



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 778 of 2012

HELLEN JEPKOSGEI KIPKORIR.....PLAINTIFF
VS

PETROLINA KIPKURGAT.....DEFENDANT

(Suit originated by O.S; plaintiff claiming that defendant obtained suit land fraudulently; suit land obtained by defendant by way of transmission; plaintiff claiming that succession proceedings invalid; plaintiff seeking an order of nullification of the grant; plaintiff seeking order of citation and nullification of titel; plaintiff claiming that defendant's successor obtained the suit land fraudulently; plaintiff agitating claim on behalf of estate of deceased; plaintiff not having any grant of letters of administration; held not proper forum to nullify grant of administration; not proper forum to seek order of citation; plaintiff also has no locus; suit dismissed).

J U D G M E N T

A. BACKGROUND

This suit was commenced by way of an Originating Summons dated 11 November 2011. As drafted the applicant (or Plaintiff) has sought the following orders.

1. THAT a Declaration by this Honourable Court that the Grant of Letters of Administration the Estate (sic) of KIMOI CHEMISTO KIPROP (DECEASED) made in favour of the Defendant on 2nd June 2011 in Eld High Court Succession Cause No 176 of 2010 and ALL the proceedings thereto were defective in substance and obtained fraudulently in concealment from the Court of facts material to the case.
2. THAT this Honourable Court be pleased to order cancellation of the Defendant as the registered owner of land parcel L.R NO. IRONG/ITEN/246 and the Title Deed for land parcel of L.R NO IRONG/ITEN/246 measuring 19.44 Ha. do revert to the Estate of CHEROP ARAP CHEMISTO (Deceased) who is since Deceased.
3. THAT the Defendant/Respondents be cited to take out Grant of Letters of Administration together with the Plaintiff, intestate of all Estate of CHEROP ARAP CHEMISTO (DECEASED) and who prior to this death was the registered owner of land parcel L.R NO. IRONG/ITEN/246 measuring 19.44 Hectares as at 05/10/1961.
4. THAT costs of this Originating Summons be provided for.

Alongside the O.S. , the applicant filed an application for injunction to restrain the defendants from utilizing the suit land pending the hearing and determination of the O.S.

The application for injunction was argued before me on 26.11.2012. I could not however make a ruling on the same as I noticed that there was no supporting affidavit to the Notice of Motion, and neither was there the Replying Affidavit to the O.S on record. I then recalled the counsels on 3/12/12 to point out to them the missing documents. Counsel for the plaintiff confirmed that there was no supporting affidavit to the Notice of Motion and requested that the Replying Affidavit to the originating summons be deemed the supporting affidavit to the Notice of Motion. I was also supplied with the missing Replying Affidavit to the O.S by counsel for the defendant. At that point I asked the parties whether I could straight away proceed to determine the O.S and they were agreeable. I was therefore excused from determining the Notice of Motion. I then gave time to the parties to file any further affidavits that they intended to rely on and directed the counsels to appear before me on 11/11/12 to argue the O.S. Neither party filed additional documents. On 11/11/12 there was only counsel holding brief for Mr. R.M Wafula for the respondent and there was no appearance on behalf of the firm of M/S A.K Chepkonga & Co for the applicant. Mr. Miyianda, who held brief for Mr. Wafula, stated that he would not wish to make any oral submissions and relied entirely on the submissions filed in respect of the Notice of Motion and asked that the same be deemed to be submissions in respect to the O.S. I then retired to write this ruling.

B. APPLICANT'S CASE

The applicant's case is that the suit land IRONG/ITEN/246 was originally registered in the name of one CHEROP ARAP CHEMISTO (DECEASED) who was its first registered owner. He died in 1972. Arap Chemisto had two wives, one TERIKI KIPROP and KIMOI CHEMISTO both of whom are now deceased. It is the applicant's case that on 25 January 2000, the first widow of the deceased, KIMOI KIPROP CHEMISTO illegally and fraudulently caused the suit land to be transferred to her name. It is alleged that this was fraudulent as the estate of CHEROP had never been administered and no letters of administration of the estate of CHEROP had ever been taken out. It could not therefore happen that KIMOI would become registered as owner of the suit land. KIMOI later died and the Respondent who is a daughter of KIMOI filed a succession cause and obtained letters of administration to the estate of KIMOI. Since the suit land had already been transferred to KIMOI, the estate of KIMOI was comprised of the suit land. The respondent after obtaining letters of administration had the same confirmed on 2 June 2011 with herself as the sole beneficiary of the Estate of KIMOI. The grant was therefore confirmed with the order of confirmation stating that the Respondent be registered as the owner of the suit land. The applicant annexed a copy of the Green Card of the suit land which shows that on 25.1.2000, KIMOI got registered as owner of the suit land and was issued with a title deed. The last entry is a Restriction by one HELEN KIPKORIR (presumably the applicant) herein barring any dealing until a case at the tribunal (presumably land disputes tribunal) is heard.

