REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCC. NO. 145 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE KIMETO KOITOROR

CHESIRE alias KIMETO ARAP CHESIRE – DECEASED

AND

IN THE MATTER OF SUMMONS FOR REVOCATION OF GRANT

BETWEEN

TABARBUCH TOROITICH.....1ST PLAINTIFF

JOSEPH KIMUTAI CHESIRE.....2ND PLAINTIFF

VERSUS

FRANCIS KIPTOO KIMETO.....1ST DEFENDANT

BENJAMIN KIPLAGAT.....2ND DEFENDANT

RULING

1. By a summons dated the 20th December, 2018, made under the provisions of **sections 38 and 47 of the Law of Succession Act, Cap. 160,** the applicants **FRANCIS KIPTOO KIMETO** and **BENJAMIN KIPLAGAT** seeks that:

a) The summons for revocation of the grant is incompetent and untenable.

b) Costs of the summons be borne by the applicants.

2. The application is premised on grounds that the respondents are not dependents of the deceased, and the issue of trust cannot be dealt with in a succession matter. It is stated that the 1st respondent was a widow of a brother of the deceased, while the 2nd respondent is a son of a brother to the deceased, and the application for revocation of the grant is an abuse of the court process

3. In the supporting affidavit sworn by **FRANCIS KIPTOO KIMETO**, it is deposed that the respondents' claim to the parcel of land which forms part of the assets of the estate, is based on an alleged existence of a trust between the two deceased brothers, namely **KIMETO CHESIRE** and **TOROITICH CHESIRE KOITOROR**, which cannot be dealt with in a succession cause

4. The plaintiff filed a replying affidavit to the summons on the 15th October, 2019. The defendants filed submissions to the summons on the 23rd. January, 2020. The plaintiff wishes to submit as hereunder.

5. The applicants explain in the written submissions, that the respondents are their aunt and cousin respectively, and the only basis for seeking revocation of the grant is their claim that the deceased held the land in trust for his deceased brother (who was the husband and father of the respondents). It is their position that the issue of whether property is trust land is not a probate and administration matter as this can only be pursued in a suit seeking declaratory orders.

6. The applicants contend that the court has no jurisdiction to address the issue of trust to land as such a claim ought to be in a suit and to proceed in the **Environment and Land Court**. The respondents maintain that the objection in issue is ***res -judicata*** as it was taken up by the defendants in response in paragraph 8 of the replying affidavit to the application by the plaintiff dated 1st March, 2019. That despite the said issue having been before the court it proceeded to allow the respondents' application and the court is deemed to have dismissed the objection by the defendants. This court is urged to consider **explanations 3 and 5** on ***res - judicata*** as provided in **section 7** of the **Civil Procedure Act**, Cap. 21 which provides;

> **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**
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> **Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**
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> **Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**
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> **Explanation. — (3) <u>The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.</u>**
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> **Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**
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> **Explanation. — (5) <u>Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused</u>.**
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> **Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

7. The respondents argue that the applicants in the premise ought to have lodged an appeal against the ruling of the court delivered on **1st October, 2019** to the Court of Appeal for having not sustained the objection that the summons for revocation was in competent on the basis of failure to bring a suit and seek a declaration of trust.

8. This court is urged to find that the current summons by the defendants is indeed ***res - judicata*** not-withstanding that it was filed prior to the summons which was decided first on 1st. October, 2019.

9. The issue of incompetence for want of suit and declaration of trust in respect of the summons for revocation of grant is faulted as belated because the directions granted by Kimondo (J) on the 23rd May, 2016 he converted the proceedings herein into a suit to be heard by ***viva-voce*** evidence. That in the directions by the Kimondo (J) he constituted the affidavits and pleadings filed in this cause by the objectors to be a plaint and defence and the description of parties changed to those in an ordinary civil suit to be plaintiffs and defendants and it would be superfluous to hold that an action for a declaration of a trust should be lodged as it will create duplicity and increase the costs.

10. Further, that the directions in issue were given in the presence of the advocate for the defendant and he never contested the conversion of the pleadings into a plaint and defence and the said matter ought to have been raised at the time of giving directions, thus it is belated. The defendants have never appealed against the order made on the directions and it will be an abuse of court process to sustain an objection which the directions already resolved by deeming the pleadings as a plaint and defence. The respondents lament that the application focuses more on form than substance and will militate against the spirit of article 159 of the **<u>Constitution of Kenya</u>**, 2010.

11. The respondents maintain that the issue of the relations of the parties is not material as the applicant's complaint relates to the institution of the succession cause by including a property that did not belong to the deceased which has been wrongfully administered in this estate being **IRONG/ITEN/133**. The respondent contends that the administration of an asset that belongs to a person other than the deceased in this cause can only be raised in the record of the proceedings in which the issue arose and not in a separate suit as the title of the defendants was as a consequence of the court proceedings which ought to be set aside by revocation. In support of this submission, the applicant relies on the case of **<u>PLR v JNR & Another</u>**, **[2013] eKLR** where **Waithaka J**. stated:

> ***"Consequently, this property being the estate of the Deceased is governed by the Law of Succession Act. Section 2(1) of the Law of Succession Act provides that provisions therein applied to all cases of intestate or testamentary succession to the estates of Deceased persons and to the administration of estates of Deceased persons and to the administration of estates of those persons. An estate means the free property of a deceased person that is the property of which that person was legally competent free to dispose during his lifetime, and in respect of which his interest has not been terminated by his death…. The property and issues to be determined [in this case] fall under the realm of the Law of Succession Act. The Environment and Land Court is a special Court established under Article 162 (2) (b) of the Constitution and it is meant to deal with matters concerning the environment and the use and occupation of and title to land. However, matters of ownership and entitlement to a deceased person's property, including land are governed by the Law of Succession Act and are to be determined by the Family Court…."***

