



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**SUCCESSION CAUSE NO. 30 OF 2017**

**IN THE MATTER OF THE ESTATE OF KIMUTAI TIONY (DECEASED)**

**MAGRINA CHEPTOO KIMUTAI.....1<sup>ST</sup> OBJECTOR**

**CHEPTOO KIMUTAI.....2<sup>ND</sup> OBJECTOR**

**-VERSUS-**

**ANN MUTAI.....1<sup>ST</sup> RESPONDENT**

**PRISCA TIONY.....2<sup>ND</sup> RESPONDENT**

**EZEKIEL KIBET TUM .....3<sup>RD</sup> RESPONDENT**

**JOSEPHAT KIPCHUMBA BIAMA .....4<sup>TH</sup> RESPONDENT**

**RULING**

1. Through a Chamber summons application dated 24<sup>th</sup> July 2018, the applicants seek an order of preservation of the case pending the hearing and determination of the summons directing the respondents either by themselves agents and/or servants from intermeddling with the Estate assets:

- a) **MOIBEN/ LOLKINYEI BLOCK3 (ITET)/23**
- b) **SERGOIT KOIWOPTAOI BLOCK 2 (SENETWEI) 21**
- c) **UNREGISTERED 2 PLOTS KAPROBU CENTRE**

2. The applicant also seeks the rectification of the register in respect of the property known as **MOIBEN/LOLKINYEI BLOCK3 (ITET)/23** which title was fraudulently changed into the name of **Ezekiel Kibet Tum** and **Cosmas Kimeli**

3. The grant issued in favor of the petitioners/ respondents herein be revoked and the grant be issued in favor of all the widows of the deceased.

4. The prayers sought were based on grounds that;

- a) The court made a grant of letters of Administration in favour of the respondents
- b) The grant was obtained fraudulently by the petitioner who made false statements with the knowledge of the pending succession cause before **Eldoret Chief Magistrate's Court Succession Cause No. 90 of 2017**.
- c) That the proceeding to obtain grant of letters of Administration in succession cause **No. 90 of 2017** was by an order issued in **Eldoret High Court citation No. 103 of 2014** allowing the applicants herein to obtain grant.
- d) That the current proceeding to obtain grant by the respondents is defective owing to the fact that the will annexed is a forgery and does not have executors. Additionally, there is an order of injunction issued in **Eldoret Chief Magistrates Court succession cause No. 90 of 2017 against the 3<sup>rd</sup> respondent and KIPCHUMBA BAIMA**.

