



REPUBLIC OF KENYA



**In re Estate of Willam Kiptanui Birir alias Kiptonui Arap Birir (Deceased)
(Succession Cause 3 of 2020) [2023] KEHC 23768 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 3 OF 2020
JK SERGON, J
OCTOBER 12, 2023**

BETWEEN

**RONNY TANUI 1ST APPLICANT
BETTY CHEPKEMBOI BIRIR 2ND APPLICANT
DAVID TONUI KIPKEMOI 3RD APPLICANT
MARY CHEBET BIRIR 4TH APPLICANT
SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
WILLIAM KIPTANUI BIRIR ALIAS KIPTONUI ARAP BIRIR**

AND

**JONATHAN BIRIR 1ST RESPONDENT
ALFRED MUTAI 2ND RESPONDENT**

RULING

1. The application for this court's determination is a summons dated 31st August, 2022 seeking the following orders;
 - i. A declaration that the Respondents are intermeddling with the property of the estate of William Kiptanui Birir alias Kiptonui Arap Birir;
 - ii. An order of injunction be and is hereby issued restraining the Respondents, their agents, personal representatives and/or any other person from intermeddling, dealing and/or interfering with the assets of the estate of the late William Kiptonui inter alia land known as Kericho/Kapsuser/221;



- iii. An order of injunction be and is hereby issued directing the Respondents to remove the gate and/or all other barriers mounted thereof including the fence on a portion of land title number Kericho/Kapsuser/221 and grant the said portion of land known as Kericho/Kapsuser/221;
 - iv. An order directing the Respondents jointly and severally to pay the Applicants the sum of Kshs. 1,224,192/= with interest at commercial rates being the income they have deprived the estate of the deceased in intermeddling with land known as Kericho/Kapsuser/221 from November 2020 to date.
 - v. The costs of this application be provided for.
2. The Application is based on the grounds stated on the face of it and the facts deponed in the supporting affidavit sworn by Mary Chebet Birir, a co- administrator of the estate of William Kiptonui Birir alias Kiptonui Arap Birir.
 3. The Applicant avers that the applicants are administrators of the estate of the deceased pursuant to a grant of letters of administration intestate issued on 1st April, 2021.
 4. The Applicant avers that the deceased is the registered proprietor of all that parcel of land known as Kericho/Kapsuser/221 which forms part of his estate and at all times utilized the same as his matrimonial home.
 5. The Applicant avers that the deceased and applicants have been practicing large scale tea farming on Kericho/Kapsuser/221 for about 4 decades and selling tea to KTDA Tegat Tea Factory and Kabianga Tea Factory and further that the surviving spouse of the deceased, Ludiad Chemutai Birir, has been running the farm and utilizing its proceeds for her upkeep and maintenance after the demise of William Kiptonui Birir.
 6. The Applicant avers that the 1st Respondent is a creditor to the estate and only entitled to 2.5 acres of the land known as Kericho/Kapsuser/221 which portion is listed by the applicants herein as a liability to the estate and further that the 1st Respondent has been in possession of the said portion of land for about 4 decades and constructed a homestead for his family on the said portion.
 7. The Applicant avers that at all material times, the area and/or portion of land the 1st Respondent is entitled to on the estate is well demarcated and identified and neither the 1st or 2nd Respondent have been in occupation of any other portion of the estate save for the 2.5 acres.
 8. The Applicant avers that the deceased died on 6th December, 2015 after which on or about November, 2020 the Respondents unlawfully entered, assumed and took possession of another portion of the estate, mounted a gate at the entrance of the said portion and a fence denying the applicants (administrators of the estate) access to the same.
 9. The Applicant avers that the Respondents have not only been harvesting and selling tea leaves from the encroached section of the estate depriving the estate from income thereof, they have also pruned a section of the tea bushes on the encroached section.
 10. The Applicant avers that the Respondents actions are tantamount to intermeddling with the property of the deceased and a result of the Respondent's actions the estate has lost approximately 41, 633 kgs of tea and deprived the estate income approximately in the sum of Kshs. 1,244, 192/= and it was therefore in the interest of justice and imperative that the Respondents are compelled to pay the said amount to the estate with interest at commercial rates and be restrained from further intermeddling with the estate.



