



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 157 OF 2010**

**IN THE MATTER OF THE ESTATE OF KIBUNEI TUITOEK CHERUS**

**WILLIAM KIPROTICH CHERUS ..... PETITIONER**

**VERSUS**

**STANLEY KIPLANGAT RONO & WILLIAM K.C. RONO .....OBJECTORS**

**RULING**

1. This is an application brought by way of a Notice of Motion said to have been brought under **Section 47** of the **Law of Succession Act** and **Rule 49** of the **Probate and Administration Rules**. It is dated 23rd October, 2013. It was brought under certificate of urgency. The applicant, **William Kiprotich Cherus** is the Petitioner in the main succession cause. He seeks for orders :-
  - a. **That this application be certified urgent and service thereon be dispensed with in the first instance.**
  - b. **That pending the inter partes hearing of the application the Objectors by themselves and/or their servants, assigns, tenants and all who claim under as through them be restrained by way of a temporary injunction from entering, occupying and erecting structures on the property known as LEMBUS/METIPSO/50 registered in the name of KIBUNEI TUITOEK CHERUS which is part of the Estate.**
  - c. **That pending the hearing and determination of the Objection proceedings filed in the Succession Cause, the Objectors by themselves and/or their servants, assigns, tenants and all who claim under or through them be restrained by way of a temporary injunction from entering, occupying and erecting structures on the property known as LEMBUS/METIPSO/50 registered in the name of KIBUNE TUITOEK CHERUS which is part of the Estate.**
  - d. **The costs of this application be provided for.**
2. The application has grounds on the face of it and is supported by an affidavit sworn by the applicant dated 23rd October, 2013. He contends that he is the Administrator of the Estate of his late father Kibunei Tuitoek Cherus. The Respondents had filed an objection to the issuance of a Grant to the applicant in the main succession cause. Whilst the proceedings were pending in court, the Respondents without the color of right trespassed onto Lembus/Metipso/50, a property registered in the name of the deceased and started to construct a permanent house and cultivate the land. He therefore seeks an injunction stopping the said construction in order to preserve the Estate till the hearing and determination of the suit.
3. The application is opposed. The Respondent filed a Replying affidavit sworn by **William**

- Kiplagat Cheruiyot Rono** on 4th November, 2013. He avers that he is 2nd objector herein and an administrator of the Estate of his late father, Kiprono Arap Bondet.
4. He avers that sometime in the 1960's his late father purchased Lembus /Metipso/ 50 from the applicant's father and settled with his family on the land. The deponent further avers that Lembus /Metipso/ 50 and Lembus /Metipso/ 49 are the resultant portions of a subdivision undertaken on what was originally know as Lembus /Metipso/41. The original land was owned by the applicant's father. That the subdivision and subsequent application for consent to transfer were a clear indication of his late father's proprietary interest over the suit land.
  5. Furthermore he avers that an injunction cannot issue as the respondent's family reside on the suit land and such an order would amount to an eviction order. He also deponed that no damage or loss will be occasioned to the applicants as the two families have lived in their respective portion of land for over 50 years. He therefore urges the court to dismiss the application to allow the main succession cause be set down for hearing.
  6. The application was argued by both Counsel on the 13th February, 2013. **Mr. Oumo** held brief for **Mr. Orina** counsel on record for the Petitioner/Applicant. The learned counsel, **Mr. Mutai**, submitted on behalf of the Objector/Respondents.
  7. **Mr. Oumo** in his submission reiterated the grounds raised in the supporting affidavit of the applicant. He submitted that the applicant's father was the registered owner of the suit property which formed part of the deceased Estate. That the respondent filed objection proceedings and whilst the same are pending in court the respondent has begun putting up a permanent structure on the suit property. He urged the court to grant the injunction against the respondents in order to save the stratum of the property.
  8. In response, **Mr. Mutai** sought to elaborate further on the history of the two families. According to him the applicant had been economical with the truth. He submitted that the families of Kiprono and Kibunei have been living side by side since 1960. On or about 1983 and after registration of land commenced in Kenya, the two deceased men obtained consent to subdivide the original land which was known as Lembus /Metipso/41 and measured 9.6 Hectares into two equal portions and a further consent to subsequently transfer one of the resultant parcels in favour of Kiprono. The original land was under the name of Kibunei. As the subdivision and registration went on, the two families put up houses on their respective portion and cultivated the same. According to counsel this is a fact that the applicant ought to have declared when seeking injunctive orders. As such he urged the court to set aside the ex-parte orders as it stops the respondents from enjoying their portion of land which they have lived on for over 50 years.

