



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

SUCCESSION CAUSE NO.49 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE MAGETE TESOT (DECEASED)

PAUL KIPKEMOI SITIENEI.....PETITIONER/APPLICANT

VERSUS

SARAH CHELANGAT.....OBJECTOR/1ST RESPONDENT

AND

LOISE CHELANGAT TESOT.....2ND RESPONDENT

KIBUNGE TANGUS.....3RD RESPONDENT

NICHOLAS KIPKIRUI LANGAT.....4RD RESPONDENT

JOHN KORIR.....5TH RESPONDENT

THOMAS KOECH.....6TH RESPONDENT

JOSEPH CHERUIYOT.....7TH RESPONDENT

SAMUEL KIPNGENO KORIR.....8TH RESPONDENT

WESLEY LANGAT.....9TH RESAPONDENT

SAMUEL KIMUTAI KIRUI.....10TH RESPONDENT

JUDGMENT

1. The Applicant/Petitioner filed a Notice of Motion dated 24thApril, 2018 brought under section 49 and 73 of the Probate and Administration Rules, Section 47 of the Law of Succession Act, Section 68 and 69 of the Land Registration Act, 2003 and all other enabling provisions of the Law supported by the Affidavit of Paul Kipkemoi Sitienei (petitioner) seeking orders that:

i. THAT this honourable court be please to certify this application as urgent and proceed to consider the same ex-parte in the first instance and to issue appropriate orders accordingly.

ii. THAT this honourable court be please to issue temporary order of inhibition, inhibiting the registration and deposition, transactions, transfer or any entries whatsoever against land parcel No. **KERICHO/KONGOTIK/528** pending the hearing and determination of this Application inter parties and thereafter as the court shall order.

iii. THAT this honourable court be pleased to issue temporary order of injunction restraining the 1st to 10th Respondents, by themselves or whomsoever else acting on their behalf or institution from entering into, fencing off, invading, cultivating, trespassing, constructing, taking possession or in any manner whatsoever or howsoever interfering with land parcel No. **KERICHO/KONGOTIK/528**.

iv. THAT this honourable court issue an eviction order against 3rd to 10th Respondents who are already in occupation of land parcel No. **KERICHO/KONGOTIK/528**.

v. The Officer Commanding Bomet Police Station do provide security to effect the orders of eviction.

vi. THAT any other directions be given as the honourable court deems fit.

vii. THAT there be no order as to costs.

2. The Application was founded on the following grounds and those set out in the Supporting Affidavit of Paul Kipkemoi Sitienei;

i. That the Respondents are not beneficiaries of the deceased estate.

ii. That the 1st and 2nd Respondents fraudulently sold the deceased land to the 3rd up to 10th Respondents who are now occupying the deceased's land illegally.

iii. That the 3rd to 10th Respondents are hostile to the deceased's beneficiaries and have denied them access to the land and have further refused, neglected to move from the land despite being issued with numerous notices.

iv. That the beneficiaries have been denied rightful enjoyment of their birth right by Respondents who are not beneficiaries of the deceased's estate.

3. The Applicant/Petitioner urged the court to intervene and guide this process until distribution of the deceased estate is finalized. The matter proceeded by way of viva voce evidence.

OBJECTOR'S CASE

4. The Objector called in seven (7) witnesses all of whom gave sworn statements.

Objector witness 1 Sarah Chelagat testified that she is first cousin to the Petitioner and that Tapsabei Petitioner's mother had secretly filed for succession. It was her evidence that parcel land Kericho/Kongotik/528 had been subdivided in 1987 and allocation done in 1990. She further gave evidence that shares in the land were sold by her mother Loise and that the Petitioner was present during the transaction and produced sale agreements to that effect. In addition, there are constructions on the plot.

5. She further testified that dispute arose after the demise of the petitioner's father(deceased) as the Petitioner started claiming that the land was registered under his father's name and therefore belongs to them. It was Sarah's claim that the said land belongs to their grandfather and not the deceased as claimed.

6. Objector's witness 2 Loise Tesot testified that the deceased is her brother in law making the petitioner her son. It was her evidence that they have been staying in LR.No. 528 which belonged to their father in law with the deceased for many years until they bought another one.