11. The Applicant avers that the Respondents actions have not only denied the estate income from its assets but have also restrained the applicants from executing their duties as co-administrators of the estate thereby exposing the estate to waste.
12. The Respondent filed a replying affidavit dated 15th February, 2023 in opposition to the chamber summons dated 31st August, 2022 sworn by Alfred Kipkorir Mutai.
13. The Respondent avers that whereas the land parcel Kericho/Kapsuser/221 is registered in the names of Kiptonui A. Birir the deceased herein however its registration did not confer absolute ownership but as a trustee for himself and all other beneficiaries of the estate of Maritim Fundi and further that the deceased, 1st Respondent together with Richard Kipkurui Birir are siblings and legitimate heirs of the estate of Maritim Fundi thus entitled to a share in the ancestral land comprised in Kericho/Kapsuser/221 & Kericho/Cheborgei/161 as mutually agreed and resolved in a family meeting convened on 6th June, 2020.
14. The Respondent avers that contrary to the allegations that the 1st Respondent is a creditor to the estate herein and entitled to a portion measuring 2.5 acres in land parcel Kericho/Kapsuser/221, the 1st Respondent was entitled to 5.35 acres in Kericho/Kapsuser/221 and further that the deceased and the 1st Respondent are biological brothers and their dispute over ancestral land in the subject property has been a subject of deliberations in several meetings convened by the parties and clan members and the same was resolved in a meeting convened on 4th July, 2020.
15. The Respondent avers that the actual acreage of ancestral land registered and held in trust for the benefit of all the beneficiaries of Maritim Fundi comprised in land parcel Kericho/Kapsuser/221 is 14.82 acres which was duly ascertained by the surveyor on 5th September, 2020 and further that the decision to survey and identify the shares of each of the beneficiaries of the estate of Maritim Fundi was mutually agreed and resolved in the family meeting convened on 8th August, 2020.
16. The Respondent avers that the exercise of resurvey, demarcation and fixing of beacons to mark the boundaries of the beneficiaries' respective shares in the subject land Kericho/Kapsuser/221 was done by the County Surveyor. The exercise was done in the presence of all the beneficiaries and Area Chief Mr. Simon Sinei as scheduled on 5th September, 2020 and on the conclusion of the exercise the 1st Respondent became entitled and took possession of an additional portion measuring 5.35 acres in Kericho/Kapsuser/221.
17. The Respondent avers that the deceased herein in his lifetime was fully aware that he was not the absolute proprietor of the subject land but had neglected and/or reneged to share out portions of the ancestral land registered and held in trust by himself amongst the rightful beneficiaries of Fundi Maritim despite several demands and pleas from his other siblings including the 1st Respondent.
18. The Respondent avers that contrary to the applicants assertions, the entry, possession and/or occupation of the alleged additional portion sometime in November, 2020 was in the knowledge and/or consent of the applicants after a series of family meetings which the applicants actively participated in before the final resolution and further that the use, occupation and possession of the additional portion measuring 5.35 acres in the subject property which was voluntarily ceded by the applicants to the 1st Respondent after which the 1st Respondent erected a fence and assumed possession thereof as his rightful share of ancestral land.
19. The Applicant filed a supplementary affidavit dated 24th July, 2023 sworn by Mary Chebet Birir in response to the replying affidavit by the respondents.



