



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 253 OF 2013**

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH TIROP KIPTARUS – DECEASED**

**BETWEEN**

**ELIJAH KIPROTICH MURREY.....APPLICANT**

**DR. CAJERTANE MAKEYO SYALLOW.....RESPONDENT**

**RULING**

1. The Notice of Motion dated 17<sup>th</sup> November seeking orders that;

- a) The District Surveyor Uasin Gishu County to conduct a survey for purposes of confirming acreage on land **parcel No. UASIN GISHU/ NGENYILEL/526 and Uasin Gishu/ NGENYILEL/527** and register the same.
- b) The District Surveyor Uasin Gishu to establish the boundaries of land parcels **No. UASIN GISHU/ NGENYILEL/526 and Uasin Gishu/ NGENYILEL/527**.
- c) An order do issue barring **CAJERTANE MAKEKO SYALLOW** from intermeddling with the estate of the deceased particularly land parcel **UASIN GISHU /NGENYILEL/526**.
- d) Costs of this application be provided for.

2. The application is based upon grounds that;

- a) The deceased (**JOSEPH TIROP KIPTARUS**) owned both parcels of land **UASIN GISHU/ NGENYILEL/ 526 and UASIN GISHU/ NGENYILEL/527**.
- b) Before the subdivision of the said parcels of land it was formerly known as **UASIN GISHU NGEYILEL/184**.
- c) In the lifetime of the deceased, he sold a portion of **UASIN GISHU NGEYILEL/184 approximately 10 acres to the said CAJERTANE MAKEKO SYALLOW**.
- d) After sub-division, the portion was retitled to **UASIN GISHU/ NGENYILEL/527**. The respondent fenced off about **17 acres** of the land instead of the **10 acres sold** to him and it has since proved difficult to ascertain boundaries between **UASIN GISHU/ NGENYILEL/ 526 and UASIN GISHU/ NGENYILEL/527**.
- e) The beneficiaries of the estate of the deceased have been prejudiced by the actions of the present owner of **Uasin Gishu/ Ngenyilel/527** and stand to suffer irreparable loss or damage.
- f) The applicant states that it is in the interests of justice that the application is allowed because the court has the discretion to do so.

3. The application is supported by the affidavit of **ELIJAH KIPROTICH MUREY** who stated that he is the administrator of the estates of **JOSEPH TIROP KIPTARUS** who died on 28<sup>th</sup> June 1998. He stated that during the lifetime of the deceased he owned a parcel of land registered as **UASIN GISHU/NGENYILEL/184** which he later sold approximately 10 acres and later subdivided it so that the portion that remained was registered as **UASIN GISHU/ NGENYILEL/ 526** while the sold one was registered as **UASIN GISHU/ NGENYILEL/527**.

4. The 2 land parcels were never been fenced off during his father's lifetime but the respondent fenced off about 17 acres. The applicant now seeks the assistance of the **DISTRICT SURVEYOR** to conduct a survey on both the parcels of land cited above to determine the actual

boundaries. He states that the beneficiaries stand to suffer if the application is not granted.

5. The replying affidavit by **CAJERTANE MAKEYO SYALLOW** is that the application is bad in law because there are no provisions for Notice of Motion under Probate and Administration Rules. Rule 49 of the Probate and Administration Rules only provides for the filing of applications by way of summons.

6. The respondent deposes that he is a purchaser for value of **UASIN GISHU/ NGENYILEL/527 measuring 10.3 acres** which was subdivided from **UASIN GISHU/ NGENYILEL/184** having purchased the same from the late **JOSEPH KIPTARUS** who had obtained consents from the Land Control Board to subdivide and transfer **4.12 Ha** which is **10.3 acres** and the deceased duly transferred land to him.

7. The respondent states that he is not utilizing any greater land than the **10.3 acres** maintaining that the allegation he has fenced off **17 acres** is untrue. He stated that he became registered as the proprietor in **1982** and no claim of any encroachment or trespass has ever been filed in court.

8. Further that the claim, if any ought to have been made within 12 years since 1982 hence it is time barred under section 7 of the Limitation of Actions Act.

