



REPUBLIC OF KENYA



**In re Estate of Recho Cheptonui Siele alias Tapropkoi w/o Kipsiele Tele (Deceased)
(Succession Cause 86 of 2009) [2024] KEHC 1248 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 86 OF 2009**

JK SERGON, J

FEBRUARY 8, 2024

**IN THE MATTER OF THE ESTATE OF RECHO CHEPTONUI
SIELE ALIAS TAPROPKOI W/O KIPSIELE TELE (DECEASED)
PHILIP KIPROTICH SIELE.....1ST PETITIONER/APPLICANT
JOHANA KIPRONO SIELE2ND PETITIONER
VERSUS
CHARLES BETT.....OBJECTOR/RESPONDENT**

RULING

1. In this cause, there are two applications which are the subject of this ruling: First, is the application dated 21st August, 2023. Second, is the application dated 11th October, 2023. In the mix also is the preliminary objection dated 16th November, 2023.
2. In the notice of motion dated 21st August, 2021 the Applicants sought for the following orders;
 - (i) Spent.
 - (ii) That pending the hearing and determination of this application inter partes, the objectors, agents and/or assigns be restrained from evicting, harassing, alienating, subdividing and/or dealing with the land parcel Kericho/Kimulot/601 in any other manner detrimental to the applicant and other beneficiaries.
 - (iii) That pending the hearing and determination of this succession cause, the objectors, agents and/or assigns be restrained from evicting, harassing, alienating, subdividing and/or dealing with the land parcel Kericho/Kimulot/601 in any other manner detrimental to the applicant and other beneficiaries.
 - (iv) That the costs be in the cause.
 - (v) Any other order that this honourable court may deem appropriate.



3. The application is premised on grounds on the face of it and the supporting affidavit of Philip Kiprotich Siele who stated that he is one of the children of the deceased and the petitioner in the instant succession cause.
4. The applicant stated that he alongside other beneficiaries of the estate have been in occupation of land parcel Kericho/Kimulot/601 and that the deceased herein was the registered owner of the said land parcel together with their elder brother who is now deceased and further that the children of the deceased have been in occupation of the said land parcel which is subject to the succession herein.
5. The applicant stated that on or about 20th August, 2023 he was notified by the village elder that a survey was to be conducted on the suit land, though they had no prior notice, he was therefore apprehensive that the survey process would be undertaken anytime and the property distributed contrary to the way the family members desire and before the instant succession proceedings are concluded.
6. The applicant therefore urged this court to intervene as the instant succession proceedings would be rendered nugatory.
7. Charles Bett, the objector/respondent, filed a replying affidavit in response to the application dated 21st August, 2023 he stated that the Philip Kiprotich Siele has never been a minor to the deceased nor a dependant of the deceased. He faulted Philip Kiprotich Siele the 1st petitioner for failing to disclose the demise of Johana Kiprono Siele the 2nd petitioner herein.
8. The objector/respondent maintained that his actions were sanctioned by the law in respect of the estate of James Moroboi Siele in Succession Case No. E34 of 2020 by this court and further that the suit land was jointly owned by the deceased herein and James Moroboi Siele and upon the demise of the deceased herein, by dint of operation of the law the jointly owned and registered property in common passed to the surviving partner under the doctrine of survivorship, in which case the surviving partner is James Moroboi Siele.
9. The objector/respondent stated that upon the demise of James Moroboi Siele, his whole estate was subject of succession proceedings in this court and a grant issued to Charles Bett vide Succession Case No. E034 of 2020 and the whole suit land transmitted to Charles Bett, the objector/respondent herein by operation of the law.
10. The objector/respondent was adamant that the provisions that govern joint tenancy and in particular the doctrine of survivorship operates to remove jointly owned property from the ambit of probate upon the demise of one of the joint tenants and further that the application did not serve any purpose as it had been overtaken by events the suit land having been transferred making the suit land not part of the estate of Tapropkoi, deceased.
11. The petitioners/applicants filed Notice of Motion dated 11th October, 2023 whereof they sought for the following orders;
 - (i) Spent.
 - (ii) Spent.
 - (iii) That the Honourable Court be pleased to issue an order for restriction at the Land Registry Bomet, restricting the Respondents, by themselves, their servants, agents, assigns, representatives or heirs restraining them from alienating, subdividing, selling, demarcating, transferring or in any way dealing with the said land parcel of land number Kericho/Kimulot/601 pending the hearing and determination of this application.



