



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 42 OF 2019**

**JOSWA KIBET KIMELIL.....APPLICANT/OBJECTOR**

**VERSUS**

**KABON TAMINING BARGOR..... 1<sup>ST</sup> RESPONDENT**

**TERESIA JERUTO BARGOR..... 2<sup>ND</sup> RESPONDENT**

(Application dated 30<sup>th</sup> July 2019 made by way of chamber summons)

**RULING**

1. The applicant moved this court by an application dated 30.7.2019 seeking the court to grant the following reliefs:

*a) (Spent with)*

*b) That an order do issue restraining and/or stopping the respondents, their agents, assignees, servants and/or third parties from transferring, selling, leasing, subdividing or from dealing in any way with the estate of Bargor Kimelil comprising of land parcel known as L.R Cheptiret/Cheplaskai Block 4(Mosop 'B')/56 pending hearing and determination of this application inter-parties.*

*c) That an order do issue restraining and/or stopping the respondent, their agents, assignees, servants and/or third parties from transferring, selling, leasing, subdividing or from dealing in any way with the estate of Bargor Kimelil comprising of land parcel known as L.R Cheptiret/Cheplaskai Block 4(Mosop 'B')/56 until confirmation of grant is issued or until further orders of this Honorable Court.*

*d) That any transaction entered into by the respondents herein with the third parties after the demise of Bargor Kimelil pertaining to land parcel known as L.R Cheptiret/Cheplaskai Block 4(Mosop 'B')/56 be revoked, annulled and/or rescinded.*

*e) That the costs of this application be provided for.*

2. The application is premised on grounds inter-alia that the Applicant is one of the beneficiaries to the estate of the late Bargor Kimelil, the respondents had moved the court but concealed some material facts thus disinheriting others. The listed beneficiaries were not the biological children of the deceased, the land in dispute belonged to their father and therefore the respondents could not obtain a grant, use it to execute a contract for easement in his absence. He further stated that it was just and fair for the estate to be preserved so that he does not suffer irreparable loss and damage in the event the prayers sought are not granted.

3. The supporting affidavit sworn by the applicant on 30.7.2019 had the same content as the grounds.

4. The 1<sup>st</sup> respondent filed a replying affidavit in her own capacity and on behalf of the 2<sup>nd</sup> respondent. She averred that the applicant was not a beneficiary to the estate of the late Bargor Kimelil who died on 21.10.1999. The land Cheptiret/Cheplaskai Block 4(Mosop) 56 belonged to her husband who was a son to the late Kimelil Chebii who had five(5) children including the applicant. The late Kimelil Chebii had one property at Kerio Valley and the same was distributed to the applicant and her husband. The applicant has since sold off his share however her co-wife and children reside on their share in Kerio Valley.

5. In addition to this, her late husband had married three wives Teresia Chemelil, Tungo Bargor and herself. The late had bought land at Nyaru way before independence and he had permitted the applicant to live on it since he had nowhere to live after he returned from Uganda where he had lived from 1947 to 1972. The applicant and his children had however stolen the title deed to the land and till his demise, the deceased was still following up on how to get the title. The applicant had used it to get compensation from the company that was erecting electricity wire cables, though this was later discovered and the company paid out the remaining to the entire beneficiaries from the three houses.

6. The deceased died intestate and the grant was issued upon full disclosure of information. The applicant ought to have sued the deceased while he was alive and further had been informed by his advocate that the applicant could do so by filing an objection in the succession cause and not file it as an independent cause.

7. He further stated that the court does order the title deed to the land in dispute be deposited at the chief magistrate's court and if there are any objections they be filed in the Magistrate Succession Cause no. 180/2019. The court was urged to dismiss the application with costs.

