant filed a further affidavit dated the 25th of January 2021 in support of the application dated the 18th of December 2020

wherein he avers that he has been rendered homeless by actions of the respondents of throwing him out of the homestead with intentions of denying him the rightful share of his deceased father (son to the deceased Kitur Chepsungulgei). He further avers that his name has not been included in the list of beneficiaries in succession cause No. 53 of 2020 despite being a bonafide beneficiary by virtue of being a grandson of the deceased. He has attached a birth certificate and his late father's death certificate to buttress his point.

4. In response to the application, the 1st, 3rd and 4th administrators filed their replying affidavit sworn on the 18th of January 2021 by the 1st respondent Gidion Kibitok on behalf of the 3rd and 4th administrators opposing the application on grounds that some of the applicants have made similar applications seeking the same orders thus the application is a total abuse of the court process. To this end, the respondents have attached copies of the applications marked as DK – 1(a) and (b).

5. In particular, the 1st respondent avers that his late father allocated to him 16 acres on which he has constructed the permanent structure as the same is his land. Furthermore, the 1st respondent avers that in the early 1970's, the deceased allocated all his houses portions of land comprised in the suit property and the same have been utilized as allocated without any objection up until now, to much of his surprise.

6. The 1st respondent further avers that all of the objectors including the applicants (excluding the 10th applicant whom he avers that is a complete stranger) continue to utilize their parcels of land and therefore, no prejudice will be suffered by the applicants should the 1st respondent complete his house that is currently under construction. He further submits that changing the status quo at this juncture will not serve the best interest of justice as the same will result in acrimony among family members.

7. Finally, the 1st respondent states that he does not intend to sell and or intermeddle with the suit property nor have the applicants proved elements of intermeddling thus the application is without basis.

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

Applicants Submissions

9. The applicants in their submissions dated the 12th of February 2021 reiterate the statements made in their supporting affidavit dated the 18th December 2020 noting that the respondents are intermeddling with the estate of the deceased and are advantageously utilizing the estate to the applicants' disadvantage.

10. The applicants submit that the suit property is a subject of the succession proceedings and as such, it would be prejudicial and detrimental to allow the respondents including third parties (lessee's) to exploit the suit land and to benefit solely by utilizing large chunks of the estate by actively undertaking commercial farming activities to the disadvantage of others.

11. In particular, the applicants submit that there are four issues for determination namely;

- a. whether the honorable court has the powers to issue preservative orders
- b. whether the court has the powers to grant equitable rights to beneficiaries of the estate by determining the maximum acreage of commercial utilization/farming with need to preserve the estate
- c. whether the court has powers to grant orders legally recognizing the 10th applicant as a bonafide beneficiary of the estate and lastly
- d. whether the honorable court has powers to compel the 2nd respondent to deposit the original title in court so as to stop any further processes of intermeddling with the estate.

12. As regards the first issue, the applicants rely on Section 45 of the Law of Succession Act that prohibits intermeddling and further rely on the definition adopted by Justice J.A Makau in *Estate of David Julius Ntubiri M'ithinji (deceased) 2012 eKLR* and *Estate of Kongato Chebon Kibuluny (Deceased) 2011 eKLR*. In this regard, the applicants note that it would be costly for any beneficiary who will be given that parcel of land upon subdivision as they would incur costs in demolishing the permanent structure.

13. On the second issue, the applicants rely on Article 60 of the Constitution to the effect that they are entitled to equitable access to land and not to be discriminated from. To this end, they submit that there is need to grant them equitable rights with the respondents by reducing the total acreage of utilization so that they all get equal rights. They rely further on the case of *Mutsonga vs Nyati (1984) KLR*, *Kanyi vs Muthiora (1984) KLR 712*, *Lloyds Bank Plc v Rosset, 1991 1 AC 107 132* and *Hassey v Palmer (1972) 3 ALL ER* on grant of equitable rights.

14. On the third issue, the applicants submit that children born out of wedlock are entitled to inheritance on the same pedestal as children born in marriage. To buttress this point, the applicants relied on Petition No.17 of 2014 affirming the same and further relied on *Anthony Gachoka vs National Hospital Insurance Fund and 3 others (2005) eKLR* to the effect that all interested parties to a suit property/subject be included as parties in the suit on the basis of equity. The applicants also attached copies of the birth certificate to prove that indeed the 10th applicant is a grandson to the deceased as he is a son to the deceased son and is therefore entitled to be included as a beneficiary.