7. It was her further evidence that the land was subdivided in 1990 and there was a main road passing through it dividing the land into two; hers being on the one side and for the deceased on the other. Both the deceased and her husband were present.

8. Loise also testified that after subdivision she sold some of her portion during the lifetime of Magete and the petitioner's parents agreed to them doing so. Additionally, there are occupants who have built houses.

9. Objector's witness 3 Kipkemoi Kiget Koech testified that he was the assistance chief between 1993 to July, 2018 and was aware that LR/528 was a family land. He also testified that he was present when both Loise and Paul under the guidance of Paul's father sold their portions of land and there are agreements bearing his signature to that effect.

10. It was until the demise of Magete when the petitioner started bringing disputes. It was his evidence that Taplelei was given her share which she also sold leaving that of the Petitioner and Loise's husband. He therefore prays that the grant be revoked so that all parties may be involved.

11. Objector's witness 4 Kipkirui testified that he was there during subdivision of LR KERICHO/528. It was his testimony that the land was subdivided into two portions; the upper part to Magete and the lower one to Loice who later sold her share. In addition, the petitioner was also present during the sale and did not object. He also testified that Koech was assistant chief during that period and was also there during the sale. Therefore, it is not correct that the land belongs only to Petitioner's father.

12. Objector's witness 5 Johana Kiplagat Kipsigei testified that he knows the deceased, petitioner and the objector. He gave evidence that the deceased children filed for succession without including the objectors since LR 528 was subdivided between Magete(decease) and Kiprono as they are brothers.

13. Objector's witness 6KibureiArapTangus testified that LR/528 had been subdivided into three and one portion given to Taplelei who was the deceased sister. It was his evidence that the dispute became apparent after the demise of the two brothers.

14. The lifetime of the deceased and has a sale agreement to that effect. It also testified that the petitioner was present and did not object to the sale. In addition, he was one of the signatories.

15. Objector's witness 7 Zephania Kipsang Rono testified that he is the son of Kiprono Tesot and the deceased was his uncle. It was his evidence that parcel of land 528 was subdivided amongst three persons in the year 1990 and he was present during the subdivision.

16. In addition, it was testified that parcel 528 was registered in the name of one person as his father was at Mau in Narok at the time of registration.

It is further his evidence that both parties have sold their plots and that the deceased died recently not having brought any dispute over the said land.

PETITIONER'S CASE.

17. The Petitioner testified as pw1 and he called one witness. PW1; the petitioner, testified that the deceased his father is the owner of parcel no.528 and half of 525. He testified that Magete Tesot had eight children. It was his evidence that on 1.12.1970 Magete Tesot was given parcel no.528 by the government. The deceased had been staying there since 1950's.

18. It was further his evidence the land was registered under Magete's name in 1970 and in 1990 a tarmac road passed through the parcel of land which had not been subdivided.

He further testified that it is after the demise of Loice's husband that Loice started selling the portion of land for reason that she wanted to be compensated by Magete for land taken by the road. He denied that he signed the sale agreement.

19. PW1 did not that land 525 and 526 belongs to the objector and produced a search for 525. He also produced search for parcel 528 which bears deceased's name and stated that it should be divided amongst his eight children. He finally testified that it is only after filing for succession is when the objector and her daughter came claiming for portion of the parcel of land no.528.

20. PW2; Christopher Kiplangat Murgor, testified that he is a cousin to the deceased and his brother Kiprono. He also testified that he knows the deceased's properties and the land in question is at Emitiot. It is his evidence that there was no dispute until a tarmac road passed parcel land 528.

21. It was further his evidence that as a result of the sale of land by one party, the matter was referred to arbitration where it was decided that the land belonged to Magete. Minutes were taken and it shows that Sarah was present in the meeting.

22. Parties were ordered to file their submissions. Petitioners filed his submission on 22nd November, 2018 while the Objector opted not to file submissions.

