



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. SUCCESSION CAUSE NO. 10 OF 2016

IN THE MATTER OF THE ESTATE OF CHEPSONGOK TAPSAMBU (DECEASED)

IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT

BETWEEN

PAUL KENY.....APPLICANT

AND

JOSEPH KIPROTICH SITIENEI.....RESPONDENT

RULING

1. Before the Court for determination is the application dated **13 September 2019**. It is expressed to have been filed by the applicant pursuant to **Sections 45 and 47** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** and **Rule 73** of the **Probate and Administration Rules**, for the following orders:

[a] Spent

[b] Spent

[c] That a restraining/conservatory order be issued restraining the respondent, **Joseph Kiprotich Sitienei**, his agents, servants and or assigns from entering into agreements to sell, charge, lease, mortgage, survey, demarcate or subdivide or in any other manner intermeddle with the estate of the deceased; and more particularly land parcel **No. Nandi/Kiminda/1035** pending the hearing and determination of the substantive application herein.

[d] That the orders issued by the Court on **7 December 2015** be reviewed and set aside and the estate land **No. Nandi/Kiminda/1035** be redistributed afresh.

[e] That the cause be fixed for hearing for purposes of distribution of the estate; and the applicant, **Paul Keny**, be listed as a beneficiary as recommended by the chief of Kiminda Location in his letter to the Court.

2. The application was premised on the grounds that the respondent is unlawfully intermeddling with the estate property; and is in the process of selling the estate land in disregard of the applicant's interest therein; and that unless restrained, the applicant risks suffering irreparable loss. In his Supporting

Affidavit, sworn on **13 September 2019**, the applicant averred that he bought a portion of the suit land, measuring one acre, from the deceased, **Chepsongok Tapsambu**; and that the respondent has declined to transfer that portion to him, yet he has all along been in occupation. The applicant further complained that the respondent has been felling trees from his portion of the subject property and has even threatened him with eviction. Hence, he prayed for conservatory orders pending the resolution of his claim against the deceased's estate.

3. The applicant annexed to his Supporting Affidavit a Certificate of Official Search confirming that land parcel **No. Nandi/Kiminda/1035** is registered in the name of the deceased, **Chepsongok Tapsambu**. He also annexed a letter dated **12 September 2019**, written by the Chief of Kiminda Location, **Priscilla Terer**, to confirm that the applicant bought the suit property with the trees thereon. The documents marked **Annexures PK 2** to the Supporting Affidavit are photographs to prove the assertion that trees on the suit property have been cut down.

4. The respondent opposed the application contending that it is incompetent and incurably defective. He relied on his Replying Affidavit sworn on **16 September 2019** and asserted that he is the only child of the deceased and therefore entitled to her estate in its entirety. He averred that, since he had already concluded the process of administration and caused the subject land to be vested in his name, the application is not only belated but is also untenable for want of jurisdiction.

5. The application was canvassed by way of written submissions, pursuant to the directions issued herein on **2 March 2020**; whereupon learned counsel for the respondent filed written submissions on **6 March 2020** pitching for the dismissal of the application. Counsel for the applicant, **Mr. Tallam**, filed his written submissions dated **11 March 2020** on **3 July 2020**. He proposed the following issues for determination:

[a] Whether this Court has jurisdiction to entertain this cause;

[b] Whether the applicant is a beneficiary of the estate of the deceased;

[c] Whether the estate land, namely parcel **No. Nandi/Kiminda/1035** ought to be preserved.

6. **Mr. Tallam** looked at the issue of jurisdiction from the prism of **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**; and consequently took the posturing that the Court, as a probate court, has the requisite jurisdiction to entertain the applicant's claim, he being a *bona fide* purchaser who transacted with the deceased in her lifetime. Counsel further sought succor in **Article 159(2)(d)** of the **Constitution** and urged the Court to administer justice without undue regard to procedural technicalities; and to focus on substantive justice. He submitted that the applicant's intention is simply for the preservation of the estate pending the hearing and determination of his claim. In Counsel's view, whether or not the applicant has a valid cause of action is not for determination at this point in time. He relied on **Winfred Nyambura Karugu & Another vs. Magdalene Nyokabi Guandai** [2015] eKLR for the proposition that it is in the interest of justice to preserve the estate of a deceased person until the same is distributed. Consequently, he urged the Court to allow the applicant's application dated **13 September 2019** and to grant the prayers sought therein.

7. In response to **Mr. Tallam's** submissions, **Mr. Choge** for the respondent submitted that, since the applicant is not a beneficiary of the deceased, he has no *locus standi* to institute the instant proceedings. Counsel cited **Sections 29, 39 and 66** of the **Law of Succession** to support his argument that, in so far as the applicant is not provided for in the categories of persons recognized in the aforementioned provisions, he has no standing in law to contend with the respondent over the estate of the deceased.

8. It was further the submission of **Mr. Choge** that this Court lacks the requisite jurisdiction to entertain the application; granted that the grant of issued to the respondent has since been confirmed and the property registered in the name of the respondent. He relied on **Article 165(5)** of the **Constitution** and the relevant provisions of the **Land Registration Act, 2012, the Land Act, 2012** as well as **Section 13(2)** of the **Environment and Land Court Act**. Counsel further urged the Court to be guided by **Republic vs. Karisa Chengo & 2 Others**, Supreme Court Petition No. 5 of 2015 and **Kabita**

Karanja vs. the Attorney General, Nyeri Civil Appeal No. 310 of 1997 and the **Owners of Motor Vessel Lillian S vs. Caltex Oil (Kenya) Ltd** [1989] KLR 1 to underscore the disparate and distinct jurisdiction bestowed on the High Court as well as the Environment and Land Court.