C. RESPONDENT'S CASE

The Respondent's case is that while still alive, CHEROP had distributed his land to his two wives. That TERIKI was allotted a land parcel IRONG/ITEN/390 which then came to belong to her and her descendants. One of the children of TERIKI is TAPLILEI KIPSEREM who is a mother to the Applicant herein. It is her case that the family of TERIKI including the applicant have been selling their portion including exchanging some of it with other parcels. It is further her case that IRONG/ITEN/246 was given to the 2nd house, that of KIMOI, who is mother to the Respondent. She has stated that KIMOI got properly registered as owner of the suit land and that when she died, the Respondent as daughter had every right to take over her estate which she duly did. It is her case that the applicant has no business interfering with the suit land as their inheritance lies in the land IRONG/ITEN/390.

D. SUBMISSIONS OF THE PARTIES.

In his written submissions, Mr. Komen, counsel for the applicant, elaborated that the estate of CHEROP has never been administered and thus KIMOI must have obtained the title to the suit land fraudulently. He argued that no evidence has been adduced to show how the estate of KIMOI was administered, if at all. That being the case, the land could not therefore be transmitted to KIMOI. He has further submitted that the grant of letters of administration of the estate of KIMOI issued vide Eldoret Succession Cause No. 176 of 2010, were obtained fraudulently as material facts were not disclosed. He submitted that I should

proceed to revoke the grant of probate as it was fraudulently obtained and in the meantime inhibit any registration on the title to the suit land.

On the other hand, Mr. Wafula, counsel for the respondent, argued that I ought to dismiss the suit. His first point is that the O.S is fundamentally defective because the reliefs sought are not those envisaged under Order 37 more specifically Rules 1(a) (e) and (g) and Rules 2 and 8. His argument is that the plaintiff is not asking the court to determine questions affecting any rights or interests or determine a question arising directly out of the administration of the estate of KIMOI. He has also argued that Rule 1(e) of Order 37 is inapplicable as the defendant cannot be cited to take out letters of administration of the late CHEROP. He asserted that the defendant is now the absolute proprietor of the suit land as she inherited the same properly from her late mother KIMOI. Mr. Wafula has further submitted that if the proceedings of Eldoret Succession Cause No.176 of 2010 were defective or that the letters of administration in the said cause were obtained fraudulently, the recourse of the plaintiff is to move the court pursuant to Section 76 of the Law of Succession Act, (CAP 160) instead of proceeding under Order 37 of the Civil Procedure Rules. He has also attacked the originating summons for being brought under the Registered Land Act which to him is inapplicable. He has thus argued that the OS is fundamentally defective and cannot give birth to a competent application.

Mr. Wafula also submitted that it is trite law that before any person can bring an action in respect of an estate of a deceased person, that person bringing the action must first of all take out letters of administration. In the instant case, he has argued that the plaintiff has no legal capacity to sue on matters touching on the Estate of Cherop arap Chemisto without a grant of letters of administration. He has argued that the suit herein is thus incompetent for lack of grant of letters of administration. He has urged me to dismiss the O.S because it is founded on a suit that is fundamentally defective.

E. DECISION OF THE COURT

(I) On Prayer 1 of the Originating Summons

The first prayer seeks a declaration that the Grant of Letters of Administration of the Estate of Kimoi arap Chemisto (KIMOI) made in favour of the defendant on 2nd June 2011 in Eldoret Succession case no.176 of 2010 and all the proceedings thereto were defective in substance and obtained fraudulently in concealment from the court of facts material to the case.

