



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
SUCCESSION CAUSE NO. 17 OF 2010
IN THE MATTER OF THE ESTATE OF KONGATO CHEBON
KIBULUNY:::::::::::::::::::::::::::::DECEASED

RULING

The application before this court for hearing is dated the 4th July, 2011. It is brought under Section 45 and 47 of the Law of Succession Act Cap 160 Laws of Kenya and all other enabling provisions of law. The prayers sought are numbered (i), (ii), (iii), (iv) and (v)

Prayers (i) and (ii) were dispensed with on 8th July, 2011.

The main prayers before this court are for:-

- (iii) A temporary preservative order to issue restraining the Respondent from felling trees, harvesting building blocks, excavating earth or in any other way intermeddle with the deceased estate's parcel of land known as MOSOP/KACHORWA/518 pending herein and determination of the petition.**
- (iv) That the respondent do account for proceeds of the unlawful excavation and sale of the building blocks and felled trees harvested from the deceased estate's suit land herein.**
- (v) Costs be provided for.**

The property in issue is the subject matter in High Court Succession Cause No. 17 of 2010. The applicant is the daughter of the deceased and the Respondent is the adopted son of the deceased.

The application is supported by the affidavit of the applicant TALAI CHERONO made on the 4th July, 2011.

The grounds are that the Respondent has trespassed on the parcel of land known as MOSOP/KAPCHORWA/518 and has felled trees, harvested stones and excavated earth and is engaging in commercial activities that are detrimental to the property, the subject matter of the Petition/Succession Cause herein.

The applicant depones in paragraph 4 of her affidavit that the subject land is meant to be used for agricultural purposes and that the Respondents commercial activities are environmentally degrading the property and making it untenable for agricultural purposes. Photographs are annexed in support of the acts of degradation.

The applicant's prayers are for preservative orders against the Respondent until the determination

of the Petition. There is also prayer for accounts to be rendered by the Respondent for the proceeds derived from the commercial activities complained of.

The application was opposed by the Respondent who filed an Affidavit in Reply where he concedes that he is in occupation of the subject property in his capacity as a beneficiary.

He further depones that the applicant and her sons demolished his house and he was forced to construct another and as he did not have money to buy building materials was therefore forced by circumstances to fell the trees and excavate the building blocks and earth to enable him build the house. He depones that all this took place way back in the sixties.

Counsel for the applicant and the Respondent both made their submissions in support and against.

Counsel for the Respondent submitted that the application was premised under the provisions of Section 45 & 46 of the Law of succession of Act and no injunctive orders can obtain. He further submitted that the application should have been brought under order 40 rule(1) or under order 37(1) of the Civil Procedure Rules. The application as it stands is defective.

Counsel further stated that the title the applicant holds and has annexed to her application reverted back to the Estate as a consequence of the Revocation and Annulment of the grant, the applicant had obtained. Therefore, the applicant and Respondent are on equal footing as beneficiaries and she has no capacity to seek the restraining orders against the respondent.

Counsel also states that photographs annexed to the applicants affidavit should have been supported by a Valuation Report, RIM and a copy of Certificate of Official Search. His prayer was that the application be dismissed and that the objector be allowed to canvass the matter of inheritance at a full hearing.

The points for determination herein are:-

- 1) **Is the application under section 45 & 47 of the Law of Succession Act properly before this court.**
- 2) **Is the Respondent then intermeddling with the subject property as envisaged by section 45(1) of the Law of Succession Act.**
- 3) **Is the applicant entitled to the preservative orders sought.**

The applicant's counsel did not file any authorities nor put in written submissions. Counsel for the Respondent filed authorities, put in written submissions and appeared before this court on the highlight the same. The court commends him for his consistency.

I have perused the application and heard both counsels for parties and note that the applicants counsel was careful in the use and choice of words that is preservative orders and never used the word injunctive orders, when making his presentation.

I find that provisions cited are appropriate. Section 45(1) of the Law of Succession Act provides for the protection and preservation for the Estate. Both parties are potential beneficiaries to the estate. It has been confirmed that the Respondent utilizes the subject property. Any of the parties can occupy and use the subject property but cannot dispose or waste the same.

From the photographs presented, I am satisfied that the same are recent photographs and cannot relate to excavations and tree fellings carried out in the sixties.

The definition of intermeddling connotes interference. I am satisfied that the applicant has made out a prima facie case of interference and that there is need to preserve the subject matter.

In the authority provided by counsel for the respondent that is **IN THE MATTER OF THE ESTATE**

OF MAJOR HUDSON WAFULA (DECEASED) through AMINO and MANCHESTER WAFULA and HALIMA MUCHEKE WAFULA - INTERESTED PARTY. HC. P & A NO. 169 NO. 2003, DULU J., which authority is persuasive and not binding on this court. The judge granted restraining orders against the intermeddler Under Section 45 of the Laws of Succession Act.

I therefore grant prayer (iii) of the application the status quo to remain but the Respondent is hereby restrained from further felling trees, harvesting building blocks and excavating earth or in any other way intermeddling with the parcel of land known as MOSOP/KAPCHORWA/518 pending hearing and determination of the Petition.

As for prayer (iv) this should proceed to be canvassed at the hearing of the Petition and the same is not granted.

Costs shall be in the cause.

**DATED AND DELIVERED AT ELDORET
THIS 14TH, DAY OF NOVEMBER, 2011**

**A. MSHILA
JUDGE**