PETITIONER'S SUBMISSIONS

23. It is submitted that following the evidence by both parties what is for determination is as follows;

- i. Whether the objector is a dependant within the meaning of a dependant as per the Succession Act.
- ii. What are the rights of a registered owner to land and whether the beneficiaries of the late Kiprono Arap Tesot the deceased brother have a legitimate claim to Kericho/Kongotik/528.
- iii. Whether the petitioner ought to seek consent from the beneficiaries of Kiprono Arap Tesot.
- iv. Whether this court has jurisdiction to determine disputes touching on use and occupation of and title to land.

24. On issue as to whether the objector is a dependant of the deceased, it is submitted that by virtue of section 29 of the Succession Act, it is confirmed that the objector is neither a dependant or beneficiary of the deceased family therefore, should not benefit from the free property of Magete Tesot.

25. On the second issue, placing reliance of section 24(a), 25(1), 26(1) of Land Registration Act and **in the Estate of Rrichard Karanja Javan (Deceased)** as highlighted in **Re Estate of Peter Igamba Njoroge** the Petitioner submitted that Kericho/Kongotik/528 registered in the name of the deceased as shown by certificate of search PE1 is the free property of the deceased and any claim to the contrary should not succeed.

26. It was further submitted that the objector did not prove any fraud on part of the deceased in obtaining the title and in any case a first registration is indefeasible even if fraud is proved.

27. It was submitted that the objector's father dies 12years ago after the registration of the land Kericho/Kongotik/528 in the name of the deceased and not at once did he raise any issues or claims to the land in his lifetime in fact, there is a land parcel Kericho/Tegat/566 registered under his name one year after the registration of Land parcel 528.

28. In addition, if there was any dispute then he would have endeavored to have the parcel subject matter registered under both their names as they did with land parcel Kericho/Kyogong/525.

29. With regards to the third issue, it was submitted that pursuant to section 51 of Succession Act which provides for information required during application for grant of letters of administration, neither the petitioner nor his siblings are required by law to seek consent of the beneficiaries of their uncle's estate whatsoever.

30. On issue of court's jurisdiction, the Petitioner relied on the cases of **The estate of Peter Igamba Njoroge Succession Cause No. 432 of 2009** and **in re estate of Solomon Mwangi Waweru (Deceased) (2018) eKLR** where the court held that;

“..the duty of the probate court is to oversee the transaction of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate.”

31. In addition to third parties claiming against the estate of the deceased in **Alexander Mbaka Vs. Royford Muriuki Rauni & 7 Others (2016) eKLR** and **In re Estate of Solomon Mwangi Waweru (Deceased) (2018) eKLR** the courts were of the same opinion that it is only where one has an established claim against the estate that has already crystalized that he can litigate it before a family court. The claim is to be considered as a liability to the estate.

32. It is therefore the Petitioner's final submission that the objector's application should not succeed and the court should thus confirm the grant of letters of administration and award costs.

ISSUES FOR DETERMINATION

33. After hearing all the parties to this application and perusing submissions filed by the petitioner together with authorities attached therewith, I find the issues for determination thereof can be summarized as follows;

i. Whether parcel land Kericho/Kongotik/528 forms part of the deceased estate thus subject to succession;

ii. Whether the Objector plus the Respondents have any interest on Parcel land Kericho/Kongotik/528;

iii. Whether the grant of letters of administration intestate issued on 29th February, 2016 to TABSABEI CHEPTONUI TESOT and SARAH CHELANGAT TESOT and now to PAUL KIPKEMOI SITIENEI and SARAH CHELANGAT TESOT valid.

iv. Whether the court can issue orders for temporary injunction and eviction as prayed for?

ANALYSIS

34. This court's jurisdiction has always been to enforce the Law of Succession Act Cap 160 laws of Kenya on administration of testate and intestate estates of deceased persons.

35. On issue 1; I find that the certificate of official Search of Kericho/Kongotik/528 produced by Paul Kipkemoi Sitienei the Petitioner shows Magete Tesot as the absolute registered owner.

36. It is however the objector's contention that the said title was obtained by fraud as it is ancestral land which ought to be divided amongst the deceased and the objector's family.

The objector and her witnesses said that the land had already been subdivided between the deceased, his brother Kiprono Arap Tesot and their sister.

