



REPUBLIC OF KENYA



Koskey v Sang (Succession Cause 66 of 2011) [2023] KEHC 20925 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 66 OF 2011**

JK SERGON, J

JULY 19, 2023

BETWEEN

JOSEPH KOSKEY APPLICANT

AND

SAMWEL SANG RESPONDENT

RULING

1. The Applicant herein lodged an originating summons dated November 16, 2018 under order 37 rule 1 & 2 of the [Civil Procedure Rules](#), 2010 and all enabling provisions of the law, seeking the following reliefs;
 - i. A declaration that the applicant is entitled to 8 acres on the site on which his mother purchased.
 - ii. There be an order that the applicant be compensated with 11 acres in case of relocation to the new site.
 - iii. Permanent injunction restraining the respondent by himself, his agents, servant or any person acting under his instructions from entering, building, cultivating, alienating and/or otherwise interfering with the portion of 8 acres in a manner prejudicial to the applicant.
 - iv. General damages in trespass together with interests thereon at court rates from the date of judgment.
 - v. Costs of this application be provided for.
2. The summons is supported by the affidavit of Joseph Koskey the applicant herein and other grounds to be adduced at the hearing thereof.
3. The Applicant avers that in or about 1962, his late mother purchased some 8 acres of land comprised in L.R. No. 5447 from the late Micky Kipyegon Sang (deceased), the father of the respondent therein,



- annexed hereto and marked “JK-1” is a copy of acknowledgement of payment of the balance of the purchase price by Micky Sang.
4. The Applicant avers that upon completion of the agreement of sale, the late Micky Kipyegon Sang upon receipt of Kshs. 500/= allocated his mother 8 acres of the suit property which she took possession and put up a residential house which is still intact to date, annexed hereto and marked “JK-2” is a digital photograph showing the said house.
 5. The Applicant avers that sometime in 1994, the deceased changed his mind and wanted to relocate his late mother from the site of 8 acres she had bought to a different area namely plot no. 3 measuring 11 acres in lieu of 8 acres in which she had previously bought, annexed hereto and marked “JK-3” is a copy of the sub division plan showing where plot no. 3 is standing.
 6. The Applicant avers that they challenged the relocation of their mother by lodging a complaint at the Chief’s office in the year 1994. The applicant avers that the dispute was resolved by a panel of elders that his mother would only move to the new allocation at plot no. 3 if she was assured that she will be given 11 acres at the new location, annexed hereto and marked “JK4” is a copy of the proceedings and verdict of the panel of elders’ decision held on 31st May, 1994.
 7. The Applicant avers that the Respondent jointly with his 8 brothers vide a plaint in June, 1994 moved to court and filed Kericho CMCC No. 189 of 1994 against their deceased father in which they sought amongst other an order restraining their deceased father from disposing or in any way alienating Plot No. 5447 and in particular 8 acres to us, annexed hereto and marked “JK5” is a copy of the plaint in respect to Kericho CMCC No. 189 of 1994 and that no favourable orders were given in favour of the Respondent and his brothers in regards to the said matter.
 8. The Applicant avers that in or about 2010, he filed Citation Cause No. 18 of 2010 citing the Respondent’s mother namely Ann Micky Sang to take out letters of administration but neither the Respondent nor his mother took any action and as a result, he was given an order allowing him to file and apply for letters of administration of the estate of Micky Kipyegon Sang, annexed hereto and marked “JK6” is a copy of the said order.
 9. The Applicant avers that upon obtaining the said order, filed the instant succession proceedings and the same was confirmed on July 30, 2014 and he was given 8 acres of the suit property, annexed hereto and marked “JK7” is a copy of the certificate of confirmation of grant, and after confirmation of the aforesaid grant, he invited the Respondent together with other beneficiaries with a view to having the estate distributed in accordance with the confirmed grant.
 10. The Applicant avers that sometime in March, 2016 the Respondent in liaison with other beneficiaries of the estate proposed a subdivision plan on the parcel of land, and asked him for vacant possession of 8 acres of the suit property and that he should move to plot no. 3, a new site as was resolved by the panel of elders, annexed hereto and marked “JK8” is a copy of the proposed subdivision plan showing the site the Respondent wants the applicant to move to.
 11. The Applicant contends that being a bona fide purchaser of the 8 acres of the suit property he is entitled to exclusive possession and/or absolute right over the same and that if the Respondent is adamant that the Applicant herein should move to the new site, he should be compensated with 11 acres in the new site as the new site is bare land and not as good as the suit property.
 12. The Respondent filed a replying affidavit in opposition to the applicant’s application dated November 16, 2018. The replying affidavit was sworn by Samwel Kiprugut Sang the Respondent herein.



