



**REPUBLIC OF KENYA**

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

**PROBATE AND ADMINISTRATION CAUSE NO.81 OF 1992**

**IN THE MATTER OF THE ESTATE OF THE LATE CHEMWENO CHEBOR KIBOLOT (DCD)**

**PHILEMON CHEMWENO.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**SUSAN TERIKI CHEMWENO.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**KIPTOO CHEMWENO.....3<sup>RD</sup> PETITIONER/RESPONDENT**

**DISTRICT LAND REGISTRAR.....4<sup>TH</sup> PETITIONER/RESPONDENT**

**- V E R S U S -**

**VINCENT CHEMWENO & OTHERS.....OBJECTORS/APPLICANTS**

**RULING**

1. The application dated 11/10/2019 alongside the Supporting Affidavit sworn on 11th October, 2019 as well as the Further Affidavit sworn on 22nd October, seeks the following orders: -

- (a) Temporary injunction restraining the dealing with the suit property until conclusion of the succession cause and;
- (b) Attendance of the District Land Registrar in Court to avail the original full parcel for **L.R. No.Moiben/Chebera/441**.

2.The basis for seeking of those orders are that: -

- 1. The impugned property/suit land still forms part of the Estate of the deceased-the late **Chemweno Chebor** having not yet been distributed.
- 2. There is a contest regarding the validity of the confirmation of Grant issued on 25<sup>th</sup> March, 1994 in light of Hon. Nambuye J's (as she then was) directions of 25<sup>th</sup> April 1994, the letter by the then Deputy Registrar of 23<sup>rd</sup> May 1994 and the absence of some members of the family during the purported confirmation on 25<sup>th</sup> March, 1994.
- 3. The applicants question the validity of various Certificate of Title over **L.R. No. Moiben/Chebera/441**, specifically the Titles issued to the 1<sup>st</sup> Respondent on 27<sup>th</sup> January, 2014 and on 10<sup>th</sup> September 2019, in view of the Letter dated 12<sup>th</sup> March 2014 by the Land Registrar.

3.The applicant submits that the deceased was the registered proprietor of **Parcel No. Moiben/Chebera/441** as part of the Estate of the Late **Chemweno Chebor** thereto as from 3<sup>rd</sup> February, 1972 and had not transferred the property as at his demise on 31<sup>st</sup> January, 1985.

4. It is pointed out that the **Law of Succession Act** deals with the distribution of the Estate of a deceased person and criminalizes the intermeddling of the deceased's property –Section 47 thereto. Consequently, that until the present Succession Cause is concluded – by disposal of the Objection proceedings, then the said property ought to remain in the name of the deceased.

5.Further, that any purported registration in the names of other parties, particularly the 1<sup>st</sup> Respondent on or about 27<sup>th</sup> January 2014 and later on 10<sup>th</sup> September, 2019 would be illegal and in breach of the law. The applicant relies on the **Certified Extract of the Register** as supported by the Land Registrar – Annexure VCC 7 in the Supporting Affidavit, and copy of Certificate of Title – Annexure VCC 6(a). This court is urged to consider the letter from the Land Registrar on 12<sup>th</sup> March 2014 that confirmed the existence of objection proceedings as well as indicating that the parcel of land remains in the name of Chemweno Chebor.

6. With regard to the validity of the Confirmation of Grant issued to the 1<sup>st</sup> Respondent on 25<sup>th</sup> March 1994, it is submitted the proceedings of 25<sup>th</sup> March 1994, 11<sup>th</sup> April 1994 and 25<sup>th</sup> April 1994 shows the observations which were made about the strange turn the events; in particular plucking of proceedings of the day in which confirmation was allegedly done- (Annexure VCC (2) in the Supporting Affidavit). That this led to the file being placed before the SPM and order/directions of 23<sup>rd</sup> May, 1994 (Annexure VCC 3) nullifying the said Confirmation of Grant. The Letter was copied to different government agencies, and the Order/directions remain unchallenged and/or reviewed to date. That in any event, there exists a revocation of grant application still pending hence the present Succession Cause remains very much alive.

