



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 47 OF 2007

RE: ESTATE OF JOSHUA BIRECH YEGO (DECEASED)

GIDEON KIPNGETICH SARETO.....1ST PETITIONER

JAPHETH KIPKETER BETT.....2ND PETITIONER

VERSUS

EMILY JERUTO YEGO.....1ST OBJECTOR

FELIX KIPLAGAT SARETO.....2ND OBJECTOR

RULING

1. The objectors pray for a *preservation order* to freeze all dealings with the *free estate* of the deceased. They have presented summons dated 23rd September 2011. The summons is founded upon section 45 and 76 of the Law of Succession Act and Rules 44 and 49 of the Probate and Administration Rules. There are other prayers to revoke the grant issued to the petitioners on 8th May 2007. However, the court directed that the issue of validity of the grant be determined by *viva voce* evidence. This ruling thus relates *only* to the prayer for *preservation* of the estate.

2. There is a deposition sworn by the 1st objector on even date. The objectors state that the deceased was polygamous. The 1st objector is a widow; the 2nd objector is her son. She avers that the intention of the deceased was that the 1st house be settled at Moi's Bridge; and, the 2nd house in the 50 acres at Jabali. She states that her matrimonial home is at Moi's Bridge which the 1st petitioner has transferred to himself.

3. The objectors contend that the grant was obtained fraudulently and in secret; that the testator was not in a position to make a testamentary disposition as he had lost his memory; that the purported will was not attested to by two witnesses as required by the Law of Succession Act; that the estate is being wasted; that the 1st petitioner is not entitled to a further share of the estate as he had been provided for during the life time of the deceased; and, that the land at Moi's Bridge should be distributed to the 1st objector and her children.

4. The application is contested. The 1st petitioner has filed a replying affidavit sworn on 10th August 2012. He avers that he is a son of the deceased. He states that the 2nd petitioner is not a stranger as alleged by the objectors but was an old friend of the deceased; and, that he is well known to the family. The deponent denies that the deceased was in a coma or unable to comprehend the nature of the impugned

will. Regarding the medical condition of the deceased, he avers the deceased had *completely* recovered from *partial* loss of memory.

5. Learned counsel for the petitioners submitted that there has been *laches*; and, that the summons is overtaken by events. The 1st petitioner denies that the grant was obtained by fraud or concealment of material facts. For example, he states that his lawyers, Gicheru & Company, notified the objectors' lawyers, Ngigi Mbugua & Company, of the reading of the will; that the cause was advertised; and, a grant issued and confirmed without any objection. He avers that a total of eight titles were transmitted and new titles issued. He denies that the 1st objector's home is located on Moi's Bridge/ Moi's Bridge 2 (Tuiyobei) 490. He says that plot was bequeathed to him. He states that the 1st objector's home is built on another plot Moi's Bridge/ Moi's Bridge Block 2 (Tuiyobei) 493.

6. On 19th October 2015 I heard arguments from learned counsels for the objectors, petitioners and beneficiaries respectively. I have considered the summons, the depositions, and the rival submissions.

7. Like I stated, the objection proceedings are still pending. I cannot make conclusive *findings* on the conflicting positions taken by the parties. That will be the true province of the trial court on tested evidence. The narrow issue for determination is whether an order for preservation of the *free estate* should issue.

8. Section 47 of the Law of Succession Act gives the High Court jurisdiction to entertain *any* application and determine *any* dispute under the Act. Rule 73 of the Probate and Administration Rules provides that nothing in the Rules shall limit the inherent powers of the court to make such orders as are necessary to prevent the ends of justice from being defeated. Like I stated the summons is expressed to be brought under section 45 and 76 of the Law of Succession Act and Rules 44 and 49 of the Probate and Administration Rules. The jurisdiction of this Court to deal with the dispute is thus not in doubt. A grant, whether or not confirmed, may be *revoked* either by the court *suo moto*; or, by an application made under section 76 of the Law of Succession Act.

9. Section 45 of the Law of Succession Act prohibits any person from *intermeddling* with the estate of a deceased person. The petitioners hold a *confirmed grant* that has *not* been revoked. I cannot strictly say that they are intermeddling with the estate. I heard the objectors to say that the grant is invalid; and, that the will disinherited some beneficiaries. Whether or not there was a valid will; or, whether the grant was obtained fraudulently; or, whether the petitioners are entitled to administer the estate will be determined at the hearing.

10. For now, it is not contested that the 1st objector was a widow of the deceased. One of her serious claims is that her matrimonial home stands on Moi's Bridge/ Moi's Bridge 2 (Tuiyobei) 490; and, that the 1st petitioner has transferred the land to himself. The 1st petitioner retorts that the home is on a different property, Moi's Bridge/ Moi's Bridge Block 2 (Tuiyobei) 493.

11. The other serious allegation goes to the *validity* of the will. The deceased died on 2nd January 2007 at the age of 79 years. The will is dated 6th May 2006. On the face of it he passed on about *six months* of making the testamentary disposition. The 1st petitioner concedes that in the year 2004, the deceased had suffered *memory loss*. I am alive that from exhibit *GKS2* in the replying affidavit, the deceased was treated at Moi Teaching and Referral Hospital in 2005. The 1st petitioner states he fully recovered. The trial court will have to untangle the evidence and determine whether the deceased had *capacity* to make a will. There are then the general questions whether the will complies with all the legal requirements of the Act; and, whether adequate provision was made for all beneficiaries.

12. For the time being, I can only state that the matters raised by the objectors are not idle and call for a deeper inquiry of all the circumstances surrounding the will and the issuance of the grant. I am satisfied that the objector has established a *prima facie* case for grant of a preservative or conservatory order. See *Flemish Investments Limited v Town Council of Mariakani*, Mombasa High Court Case 459 of 2010 (unreported), *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589, *Giella v Cassman Brown and*

Company Limited [1973] E.A 358.

13. If the distribution of the *free estate* continues or is concluded, it will render the summons an academic exercise. One of the parties is likely to be left holding the short end of the stick. It is important in family disputes of this nature to ensure equality of arms. I agree with the petitioners that there was *unexplained* delay of nearly *four years* before presentation of the summons. I note from the record that the objectors had presented a similar summons dated 5th February 2009. It was withdrawn on 24th May 2010. From a close study of the dispute, I would agree that the objectors have *not* been truly cooperative in the process. From the petitioners' exhibit marked GKS13, it would appear that a substantial part of the estate was transmitted; and, titles issued before the presentation of summons for revocation of the grant.

14. However, this dispute relates to *family land* and other properties. It sets a widow and children from the two houses on a collision course. It can be avoided. It is important that the matter be determined on the *merits* and not *technical* justice. Furthermore, I do not see substantial prejudice that will be suffered by the petitioners if the estate is preserved pending the determination of the summons.

15. Finally, this court is now enjoined by article 159 of the Constitution; and, by sections 1A and 1B of the Civil Procedure Act, to do *substantial justice* to the parties. Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

16. The upshot is that prayer 2 in the objectors' summons dated 23rd September 2011 is allowed. A *preservation order* is hereby issued freezing all dealings with the *free and unascertained estate* of the deceased. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 28th day of January 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:-

No appearance for the petitioners.

Ms. Kimaru for Mr. Ngigi Mbugua for the objectors.

No appearance for the beneficiaries.

Mr. J. Kemboi, Court clerk.