



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 17 OF 2007

IN THE MATER OF THE ESTATE OF WILLIAM KIPROGONY ARAP KETER (DECEASED)

**STEVEN BARRY CHEBOCHOK.....BENEFICIARY/
APPLICANT**

VERSUS

**JONATHAN KIBAIBAI ARAP ROGONY.....1ST
RESPONDENT**

DAVID KIPYEGON ROGONY.....2ND RESPONDENT

PHILIP KIPYEGON MASON.....3RD RESPONDENT

RULING

The Chamber Summons dated 17/5/2011 was filed by Steven Chebochok against Jonathan Kibaibai Arap Rogony, David Kipyegon Rogony and Philip Kipyegon Mason, seeking an order that the said respondents be directed to strictly obey the court order issued on 18/3/2010 and in default, action be taken against them. The application is supported by an affidavit sworn by Stephen Barry on 17/5/2011 and a further affidavit dated 6/6/2011. Mrs Ndeda appearing for the applicant submitted that the applicant filed an application dated 10/2/2010 seeking revocation of the grant issued to the respondents. However, the parties recorded a consent on 24/3/2010 to the effect that the District Land Surveyor, Kericho District, do survey the land within 30 days and file a report and the status quo was to be maintained till the matter was finalized. The surveyor filed his report in court but before the court could know the way forward, objection proceedings were filed on 9/11/2010. The respondents have used the plan used by the surveyor to subdivide the estate and have started constructing structures in areas not in their occupation; That they have sprayed their areas with herbicide, fenced off areas that were not fenced. After the consent, the respondents went ahead to subdivide the land in total disobedience of the court order. It is contended that subdivision is still in dispute and the fencing is forcing the applicants from where the deceased left them. The applicant also contends that there are surveyors involved and it has not been agreed on which plan will be adopted. It is the applicant's wish that there should be no fencing pending the hearing and determination of this case.

The objector who represents the 5th house and was represented by Mr. Ombui, did not oppose the application nor did the 4th house which was represented by Mr. Munene.

The 1st, 2nd and 3rd houses represented by Wanderi Advocate opposed the application. The respondents filed a replying affidavit dated 30/5/2011. It was submitted that the estate comprises about 500 acres of land and the 5 houses had met severally and agreed on the mode of distribution by the administrators holding the property in trust for all the beneficiaries and that the title is already in the names of the 4 administrators. When nearly through with the process, the applicant filed an affidavit for revocation of grant and he was asked to file a further application to explain how the 1st, 2nd and 3rd respondents were

intermeddling but he did not do it. Mrs Wanderi submitted that the allegation of intermeddling is without any basis and it is vague as it is not clear who did what. Counsel urged that so far, each house has taken its portion of the estate and so has the 4th house. That the applicant has also fenced his portion, ploughed it and leased part of it out. Counsel enumerated what each of the applicant's brothers has done with their portions, and most have built and so has the applicant's mother; That each family was given 100 acres of land to till and cattle. It is urged that the applicant wants to retain a house where he used to live and to graze on other portions belonging to other beneficiaries. It was also averred that since the consent order of 18/5/2010 was made, the respondents have gone to the Land Control Board and subdivision has been done in accordance with the court order. That Eric Rogony, the applicant's real brother was present during all those transactions. It was also urged that a map was drawn showing the subdivisions and demarcation and each house asked to confine its activities to its portion and the status quo is what was on the ground that had to be maintained; That the surveyor complained of was not on his land but on the land of Benjamin who has not complained. It was the respondent's contention that the order of 18/3/2010 has been complied with as the Government Surveyor was to verify the acreage, 5th house to get 70 acres and the others to share the rest equally.

I have now considered the rival positions taken by the applicant and the 1st, 2nd and 3rd houses represented by Mrs Wanderi. The 4th respondent and the objector did not oppose the application. The essence of this application is that the respondents have not complied with the court's order of 18/3/2010. The court order was made after the court heard both the applicant and respondents on the application dated 10/2/2010. The consent order provided inter alia:-

- “1. That by consent parties are granted leave to file one further affidavit each.**
- 2. That the District Surveyor Kericho to verify the acreage of the entire land on the ground.**
- 3. That house 5 to have 70 acres and the other houses to share the rest of the land equally.**
- 4. That the 3rd Administrator to file a statement of account on the estate income before the grant was issued and all the administrators after the grant was issued.**
- 5. That status quo to be maintained until this matter is finalized.**
- 6. That costs of the District Surveyor be paid by the estate.”**

The application dated 10/2/2010 had been filed by the applicant seeking revocation of the grant issued to Jonathan, David Rogony Philip Mason and Erick Bii.

The order of 18/3/2010 provided that the status quo be maintained. It is not clear what the status quo was but it has been admitted by the respondent that after the said order was made, the land has been surveyed and the matter referred to the Land Control Board and the land belonging to the estate subdivided. Those actions obviously go against the order made on 18/3/2010. The respondent exhibited the Agenda of Kipkelion Land Control Board held on 13/7/2010 which took place after the consent order that had been reached. There is no evidence that the consent order had been set aside or varied by the parties. The respondent also contend that Erick Bii who belongs to the applicant's house was present and represented the applicant. It is worth noting that even when the applicant filed the application dated 10/2/2010, for revocation, Erick Bii was already one of the administrators and without an express consent shown to the court, it cannot be assumed that Erick Bii represented or appeared on behalf of the applicant. The applicant is one of the administrators and should have been party to the decision.

In the consent order of 18/3/2010, the Government Surveyor was only supposed to verify the acreage of the entire land on the ground. He was to do no more. It was not agreed that another surveyor be engaged to carry out the demarcation and subdivision. If the parties had agreed to do that, they should have moved the court since the matter is still pending and there were issues of accounts still outstanding and the status quo was still maintained.

Mrs Wanderi argued that even the applicant has been a beneficiary to the subdivision and should therefore not be heard to complain. The subdivision has been done contrary to the consent order of 18/3/2010. The court has no idea whether the applicant consented to the survey, demarcation and subdivision. By the respondent's own admission, they have indeed intermeddled with the deceased's estate and disobeyed the consent order of 18/3/2010. They are ordered to forthwith, stop any further

intermeddling and comply with the said order and await further directions to be taken as to the way forward. It is also worth noting that a summons for revocation was filed by the objector, dated 8/11/2010, and it is yet to be determined. Directions have been taken that the matter proceeds by way of viva voce evidence. The respondent's actions are trying to defeat that application.

The upshot is that the application dated 17/8/2011 is hereby allowed with costs being in the cause.

DATED and DELIVERED this 23rd day of September, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Otieno holding brief for Mrs Ndeda for the applicant.

Mrs Wanderi for the respondents.

Kennedy - Court Clerk.