



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 221 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPKOSGEI CHEPTURO**

**BETWEEN**

**SAMMY KIPROTICH KOSGEL.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**CLEMENT KIPROTICH LAGAT.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**AND**

**PIUS ISAIGA & 57 OTHERS.....APPLICANTS**

**RULING**

There is an application filed on 1<sup>st</sup> November 2019 and a preliminary objection filed on the same date before the court for determination.

The preliminary objection is to the applicant's application dated 22<sup>nd</sup> October 2019 and is raised on the points of jurisdiction of the court, locus standi and res judicata. The notice of motion filed on the same date seeks to strike out the application dated 22<sup>nd</sup> October 2019 on the grounds of locus standi and res judicata.

I shall proceed to tackle the preliminary objection as the issues are the same as that in the application.

**APPLICANT'S CASE**

The applicants in the application dated 22<sup>nd</sup> October 2019 submitted that prayers 1,2 and 3 of the application were granted at the interim stage. What remains is prayers 4 to 8. They submitted that they relied on the grounds set out in the application.

The deceased died in 1992 and left behind the land known as Nandi/Kapkangani/272 and the succession cause was filed in 2015. The respondents had commenced the subdivision of the suit land in 2013 and subdivided it in their own names. The parcel numbers are the ones they carried in the succession matter. The court confirmed the grant on the basis of those titles. They annexed the certificate of confirmation and the green card of the original title. They also annexed documents showing respondents who are petitioners were involved in selling parcel no. 1371 to the applicants among others. This amounts to intermeddling with the estate of the deceased.

The applicants have been in possession of the land from 1969 and the

respondents have never used that land. This is a material fact which they ought to have disclosed. As a result, they have applied for revocation of grant.

The application was to preserve the estate as the court determines on the confirmed grant. The petitioners had gone ahead to evict the applicants from the land parcel. The summons for revocation need to be heard before the eviction is carried out.

The replying affidavit served on them does not address the key issue in court. They have not disclosed how the deceased's land was subdivided. They mentioned other cases in other courts but had not disclosed this while the succession case was ongoing. The judgment in other matters was not about the legality of the titles. The courts proceeded in those matters under assumption that they were dealing with bonafide owners.

The Preliminary objection challenges jurisdiction. What is in question is a grant granted by this court therefore it has the jurisdiction to revoke it. The applicant has the locus standi to challenge the issuance of titles as they were in occupation of the land.

They further submitted that in ELC 103 of 2019 the case was withdrawn. It's not the issue in this case. They were dealing with the issue of revocation of

grant which has never been an issue in this court. The withdrawal of an objection is not a bar to application for revocation. The titles that were

obtained illegally are being defended here.

## **RESPONDENT'S CASE**

The respondents relied on the replying affidavit dated 6<sup>th</sup> November 2019 and the affidavit sworn on 1<sup>st</sup> November 2019.

They questioned the jurisdiction of the court in matters of land, moreso on matters seeking to stop eviction of parties evicted via land court. The issue is disguised as a revocation of grant but it's an appeal of various decisions of the court on ownership of land. This court appeared to overturn the decisions and return the applicants to the land. The role of the ELC is clear *in Article 162 of the Constitution*.

The petitioners have annexed SKK-1 which is a court judgment, SKK-2 which is a court order, SKK-3, a court order and SKK-4 and 5 which are also orders and a judgment. SKK-7,8 and 9 which are rulings and a copy of the auctioneers' report showing how eviction was carried out.

They are forum seekers. When they came to seek confirmation of the grant they came as objectors but they could not argue and later withdrew the objections after realizing they were beneficiaries. The grant was issued and after 6 months it was confirmed.

On locus standi they have not come out clearly as beneficiaries or as interested parties. *Section 76 of the Succession Act* talks about interest. If they are purchasers, they should have purchase documents. If the grant is revoked, what next for them? The interest in the land has been determined by other courts more than 9 times.

On the issue of res judicata, the matter has been determined by a court of law. They misled the court. They never came to court before the eviction.

Fraud needs to be ascertained by the party who alleges. None of the grounds of fraud are established. The applicant filed a suit on 22<sup>nd</sup> October 2019 in the ELC court on the same grounds. When the orders were declined they came to this court.

## **ISSUES FOR DETERMINATION**

- a) Whether the court has jurisdiction to hear this matter
- b) Whether the applicants in the application dated 22<sup>nd</sup> October 2019 have locus standi
- c) Whether the application dated 22<sup>nd</sup> October 2019 is Res Judicata
- d) Whether the application dated 22<sup>nd</sup> October 2019 should be struck out.

## **WHETHER THE COURT HAS JURISDICTION TO HEAR THE APPLICATION DATED 22<sup>ND</sup> OCTOBER 2019**

The application seeks orders of prohibition on land parcels NANDI/KAPKANGANI/1371-1384. It is the respondent's case that the court cannot issue these orders as they are seeking to overturn the decision of the land courts on issues which were already determined by the court.