- (iv) That the Honourable Court be pleased to issue an order for restriction at the Land Registry Bomet, restricting the Respondents, by themselves, their servants, agents, assigns, representatives or heirs restraining them from alienating, subdividing, selling, demarcating, transferring or in any way dealing with the said land parcel of land number Kericho/Kimulot/601 pending the hearing and determination of the main succession cause.
 - (v) That this application be consolidated and heard together with the application dated 21st August, 2023, that is pending before this court.
 - (vi) That the costs of this suit be in the cause.
12. The application is supported by grounds on the face of it and the affidavit of Philip Kiprotich Siele who stated that he is one of the children of the deceased and a beneficiary of the estate of the deceased.
 13. The applicant stated that he alongside other beneficiaries of the estate have been in occupation of land parcel known as Kericho/Kimulot/601 and that the respondent has proceeded to irregularly and fraudulently register sub division of the said land parcel contrary to the certificate of confirmation of grant.
 14. The applicant urged this court to grant an injunction restraining the Respondent from intermingling with Kericho/Kimulot/601 which constitutes the estate of the deceased failure to which they would suffer irreparable loss and damage.
 15. There was a preliminary objection dated 16th November, 2023 filed by Charles Bett the objector/respondent against the inclusion of Kericho/Kimulot/601 as part of the estate of the deceased herein, the said land parcel was registered as a joint tenancy on 2nd May, 1973 in the names of Tapropkoi w/o Kipsiele Tele and Moroboi Siele on grounds that Kericho/Kimulot/601 is jointly owned and upon the demise of one of the joint owners, the property went to the objector by dint of operation of the law and was therefore not available for distribution as part of the estate of the deceased and the same was untenable as it offended various provisions of the law section 60, 65, 91 (1); (3) (a); (4) (b) © and (7) of the Land Registration Act No. 3 of 2012 and the rules of jus accrescendi or survivorship doctrine on joint tenancy and in any event the rules of intestacy do not apply to the joint tenancy and therefore the deceased passed nothing to her heirs.
 16. The objector/respondent filed submissions in respect to the preliminary objection, he maintained that it was not disputed that the suit property Kericho/Kimulot/601 was jointly owned and registered in the names of Recho Cheptonui Siele and James Moroboi Siele and referred to a copy of the land certificate which is on record, the suit land was not ancestral land rather it was allotted and financed by the Settlement Fund Trustee to the two as they both paid off the acquisition loan advanced to them by the fund.
 17. The objector/respondent contended that a joint tenancy creates the right of survivorship, where if any of the joint tenants dies, the the property is automatically transferred to the surviving owner, Recho Tele predeceased James Moroboi Siele and therefore title to the said property passed to him as the surviving owner.
 18. James Moroboi Siele who died on 10th August, 2010 was the father to Charles Bett the objector/applicant herein and that upon the death of a joint holder his interest passes to the survivor without probate, that the title to L.R. No. Kericho/Kimulot/601 passed on by survivorship to James Moroboi Siele (now deceased) and by virtue of a confirmed grant in Succession Cause No. E34 of 2020 the administration of the estate passed on to Charles Bett, who has since been registered.



19. The objector/respondent was adamant that the suit land did not constitute part of the estate of Recho Tele, the deceased herein and was therefore not available for distribution.
20. The objector/respondent contended that the petitioners had not demonstrated to this court that they own suit land nor that the suit land is not jointly owned and registered, he was therefore seeking to have this court uphold the preliminary objection against the petitioners.
21. The petitioners filed written submissions in respect of the application dated 21st August, 2023, 11th October, 2023 and preliminary objection dated 16th November, 2023.
22. The petitioner maintained they met the conditions set by the courts in granting and interlocutory injunction as set out in *Giella v Cassman Brown & Company Limited* (1973) E.A 358 and order 40 (1) (a) and (b) of the Civil Procedure Rules, 2010 and maintained that the deceased was one of the registered owners of the suit land, and his claim over the suit land was further fortified by the fact that he resides on the land with his family and the respondent is in the process of subdividing, transferring and interfering with the land without any reference to him, yet he is a beneficiary.
23. The petitioner maintained that in the absence of a restraining order the applicant will suffer irreparable loss and damages and that he and his family have established their homestead on the suit land where they have lived for a very long time and an eviction would have the effect of rendering them homeless and exposed to living a life of destitution and further that this would be a grave violation of the constitutional right to own property afforded by article 40 of *the Constitution*. The petitioner cited the case of *Nguruman Limited v Jan Bonoe Nielson & 2 Others* CA No. 77 of 2012 where the Court of Appeal expressed itself on the issue of irreparable harm as follows; “ ... the applicant must establish that “he might otherwise” suffer irreparable injury which cannot be adequately compensated in damages in absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie the nature and extent of injury. Speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the applicant.”
24. The petitioner argued that in the circumstances of this case, the balance of convenience tilts in favour of granting a restraining order in order to maintain status quo until the dispute is finally determined and cited the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 Others* (2016) eKLR it was held that; “ Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.”
25. The petitioner faulted the respondent for transferring the suit property in his name and further that the transfer was tailored to defeat the instant application and render it moot. The petitioner submitted that the probate court is empowered to prevent an abuse of its process by litigants while relying on rule 73 of the Probate and Administration Rules. The petitioner cited the case of *Said Ahmed v Manasseh Denga & Another* [2019] eKLR in which the court observed as follows; “where it is clear that the defendant’s act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it.”
26. The petitioner argued that the preliminary objection was incompetent as it did not meet the requirements of a preliminary objection as set out in *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696. The petitioner cited the case of *Peter Mungai v Joseph Ngaba Kuria & Another; Leah Njeri Ndichu (Interested Party)* [2022] eKLR where the court set out the test to be