5. The application is supported by the affidavit of **MAGRINA KIMUTAI** who states that the deceased who was their husband died intestate on 2<sup>nd</sup> February 2012. The court through citation **No. 103 of 2014** had ordered that they file petition for grant of letters of administration but her co-wives **ANNE JERONO AND PRISCA TIONY** were not agreeable.
6. They later filed succession proceedings in **Eldoret Chief Magistrates Court (CMP & A No. 90 of 2017)**. On the same date, they filed an application for injunction against the 3<sup>rd</sup> respondent **EZEKIEL KIBET TUM and KIPCHUMBA BAIMA** in which the orders were granted to safeguard our interest in parcel **No. SERGOIT/ KOIWOPTAOI BLOCK 2 (SENETWET) 21**
7. On the basis of the foregoing she states that the current application for grant of letters of administration had been:
- Made fraudulently by the making of false information or by concealment from the court of material facts obtained by untrue allegation of that essential point of law.
  - Obtained without consent and/ or knowledge of the objectors herein
  - Based on a forged will
8. She states that the 3<sup>rd</sup> Respondent and one **COSMAS KIMELI** illegally and fraudulently changed the title **NO. MOIBEN/LOKINYEI/BLOCK 3 (ITET)/23** from the name of the deceased into their own names before issuance of any grant.
9. She urged that the application be allowed and that they be allowed to obtain letters of Administration in **Eldoret Chief Magistrates Court Succession cause No. 90 of 2017**.
10. In their replying affidavit dated 13<sup>th</sup> August 2018, the respondents term the application as being made in bad faith owing to the fact that the applicant was fully aware of what was happening, and they procedurally applied for grant of probate.
11. The respondents concede that the court had granted an order of injunction in this case but maintain that it was in bad taste for the applicant to say that they had committed fraud. It is stated that there have been several instances of harassment of the respondent based upon false allegations by the applicants; yet the land has remained vacant since the injunction was issued against them. He points out that no grant has been issued to either party
12. The respondent states that their seeking of grant of probate is intended to protect and safeguard the deceased's assets until final distribution as decided by the law.
13. The respondent proposed that the application be dismissed and the court allow for the proceedings of grant of probate to be concluded. He states that the deceased's will gave clear instructions on how the applicant(s) were to be taken care of and he states that in fact, the 2 women had left the home.
14. The applicant submissions main concern raised is first the transfer of title preceded by subdivision of **No. MOIBEN LOLKINYEI BLOCK 3 (ITET)/ 23 into 2 parcels i.e. MOIBEN LOLKINYEI BLOCK 3 (ITET)/101 and 102 for Cosmas Kimeli and Ezekiel Kibet**, the deceased's sons. They obtained this without grant of letters of Administration. He maintains in his submissions that this constitutes fraud and illegality. Applicant states that the two men have gone ahead to charge these titles to **Agricultural Finance Corporation** which amounts to intermeddling with the deceased estate.
15. The applicant cited Sections 45 and 55 of the Law of succession Act which speak against dealing in land before a grant is issued. It is further stated that it is the surviving spouses who takes the priority and not the children or grandchildren.
16. Based on the instance of illegality the objector submits that the register be rectified and the estate be preserved pending the final distribution.
17. The respondent submits that the application is aimed at delaying the final determination of the distribution of the Estate and lacks merit. It is stated that no grant has been issued for want of P/A form No. 41 and therefore there can be no revocation because grant has never been issued in the first place.
18. The respondents say that the applicants have come to court with unclean hands because the issue of the deceased's will was not new to them. They add that the applicant cannot claim that the will is a forgery just because the provisions of the will do not favour them. Additionally, they state that the question of the validity of the will is not one to be determined in the context of an application but a main suit. They add that it is not mandatory for a will to appoint executors to be valid.
19. The respondent sought that the application, being prematurely brought be dismissed with costs.
20. The respondent readily admits that no grant of probate has been issued to any of the parties. At the same time, he does not deny the statement by the applicant that 2 of the deceased sons have taken part of the estate and subdivided it and further used it as a security in the form of a charge.
21. If the deceased person's will was invalidated or not demonstrated to have been authentic, then the deceased died intestate. Consequently, the way to deal with the property must be decided by the court. As stated below, the spouses of the deceased take the first place when it comes to distribution. Section 66 of the Law of Succession Act provides as follows:-

**“When a deceased has died intestate, the court shall save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice, to that discretion accept as a general guide the following order of preference, (my emphasis):**

- a. Surviving spouse or spouses, with or without association of other beneficiaries,
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part V:
  - i. the public trustee; and
  - ii. Creditors.

22. **Section 45 of the Laws of Succession Act** prohibits dealing with properties belonging to a deceased person before obtaining grant. It states:-

**“(1) Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”**

23. Since **MOIBEN/LOLKINYEI BLOCK3 (ITET)/23** formed part of the suit land, the two respondents lacked the legal capacity to subdivide and deal in the property without the consent of all beneficiaries and this is rightly termed as intermeddling by the applicants. In **GLADYS NKIROTE M’ITUNGA vs. JULIUS MAJAU M’ITUNGA[2016] eKLR** the court stated that;

**Whereas the law of succession does not define what intermeddling with the property of the deceased is, there is ample judicial decisions on acts which may amount to intermeddling. For instances, in the case of BENSON MUTUMA MURIUNGI vs. C.E.O. KENYA POLICE SACCO & ANOTHER [2016] eKLR the court observed that:**

*“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”*

24. I hold and find that the above is sufficient reason to allow the application pending the full hearing and determination of the case. The court ought to safeguard the property to avoid interference pending the final decision and thus any grant issued be and is hereby revoked.

(2) The land Registrar is directed to rectify the register in respect of property known as **MOIBEN/LOKINYEI BLOCK 3 (ITET)/23** to revert to the name of the original owner pending proper succession.

(3) Parties to propose names of 4 persons to act as administrators of the estate – this must be done within 14 days hereof.

**DELIVERED, SIGNED AND DATED THIS 11<sup>TH</sup> DAY OF APRIL 2019 AT ELDORET**

**H. A. OMONDI**

**JUDGE**