The applicant has relied on *Section 47 of the Law of Succession Act, Rule 49 and Rule 73* of the probate and administrative rules.

*Rule 49* provides;

**“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.”**

*Rule 73* provides;

**“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

The court therefore has jurisdiction to make the orders sought as per rule 73 where it deems the orders necessary for the ends of justice. However, this should only be exercised where the orders are in the interest of justice.

## **WHETHER THE APPLICANTS HAVE LOCUS STANDI**

The applicants claim they have locus standi as they are in occupation of the suit land. They have not provided any evidence of the same. Further there are court orders annexed by the respondents clearly indicating that they were to be evicted from the suit land.

In the constitutional petition no. 6 of 2016 the court held that they did not have any rights to the suit land. As per annexure SKK-6, the Environment and Land Court in Kitale in ELC 167 of 2017 determined that the originating summons seeking to determine their ownership of the suit land by adverse possession was res judicata as the issue of their rights in the suit land had already been determined in the constitutional petition.

The applicants swore an affidavit in ELC 270/2017 denying that they are parties to the succession cause as per paragraph 27 of annexure SKK-7.

It is evident that they are forum seekers from the history of the cases filed.

The fact that the constitutional court found that they did not have any rights with regards to the suit land, further compounded by the decision in Kitale ELC 167 of 2017 is a clear demonstration that they do not have any rights to the suit land. Given that they even denied under oath that they are parties to the suit, it is clear that they are willing to go to any lengths to continue occupying the suit land. However, in light of the history of court rulings and judgments, they have no locus standi. They have not proven that they are beneficiaries, purchasers or even that they are in occupation of the suit land legally.

## **WHETHER THE APPLICATION DATED 22<sup>ND</sup> OCTOBER 2019 IS RES JUDICATA**

The application seeks to stay orders that determine the issue of ownership of the suit land until the summons for revocation is determined. However, on the face of it the application only seeks to prohibit any transactions on the suit lands until the summons for revocation is determined. In my view the issue of revocation is based on fraud and intermeddling of the estate of the deceased arising from the subdivision of the suit land. In essence, if the issue of whether the sub division of the land was fraudulent, or if the disputes as to the ownership of the suit land were determined, then there would be no grounds upon which the summons for revocation would stand.

In the premises, the application is res judicata based on the fact that issues of land ownership have been determined by the constitutional court and the environment and land court in Kitale.

## **WHETHER THE APPLICATION SHOULD BE STRUCK OUT**

The applicants have sought for orders to stop the eviction of the applicants from the suit land. The evictions are as a result of a court order issued on 7<sup>th</sup> March 2018 and the eviction was carried out on 9<sup>th</sup> October 2018. The applicants were seeking an appeal through the backdoor. They were better placed to appeal the judgment that resulted in the eviction and they did not.

The application lacks merit and is struck out with costs to the respondents.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 17<sup>th</sup> day of December, 2019.**

In the presence of:-

Mr. Musiega for the applicants

Mr. Yego for the Respondents

Ms Abigael - Court clerk

**Mr. Musiega:-**

I apply for leave to appeal the decision of this Honorable court. I pray for orders of status quo so as not to prejudice the intended appeal. The status is to allow applicants remain where they are so as to give them opportunity to pursue the appeal. If dislocated their chance of regaining what is lost will be hard. They would be greatly prejudiced. The respondent stands to lose nothing. It can be compensated by way of damages. Applicants have everything to lose. Respondents intend to dispose off the land. About 2000 families are affected. Such interest outweigh that of 2 people.

**Mr. Yego:-**

I have no problem with leave to appeal.

On issue of status quo the court has pronounced itself. That is like seeking an injunction through back door. They should file an appeal and seek stay. My clients are entitled to fruits of judgment decided many times by the court. We pray the application be overruled. They should file an appeal and raise the relevant application.

**Mr. Musiega:-**

My clients have a right of appeal. The ruling is in their favour. Those in pursuit of Justice should be accorded opportunity to pursue the right. If status quo is not maintained the applicants will be out of the subject matter. The appeal will be rendered nugatory.

We pray for reservation of the subject matter necessary to pursue the appeal.

**COURT:-**

We cannot deny the applicants their right to appeal the finding of this court. Temporary orders of stay of execution had been granted before. It is not very clear of whether some of the applicants are still on the land or not. However, the court has a duty to secure the suit land or the situation to ensure that incase the appeal succeeds, the same will not be rendered nugatory. It is in this understanding that I grant leave to appeal and order for maintenance of status quo pending filing of the appeal. The stay last for 30 days.

**SIGNED**

**S.M GITHINJI**

**JUDGE**

**17/12/2019**