20. The Applicant maintained that the deceased was the registered proprietor of the subject land which formed part of his intestate estate and at all times utilized the said parcel of land as his matrimonial home and at no point in his lifetime did he hold the subject land in trust for himself and/or other beneficiaries of the estate of Kibolbei Arap Moritim.
21. The Applicant reiterated that in the event there is a land dispute subsisting between the 1st Respondent and the deceased and/or the administrators of the estate of the deceased, the same could only be heard and determined by the Environment and Land Court and not in the instant succession proceedings.
22. The Applicant contended that in the event the subject land constitutes an asset of the estate of Kibolbei Arap Moritim, it is only the administrator of the said estate can challenge the proprietorship of the late William Kiptonui Birir alias Kiptonui Arap Birir in proceedings commenced before the Environment and Land Court and not the 2nd Respondent as he lacked the requisite locus standi.
23. The Applicant conceded that the deceased, the 1st Respondent and Richard Kipkurui are siblings. The Applicant contended that he was not aware of any succession proceedings in the estate of Kibolbei Arap Moritim nor a certificate of confirmation of grant issued by the court in respect of the estate declaring Kericho/Kapsuser/221 as ancestral land or that the deceased was holding title of Kericho/Kapsuser/221 in trust for the estate of the late Kibolbei Arap Moritim or the beneficiaries of the estate.
24. The Applicant conceded that the dispute concerning the subject land spanning over five decades has been subject to various meetings, including one that dates back to 2001.
25. The Applicant contended that in the meetings held in the recent past to wit the one held on 4th July, 2020 the family of the deceased was not represented as all members were not notified of the meeting and hence did not participate in selecting the members present in that meeting allegedly resolving the dispute and in subsequent meetings attended there were no deliberations or resolutions in respect of the alleged dispute as the members invited by the 1st Respondent had made final resolutions in previous meetings, objections were disregarded and the attendance was geared towards asking the applicants to cooperate and informing them of the resolutions already made.
26. The Applicant contended that they did not instruct the County Surveyor in resurveying, demarcating or fixing of beacons to mark boundaries of the subject land, an asset of the deceased.
27. The Applicant reiterated that the deceased is the absolute proprietor of the subject land and that the process of identifying, demarcating and subsequent allocation the County Surveyor was not mutually agreed upon by the parties herein and the entire exercise by the County Surveyor is unlawful, fraudulent and amounted to further intermeddling by the Respondents, County Surveyor and all members present in the meetings.
28. The Applicant deponed that they filed a complaint with both the Area Chief and administration police reporting the respondent's encroachment and subsequent takeover of a portion of the subject land.
29. The Applicants filed written submissions which I have considered.
30. The Applicants maintain that the deceased herein is the registered absolute proprietor of the Kericho/Kapsuser/221 they relied on section 26 of the [Land Registration Act](#) which provides that a certificate of title to be held as conclusive evidence of proprietorship and therefore sought to have this court take cognizance of the title issued on 23rd March and held by the deceased as *prima facie* evidence that he is the absolute and indefeasible owner of the land subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate.



31. The Applicants contended that the subject land constitutes part of the estate of the deceased and the above notwithstanding the Respondent's assertions raised a question of ownership of the subject land inter alia whether the subject land is ancestral land and whether the deceased was holding it in trust to the estate of Fundi. The Applicants cited the case of In [*Re Estate of Stone Katbuli Muinde \(Deceased\)*](#) and *In Re Estate of Mbai Wainaina (Deceased)* and contended that these issues were within the jurisdiction of the Environment and Land Court and that this court being the probate court did not have the requisite jurisdiction to hear and determine the same.
32. The Applicants reiterated that the deceased herein is the absolute and indefeasible owner of the property as the title save for the 2.5 acres already ceded to the 1st Respondent.
33. The Applicants contended that the Respondents were raising issues in respect of the estate of Kibolbei Arap Maritim which is different from the estate of Willam Kiptanui Birir Alias Kiptonui Arap Birir. The Applicants further contended that neither the 1st and 2nd Respondent were administrators of the estate of Fundi hence did not have the requisite locus standi to bring forth the claim on behalf of the estate of Kibolbei Arap Maritim. They cited the cases of [*Edema & 2 Others v Edema & 5 Others*](#), John [*Marete Kirema & Another Gladys Karimim M'Muthamia & 3 Others*](#).
34. The Applicants contend that the Respondents are intermeddling with the property of the deceased herein in entering, assuming, taking possession of an additional portion of the land known as Kericho/Kapsuser/221, mounting a gate and fence with the assistance of the County Surveyor thereby denying the applicants access or use to the portion and depriving the estate of the income generated in the tea leaves on the encroached portion save for the 2.5 acres voluntarily ceded to the Respondents, the same having been listed as a liability to the estate and the Applicants were not contesting this as the portion was well demarcated and identified. The Applicants maintained that the instant application was premised on the provisions of section 45 of the [*Law of Succession Act*](#). They cited the following cases [*Veronica Njoki Wakagoto \(Deceased\)*](#), [*Gladys Nkirote M'itunga v Julius Majau M'itunga and Katumo & Another*](#).
35. The Applicants contended it is settled that this court has the jurisdiction to issue an order of injunction per section 47 of the [*Law of Succession Act*](#) and rule 73 of the [*Probate and Administration Rules*](#) and further that they were entitled to the order of injunction as sought and cited the Court of Appeal case in [*Floris Piezzo & Another v Giancarlo Falasconi*](#) cited *in re Estate of Gideon Kibitok Tarus (Deceased)*.
36. The Applicants set out the principles this court should consider in the application for an injunction in [*Giella v Cassman Brown & Company*](#).
37. The Applicants contended that they as administrators pursuant to section 83 (b) of the [*Law of Succession Act*](#) were duty bound to get in all free property of the deceased, however, the respondents actions were restraining the applicants in administering their duties, denying the applicants entry to the portions of land, user of the said land thereby depriving the estate of income from the tea leaves, they therefore had a *prima facie* case with a probability of success and cited the case of [*Mrao Ltd First American Bank of Kenya Ltd & 2 Others*](#).
38. The Applicants contended that the respondents' criminal actions are continuous and were causing irreparable damage and loss to the estate and further that there is enormous intrinsic sentimental value and attachment to the property which cannot be compensated by an award of damages.
39. The Applicants argued that the balance of probability tilted in their favour as it was imperative to safeguard the property of the estate from wastage and safeguard its income pending future litigation while citing the case of [*Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 Ors*](#).



