



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
SUCCESSION CAUSE NO. 32 OF 2018
IN THE MATTER OF THE ESTATE OF ANTHONY K. MUREI alias KIMELI ARAP MUREI (DECEASED)
AND
IN THE MATTER OF AN APPLICATION FOR
A PERMANENT INJUNCTION
BETWEEN
CATHERINE JEPLETING MELLY.....PETITIONER
AND
RICHARD CHEPKWONY MAIYO.....INTERESTED PARTY
RULING

[1] Before the Court for determination is the Summons dated **11 November 2019**. It was filed herein by the Interested Party, **Richard Chepkwony Maiyo**, pursuant to the provisions of **Section 48(1)** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** and **Rule 73 of the Probate and Administration Rules**, for the following orders:

[a] Spent

[b] that the petitioner, **Catherine Jepleting Melly**, be ordered to preserve a portion of 1.0 acre out of the estate property, namely, **Nandi/Komoiwo/1160**, occupied and possessed by the interested party, from any sub-division, sale, transfer or any adverse dealings whatsoever, pending the hearing and determination of the application *inter partes*;

[c] That the County Land Registrar, Nandi County together with the County Lands Surveyor, Nandi, do survey, identify, determine, establish, fix and plant the boundaries of that portion of 1.0 acre out of land **Parcel No. Nandi/Kamoiwo/1160** in favour of the applicant;

[d] That the Certificate of Confirmation do issue soon thereafter; and that the estate property be distributed in terms of the survey and findings of the Surveyor and the Land Registrar;

[e] A permanent Injunction restraining the Petitioner, whether by herself, her agents, servants, nominees, assigns or any person claiming through her, from entering into, laying any claim, being on the land, putting structures, building, digging, ploughing, planting or doing anything of whatsoever nature so as to dispossess the applicant of any part or portion out of the 1.0 acre in **Nandi/Kamoiwo/1160**, now used, occupied and possessed by the applicant as a purchaser for value from the Deceased.

[f] That costs of the application be provided for.

[2] The application was premised on the averments set forth in the Supporting Affidavit sworn by the applicant on **11 November 2019**, in which he deposed that the deceased, **Anthony K. Murei**, died intestate, leaving behind his widow, **Catherine Jepleting Melly**, who is the petitioner herein. He added that he bought a piece of the deceased's land, **Parcel No. Nandi/Kamoiwo/1160**, measuring approximately 1.0 acre, during the deceased's life time; and that he has been in occupation thereof to date from the year **2003** to date. He further deposed that

his portion is distinct, separate and fenced off from the main property of the deceased.

[3] The applicant further averred that, since he was desirous of obtaining his own title to the portion of land he purchased from the deceased, he filed a Citation before Kapsabet Court, being **Citation Cause No. 7 of 2019**, in which he named the respondent as the citee; and that in consequence thereof, the respondent filed this cause but failed to acknowledge his share as a liability to the estate. He further complained that the respondent has failed, ignored and/or neglected to take steps to have the grant confirmed to pave way for distribution of the estate and for the curving out of his 1.0-acre portion.

[4] The applicant further averred that, the respondent has, instead, been threatening him with eviction; which acts have given rise to the prosecution of the respondent for a criminal offence. He therefore asserted that it is in the interest of justice and fairness that the respondent be compelled to include her in the application for confirmation of grant; that he be given title for his 1.0 acre of the estate property; and that a permanent injunction be issued restraining the respondent from interfering with his 1.0-acre portion.

[5] In response to the application, the respondent relied on her Replying Affidavit, sworn on **2 July 2020**. Her contention is that she is not an administrator of the estate of the deceased herein and therefore has no mandate to effect any of the proposed orders. She added that she is, in fact, the widow of **Stephen Kiplagat Melly**, who was one of the sons of the deceased herein; and that Grant of Letters of Administration Intestate, in respect of the deceased's estate was made on **19 October 2018** to four administrators, namely: **Joseph Kipkemboi Meli, Eulitah Jesang, Stephen Kibet** and **Linus Kiplimo Meli**; none of whom has been enjoined to the instant application. It was therefore her contention that the instant application is lacking in merit and ought to be dismissed with costs.