12. It is also pointed out that no provision of any law has been cited as barring the filing of the summons for revocation by the plaintiffs, and this court ought to be concerned as to whether the plaintiff has an interest in the estate in revocation proceedings. We do rely on the

provisions of section 76 of the **Law of Succession Act**, **Cap. 160** which provides;

> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion…*

13. Finally, that in the interest of justice and considering the time the matter has been pending in court, the High Court can exercise its incidental concurrent jurisdiction and transfer it to the Environment and Land Court instead of dismissing the matter. In this regard the court is urged to be guided by the authority in **Spinners & Spinners Limited V Spinners & Spinners Limited**, **[2017] eKLR** in which Prof. Ngugi (J)observed;

> ***"Kenyans desired specialized courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162 (2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts.***
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> ***Kenyans objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit.***
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> ***I see no useful purpose that is served by this other than punishing a party that acted in good faith. This would be an appropriate course of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith.***
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> ***22. I then distinguished between substantive and incidental jurisdiction and concluded that even in the absence of express statutory provisions the High Court and, indeed, any of the Equal Status Courts, has inherent incidental jurisdiction to transfer matters which are improperly but in good faith filed before them but they more appropriately belong to one of the other Equal Status Courts. In reaching that conclusion, I said the following which I reiterate here:***
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> ***'I agree there is no substantive concurrent jurisdiction shared between the High Court of Kenya and the two Article 162(2) Equal Status Courts. Indeed, our Constitution advertently aimed to isolate the jurisdiction of the Equal Status Courts and prohibit the High Court from exercising jurisdiction in areas of specialization of these Courts.***
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> ***However, I believe the constitutional architecture provides for incidental concurrent jurisdiction. For example, there is no longer any serious questions that the two Equal Status Courts have case-wide jurisdiction to hear and determine any additional other issues raised or pleaded in a case which is primarily on their area of specialization even if those issues normally fall outside their jurisdiction. This is the reason Equal Status Courts can deal with any issues raised respecting the violation of the Bill of Rights for example.***
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> ***In my view, this incidental concurrent jurisdiction includes the ability of both the High Court and the Equal Status Courts to deal with certain procedural or administrative questions that present quasi-judicial issues where the Court in question is requested to act in the interests of justice or due administration of justice. This is where I would locate the ability of any of the three superior courts of cognate jurisdiction to transfer to the counterpart superior court any case filed before it that would more appropriately be adjudicated in the cognate superior court. Under this incidental concurrent jurisdiction, the High Court was able, for example, to transfer certain matters to the Environment and Land Court and the Environment and Labour Relations Court initially.'***
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> ***23. I have found no reason to depart from this reasoning.***
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> ***24. Consequently, my decision on the matter is that while this Court does not have jurisdiction to hear the appeal, the Court has incidental concurrent jurisdiction to transfer it to the appropriate Equal Status: The Employment and Labour Relations Court."***

Also cited is the decision in **Kenya Medical Research Institute v Samson Gwer & 8 Others**, [2019] eKLR in which Makhandia, Kiage and Murgor JJJ.A held;

> ***"The position as we see it is that even were KEMRI right that the High Court did not have jurisdiction, but it did, the proper way to deal with the matter had it found it to be improperly before it, would have been to transfer it to the proper forum, as it in fact did. That is the position we took in*** *DANIEL N. MUGENDI VS. KENYATTA UNIVERSITY & 3 OTHERS [2013] eKLR* ***in these words that bear repeating;***
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> ***"Believing as we do that approach taken by Majanja, J. (supra) is the correct one, and in endevouring to meet the ends of justice untrammeled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of***

fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "mixed grill" causes in any court they fancy. This will only delay dispensation of justice.

In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment and Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental right associated with the two subjects."

We need only add that it was mischievous of KEMRI to raise this matter substantively in this appeal when the issue of the jurisdiction of the court below and the propriety of the transfer of the petition to it by the High Court had been raised by KEMRI in a preliminary objection and ruled upon by the learned Judge on 3rd May 2013."

14. Whereas this court takes cognizance of the sentiments expressed by Waithaka (J) in **PLR v JNR & Another, [2013] eKLR.** It would be absolutely myopic to conclude that this is purely succession issue, as the respondents do not claim to be beneficiaries of the estate. The mere fact that Kimondo J gave direction as to how the matter was to proceed, did not in any manner transform the nature of what is in dispute. Indeed, as observed by the applicants' counsel, the desire to make a declaration that the contested parcel was held in trust, in my view falls squarely within the jurisdiction of the Environment and Land Court.

15. What then should this court do with a matter which does not fall within its jurisdiction? Let me borrow and paraphrase from what Prof Ngugi (J) said in **Spinners & Spinners Limited V Spinners & Spinners Limited, [2017] eKLR** (supra) that striking out the suit and requiring the parties to file a fresh suit in close cases serves no useful purpose other than punishing a party that acted in good faith, unless it can be demonstrated that the party so file acted in bad faith. In the present instance, no such bad faith has been established

16. I also take into account the fact that this matter has been in court since the year 2011, and striking out the same will not only result in delaying its finalization, but also place a financial burden on the respondents in terms of paying filing fees.

17. Consequently, I hold and find that whereas the application and arguments as regards this court's jurisdiction in the matter is indeed merited, I am persuaded that the cure lies not in striking out the application, but directing that the same be transferred to the court of appropriate Equal Status, namely, the Environment and Land Court at Eldoret, and I so order.

Each party shall bear its own costs.

E-Delivered and dated this 22ND day of MAY 2020 at Eldoret

H.A. OMONDI

JUDGE