40. The Applicants while citing the following Court of Appeal cases of *Kenya Breweries Ltd & Another v Washington O. Okeya* and *Nation Media Group & 2 Others v John Harun Mwau* reiterated that they were seeking a mandatory injunction and that this was a case characterized by the existence of special circumstances and further that the applicants were duty bound to collect and preserve the estate whereas the respondents were required to account to the administrators of the estate the income they had collected and/or derived as a result of the intermeddling.
41. I have considered the application and supporting affidavit, dated 31st August, 2022, the replying affidavit in opposition to the application, the supplementary affidavit filed as a rejoinder and the submissions filed on record and I find that the sole issue for this court's determination is whether the respondents actions are tantamount to intermeddling, dealing and/or interfering with the assets of the estate of the late William Kiptonui specifically land known as Kericho/Kapsuser/221. I have studied the pleadings and the annexures keenly and I find that the answer is in the negative.
42. I find that the applicants conceded that the deceased herein, the 1st Respondent and Richard Kipkurui are siblings and also that there has been a subsisting dispute concerning the subject property spanning over five decades and the same has been subject to various meetings.
43. I find that the fact that the 1st Respondent has been in occupation and/or possession of 2.5 acres of the subject property is not contention; rather, it was the occupation and/or possession of the additional portion of the subject property sometime in November, 2020. I find that the same was in the knowledge and/or consent of the applicants after a series of family meetings which the applicants were present as per the records of minutes of the said meetings and therefore were aware of the resolution on the use, occupation and possession of the additional portion measuring 5.35 acres in the subject property which was voluntarily ceded by the applicants to the 1st Respondent and it is therefore untenable that the same applicants have moved this court feigning ignorance of the state of affairs of the subject property.
44. I have taken cognizance of the claims on the ownership of the subject property, on one hand, the applicants assert that the deceased herein is the absolute and indefeasible owner of the subject property save for the 2.5 acres already ceded to the 1st respondent and that the same has been listed as a liability in the estate of deceased, on the other hand, the respondents maintain that the subject property is ancestral land which was registered and held in trust for the benefit of all the beneficiaries of Maritim Fundi. The claims on ownership of the subject property can only be heard and determined by the Environment and Land Court and not in the instant succession proceedings, the probate court is not clothed with jurisdiction to hear and determine land disputes as such this court cannot entertain proceedings on the ownership of the suit property.
45. Accordingly, I dismiss the application dated 31st August, 2022 with no order as to costs.

DELIVERED, SIGNED AND DATED VIRTUALLY THIS 12TH DAY OF OCTOBER, 2023.

J.K SERGON

JUDGE