The applicant is aware that the same can only be resolved in accordance with the **Land Registration 2012 or the Land Act 2012**. The claims by the applicant are matters with the jurisdiction of the Environment and Land Court under section 13 of the Environment and Land Court Act 2011. He prays that the court dismisses the motion for want of jurisdiction with costs.

9. The respondent submits that the application is in contravention of the Probate & Administration rules which only provide for filing applications by way of summons renders the application incurably bad. Additionally, the respondent states that there is want of jurisdiction because the claims by the applicant are matters such as trespass and boundary disputes which fall within the Environment and Land Court's jurisdiction. It is contended that the court has no jurisdiction to transfer the suit to a competent court because a suit can only be transferred if it is a valid suit.

10. The Respondent urged this court to pay heed to the provisions of **Section 18(2) of the Land Act** which provides that the court will not entertain any action or other proceedings relating to a boundary dispute unless boundaries have been established.

11. The respondent submits that there was no evidence of encroachment by him on the land and that he was a bona fide purchaser for value. He states that the time limitation of the claim ought to have been brought 12 years from the time of the respondent's possession i.e. since 1982 which time runs to 1994. In a nutshell, the respondent's replying affidavit according to him, contains grounds that warrant the application be dismissed with costs.

12. The applicant's on the other hand states that his desire is to have the letters of administration confirmed and a grant issued but adds that if the court is to confirm the grant, it will need to know the size of the estate to be shared making it compulsory for the measurements to be determined before the succession cause proceeds.

13. The applicant states that the application is properly before the court and was filed within the requisite period. In summary, all the documents relied upon by both the respondent and the applicant do not indicate the measurement of the land parcel and because of this it is impractical and impossible to proceed with the confirmation of grant. No one was disputing that the land is more than 10.3 acres and the respondent has not given any justifiable reason for refusing to measure the land nor has he shown that he will suffer prejudice since the applicant states that he is willing to incur costs spent during the exercise.

14. As regards the way the application was brought, **Rule 63 of the Probate and Administration Rules** it provides as follows:-

**“63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, X I, XV, X VIII, X XV, XLIV and X LIX, together with the High Court (P practice and P procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”**

15. The instant application is headed as Notice of Motion and is premised on Section 45 of the Law of Succession Act CAP 160.

The said Section is not among the orders contemplated under Rule 63 of the Probate and Administration As stated in the case of **Wangari Gichuki v Daniel Wanjigo Muchemi SUCCESSION CAUSE NO. 285 OF 2009** the court stated that;

**“ It is therefore evident from the aforesaid provisions that such provisions of the Civil Procedure Act do not apply in Succession Matters save as expressly provided under the law of Succession Act and the probate and Administration Rules. The application is therefore not properly headed as it refers to “Notice of Motion” instead of “summons” and is rather based on the wrong sections and orders. The application is not properly drawn nor is it brought under the right provisions of the Law of Succession Act and Rules under Probate and Administration Rules. The court in succession matters however under Section 47 of the Law of Succession Act has jurisdiction to entertain any dispute under the Law of Succession Act without due regard to technicalities. I agree with Hon. Mr. Justice Lenaola in RE ESTATE OF ISAKA MUTHEMBWA KITHOME (P & A 539 of 2007) where he stated that Forms are a technical matter and that failure to follow a format should not stop the court from dealing with any clear issue regarding the estate. I hold that the failure of the applicant herein to follow the right form and refer to the correct section and Rules cannot be a basis to deny her a hearing and determination of her application on merits.”**

16. In view of this, and in the spirit of Article 159 (2) (d) the matter raised by the respondent of the application being filed under the wrong

premise of the law is a mere technicality and should not hinder the application from being heard on its merits.

17. Whereas it may be difficult for the succession cause to be reasonably concluded where the acreage of the land is not clear and boundaries are not established, the question of ownership, land use, boundaries, and trespass fall within the docket of the ELC as well set out **under Article 162 (2)** which requires that the specialized court should deal with inter alia the use and occupation of land, and title to land. This being the core prayer in the application, I am in agreement with the respondent that the application falls outside the jurisdiction of this court. Consequently this application fails and is dismissed with costs

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

**H. A. OMONDI**

**JUDGE**