



REPUBLIC OF KENYA



**In re Estate of Teresia Jemaiyo Bitok (Deceased) (Probate & Administration
11 of 2021) [2024] KEHC 8819 (KLR) (17 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
PROBATE & ADMINISTRATION 11 OF 2021**

JR KARANJA, J

JULY 17, 2024

RULING

1. The grounds in support of the application made by the Applicant, Linus Kibor Kiptalam, vide the summons dated 11th October 2023 for stay of these proceedings and/or further proceedings pending the hearing and determination of the Kapsabet Environment & Land Court Case No. E020 of 2023 (O/S) relating to Land Parcels No. Nandi/Kipkaren/Salient/243 and No. Nandi/Kipkaren/Salient/245, are particularized in the body of the summons and include that the Applicant is the brother of the deceased in this Succession Cause No. 11 of 2021 (i.e. the Late Teresia Jemaiyo Bitok) and that he instituted objection proceedings claiming ownership of the foregoing parcels of land allegedly registered in the name of the deceased in trust for his (Applicant) benefit thereby bringing the matter within the jurisdiction of the Environment and Land Court and for which he instituted the aforementioned declaratory suit. In the Environment and Land Court which has since issued orders for maintenance of “status-quo” pending hearing and determination of the application for injunction filed together with the originating summons dated 4th October 2023.
2. It is the Applicants contention that a stay of these proceedings is necessary so as to enable the Environment and Land Court determine whether or not the Applicant has a beneficial right in the aforementioned parcels of land thereby automatically determining these proceedings which involve the Applicant as the Applicant/Objector in the application for revocation of grant made vide the summons for revocation of grant dated 14th September 2012, against the four Respondents herein. It is in-structure to note that the originating summons filed by the Applicant in the Environment and Land Court pits the Applicant against the First Respondent herein, Elizabeth Chepkirui Bitok, and not the remaining three Respondents who are therefore not parties to that suit in which the First Respondent is sued as the Administrator or Administratrix of the estate of the late Teresia Jemaiyo Bitok (deceased).
3. The First Respondent opposes the present application on the basis of the averments and grounds set out in her replying affidavit dated 17th November 2023 wherein it is averred “inter-alia” that the deceased was the mother of the first Respondent and a sister to the Applicant and that she was the registered owner of the subject parcels of land since the year 1976 after having purchased the parcels from the previous owner or owners. That, the deceased held the titles respecting the parcels from the



year 1977 and when she passed away on 22nd April 2006, she was survived by the First Respondents and her siblings as the beneficiaries of her estate. That, throughout the period the Applicant never made any claim on the ownership of the subject parcels of land, neither has he ever been in possession of the parcels.

4. The First Respondent contended that she and her late brother, Vincent Kiprono Bitok (Second Respondent), instituted these succession proceedings and obtained grant of letters of administration intestate respecting the estate of the deceased on the 27th August 2009. That the Applicant developed greed over Parcel No. Nandi/Kipkaren/Salient/245 and registered a restriction over the same, on the 29th September 2006 and later joined these proceedings vide his summons for revocation of grant dated 14th September 2012.

The First Respondent implied in her averments that the summons for revocation of the grant was made by the Applicant in bad faith by including Parcel No. Nandi/Kipkaren/ Salient/243 for which he previously made no claim and by expressing male chauvinism in clinging to the outdated Nandi Custom of never allowing women to own land. Further, by the Applicant's deliberate action of delaying the prosecution of his objection which was in any event instituted more than eleven (11) years ago whereas these proceedings were commenced fifteen (15) years ago.

5. The application was canvassed by written submissions which were filed on behalf of the Applicant/ Objector by Isiaho Sawe and Company Advocates and on behalf of the Respondents by Gicheru and Company Advocates and was anchored on the provisions of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

Whereas Section 47 provides for the jurisdiction of this court to deal with any dispute under the Act, Rule 73 provides for the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. This court, having considered the application on the basis of the supporting grounds, the rival submissions and the history of the matter is of the view that the Applicant is not deserving of the exercise of this court's discretion in his favour for reasons that, the application is for an order of stay of the proceedings or further proceedings of this succession case pending the hearing and determination of the land case filed at the Environment and Land Court in Kapsabet, yet by dint of Article 162(2) of the Constitution the Environment and Land Court Act 2011 was enacted to provide for matters relating to land and the environment and under which the jurisdiction of the Environment and Land Court to hear and determine such matters is provided for in Section 13 of the Act.

6. The said provision confers jurisdiction to the Environment and Land Court (E & L) to hear and determine questions pertaining to ownership of land. Consequently, such question would be outside the ambit and jurisdiction of a succession court such as this one which under the Law of Succession Act, and the Probate and Administration Rules, is conferred with jurisdiction to hear and determine questions on the assets of a deceased person, the survivor's of the deceased and all those persons with beneficial interest in the estate of the deceased including distribution of the assets amongst the survivors and/or dependants/beneficiaries.