8. A further affidavit was sworn by the applicant dated 20.8.2019 and was filed in court in response to the replying affidavit. He averred that the respondents were not widows to the late Bargor Kimelil, who never sired any children. His father Kimelil Chebii had given money to Bargor Kimelil to buy him land at Nyaru farm but he registered it under his name. The land was to be shared equally with his other two brothers and that the 1<sup>st</sup> respondent has been residing at Kiboino within Elgeyo Marakwet County. He had never been paid Ksh 110,000/= by Selenkei Investment Ltd as alleged by the respondents.

9. He further urged that he had already filed an objection at the chief magistrate's court.

10. A supplementary affidavit sworn by Kabon Tamining Bargor, the 1<sup>st</sup> respondent, dated 20.9.2019 was filed in response to the further affidavit. She averred that she was the eldest wife to the late Bargor Kimelil. She has been living on the said parcel of land and that the objection proceedings filed by the applicant in the lower court raises the same issues and thus this application be dismissed with costs.

## **SUBMISSIONS**

### **Applicant's submission**

11. It was his submission through counsel that the respondents had concealed information from him that a suit had been filed at the chief magistrate's court, till when he filed this instant application. The respondent had urged this application could not stand as a pleading. A pleading is referred in the Civil Procedure Act as follows:

*“pleading includes a petition or summons , and a statement in writing of claim or demand of any plaintiff and of defence or any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”*

12. The deceased was not married and he could not sire children. The respondents are called upon to prove whether there was any customary marriage. In ***Njoki v. Mathara & Ors civil appeal no.71 of 1989(UR)***, Kneller J. the judge held that,

I. The onus of proving customary marriage is on the party who claims it.

II. The standard of proof is the usual one for civil action, balance of probabilities.

III. Evidence as to the formalities required for a customary law marriage must be proved to the above standard.

The applicant also referred to ***Hortensiah Wanjiku Yawe v. The Public Trustee, Civil Appeal No.13 of 1976.***

It was upon the respondents to prove and the children be subjected to DNA test to ascertain the veracity of the averments.

13. Further the respondents were not present when the deceased acquired the properties

14. Also that it was true he was in Uganda and came back in 1972 and he settled on the suit land which was to be shared equally as it belonged to their father. He has resided on the suit land for over 10 years while the deceased was alive. The respondents do not reside on the land and they have not given a reason as to why it took them over 20 years to bring the ownership dispute to court.

15. In addition he urged that this court has a discretion to issue temporary injunction and/or restraining orders. However the court has to refer to the following principles:

*i. Whether the applicant has demonstrated a prima facie case with a probability of success.*

*ii. Whether the applicant is likely to suffer irreparable harm if injunction is not granted*

*iii. Where the balance of convenience tilts, if the court is in doubt.*

The applicant had gained interest rights over the suit property despite it being registered in the deceased name. The respondents had concealed some vital information, thus there was no other remedy open to him by which he would protect himself other than the reliefs sought for.

16. The applicant filed a supplementary submission by stating that the said land was purchased by the applicant's father Kimelil Chebii and he has been in exclusive possession of the land for over 40 years and the same has never been interrupted. See ***Mwangi & Anor v. Mwangi*** (1986) KLR 328 where the court held that the interest of a registered proprietor of land is subject to the overriding interest of persons in possession and occupation thereof even without legal title and that such overriding interests are equitable rights which are binding on the

land.

17. The limited letters of administration of the estate of the deceased which was still pending was contrary to section 76 of the laws of Succession Act since his consent was required to obtain the grant. The court was referred to ***Shelmith Wacuka Ndumu (suing as the legal representative of Mwaura Mbira) v. Wanjira Mwaura & 10 Ors (2016) eKLR*** where the court issued orders citing that it was better to delay and do the right thing rather than to rush and do the wrong thing.

18. The applicant also relied on ***Giella v. Cassman Brown & Company(1973) EA 358*** the case that lies the principles to be established before grant of a temporary injunction.