7. The applicant contends that land parcel **L.R. No. Moiben/ Chebara/441** has various Certificate of Title yet, it is trite law that one parcel of land cannot have more than one title in existence yet the current status of the suit land is clouded in mystery. Indeed, this is the reason why the Applicant is seeking for orders for the Land Registrar to attend court with the parcel file. That, there seems to be various contradictory positions and/or communications on the various other proprietors and/or encumbrance over the title after 1972-when **Chemweno Chebor** was first registered.

The applicant is emphatic that the registration of **Susan Teriki Chemweno, Philemon Chemweno and Evelyn Jemutai** Kitur on 27<sup>th</sup> January 2014; the registration of **Susan Teriki Chemweno, Kiptoo Chemweno and Philemon Chemweno Chebet** on 10<sup>th</sup> September 2019 – Annexure PCC 4 (b), whilst the Copy of Register Extract as certified by the Land Registrar on 10<sup>th</sup> February 2014 (Annexure VCC 7 is the Applicant's Supporting Affidavit) doesn't show any activity after 3<sup>rd</sup> February 1972 save for the restriction placed on 7<sup>th</sup> December, 2011. The search (PCC 4(b)) however does not also show the existence of history of any encumbrances over the title.

8. It is argued on behalf of the Applicant that it has been aptly demonstrated he has a prima facie case with a high probability of success and is thus entitled to the reliefs sought. Moreover, that the damage that would be caused would not be compensated by way of damages – the Court cannot be used to sanitize an illegality. That in any event, the applicant will also be able to demonstrate that there are elements of fraud involved in the change of ownership of land that is still ideally belonging to the deceased.

9. The respondents are faulted as having invited this court that to speculate as to why the Applicant seems only interested in the parcel **No. Moiben/Chebara/441**, and that the applicants have aptly demonstrated that the said parcel of land is the only one that is in contention, and that whilst it was agreed that it would be shared between the five houses, one house (the 1<sup>st</sup> Respondent's) seem to want to have that for himself/itself. That the Annexure JCC 1 in the further affidavit by the Applicant shows the proposed mode of distribution which the 1<sup>st</sup> Respondent now wishes to renege on.

10. Moreover, that from the initial proposed mode of distribution, **Moiben/Chebara/411 and Moiben/Chebara/221** still remain in the name of the deceased and one has to wonder what is special about **Moiben/Chebara/441** that proprietorship is changed midstream.

In opposing the application, the respondents in the replying affidavit sworn by **Philemon Chemweno** point out that whereas the grant issued has been revoked, the present application is res judicata as a similar application dated 1/04/2014 was heard, and dismissed by this court vide a ruling dated 23/07/2019. Unfortunately, I do not comprehend the contents of paragraphs 10-11, 14., which seem to argue and pose questions. However, the position adapted by the respondents is that titles have changed hand from the deceased to the beneficiaries, and some of the beneficiaries have disposed of their portions to third parties as demonstrated by the sale agreement and copies of official search.

11. In the written submissions, the respondents state that the doctrine of res judicata bars this court from revisiting the same matter it had already adjudicated upon. That the applicants have now introduced new documents which had all along been in their possession, and within their knowledge at the time the application dated 1/04/2019, all being done under the guise of contents referred to in the further affidavit.

12. The applicants are accused of trying to mislead the court by purporting that the grant was revoked on the strength of a letter dated 23/05/1994 issued by the Senior Principal Magistrate nullifying the temporary grant, as that letter cannot be a substitute to formal application for revocation, subsequently filed in this matter, and which have never been prosecuted. That in any event a magistrate cannot purport to set aside or vary orders issued by the High Court.

The attempt to have the **Iten Land Registrar** summoned to attend court and explain the state of things is termed as an attempt to enjoin a 4th party into these proceedings irregularly, as no leave has been obtained for joinder of party.

