



**REPUBLIC OF KENYA**

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

**PROBATE & ADMINISTRATION CAUSE NO. 241 OF 2008**

**RE: ESTATE OF CHERUIYOT ARAP BIRECH (DECEASED)**

**ESTHER JERONO SUGE.....1<sup>ST</sup> PETITIONER**

**JEPWAMBOK BIRECH.....2<sup>ND</sup> PETITIONER**

**RULING**

1. The 1<sup>st</sup> petitioner prays for review of the ruling and order of court (Ngenye-Macharia J) given on 14<sup>th</sup> November 2012. The summons was filed on 7<sup>th</sup> January 2013 and is supported by a deposition of the 1<sup>st</sup> petitioner sworn on 20<sup>th</sup> December 2012.
2. The background is that by an earlier summons dated 10<sup>th</sup> January 2012, the 1<sup>st</sup> petitioner asked the court to release to her the original title deed deposited in court for the property known as Nandi/Lelmokwo/242; and, to lift an inhibition order on the title. The reason was to pave way for the 1<sup>st</sup> petitioner to distribute the net intestate estate to the beneficiaries. On 14<sup>th</sup> November 2012, the court dismissed the summons.
3. That is the order that has aggrieved the 1<sup>st</sup> petitioner and precipitated the present application. The applicant contends that there is an error on the face of the record; that there has been non-disclosure of material facts; that the 2<sup>nd</sup> petitioner (who has since passed on) was alive when the summons dated 10<sup>th</sup> January 2012 were presented to court; that the late Cheruiyot Arap Birech had three houses; that the 1<sup>st</sup> petitioner is the only remaining heir to the 1<sup>st</sup> house; that Henry Kibet Cheruiyot, a grandson of the deceased is a legal heir to the 2<sup>nd</sup> house while the third house was represented by the 2<sup>nd</sup> petitioner (now also deceased). Accordingly, the shares to the 3<sup>rd</sup> house should devolve to her children. The applicant contends that those children will have to take out a grant to their mother's estate. In the meantime, the applicant states that she will hold their share in trust.
4. In the impugned ruling, the learned judge had observed that she could not locate an application dated 23<sup>rd</sup> April 2008 on the court file. The applicant states that the application was in a related file in Eldoret High Court Miscellaneous application 162 of 2008. In that file, the court revoked an earlier grant issued by the lower court in Kapsabet Succession Cause 62 of 2007. I have seen a consent order given in the Miscellaneous Cause on 14<sup>th</sup> July 2008 decreeing that the title be deposited in court; and, that it be released only with the consent of both counsel for the petitioners.
5. The grant in this cause was confirmed on 7<sup>th</sup> December 2011. The suit property was to be divided into three equal shares of 5.17 acres in favour of the 1<sup>st</sup> petitioner, Henry Kibet Cheruiyot and Jepwambok Birech (2<sup>nd</sup> petitioner). Each of them was also to get two cows. There are no proceedings to revoke the current grant.

6. By virtue of an order made on 27<sup>th</sup> June 2011, the 2<sup>nd</sup> petitioner was allowed to act in person. In the impugned ruling, the court correctly observed that the order of consent of 10<sup>th</sup> January 2012 meant that the title could only be released to counsel for the 1<sup>st</sup> petitioner and the 2<sup>nd</sup> petitioner in *person*. The 2<sup>nd</sup> petitioner died on 5<sup>th</sup> May 2012 subsequent to the presentation of the application dated 10<sup>th</sup> January 2012. There seems to me to be a clear error on the record. The court had said that Henry Kibet Cheruiyot should have been served alongside the children of the 2<sup>nd</sup> petitioner “to confirm how they wish the share of the 2<sup>nd</sup> petitioner to be distributed; and in the alternative to confirm they had no objection to release of the title to the 1<sup>st</sup> petitioner”. As I have stated, the grant in this cause was confirmed on 7<sup>th</sup> December 2011. The suit property was to be divided into three equal shares of 5.17 acres in favour the 1<sup>st</sup> petitioner, Henry Kibet Cheruiyot and Jepwambok Birech (2<sup>nd</sup> petitioner). Each of them was also to get two cows. There are no proceedings to revoke the current grant. The grant was issued to the 1<sup>st</sup> petitioner. It is common ground that the 2<sup>nd</sup> petitioner is dead. The succession to her estate will have to be in separate proceedings. The 1<sup>st</sup> petitioner is *not* getting the title for *her* personal *benefit* but in order to distribute the estate as per the confirmed grant. Henry Kibet Cheruiyot has been provided for in the confirmed grant.
7. 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. Under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules 2010, the court has power to review its decision. The applicant must demonstrate that there is new and important matter or evidence which, after exercise of due diligence was not within his knowledge or could not be produced at the time; or, on account of some error or mistake apparent on the face of the record; or, for any other sufficient cause.
8. The summons for review has been brought without delay. If the title is not released to the 1<sup>st</sup> petitioner, there will be an unnecessary gridlock to the distribution of the estate. Unless the prohibition on the title is lifted, the partition of the title as per the confirmed grant will not proceed. Yet, there are no objection proceedings or an application to revoke the present grant. It would also mean that the title deed deposited in court remains in court indefinitely. I would thus find there is sufficient cause to review of the order of 14<sup>th</sup> November 2012 but with sufficient safeguards to protect the interests of all beneficiaries.
9. In the result, the ruling and order of court of 14<sup>th</sup> November 2012 is reviewed as follows-
  - a. The application dated 10<sup>th</sup> January 2012 is reinstated.
  - b. The original title over Nandi/ Lelmokwo/242 deposited in court shall be released to the 1<sup>st</sup> petitioner *but* only for the purpose of *distributing* the property as per the certificate of confirmed grant given on 7<sup>th</sup> November 2011 and issued on 7<sup>th</sup> December 2011. To ensure the interests of justice are not defeated, the 1<sup>st</sup> petitioner shall do so within *six months* of today’s date. The 1<sup>st</sup> petitioner shall file an appropriate report to the court as required by section 76 of the Law of Succession Act within *six months* of today’s date.
  - c. The new sub-title for 5.7 acres in favour of the estate of Jepwambok Birech, the 2<sup>nd</sup> petitioner (now deceased) shall be deposited with the Deputy Registrar of this court pending the application for a grant by her children or heirs as may be appropriate. The other resulting sub-title of 5.7 acres in favour of Henry Kibet Cheruiyot shall be released to him.
  - d. In order to allow the partition and mutation of the principal title, the inhibition order registered pursuant to the order of 14<sup>th</sup> July 2008 is hereby raised or lifted.
  - e. To avoid the ends of justice from being defeated, this order shall be served upon the Registrar of Lands, Nandi County or the relevant Lands Registry and noted against the title.
  - f. I make no order on costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 27<sup>th</sup> day of October 2015.**

**GEORGE KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:-***

Mr. Otieno for the 1<sup>st</sup> petitioner.

No appearance for the 2<sup>nd</sup> petitioner.

Mr. J. Kemboi, Court clerk.