9. **Mr. Choge** further took issue with the fact that the applicant waited for over 30 years to enforce the alleged agreement he made with the deceased. He urged the Court to find that the transaction is void from the standpoint of the **Land Control Act, Chapter 302** of the **Laws of Kenya**. He accordingly posited that the applicant cannot be said to have a *prima facie* case with probability of success; a critical requirement for the grant of the orders sought. He referred the Court to **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358 and **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others** [2003] eKLR for the applicable principles.

10. As to whether a good case for review has been shown by the applicant, **Mr. Choge** relied on **National Bank of Kenya Ltd vs. Ndungu Njau**, Nairobi Civil Appeal No. 211 of 1996; **Kithur vs. Kioko** [1982] KLR 177 at pg. 181; and **P.N. Eswara Iyer vs. The Registrar** [1980] AIR 808 980 SCR (2) 889 and urged the Court to find that no justification has been made to reopen the process of confirmation of grant as sought by the applicant. In his submission, there is no glaring mistake or error apparent on the face of the record to warrant such a recourse, nor has it been shown that there is discovery of a new and important matter or evidence which was not available when the grant was confirmed. Counsel urged for caution and relied on **DJ Lowe & Co. Ltd vs. Banque Indosues**, Nairobi Civil Application No. 217/1998 (UR) for the proposition that, where an application for review is based on the fact of discovery of fresh evidence the court must exercise greatest care, as it is easy for a party who has lost to seek to strengthen the weak part of his case by procuring additional evidence. Accordingly, **Mr. Choge** prayed for the dismissal of the applicant's application with costs.

11. I have given careful consideration to the application in the light of the averments set out in the pertinent affidavits as well as the written submissions filed herein by learned counsel. A perusal of the record shows that this is a miscellaneous application filed pursuant to **Section 76** of the **Law of Succession Act**, for the revocation/annulment of the Grant of Letters of Administration Intestate issued to the respondent in **Kapsabet Principal Magistrate's Succession Cause No. 127 of 2015**. A copy of the said grant, issued on **7 December 2015** in respect of the estate of the deceased, **Chepsongok Tapsambu**, was annexed to the Supporting Affidavit of the applicant sworn on **29 September 2016**.

12. As the applicant was the only beneficiary of the deceased's estate, an application for confirmation of that grant was made simultaneously with the petition for grant; and the record shows that a Certificate of Confirmation was accordingly issued on **7 December 2015** along with the grant. It was not until **1 October 2018** that the applicant entered appearance and filed his Replying Affidavit in opposition to the application for revocation; which appears to be the action that precipitated the filing of the instant application dated **13 September 2019**.

13. Thus, although the application for preservation of the estate was filed way back on **13 September 2019**, it has remained unprosecuted to date. This is significant granted the object of the application and the fact that the respondent, as the sole beneficiary of the estate of the deceased, has long since been issued with a title deed for land parcel no. **NANDI/KIMINDA/1035**. A copy of that title deed was annexed to the respondent's Replying Affidavit, sworn on **16 September 2019**. It shows that the title deed was issued on **22 March 2016**, a few days after the applicant's Certificate of Official Search annexed to the instant application.

14. Thus, the two issues that arise for my determination are, firstly, whether the Court has jurisdiction to entertain the instant application; and secondly, whether there is justification for review of the confirmation of grant. The jurisdiction of this Court, as a probate court, is principally captured by **Section 47** of the **Law of Succession Act**. It provides that:

“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...”

15. In the same vein, **Rule 73** of the **Probate and Administration Rules** provides that:

“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.”

16. There can be no doubt that the Court has the jurisdiction to handle probate matters in general. It is noteworthy however that, whereas it was the norm for the High Court to handle applications for revocation of grants issued by the subordinate courts, this has since changed, with the amendment of **Section 48(1)** of the Act by **Section 23** of the **Magistrates Courts Act**. That provision now states thus:

“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 (1) of the Magistrates’ Courts Act, 2015.”

17. It was therefore not necessary for the revocation application dated **29 September 2016** to be filed in the High Court. That notwithstanding, it is manifest, from the averments set out in the respondent’s Replying Affidavit that the process of administration of the deceased’s estate has been concluded and the subject property has now been registered in the name of the respondent. Hence, the question to pose is whether, in the circumstances, this Court has jurisdiction to grant conservatory orders for purposes of **Section 45** of the **Law of Succession Act**. As was pointed out by the Court of Appeal in the **Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1:**

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

18. Likewise, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court explained that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

19. Thus, while **Article 165(3)(a)** of the **Constitution** gives the High Court unlimited original jurisdiction to handle civil and criminal matters, **Sub-Article (5)** thereof is explicit that that jurisdiction does not extend to matters reserved for the exclusive jurisdiction of the Supreme Court or matters falling within the jurisdiction of the Employment and Labour Relations Court and the Environment and Land Court. For purposes of ascertaining matters falling within the jurisdiction of the Environment and Land Court, **Section 13** of the **Environment and Land Court Act** provides that:

(1) The Court shall have original and appellant jurisdiction to hear and determine all

disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

20. Thus, the subject property having been registered in the respondent's name, it is my considered finding that it is no longer estate property; and therefore that the court with jurisdiction to entertain the claim henceforth is the Environment and Land Court. That being my view of the matter, I must down my tools at this stage by striking out, not only, the application dated **13 September 2019** for being misconceived and untenable, but also the entire cause. Each party shall bear own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF JUNE 2021

OLGA SEWE

JUDGE