



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 204 OF 2014**

**IN THE MATTER OF THE ESTATE OF WILSON KEMEI (DECEASED)**

**A. CHERUIYOT SAMMY KIPKURUI.....CITOR**

**VERSUS**

**RAEL CHERUIYOT KEMEI.....CITEE**

**RULING**

The ruling relates to the application by A. Cheruiyot Sammy Kipkirui (hereinafter the citor) dated 16th April, 2014. The orders sought are:

- a) Spent
- b) nThe citee be summoned together with Kiprono Towett C and John Kipkorir Cheruiyot, who are also beneficiaries.
- c) The said intermeddlers to show cause why they are intermeddling.

The application is premised on grounds that:

- i. The citee together with Kiprono Towett C and John Kipkorir Cheruiyot, who are all beneficiaries, have intermeddled with the estate of the deceased.
- ii. The citee together with Kiprono Towett C and John Kipkorir Cheruiyot may further intermeddle with the estate of the deceased.
- iii. The citee was duly served with citation to accept or refuse letters of administration but has neglected and/or refused to respond.
- iv. The caution which was issued may be lifted at any time and further intermeddling may recur.
- v. It is in the interest of justice that the citee and her co-intermeddlers be summoned to show cause why they are intermeddling. The application is further supported by the citor's affidavit sworn on the 16th April, 2016.

Despite evidence of proper service there is no response to the application.

The gist of the applicant's case as can be seen from the grounds and the supporting affidavit is that the Respondent (hereinafter the citee) together with one Kiprono Towett and John Kipkorir Cheruiyot have intermeddled with the estate of the deceased. They are likely to persist with the intermeddling and a caution lodged may be lifted anytime and further intermeddling may occur.

It is further stated that it is in the interest of justice the citee and her co-intermeddlers be summoned to show cause why they are intermeddling. The citor is accused of failure to respond to a citation served on herself to accept or refuse letters of administration.

I do however note that the citee has since entered appearance on the 17th April, 2014. Contemporaneously, the citee has filed an application seeking the transfer of this matter to Kericho High Court.

The application herein was disposed off by way of written submissions.

It is submitted that the citee is a son of the deceased and thus a dependant within the meaning of dependant under the Law of Succession Act.

The issues for determination are:

1. Whether the intermeddlers should be summoned to court to show cause why they are intermeddling.
2. Whether the court should issue preservatory orders for the preservation of the estate of the deceased.

On issue (1) above, it is clear from the documents exhibited that the land in Kericho is now registered in the names of the citee, yet it is stated that the same had belonged to the deceased. There is a receipt showing that part of the land had purportedly been sold to one Daniel Kipkurui Langat by a beneficiary Kiprono Towett C. the deceased died in 1995. A transfer was effected in 1996. The begging question is how this was possible without letters of administration being applied for and confirmed.

It is trite law that no person has the power to dispose off any capital asset of a deceased estate before a grant of letters of administration.

In the case of James Masanya Ontiri Igendia V. Magero Matungo & another, [2014] eKLR made reference to **Section 3** of the **Law of Succession Act Cap 160 Laws of Kenya**, which defines "*free property*" in the following terms:

***"Free property" in relation to a deceased person, means the property of which that person was legally freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.***

The court went on to make a determination in the above mentioned case that:

***"There is no doubt in the instant case that there was no free property of the deceased to be taken possession or disposed of by the 1st Respondent. He was clearly intermeddling with the estate of the deceased when he purported to dispose of the same before Grant of Letters of Administration."***

In concluding, the court stated that:

***"I find and hold that the actions of the 1st and 2nd respondents can be termed as those of intemeddlers. This application by the petitioner/applicant is allowed in terms of prayers 2, 3 and 4 with costs of the application to the petitioner/applicant. Once the process of the title of the suit property reverting to the deceased is completed the petitioner/applicant should***

**proceed with confirmation of the Grant in accordance with the provisions of the law under the Act.”**

In **Section 55** of the **Law of Succession Act** provides as follows:

**“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by Section 71.”**

In the same light, **Section 8(b)(ii)** of the **Act** provides that no immovable property shall be sold before the confirmation of grant.

Given the facts of this case, it is my considered view that the intermeddlers be summoned to court to show cause why they are intermeddling with the estate.

It is at this point that **Section 45** of the **Law of Succession Act Cap 160, Laws of Kenya** comes into play. That section provides:

**“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 a 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 to both such fine and imprisonment; and**

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

Should preservatory orders issue in this matter? The answer is in the affirmative. To protect the estate from other intermeddling and to secure the interest of the Citor and other beneficiaries, preservatory orders are necessary. Same to issue.

With the result that the application dated 16th April, 2014 is allowed in terms of prayers (b) and (c).

The property the subject of this cause is situated in Kericho County. To move the case forward, I direct that the application for transfer of this cause to the High Court at Kericho dated 17th April, 2014 be fixed for hearing at the earliest.

**Dated, Signed and Delivered at Nakuru this 28th day of June, 2016.**

**A. K. NDUNG'U**

**JUDGE**