applied in determining a preliminary objection as follows; “ For a preliminary objection to succeed the following tests ought to be satisfied: firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.” In the instant matter the petitioners were contesting the respondent’s allegation that the suit land was jointly owned, it was their assertion that the suit land was a tenancy in common and therefore that the preliminary objection filed on the record calls for an inquiry as to whether the suit land was jointly owned or a tenancy in common and in any event the issue of ownership was raised in the wrong forum as this court is not clothed with the requisite jurisdiction.

27. The petitioner maintained that the applications dated 21st August, 2023 and 11th October, 2023 are merited and this court ought to grant the orders sought in the two applications pending determination of the instant succession cause whereas the preliminary objection dated 16th November, 2023 is untenable and ought to be dismissed.
28. I have considered the application dated 21st August, 2023 and the other dated 11th October, 2023 plus the preliminary objection dated 16th November, 2023 and I find the sole issue for determination by this court is whether Parcel No. Kericho/Kimulot/601 constitutes part of the estate of the deceased herein. The petitioner is adamant that the suit property forms part of the deceased herein whereas the objector concedes that the suit property was jointly owned and registered in the name of Tapropkoi w/o Kipsiele and Moroboi Siele in equal shares which fact is supported by the certificate of title dated 16th January 1976 and several certificates of official search until more recently when the suit property was transferred to Charles Bett, the surviving heir of Moroboi Siele the objector herein and therefore the suit property was not ancestral land and therefore not within the ambit of the probate court.
29. The objector contended that a joint tenancy creates the right of survivorship, where if any of the joint tenants dies, the property is automatically transferred to the surviving owner, Recho Cheptonui Tele alias Tapropkoi w/o Kipsiele Tele who predeceased James Moroboi Siele and therefore title to the said property passed to the objector as the surviving owner, without probate and the same was affirmed by virtue of a confirmed grant in Succession Cause No. E34 of 2020 and the administration of the estate Moroboi Siele passed to Charles Bett, who has since been registered as the proprietor of the suit property Kericho/Kimulot/601.
30. Therefore the crux of the matter is whether the probate court has jurisdiction to determine the ownership of land in the context of the objection proceedings herein, which answer is in the negative. I find that this court cannot ascertain whether the suit property Kericho/Kimulot/601 constitutes part of the estate of the deceased herein without delving into issues of ownership.
31. The question as to the whether the suit property was owned under a joint tenancy and or tenancy in common are issues which can only be determined by the Environment and Land Court pursuant to Article 162(2) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, 2011.
32. The instant succession cause is ongoing and therefore any dispute arising between the beneficiaries and third parties in relation to the ownership of the estate property ought to be resolved before distribution which is the primary role of the probate court.
33. In *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR the Court held as follows; “ Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table.



The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant.”

34. In the circumstances, I find that the applications dated 21st August, 2023 and 11th October, 2023 have been overtaken by events as the suit property was transferred to the objector herein which fact is supported by the certificate of official search dated 22nd September, 2023.
35. In the end, I find the two Applications to be without merit. They are hereby ordered dismissed.
36. In the foregoing this court cannot entertain the preliminary objection dated 16th November, 2023 for want of jurisdiction. The upshot is that the Preliminary Objection is hereby dismissed.
37. As for order on costs is to order which I hereby do is to direct that each party meets its own.

Delivered, Signed And Dated At Kericho This 8th Day Of February 2024.

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J.K. SERGON

JUDGE

In the presence of;

C/Assistant – Rutoh

Nyaingiri for Respondent

No Appearance for the applicant