It will be noted that the applicant is seeking to nullify succession proceedings that have basically been finalized. I am not convinced that this is a prayer that may be granted through the avenue chosen by the applicant. I do not think that the powers donated by Order 37 are so wide as to nullify succession proceedings. If the applicant is of the view that the succession proceedings in P&A cause No. 176 of 2010 were defective, then the proper avenue is to file an application in that succession cause to nullify the proceedings. To file an O.S to nullify the proceedings is in my view improper. I have been persuaded to reach this position vide the authority of the case of ***Judith Gathoni Willie vs George Kihara Muchuki & 2 others Nakuru HCCC No. 163 of 2004 (OS) eKLR***. In the said case, the applicant filed an originating summons which *inter alia* sought orders that he be entitled to participate in the administration of the estate of Willie Mwangi Muchuki (deceased), as a duly recognized administrator together with other administrators. It emerged that there was a succession cause filed on behalf of the estate of Muchuki being Nakuru Succession Cause No.68 of 1992. A preliminary objection was thus raised that the suit was res judicata. Kimaru J, held that the matters raised in the originating summons ought to have been raised in the Succession Cause and not in a fresh suit. He dismissed the originating summons and held that the applicant was at liberty to raise the issues in the Succession Cause. This decision was upheld on appeal in ***Nakuru Court of Appeal Civil Appeal No.277 of 2004***.

I think strongly that the applicant was wrong in filing this suit to agitate for the nullification of the proceedings in Succession Cause No. 176 of 2010. There are clear procedures under the Succession Act, CAP 160, Laws of Kenya, on the nullification of a grant of letters of administration. I cannot also hold that proceedings held in a court of equal jurisdiction are null and void. The proper way is for the applicant to move the court in the Succession proceedings for the orders of nullification of those proceedings or the nullification of the grant issued in the said proceedings. Prayer 1 of the OS therefore fails.

(ii) On Prayer 2 of the originating summons.

Prayer 2 of the O.S asks me to cancel the title of the respondent and that the same revert to the Estate of Cherop arap Chemisto (CHEROP). I am not sure whether the respondent is now registered as owner of the suit land as the copy of the Green Card attached to the OS shows that the same is in the name of KIMOI KIPROP CHEMISTO. Even assuming that the title is in the name of the respondent, she has obtained the same by virtue of the succession proceedings alluded to earlier. If the applicant is to proceed to nullify the said succession proceedings, then it follows that the title of the respondent will automatically be nullified. Again, it is my position that the proper forum in which to address the second prayer is the succession cause. In any event, the applicant herein does not hold any grant of letters of administration. He cannot therefore purport to claim on behalf of the estate of CHEROP. For the applicant to claim and sue on behalf of the Estate of CHEROP she must first obtain letters of administration of the Estate of CHEROP even if the same are limited only to filing suit.

The applicant does not purport to hold any grant of letters of administration for the Estate of CHEROP. I find that she is incompetent to file any suit on behalf of the Estate of CHEROP. Prayer 2 therefore fails.

(iii) Prayer 3 of the Originating Summons

The last substantive prayer is for an order that the defendant be cited to take out grant of letters of administration together with the plaintiff, of the estate of CHEROP. I think this order is best considered in a succession cause and not by way of originating summons in an ordinary suit. Citations are covered under the Succession Act, CAP 160 specifically under Rules 21,22 and 23 of the Probate and Administration Rules. There is an elaborate procedure that must be followed when seeking orders of Citation. I cannot circumvent these Rules. The applicant must move the appropriate court in the appropriate manner if she seeks to have an order of Citation. I need not say more on this prayer. It cannot be granted in these proceedings and in the manner asked. Prayer 3 therefore fails.

F. CONCLUSION.

The three prayers sought in the O.S have failed. For the avoidance of doubt, I have not made any determination on whether or not the Estate of CHEROP was properly administered. I have also not made any determination on whether KIMOI obtained the registration of the suit land into her name in the proper manner. I have only held that the applicant cannot obtain the said orders in the manner and capacity in which she has attempted to move this court. She can attempt to obtain the orders sought in the appropriate forum and/or after she obtains capacity.

In the premises, this Originating Summons is dismissed with costs.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of
R.M. Wafula of M/s R.M. Wafula & Co for the Respondent.
N/A for Ms A.K. Chepkonga & Co for the applicant.