37. The petitioner on the other hand argues that the land belongs to his father (deceased) and stands the position that no subdivision has ever been done on the land.

38. As per the evidence produced in court, there is an official search that reflects that the ownership of the land, the subject matter of this case, belongs to Magete Tesot (deceased). The Registration Act gives absolute ownership of free property to the person under which the title is registered.

39. I therefore, find that there is evidence that the land in dispute; L.R Kericho/Kongotik/528 belongs to the deceased and therefore It is subject to this succession.

40. If the Objector contests the issue of ownership of the said property. Article 162(2) (b) of the Constitution, 2010 and Section 13 of Environment and Land Act Cap 12A gives the Environment and Land Court jurisdiction to determine land disputes.

41. I find that this court has no jurisdiction to adjudicate matters that touch on land ownership or any other interest in land other than issues of succession.

42. On issue 2; Objector witness 2 Loise Chelangat Sitienei testified that the land subject matter of this application was subdivided she already sold her portion of land and some of the deceased portion. It was also her testimony that the land has occupants who have built houses on it.

43. Objector witness 6 Kiburie Arap Tangus also testified and gave evidence that he also purchased a portion of this land and during the purchase the Petitioner was present and was also one of the signatories. Copies of sale agreements were produced as exhibits.

44. In the case of **Re Estate of Solomon Mwangi Waweru (Deceased)** the court said that there is no function of succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an estate by third party.

45. I find that the objectors ought to institute separate proceedings to articulate or vindicate their claims or rights on the property subject matter of this case.

46. On issue 3. I find that the grant of letters of administration issued on 29th February 2016 are valid for reasons that all the prerequisite required for filing of the grant were fully met to warrant the grant of the letters.

47. Where there is a dispute of what constitutes the net estate of the deceased available for distribution arising from contest as to the deceased's title and ownership, I find that the said asset cannot be distributed until the dispute is resolved and confirmation of the rest of the undisputed assets may be granted to allow beneficiaries beneficial interest over the said part of the estate.

48. On issue 4 as to whether the court can issue orders for temporary injunction as prayed the conditions for consideration in granting an injunction are now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

49. The principles in *Giella vs Cassman Brown* (supra) are as follows:

- i. "Is there a serious issue to be tried?;**
- ii. Will the applicant suffer irreparable harm if the injunction is not granted?**
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")**

50. The test for granting of an interlocutory injunction was also considered in the **American Cyanamid Co. vs Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried,**
- ii. Damages are not an adequate remedy,**
- iii. The balance of convenience lies in favour of granting or refusing the application.**

51. I find that the petitioner/Applicant has established that the land parcel land Kericho/Kongotik/528 forms part of the deceased estate of the deceased herein and that he is entitled to an injunction pending the confirmation of grant.

52. The Application dated 24/4/2018 is accordingly allowed in the following terms;

- i. That parcel land Kericho/Kongotik/528 forms part of the estate herein as it is registered in the name of the deceased and therefore it is subject to this succession;**
- ii. That the Objector and the Respondents are not beneficiaries of the Estate of the deceased herein and there is no evidence that they are liabilities of the said estate.**
- iii. That the objector and the Respondents can only resolve their ownership dispute on Land Parcel land Kericho/Kongotik/528 in the ELC court and not in this succession cause.**
- iv. That the grant of letters of administration intestate issued on 29th February, 2016 to TABSABEI CHEPTONUI TESOT (now deceased) and SARAH CHELANGAT TESOT and now to PAUL KIPKEMEOI SITIENEI and SARAH CHELANGAT TESOT is valid.**
- v. That a temporary order of inhibition be and is hereby issued inhibiting the registration and deposition, transactions,**

transfer or any entries whatsoever against land parcel No. KERICHO/KONGOTIK/528 pending the confirmation of grant.

vi. That each party to bear its own costs of this Application.

vii. That any party aggrieved by this judgment has a right of appeal to the Court of Appeal within 28 days of this date.

Delivered and signed at Bomet this 6th day of August 2020.

A.N. ONGERI

JUDGE