### **ISSUES FOR DETERMINATION**

9. Whether the Applicant has made out a prima facie case that the suit property is in need of preservation and protection?
10. Whether there is irreparable loss occasioned that cannot be compensated by damages?
11. The Documents submitted by the Objectors and the determination of their beneficial interests in the suit property.

### **ANALYSIS**

12. The preservatory order sought by the Applicant has the same force as an injunctory order. The threshold applicable is the same set down for that of injunctory orders in that the Applicant must make out a *prima facie* case and the Applicant must also show that the loss is irreparable and cannot be compensated by way of damages.
13. The Applicant annexed a copy of the Title and an Official Search for the property known as **LEMBUS/METIPSO/50** and the annexure is marked as '**WKC1a**'. The property is registered in the name of the father of the Applicant the Late Kibunei Tuitoeck Cherus.
14. The Applicant is the son of the Late Kibunei Tuitoeck Cherus and the Petitioner herein. By annexing the Title the Applicant has established his father's proprietary interests in the suit property and the Applicant has also successfully established and demonstrated his beneficial interest in the suit property.
15. The Objector/Respondent has not denied that there is ongoing construction on the suit property.

From the submissions made by the parties it is clear that the ongoing construction is not at the behest or invitation of the Applicant. This court is satisfied that the Applicant's has also demonstrated that his rights and interests are being infringed upon and seeks the protection of these rights. The court is satisfied that the applicant has made out a prima facie case.

16. The ongoing construction is tantamount to interference with the property that forms part of the Estate of **Kibunei Tuitoek Cherus** as this construction definitely creates a major change to the nature and the stratum of the suit property. This court reiterates that the Applicant has demonstrated that he has a beneficial interest in the suit property and is not privy nor has he consented to the ongoing construction work. The changes brought about by the construction are found to be prejudicial to the rights and interests of the Applicant. It is therefore imperative that the status of the suit property remains as it is without any further changes pending finalization of the objection proceedings in the succession cause.

### **FINDINGS**

17. The court finds that the Applicant has made out a prima facie case and finds that the property is in need of preservation and protection.
18. That the Applicant will suffer irreparable loss if the court fails to grant him the orders sought and that a loss of inheritance is a loss that cannot be compensated by way of damages
19. The issues relating to the Objector's beneficial or proprietary interest in the Land and the concurrent issues of Sale, Transfer, Consents to sub-divide leading to the subdivision of the property and the issuance of the two (2) Titles are issues that have to be canvassed and determined at the main hearing of the Objection Proceedings filed herein. Which the Objector is urged to fix the same for hearing and determination at the earliest possible instance.

### **CONCLUSION**

20. The application is hereby allowed.
21. **THAT** pending the hearing and the final determination of the Objection proceedings filed in the Succession Cause, the Objectors by themselves and/or their servants, assigns, tenants and all who claim under as through them are hereby restrained by way of a preservatory order from erecting further structures on the property known as **LEMBUS/METIPSO/50** registered in the name of **Kibunei Tuitoek Cherus** and more particularly restrained from carrying out further construction work on the existing structure which is now at the roofing stage.
22. The Applicant shall file into court a written undertaking for security for costs and damages within fourteen (14) days, from the date hereof.
23. The Respondents shall bear the costs of this application.

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 23<sup>rd</sup> day of April, 2014.**

**A. MSHILA**

**JUDGE.**

**Signed and Delivered at Nakuru this 23<sup>rd</sup> day of April, 2014 by**

**Hon. Lady Justice H. Omondi.**

**JUDGE**