



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 265 OF 2001**

**IN THE MATTER OF THE ESTATE OF CHELAGAT ARAP CHEPTOO (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR MANDATORY INJUNCTION**

**BETWEEN**

ANNE JERONO JOSE.....1<sup>ST</sup> APPLICANT

MARTHA CHEPKOSGEI YATOR.....2<sup>ND</sup> APPLICANT

**AND**

SAMWEL KIPLAGAT CHEPKWONY.....RESPONDENT

**RULING**

[1] The Notice of Motion dated 7 January 2021 was filed by the two applicants, **Anne Jerono Jose** and **Martha Chepkosgei Yator** pursuant to the provisions of **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** as well as **Order 40 Rules 2 and 4(a)**, and **Order 50 Rule 1** of the **Civil Procedure Rules, 2010**. They seek the following orders:

[a] Spent

[b] That the Court be pleased to compel the defendant herein to transfer the title for their respective portions of the property known as **Kiplombe/Kaunet/Block 4 (Katani) 17** measuring 5.5 and 0.4 acres; and that pending the hearing and determination of the application *inter partes* there be a temporary injunction restraining the respondent from entering into, constructing upon, selling, subdividing, registering, charging or otherwise encumbering the said pieces of land.

[c] That the costs of the application be in the cause.

[2] The application was premised on the grounds that the applicants are the beneficial owners of their respective portions of the estate property, having bought the same for valuable consideration from **Mary Jebet Chepkwony and Francis Kiplimo**, as the administrators of the estate of the deceased. In the case of the 1<sup>st</sup> applicant, it was her assertion that she has been in possession and occupation of her portion since the year **2000**; and that the respondent has deliberately failed to transfer the land to her. She further mentioned that she is now in need of funds to educate her son who is studying in the United States of America; and that she is desirous of selling a portion of her land for the purpose; which she is unable to do without title.

[3] In support of the application, the applicants relied on the affidavit of the 1<sup>st</sup> applicant sworn on **7 January 2021** and the documents annexed thereto; notably the sale agreements marked dated **23 November 2001** and **19 December 2020**. It was the averment of the 1<sup>st</sup> applicant that the respondent is taking advantage of her old age to sabotage the process of transfer of title; and that he has consistently ignored summons from the area chief and assistant county commissioner. She is consequently apprehensive that she may be evicted from the property unless the orders sought are granted.

[4] Although duly served with the application and hearing notice for **1 February 2021**, the respondent opted to file no response to the application. He likewise failed to attend court to defend himself; whereupon the matter proceeded *ex parte*.

[5] A perusal of the court record reveals that the deceased, **Chelagat Arap Cheptoo**, the registered owner of all that parcel of land known as **Kiplombe/Kaunet/Block 4 (Katani) 17**, measuring 19.49 Ha, died intestate on **22 November 1997** and that he was survived by his widow **Mary Jebet Chepkwony** and four sons and one daughter whose names were supplied in Form P&A 5 as hereunder:

[a] **Eunice Barabara**

[b] **Samuel Kiplagat Chepkwony**

[c] **Francis Kiplimo**

[d] **Amos Kipkoech Lagat, and**

[e] **Daniel Kibet Kogo**

[6] The court record further shows that the Petition for Grant of Letters of Administration Intestate was filed herein on **7 September 2001** by the widow, to whom a Grant was issued on **21 February 2003**. The said Grant is yet to be confirmed; and it can only be deduced, from the documents annexed to the application that the delay in confirmation was partly due to the demise of the sole administrator, **Mary Jebet Chepkwony**. One of those annexures is a letter dated **23 December 2020** written by the Chief of Kibulgeny Location, stating that **Mary Jebet Chepkwony** passed away on **22 December 2006**. A Certificate of Death No. 354830 to that effect was also annexed to the 1<sup>st</sup> applicant's affidavit.

[7] Whereas **Section 81** of the **Law of Succession Act**, provides for continuity in the event of the death of an administrator, it specifically envisages situations where there are several administrators. It states that:

**“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them...”**

[8] Whereas there is on record an application by the respondent, **Samwel Kiplagat Chepkwony**, to be substituted as the petitioner and administrator of the estate of **Chelagat Arap Cheptoo** in place of **Mary Jebet Chepkwony**, that application is yet to be prosecuted to conclusion. Clearly therefore, it is manifest that the application for a mandatory injunction to compel **Samwel Kiplagat Chepkwony** to effect a transfer in favour of the applicants is entirely misconceived as he has no mandate to do that which the applicants require of him; not only because he is yet to be appointed as an administrator, but also because the Grant is yet to be confirmed for purposes of **Section 71** of the **Law of Succession Act**.

[9] There is another reason why the application is misconceived, and it is this. The applicants' stake in the estate was not recognized as a liability when the Petition was filed; and whereas the 1<sup>st</sup> applicant contended that she has been living on the portion she claims ownership for over 20 years, no such acknowledgment was made in the Affidavit in Support of Petition, Form P&A.5 filed on **7 September 2001**. Indeed, a look at the sale agreement for the 1<sup>st</sup> applicant reveals that the agreement was made on **23 November 2001**, long after the death of the deceased and well before the widow was issued with Grant of Letters of Administration Intestate. What that implies is that the sale was done in breach of the law, and in particular, in disregard of the provisions of **Section 45** of the **Law of Succession Act**, which is explicit that:

**"(1) Except in so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."**

[10] Moreover, the proviso to **Section 82** of the **Law of Succession Act** is clear that no immovable property of a deceased person shall be sold before confirmation of grant. Having thus flouted the law, the applicants were ill-advised to move the Court for relief on the basis of their illegal contracts; for the maxim of *ex turpi causa non oritur actio* would come into play. In **Scott vs. Brown, Doering, McNab & Co.** (3) [1892] 2 QB 724, a case that has been followed in numerous court decisions in this jurisdiction, it was held that:

**“This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”**

[11] In the result, application dated **7 January 2021**, though unopposed, is untenable. The same is accordingly hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8<sup>TH</sup> DAY OF FEBRUARY 2021**

**OLGA SEWE**

**JUDGE**