In the present circumstances, the function of this court is to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the estate which in this case includes the subject parcels of land more specifically Parcels No. Nandi/Kipkaren Salient/243 and Nandi/Kipkaren/Salient/245 (See, In Re- Estate of Alice Mumbua Murua (Deceased) [2017] eKLR).

7. The originating summons filed by the Applicant in the Environment and Land Court was annexed to the Applicant's supporting affidavit. It is dated 4th October 2023 and seeks declaratory orders against the First Respondent as the Administratrix of the estate of the deceased which includes the



aforementioned parcels of land. The enabling provision of the law under which the summons were brought was Order 37 of the Civil Procedure Rules. Since this court cannot grant orders made under the said provision of law in relation to ownership of the subject parcels of land, it cannot therefore make orders of stay of proceedings in the present matter based on the existence of the land case at the Environment and Land Court.

In a succession cause, such orders would only be granted with much caution and only in exceptional circumstances and most importantly within the provisions of the Law of Succession Act.

8. In particular, Rule 41(3) of the Probate and Administration Rules provides that: -

“where a question arises as to the identity share, or estate of any person claiming to be beneficially interested in or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, Rule 1 of the Civil Procedure Rules and may therefore, subject to the provision to Section 71(2) of the Act, proceed to confirm the grant.”

9. This court’s opinion is that the foregoing provision provides a window for stay of proceedings in a succession cause but only with regard to the part of the estate property which is in dispute. In that way the entire proceedings would not be subjected to an order of stay if it is granted regard being given to the fact that stay of proceedings is a matter of judicial discretion which is normally exercised in the interest of justice taking into consideration the need for expeditious disposal of cases, whether the Applicant has an arguable case and whether the application has been brought expeditiously.

As a matter of necessity the estate property must always be properly identified and where issues of ownership of the estate property are raised in a succession cause, they ought to be resolved before such property is distributed. Such issues must however, be “prima-facie” valid and this is the more reason why Rule 41(3) of the Probate and Administration Rules exists.

10. These proceedings were commenced on the 9th May 2008, with the filing of the petition for grant of letters of administration Intestate respecting the estate of the deceased by the First and Second Respondents. The estate comprised of several parcels of land described as Nandi/Kipkaren Salient/241, 242, 243, 245 and 250. The Respondents and the others were listed as the survivors of the deceased and the beneficiaries of the estate which includes the two parcels of land subject of the proceedings in the aforementioned land case instituted in the Environment and Land Court by the Applicant who at the time was not a party to these succession proceedings, neither was he listed as a beneficiary and/or dependant and/or creditor of the estate.

Ultimately, on the 27th August 2009, the grant of letters of administration intestate was issued to the Frist and Second Respondents, but three or slightly more years thereafter, the Applicant filed an application for revocation of the grant vide the summons for revocation of grant dated 14th September 2012. His interest in the matter as could be deciphered from the supporting affidavit was the estate property Land Parcel No. Nandi/Kipkaren Salient/245 which according to the annexed certificate of official search was registered in the name of and belonged to the deceased since the year 1977, but in the year 2006 the Applicant registered a restriction thereon.

11. The summons for the revocation of the grant was followed by several other applications by the Applicant against the Respondents which culminated with the directions given by the court on 25th February 2019 to have the summons for revocation of grant (objection) heard by way of “viva-voce”



evidence. The hearing effectively commenced on 24th May 2021 with the Applicant's testimony as PW1 as well as testimonies of his witnesses (PW2 and PW3). Thereafter, the matter was adjourned for further hearing of the Applicant/ Objector's case and this remained a trend such that the Applicant's case remained unclosed thereby stalling further hearing and determination of the objection. This, notwithstanding, the Applicant filed the present application vide the summons dated 11th October 2023 seeking stay of these proceedings on the basis of a separate suit filed in the Environment and Land Court vide the originating summons dated 4th October 2023.

12. It is clear from all the foregoing that the present application is not made in good faith and is intended to further delay the expeditious disposal of this cause and indeed, the Applicant's summons for revocation of grant coming as it does eleven (11) years after the summons for revocation of grant was filed and four (4) years after the hearing of the summons commenced.

Ironically, this application is anchored on Rule 73 of the *Probate and Administration Rules*, yet it is the Applicant who is abusing the process of the court by filing several unnecessary applications and deliberately delaying the expeditious disposal of this cause. He therefore becomes a victim of his own application, hence, poetic justice.

It is for all the foregoing reasons that this court's discretion cannot be exercised in his favour. Consequently, this application is hereby dismissed with costs to the Respondents. The Applicant must now take the "devils alternative" to decide either to withdraw his objection in favour of his suit in the Environment and Land Court or to withdraw the suit in favour of the objection.

DELIVERED AND DATED THIS 17TH DAY OF JULY 2024

J. R. KARANJAH,

JUDGE