19. In addition the high court had jurisdiction to determine any dispute and that rule 73 of the Probate & Administration Rules provides for the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

20. The respondents failed to file its submission.

### **Analysis and determination**

21. The issues that arise for determination is whether the applicant is a beneficiary to the estate of the deceased and what is the nature of dispute before this court. This court has considered the application, the replying affidavit, the further affidavits and supplementary affidavits. The applicant's certificate of urgency refers to the grant but the motion itself is on seeking interlocutory injunction.

22. The well established authority that sets precedent on whether to grant or decline an injunction was set in ***Giella v. Cassman Brown & Co. Ltd (1973) EA 358***. The applicant relied on this case in their supplementary affidavit. Prior to this the applicant had illustrated and demonstrated how he had been in quiet possession of the land unlike the allegations set forth by the respondent. The application revolves on dispute on the ownership of land parcel number Cheptire/Cheplaski Block 4(Mosop 'B')56. The applicant in his further affidavit which is dated 20.8.2019 contends the said land belonged to his father who had given money to the late Bargor Arap Kimelil to purchase the same. However, he had the same registered in his name. (N/B this averment differs from the supporting affidavit where he states he is the brother to the deceased).

23. The respondents allege the land in question belonged to their late husband and the applicant was only allowed to settle on it since he did not have a place of his own. The issues raised by both the applicant and respondent is in regard to land ownership and this court may not have jurisdiction to determine the same.

24. This court shall constrain itself on the issue of the estate of the deceased, whether the grant of letters of administration ad litem was issued without listing all the beneficiaries including the applicant, and if he is the one of the beneficiaries. The grant was to be used for purposes of entering into an agreement on an easement contract.

25. The applicant referred this court to Section 47 of the Law of Succession Act. Under the section, the Court is empowered to inter alia, determine any dispute under the Act and pronounce such decrees and make such orders as may be expedient. It is this court's finding that the above is in regard to succession matters but not land ownership disputes. The said dispute can only be determined before a court vested with jurisdiction and here reliance is placed on the case of The owners of Motor Vessel "Lillian S" versus Caltex Oil Kenya Limited, (1989) KLR 1 where it was held that jurisdiction is everything and once a court does not have jurisdiction, it has to down its tools.

26. The applicant has not made an application to have the issued grant revoked for the reason that all beneficiaries were not listed. Section 44 of the Succession Act gives the mode on how an applicant can move the court. The applicant has not brought his motion under this provision.

### ***"Revocation or annulment of grant"***

(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of Section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him-

(a) Whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and

(b) The extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.

(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefore.

(4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.

(5) Where the High court requires that notice shall be given to any person of its intention on its own motion to revoke or annual a grant on any of the grounds set out in *Section 76* of the *Act* the notice shall be in form 69 and shall be served on such persons as the court may direct.”

27. The applicant relied on *rule 49* of the *Probate and Administration Rules* which provide as;

**“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit”**

The applicant’s position is untrue. *Section 44* of *Succession Act* provides for the manner on how he was to approach the court as he alleges he was a beneficiary who was left out during issuance of grant.

28. *Section 29* of the *Law of Succession Act* defines dependants as follows:

(a) The wife or wives, of former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) Such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

The applicant in his supporting affidavit dated 30.7.2019 states that he is a brother to the deceased, a fact which is not disputed by the respondents in their replying affidavit dated 13.8.2019. From the above proviso the wives and children take precedent in the order of beneficiaries. The applicant however alleged that the deceased did not have any wife and the respondents should prove the same. The applicant has not shown that he was being maintained by the deceased prior to his death. In fact even most of the contents in the replying affidavit revolves around the acquisition of the said parcel of land, an issue of which this court does not have jurisdiction.

29. This court, given the foregoing considerations, do find that the application lacks merit and is hereby dismissed with costs to the respondents.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 18<sup>th</sup> day of December, 2019.**

In the presence of:-

Miss Kiptoo holding brief for Mr. Kipkurui for the applicant

Mr. Oduor holding brief for Ms Kosgei for the Respondents

Ms Abigael - Court clerk