15. Finally on the last issue, the applicants submit that the court has inherent powers to compel the 2nd respondent to deposit the original title in light of the fact that the respondents have continuously entered into informal leases/contracts and or sold portions of the estate to third parties which will render the estate of the deceased wasted and difficult to remove such third parties from the estate upon completion and

subdivision of the estate. The applicants have attached evidence purporting to list 11 individuals as purchasers of part of the estate of the deceased.

16. For the foregoing reasons the applicants submit that the application be allowed and a preservative order be issued against the respondents.

The respondents Submissions

17. In their submissions dated the 18th of February 2021, the respondents reiterated the contents of their replying affidavit and opposed the application on grounds that the applicants have filed similar petitions such as High Court Misc. Application No 9 of 2020 and citation No. 41 of 2020.

18. The respondents further contend that it is malicious for the applicants to seek to restrain them especially the 1st respondent from proceeding with construction of his house, whose construction commenced way before the proceedings herein were instituted. As such, the 1st respondent submits that no prejudice will be suffered by the applicants should he complete his house under construction as he is a legal beneficiary of the deceased by virtue of being his son.

19. The respondents reiterate in their submissions that they do not intend to sell and or intermeddle with the portion awarded to them by their parents and further submit that they are administrators having been legally appointed by this court vide letters of administration issued on the 26th of November 2020. To this end, the respondents note that development of the estate does not amount to intermeddling.

20. The respondents further submit that the allegations that they are utilizing the estate to the applicants' disadvantage is an afterthought as each of the applicants have continuously utilized the portions allocated to them by the deceased since 1970.

21. Furthermore, the respondents contend that Section 47 of the Law of Succession Act vests court with wide discretion to make such orders as may be expedient in the best interest of justice. In particular, the respondents rely on the case of *Giella v Cassman Brown (1973) E.A 358* noting that the applicants need to satisfy the three conditions set by the case. To this end, the respondents aver that the applicants have not met the three conditions as they have not established a prima facie case, irreparable injury nor why the balance of convenience should tilt in the applicants favour.

22. Finally, the respondents submit that they have not intermeddled with the estate of the deceased as envisaged under Section 45 of CAP 160. It is their submission that administrators hold a deceased estate in favour of all beneficiaries and there is no evidence provided by the applicants that the respondents intermeddled in the property.

23. For these reasons, the respondents submit that the applicants application be dismissed and an order of status quo be granted.

Analysis and Determination

24. A perusal of the pleadings and supporting documentation reveal that there is only one issue for determination namely, whether the applicants have made out a case for the grant of preservative orders.

25. However, before I proceed, it is important to point out that the applicants canvassed lots of issues in their submission and further affidavit by the 10th applicant, which issues were never raised in the chamber summons nor in the orders sought. In this regard, the Court need not address issues/orders not prayed for in the chamber summons.

26. Indeed **Section 47 of the Law of Succession Act** vests court with wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person. It 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.”

27. Similarly, 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.”

28. A reading of the above sections indicate that the High Court is clothed with wide powers to do what is necessary to ensure that the ends of justice are met. This position finds support in *Millicent Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others [2018] eKLR* where the court affirmed that the High Court has powers to issue injunctions for purposes of preserving the estate of a deceased person.

29. **William Musyoka, in his book, Law of Succession, Law Africa 2006 at page 115** notes that the provisions of Section 47 of the Law of Succession Act gives court wide discretion in dealing with testamentary and administrative issues. The import being that Section 47 gives court the power to issue protective orders in order to safeguard the estate of a deceased person.

30. Furthermore, the Court of Appeal in *Floris Piezzo & Another –vs- Giancarlo Falasconi (2014) eKLR*, 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.”

31. The upshot of the foregoing is that the High Court has jurisdiction to issue all manner of orders including the issuance of protective orders against the wrongful disposal and or intermeddling with the estate/free property of the deceased as enumerated under **Section 45 of the Law of Succession Act** where appropriate and necessary in order to preserve and safeguard, the estate of a deceased person.

32. In *re Estate of Jeremiah Ngiri Kibati (Deceased) [2019] eKLR* and *Re Estate of Elijah Ngari (Deceased) [2019] eKLR*, the court in dealing with the issue of issuance of conservatory orders in succession matters cited with approval the decision of this court in *Japhet Kaimenyi M’ndatho v M’ndatho M’mbwiria [2012] eKLR* noting that an applicant in an application for preservative orders: -

“has to satisfy the following conditions: -

a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservative orders of inhibition are issued.

b. That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.

c. That the applicant has arguable case.”

33. Similarly, *In the Matter of the Estate of Paulo Kiplagat Boiwo (Deceased) (2012) eKLR*, the court while affirming that preservative orders are similar to injunctive orders noted that applicants have to abide by the conditions set out in the celebrated case of *Giella vs Cassman Brown (1973) E.A 358* namely the applicant must *make out a prima facie case* and show that they *will suffer irreparable loss which loss cannot be compensated by damages* and lastly that the *balance of convenience* should tilt in their favour where doubt exists.

34. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* the Court of Appeal while reiterating the three conditions further clarified that the conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. This means that 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.

35. In *African Banking Corporation Limited v Netsatar Limited & 6 Others Nairobi Milimani HCC no. 299 of 2009 (UR)* the court in discussing what constitutes an arguable case observed that: -

“A “good arguable case” was defined by Mustill J in The Niedersachsen [1983] 2 Lloyd’s Rep 600 at page 605 to be: -

One which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.”

This in my view, is a sound principle to rely on in establishing whether a Plaintiff has a good arguable case.”

36. In the present case, it is clear from the material placed before court that the applicants and the respondents are related to the deceased person in one way or another save for the 10th applicant whose link is disputed by the respondents. Moreover, there is no doubt that the parties herein are in occupation of portions allegedly allocated to them by the deceased in the 1970s. This has been admitted by both the applicants and the respondents. What is in dispute is the action of the 1st respondent to construct permanent structure on the suit property prior to subdivision of the estate of the deceased.

37. On one hand, the applicants aver that the construction amounts to intermeddling and note that if court does not grant the preservative orders, there is risk that whoever gets that piece of property will incur loss in demolishing the structures. On the other hand, the 1st respondent indicates that the permanent structure he is constructing is on land given to him by his father, the deceased and that the deceased gave land to each of the beneficiaries including the applicants.

38. However, the 1st respondent has not provided any evidence to prove that the suit property he is constructing the house on was given to him by the deceased and id not part of the deceased’s estate.

39. Moreover, the applicants have tendered evidence marked as KK 1 showing a list of 11 individuals as purchasers and therefore acquiring interest in the deceased's estate. Accordingly, the applicants contend that this shows that there is danger that part of the estate has already been sold and remain apprehensive that unless preservative orders are issued, there is risk that the estate may be wasted.

40. In my view, the above actions, when weighed together, shows that the applicants have established at this stage that there is risk of the Estate being wasted and secondly, that they have a prima facie case as beneficiaries of the estate of the deceased. These actions, in one way or another affect the substratum of the subject matter and may result in the dissipation of the Estate of the deceased person. It is however important to note that at this interlocutory stage, the Court is not required to and should not make any conclusive findings on the merits or lack thereof of the applicants claims. That shall be the function of the court at trial to establish entitlement to the deceased's Estate and to what extend.

41. Furthermore, I agree with the applicants that there is risk that if the Court subdivides the Estate and the section where the permanent structure is being constructed is given to another beneficiary other than the 1st respondent, that beneficiary will incur additional costs in demolishing the structure and the 1st respondent as well suffer irreparable loss.

42. Moreover, the balance of convenience tilts in favour of the applicants in order to preserve the estate pending the final determination of the succession proceedings and taking into consideration the guidance provided under **Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules** to meet the ends of justice.

43. In this case, its clear that the 1st respondent is an administrator of the estate of the deceased and holds it for the benefit of others who have a valid claim against the estate. Though the applicants have raised objection, the appointment of the respondents has not been annulled and under law, remains valid. Consequently, the respondents' have power to deal with the property of the deceased but within parameters permissible under law. Moreover, in **the Matter of the Estate of Dr John Muia Kalii (deceased) Machakos High Court Succession Cause No. 81 of 1995, Mwera J** was clear that since intermeddling is a criminal offence, evidence in support of the allegation should be strong. In our present case, I find at best the claims to be of mere allegations without tangible evidence.

44. As regards the utilization of the Estate for commercial farming activities, it would be unfair to restrain the respondents at this stage in absence of proper information or evidence on record on the stage of crops planted considering that costs may have been incurred by parties in planting and or cultivating the land. In this regard, it is my view that the status quo be maintained in so far as farming of the suit property is concerned pending the hearing and determination of the succession cause or objection.

45. This Court therefore orders that, preservative orders do issue restraining the respondents either by themselves, their servants, or any other person acting from their authorization or control restraining them from intermeddling with the estate by constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties, discussing the facts of this case outside the jurisdiction of this court, increasing the number of acreage for farming beyond the current acreage and undertaking or continuing to carry out of any further development in the said property namely **L.R No Nandi/Cheptil/24**, pending the hearing and determination of this succession proceedings.

46. Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF APRIL, 2021.

In the presence of:-

Mr. Chebiego for the 1st and 12th applicants. (absent)

Mrs. Sawe for the 1st, 3rd and 4th Respondents.

Gladys - Court Assistant