13. The Respondent avers that the application is fatally defective, incompetent, bad in law and an abuse of court process
14. The Respondent avers that the property in question is not registered in his name nor that of his late father Micky Sang but in the name of Inglewood Farm Limited, the registered proprietor, annexed hereto and marked "SKS 1" is a copy of the title deed and furthermore the applicant herein had not annexed a search certificate as required by law that he, indeed was the registered proprietor.
15. The Respondent contends that the entire pleadings were strange in succession proceedings which otherwise commence by way of revocation of grant, objection or protest and further that the instant application rests within the confines of civil proceedings and in the ELC not in the succession proceedings.
16. The Respondent avers that the orders being sought are vague in nature and incapable of being granted on the face of it.
17. The Respondent contends that the provisions of the law under which the instant application was brought does not hold water as the applicant had been away for 35 years, since 1984 and has never set his foot on the suit property, annexed hereto and marked as "SKS 2" is a copy of a picture of his house which he abandoned in 1984 and left for Kuresoi-Nakuru County where he currently lives.
18. The Respondent contends that the applicant has not been in exclusive use and occupation of the land being claimed for a period in excess of 12 years prior to filing this cause which is a legal requirement if the instant cause is to proceed and further that the essence of the originating summons is to seek an order of adverse possession of the land in which the applicant has been in exclusive use, the claim for relocation is strange to the law and drafters of the *Civil Procedure Act*, therefore, the instant application was strange to the law.
19. The Respondent avers that the applicant's father Kipkoskei Arap Bigen bought 8 acres from his father in the early 1960s and was allocated the said 8 acres which his step brothers from the 2nd house are currently occupying 4 acres and have made substantial developments.
20. The Respondent avers that the applicant buried his son on the portion belonging to him, the applicant's sister was grazing her cows on the remaining 3 acres belonging to the applicant as he had already sold 1 acre to a third party, hence his claim to be relocated has no basis.
21. The Respondent avers that the panel of elders overstepped their mandate by deliberating on a non-existent title.
22. The Respondent avers that the applicant is a litigious man and has filed several suits in court which were dismissed as being incompetent.
23. The respondent avers that the instant suit was incompetent in that he has not filed a representative suit, he has not filed the instant suit on behalf of his late father Kipkoskei Arap Bigen who was the purchaser nor filed the suit on behalf of the estate of the estate of his late father.
24. The respondent avers that the reasons for compensation has not been advanced or that he has been in occupation of the land 11 acres for a period in excess of 12 years.
25. The respondent avers that the allocation of 8 acres of land on the grant was made in 1982 and the 2nd house already settled on the land, the issue as regards to 11 acres had never come up in any of the meetings nor a request made thereof and further that the alleged meeting of 1994 was invalid in that the Respondent's late father was not invited to the meeting and further that the resolution passed



in the same meeting was incapable of being implemented as the Respondent's late father was not the registered proprietor of the suit land.

26. The respondent avers that the present applicant is a lone ranger, his brothers have no interest in the present suit as they are already settled and further that he was not aware of the Citation Cause No. 18 of 2010.
27. The respondent maintains that the beneficiaries of Micky Sang and the brothers of the applicant have agreed on how the estate of his late father is to be distributed, a proposal on the distribution of the estate herein has been agreed by all the people save for the applicant, annexed hereto and marked as "SKS-3" is a copy of the proposal sketch map and minutes of the meeting held by the applicant's brothers.
28. I have considered the originating summons dated November 16, 2018, the supporting affidavit in support thereof, the replying affidavit in opposition to the instant application and the parties oral submissions and I find that this court is functus officio in relation to the suit property L.R No. 5447 as this court issued a certificate of confirmation of grant on July 30, 2014. *In re Estate of Daniel Khasievera Anusu (Deceased)* [2022] eKLR Musyoka J. observed as follows; "Once a grant is confirmed, the work or role of the probate court would largely be at an end. It is not the role or function or mandate of the probate court to superintend over how the land is to be thereafter distributed on the ground. The provisions of the *Law of Succession Act*, cap 160, Laws of Kenya, and the Probate and Administration Rules do not deal with that. They do not provide for it. The probate court is pretty functus officio, once it confirms the grant."
29. Accordingly, I find that this application lacks merit. Let the applicant move the appropriate court, the Environment and Land Court. The originating summons dated November 16, 2018 is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JULY, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Miss Kitur holding brief for Kirui for the Objector

No Appearance for Migiro for the Petitioner

