

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

PROBATE AND ADMINISTRATION CAUSE NO. 35 OF 2002.

IN THE MATTER OF THE ESTATE OF THE LATE JULIUS CHARITO

LOPOR.

MARGARET CHEPKORIR CHARITO :::::::::::::::::::: APPLICANT.

VERSUS

CHEBET KIMUGAI :::::::::::::::::::: RESPONDENT.

R U L I N G.

This is an application by way of Notice of Motion under section 3 and 3A of the Civil Procedure Act, section 45 of the Law of Succession Act and Rule 75 of the Probate and Administration Rules. It seeks for orders that the respondent, her servants and/or agents be restrained from intermeddling with plot No. 288 West Pokot, Siyoi registered in the name of the deceased pending the hearing and determination of the objection proceedings or until further orders of the court.

The grounds of the application are listed on the face of the Notice of Motion and the application is supported by an affidavit sworn on 21st November, 2004 by Margaret Chepkiror Charito who is the applicant. At the hearing both applicant and respondent were represented. Mr. Kidiavai for the applicant submitted that they were seeking restraining orders against the objector/respondent, her servants or agents from intermeddling with Plot No. 288 Siyoi/West Pokot registered in the name of the deceased. He submitted that the applicant was the sole widow and administrator of the estate of the deceased. The grant of administration had been issued but not confirmed as the objector/respondent filed objection proceedings, which are yet to be heard and determined. The objector has not taken steps to prosecute her objection proceedings, and in the meantime herself and her daughter have been trespassing on the subject land by planting crops and one of the daughters of the objector forcefully occupied one of the houses on the land. This justified the orders being sought.

Ms. Arunga for the objector opposed the application on the grounds that applicant had fraudulently obtained letters of administration, that is why objection proceedings were taken. She submitted that the objector had taken steps to prosecute her objection proceedings as on 28th July, 2003 they appeared before Commissioner of Assize Mr. Birech for directions on the hearing of the objection proceedings. She stated that there are children staying and cultivating the land, though the objector is actually a married woman and staying elsewhere. The court cannot issue orders evicting those children who are actually on the land. She referred to

an incident where the applicant demolished houses on the land which is a subject of a criminal case pending at Kapenguria court. She also submitted that applicant assaulted the respondent and her sister while they were ploughing the land and thereafter accepted to pay them compensation through elders. She suggested that the status quo be maintained.

Having considered the submissions of both counsels and perused the documents in this application, I find that the plot in question is registered in the names of two people that is SANGARA CHEPTAG and CHARITO s/o LAPOR (ownership in common ½ undivided share each) and that there is a caution dated 19th July, 2001 filed by TAPKURKOR CHEBET KIBIWOT claiming beneficial interest. This is as per the official search certificate dated 12th October, 2001 attached to the affidavit of the applicant Margaret C. Charito. Therefore the land is not registered in the sole name of the deceased Julius Charito Lopor. The land therefore does not belong to the deceased, but belongs to the deceased and another. I see no information in the documents as to the position of Sangara Cheptang whether he is alive or dead. It is currently contentious whether the subject land belongs to the estate of the deceased, unless the position of SANGARA CHEPTANG is known. It is true that the applicant has been appointed administrator of the deceased's estate, but the question is, does the subject land without any contention, belong to the estate of the deceased? I am not able to answer that question now.

In an application for the prayers sought, the applicant has to show that she has a prima facie case with probability of success. She will also have to show that she will suffer irreparable loss if the orders sought are not granted. In view of my observation on the ownership of the land, I am not convinced that the applicant has shown to me a prima facie case with probability of success. The application therefore must fail. I decline to grant the orders sought and I urge the parties to sort out the issues of preliminary objection as fast as possible, hoping that the cloud on ownership will also be sorted out in the process.

In the result therefore I dismiss the application with costs to the respondent.

Dated and delivered at Kitale this day of 2004.

GEORGE DULU.

JUDGE.