



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Succession Cause 260 of 2005
ESTATE OF LABAN CHEMTICH CHESANG – DECEASED

RULING

This is an application under the provisions of section 45 and 47 of the Law of Succession Act, chapter 160, Laws of Kenya. It is filed by one of the sons of the late Laban Cherutich Chesang who seeks the following orders:-

1. That service of the application be dispensed with in the 1st instance.
2. That the court do issue an order preventing Shadrack F.K. Barmasai, Joseph Kangongo Cherutich and Jonathan K. Cherutich or any other person acting as their agent or servant from taking possession or otherwise intermeddling with land reference number Mosop/Lelboinet/374 pending the hearing of the application inter partes.
3. That the court do issue an order preventing Shadrack F.K. Barmasai, Joseph Kagongo and Jonathan K. Cherutich or any other person acting as their agents and or servant from taking possession and or
4. intermeddling with Land reference number Mosop/Lelboinet/373 till the petition is heard and determined.
5. Costs of the application be provided for.

The application as supported by an affidavit sworn by the applicant on 24th January, 2006. In the said affidavit, he stated as follows:-

§ That before the deceased passed away he was in occupation of land reference number Mosop/Lelboinet/373 and has continued to do so.

§ That the deceased gave him the land while he was still alive though the deceased did not make a written will.

§ That sometime in the course of this year the Respondents laid claim to the said land and have threatened to move into the land and evict him.

§ That the petition herein is still pending and that pending the hearing the deceased land and estate ought to be preserved and protected.

The Respondents oppose, the application herein. They filed three affidavits sworn as follows:-

1. Shadrack K. Barmasai sworn on 11th or 14th February,2006.
2. Joseph K. Kangongo Cherutich sworn on 30th January,2006 and
3. Josephine Jerono Barmasai sworn on 30th January,2006.

The 1st Respondent, Shdarack Barmasai, claims that he has no interest on plot No.373 and the injunctive orders are aimed not at him but his sister Josephine Barmasai. It is claimed that before the demises of the Respondent's mother, she had indicated that her 2 acres in plot 373 was to go to her daughter and grandchildren. The second Respondent, Joseph Kangongo Cherutich gives almost a similar account, namely, that what is in dispute is 2 acres of land in Mosop/Lelboinet/373 which was their mother's share and which their sister Josephine has been in occupation and using after the death of the mother.

I have considered the application before we and all the affidavits. I find that after the petition for Letters of Administration was filed in court on 24th November 2005, the same has not been advertised to date. I also find that the Applicant, the Respondents herein and Josephine Barmasai are listed as the survivors of the Estate of the Late Laban Cherutich Chesang. I did not see any letter from the chief of the area where the properties of the Estate are situated.

Section 45 of the Law of Succession Act, chapter 160 provides as follows:-

“ 45 (1) Excepted so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose of or otherwise intermediate with any free property of deceased person;.....”

Subsection (2) deals with some of the consequences of breaching or violating the provisions of section 45(1). At this threshold stage, and from the facts presented by the parties, I find that they are all children of the late Laban Cherutich Chesang. It would appear that there was some kind of family arrangement or proposals as to how the properties of the deceased was to be divided and/or distributed among the heirs and/or beneficiaries to the said Estate of course, this will have to be approved and sanctioned by this court at the appropriate time.

For The time being, the only thing the parties can do is to occupy and use the land or properties left by their father. They are not permitted to dispose of or waste the said properties. From the evidence presented to this court, I find that the Respondents named expressly in the application do not occupy or reside on Mosop/Lelboinet/373. Neither do they have any Letters of Administration to the Estate of the deceased.

It is alleged that the size of Mosop/Lelboinet is 10 acres as per the affidavit of Shadrack Barmasai. However, in the same affidavit, he claims that the family have agreed to divide the said properties as follows:-

1. Wilson Cherutich – the Applicant 4 acres
2. Haron Barmasai's family – 3 acres
3. Eric Barmasai - 3 acres
4. Kobil Chesang, son of Josephine Barmasai - 2 acres.

Total - 12 acres,

The total average according to this alleged proposed is 12 acres. This cannot be right and certainly there

is something wrong. If the land is 10 acres, then the proposed sub-division is misleading and could be the cry of this dispute. If the sub-division figures are correct, then the given size of 10 acres in the first place is wrong.

This court has no jurisdiction at this stage to distribute the Estate and cannot order a survey of the land. However, if the parties ever devise a determination of the area the land purely for temporary occupation, ;the court would be inclined to look into this provided it is by mutual consent of the parties. From the Land certificate, the land is approximately 10 acres. The question is therefore, whether the said land certificate contains the correct size or not.

For the purposes of section 45(1) I am satisfied that all the parties herein are potential beneficiaries. There is no evidence of disposal of any portion of the assets at this stage. The question that remains is whether it can be said that the Applicant's are "**intermeddling**" with the estate of the deceased. The term "**intermeddle**" means "**to interfere**". I do not think that any of the Respondents have interfered or intermeddled with the Estate's properties for purposes of section 45 of the Act. The purposes of section 45 is to ensure the protection and preservation of the properties of an Estate.

I find that the problem at this state relates to occupation and use of the lands or properties of the Estate pending the appointment of Administrators/Administrate and find distribution. At this stage, it would be risky for this court to purport to distribute the properties of the deceased or make any finding as to who is entitled to what or even who occupies what portion.

The beneficiaries as adults and, responsible citizens should be able to decide on the question of proportions etc pending the distribution of the Estate. For now, all that the court should be concerned is that no orders be given or used at this stage to dispossess of any member of the family of those portions of land they have been using when the deceased died whether directly or through their mothers.

The net result is that I find no basis for granting the orders against the Respondents as the estate of the deceased and in particular Mosop/Lelboinet/373, was not willed to any person and is still part and parcel of the Estate of Laban Cherutich Chesang. The said Estate has not been distributed. The petition herein has allegations of forgery etc.

The beneficiaries of the Estate are advised that ultimately it is them to decide their destinies. It is at this peril that they allow this petition not be advertised and the Estate finally administered and disposed of. The court cannot run their daily lives. This court shall only apply and enforce the Law when it is appropriately moved.

Other law enforcement agencies will on their part ensure maintenance of peace and security on the ground.

I therefore, do hereby dismiss the application dated 24th January,2006 with no order as to costs.

DATED AND DELIVERED AT ELDORET ON THIS 6TH DAY OF APRIL,2006.

MOHAMMED K. IBRAHIM

JUDGE