



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**SUCCESSION CAUSE NO.251 OF 2014**

**IN THE MATTER OF THE ESTATE OF BOIYOT ARAP CHIRCHIR (DECEASED)**

**BETWEEN**

**SAMMY KIPTERER SANG.....APPLICANT**

**VERSUS**

**RODAH MATHEW CHIRCHIR.....1<sup>ST</sup> RESPONDENT/ADMINISTRATOR**

**NAHASHON ROP.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a Chamber Summons dated 21<sup>st</sup> October 2016 filed by Sammy Mathew Chirchir and Nahashon Rop. The application was filed under section 45 of the Law of Succession Act (Cap.160) and Rule 49 of the Probate and Administration Rules through counsel Onesmus Langat & Co. Advocates, and seeks the following orders-

- a) **The 2<sup>nd</sup> respondent an alleged purchaser of the deceased land Kericho/Kapsorok/40 be restrained either by himself, his agents and/or servants or any other person acting on his behalf from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the land of the deceased being title Number Kericho/Kapsorok/40 pending the hearing and determination of this application.**
- b) **The 2<sup>nd</sup> respondent an alleged purchaser of the deceased land Kericho/Kapsorok/40 be restrained either by himself, his agents and/or servants or any other person acting on his behalf from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the land of the deceased being title Number Kericho/Kapsorok/40 pending finalization of this Succession Cause.**
- c) **Protection orders to issue against the respondents prohibiting interference and intermeddling with the assets of the estate of the deceased.**
- d) **Any other orders that are deemed just and expedient that will meet the ends of justice.**
- e) **Costs of this application be paid by the respondents herein.**

2. The application has grounds on the face of the Chamber Summons, that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were proposed administrators of the estate, and that the 1<sup>st</sup> respondent had interfered with the property of the estate by disposing to the 2<sup>nd</sup> respondent to the detriment of the estate, and the 2<sup>nd</sup> respondent continued with illegal occupation and cultivation of 3 acres of the property of the deceased.

3. The application was filed with a Supporting Affidavit sworn by the applicant Sammy Kipketer Sang in which it was deponed that the 1<sup>st</sup> respondent sold the 3 acres of the estate of the deceased to the 2<sup>nd</sup> respondent and used the proceeds of sale for her own benefit to the detriment of the applicant and her siblings and that despite all attempts, the 2<sup>nd</sup> respondent had refused to vacate the land and was threatening violence.

4. In response, the 2<sup>nd</sup> respondent Nahashon Rop filed a Replying Affidavit he swore on 6<sup>th</sup> December 2016, stating that he bought 2 ½ acres of Kericho/Kapsorok/40 (registered in the name of the deceased) from Alice Chepkemoi Korir on 25<sup>th</sup> September 2014, whom in turn had

purchased the same from the deceased in 1986 and annexed a copy of his purchase agreement dated 25<sup>th</sup> September 2010, marked as “NRI”. He stated that since purchase he had been occupying the land and denied buying 3 acres of land from the 1<sup>st</sup> respondent, and paying the 1<sup>st</sup> respondent the purchase price. He denied interfering with the estate of the deceased. (It is worth noting that in the sale agreement, it is clearly stated that the land was registered in the name of the deceased, and there is no indication as to how Alice Chepkemoi Korir could have power to sell the land or how she became beneficial owner). The 1<sup>st</sup> respondent did not file a response.

5. In response thereto, the applicant filed a further affidavit he swore on 14<sup>th</sup> August 2017 stating that the seller of the land was a stranger to the estate and not the registered owner of the land.

6. Parties’ counsel filed written submissions to the application. The applicant’s counsel filed submissions on 5<sup>th</sup> June 2019. He submitted that no copy of the alleged sale agreement between the deceased and Alice Chepkemoi Korir of 1986 was annexed to the affidavit of the 2<sup>nd</sup> respondent, no title deed was annexed, and that in any case in 2014 the said Alice Chepkemoi Korir did not have powers to sell the land to the 2<sup>nd</sup> respondent, and that what happened herein amounted to intermeddling with the estate of the deceased contrary to section 45 of the Law of Succession Act (Cap 160) Laws of Kenya. Counsel thus urged the court to grant the Orders sought.

7. The 2<sup>nd</sup> respondent’s counsel filed written submissions earlier on 18<sup>th</sup> February 2019. He submitted that the 2 ½ acres had been sold to the 2<sup>nd</sup> respondent in 2014 per the sale agreement annexed as “NRI” and that the 2<sup>nd</sup> respondent bought the 2 ½ acres from Alice Chepkemoi Korir who was a creditor of the estate, and on such there was no intermeddling with the assets of the estate. It was further submitted that after the purchase there was actual occupation and peaceful co-existence, and counsel denied that the 1<sup>st</sup> respondent ever sold the land to the 2<sup>nd</sup> respondent. Counsel concluded by stating that the requested orders were not merited and urged that the application be dismissed. Both counsel elected not to highlight their written submissions, and urged this court to give a ruling on the same.

8. I have considered the application, documents filed and submissions on both sides. In my view, this is an application seeking for orders that will protect the deceased’s property from acts of intermeddling. In this regard, section 45 of the Law of Succession Act (Cap.160) provides as follows-

*“45 (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 the deceased person.*

*(2) Any person who contravenes the provisions of this section shall*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator to the extent of the assets with which he had intermeddled after deducting any payments made in the due course of the administration.”*

9. It is thus clear from the above provisions of the law that intermeddling with the property of a deceased’s estate is prohibited and also criminated. All the parties counsel herein seem to agree that the subject land is still registered in the name of the deceased. It is therefore subject to intermeddling. The allegations herein of disposal of the land whether 3 acres or 2 ½ acres in my view amount to intermeddling or are likely to be so. In accordance with the provisions of section 47 of the Act, in my view this court has jurisdiction to make orders to protect the subject property.

10. Several prayers have been listed in the application herein. Some have been spent. As for the live prayers, however, I cannot issue orders that determine the rights of the parties in the alleged sale transaction at this stage, or will amount to eviction of anybody in occupation. That has to be determined in a separate case in the Environment and Land Court, as the Succession Court can only distribute free assets of the deceased, which have no standing dispute. Mine is to issue orders that will protect and preserve the assets claimed to belong to the deceased.

11. Taking into account the circumstances of the case herein, I allow the application only to the extent that I order as follows-

**a) The 2<sup>nd</sup> respondent an alleged purchaser of the deceased’s land Kericho/Kapsorok/40 is restrained either by himself, his agents and/or servant or any other person acting on his behalf from carrying out any further construction, or alienating or disposing to any other person, the deceased’s land being title Number Kericho/Kapsorok/40 pending the finalization of this Succession Cause.**

**b) I also order that the applicant herein Sammy Kipterer Sang either alone or with the administrator file appropriate proceedings in the relevant court within six (6) months from today to determine the legality of the alleged land sale transaction contested, and the determination of ownership therein be filed in this Succession Cause.**

**c) The costs of this application will be determined consequent upon the determination of the legality of the alleged land sale transaction and ownership of the land.**

**Dated and delivered at Kericho this 29<sup>th</sup> day of July 2019.**

**George Dulu**

JUDGE