13. In reply, the applicants contend that the matter is not res judicata because the initial application sought cancellation of titles, while the present application seeks preservatory orders, and to have the Registrar of Lands attend court and explain the circumstances under which the registration changes, depending on who goes to the ground, as the whole process appears murky and reeks of fraud. That in-fact in 1994 Nambuye (J) observed that part of the proceedings had been plucked out of the file, and she made an order that the orders obtained from 25/3/1994 were suspended until investigations are carried out. The argument is that until these murky issues need to be addressed fully by this court, then the matter remains alive and this court is not functus officio.

14. It is further argued by the applicants that there is no evidence to confirm that the properties have been disposed off. That even if the grant has not been revoked, there are several applications made for revocation of the same to demonstrate that the grant is contested, and the respondents are being mischievous in using the impugned grant in a bid to change proprietorship.

## **ANALYSIS**

The major issue for determination is whether this matter is res judicata. The application dated 01/04/2014 sought that:

**a) A declaration do issue against the 1<sup>st</sup> respondent herin that the title deed held by himself (PHILEMON CHEMWENO, SUSAN TERRIKI CHEMWENO, and EVERLYN JERUTO KITU is non- existent, null and void.**

**b) A temporary injunction do issue against the 1<sup>st</sup> respondent restraining him from wasting, alienating, transferring, disposing, and/or in any other way dealing in MOIBEN/CHEBARA/441 being part of the estate of CHEMWENO CHEBOR KIBILOT, pending the hearing and determination of this succession cause**

**c) The purported registration of the title in respect of land parcel aforementioned registered in favour of PHILEMON CHEMWENO CHEBET and the other two aforementioned persons be cancelled.**

In effect the application sought orders to preserve the property, and for the Land Registrar Iten to cancel the title deed.

The present application seeks that

**a) The application be certified urgent and service be dispensed with**

**b) A temporary injunction be issued restraining the respondents by their servants or agents from leasing, charging, transferring, sub-dividing or in any other way dealing with the suit land MOIBEN/CHEBARA/441 as is known by this court in relation to the proceedings before court pending the hearing and determination of the succession cause.**

**c) A temporary injunction be issued restraining the respondents by their servants or agents from leasing, charging, transferring, sub-dividing or in any other way dealing with the suit land MOIBEN/CHEBARA/441 as is known by this court in relation to the proceedings before court pending the hearing and determination of the succession cause.**

**d) The District Land Registrar to attend court and avail the original parcel file for L.R. No. MOIBEN/CHEBARA/441**

The effect of this application is to obtain orders to preserve the property, but a new prayer is added so that instead of the Land Registrar being asked to cancel the title, he/she is now required to present the original parcel file for the same property

In the case of **E.T vs Attorney General & Another (2012) eKLR**, Majanja (J) cautioned that:

*‘...the courts must be vigilant to guard litigants from evading the doctrine of res judicata by introducing new causes so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way, and in a form, a new cause of action which has been resolve by a court of competent jurisdiction...’*

The issue of preserving the suit property, and the on-goings at the Land Registrar’s office were the very subject of the earlier application which was heard and determined. What the applicant has done is to try and patch up whatever loopholes they perceive to have been detected in the ruling relating to the application of 01/04/2014. The effect of the prayers is the same, and this court already dealt with the issue of granting an injunction against the respondents relating to the cited land parcel, and I share the sentiments expressed by Majanja (J) in the afore-cited case. If they were dissatisfied with the ruling the option was to seek review or appeal.

The argument being raised that because a dispute still persists over two parcels, and that the matter has not been concluded, does not in any way breathe new life into the application. Indeed, res judicata applies equally to decisions on applications as it does to final decisions on the matter [**See Kanorero River Farm & Others vs National Bank of Kenya Ltd [1986] KLR**].

I need not delve deeper into issues as to whether the grant was revoked or not, as that is the subject of many pending applications seeking revocation. The upshot is that the application lacks any leg on which to stand and violates the doctrine of res judicata. The same is dismissed with costs to the respondents.

**Delivered and Dated this 18<sup>th</sup> day of December, 2019 at Eldoret**

**H.A. OMONDI**

**JUDGE**

**No appearance for the Petitioners/Respondent**

**Miss Qwiyaki for the Objector/Applicant**