[6] Pursuant to the directions given herein on **26 October 2020**, the application was to be canvassed by way of written submissions, to be filed and exchanged within 28 days of the order. A perusal of the record reveals that, whereas **Ms. Tum**, learned counsel for the respondent complied and filed written submissions on **19 January 2021**, **Mr. Choge** for the applicant did not comply. Thus, **Ms. Tum** proposed the following two issues for determination:

[a] Whether the respondent is the administrator of the estate of **Anthony Kimurei alias Kimeli Arap Murei** (deceased); and,

[b] Whether the applicant is entitled to the orders sought.

[7] The brief background to the application, as can be gleaned from the record, is that the Petition for Grant of Letters of Administration Intestate was filed herein in respect of the estate of **Anthony K. Kimurei alias Kimeli Arap Murei** (deceased) on **29 August 2019**. The Petition was signed by the following persons, in their capacity as sons and daughter of the deceased:

[a] **Joseph Kipkemboi Meli**

[b] **Eulitah Jesang**

[c] **Stephen Kibet**

[d] **Linus Kiplimo Meli**

[8] They disclosed in their Affidavit in Support of Petition that the deceased died intestate on **11 November 2010**; and that he was survived by his widow, **Salina Murei** and several sons and daughters. It was further averred that the deceased's estate comprised of two pieces of land, namely: **Nandi/Kamoiwo/1160** (hereinafter "**the Kamoiwo Property**") and **Nandi/Kokwet/90** ("**the Kokwet Property**"). No liability that was disclosed at the time; and, according to the Certificates of Official Search filed along with the Petition, the approximate area of **the Kamoiwo Property** was 9.84 Hectares; while **the Kokwet Property** was said to be approximately 12.95 Hectares in size. Among the documents annexed to the Affidavit in Support of the Petition is the original copy of the minutes of a family meeting held on **28 April 2018** at the home of the deceased. The minutes show that those in attendance at the family meeting were unanimous that the four persons aforementioned be appointed as the administrators of the estate of the deceased.

[9] The record further shows that a Grant of Letters of Administration Intestate was issued herein on **19 October 2018** to the four petitioners; and that thereafter, on **20 September 2019**, the petitioners filed an application for Confirmation of Grant along with a proposed Mode of Distribution, which had been duly consented to by the beneficiaries. It was that application that prompted **Richard Chepkwony Maiyo**, the Interested Party herein, to file an Affidavit in Protest to Confirmation, sworn on **11 November 2019**, as well as the instant application.

[10] What emerges from the foregoing is that, whereas the Interested Party averred, at paragraph 2 of the Supporting Affidavit that the widow of the deceased, **Anthony K. Murei**, is **Catherine Jepleting Melly**, this is not so. According to the Affidavit in Support of the Petition, the deceased's widow is **Salina Murei**. Indeed, in her Replying Affidavit, **Catherine Jepleting Melly**, has averred that she is the widow of **Stephen Kiplagat Melly**, one of the sons of the deceased who has since died. **Catherine Jepleting Melly** is therefore, not the widow of the deceased **Anthony K. Murei**, but a daughter in law. Another misstatement is the description of **Catherine Jepleting Melly** as the petitioner. The record is explicit that the petitioners were **Joseph Kipkemboi Meli, Eulitah Jesang, Stephen Kibet** and **Linus Kiplimo**.

[11] It is consequently manifest that the application is premised on untruths and therefore defective for misjoinder; for the duty to settle any liabilities that may be owing from the estate of a deceased person is by law invested in the administrators. **Section 83(d)** of the **Law of Succession Act** is explicit on this. It provides that personal representatives have the duty to ascertain and pay, out of the estate of the deceased, all his debts. Accordingly, if indeed the applicant's interest is a liability to the estate of the deceased, **Anthony K. Murei**, then the correct parties to be impleaded should have been the three surviving administrators and not the widow of **Stephen Kiplagat Melly**.

[12] It is however not the case that such a defect, of its own, is necessarily fatal. It is now a constitutional imperative that justice be

administered without undue regard to procedural technicalities. Thus, in **Raila Odinga vs. Independent Electoral and Boundaries Commission & 4 Others** [2013] eKLR, the Supreme Court held thus in its discussion of **Article 159(2)(d)** of the Constitution:

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome.”

[13] I therefore agree with the position taken in **Zephir Holdings Ltd vs. Mimosa Plantations Ltd & Others** [2014] eKLR that:

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant ... or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

[14] The applicant’s contention is that he bought a portion of the estate property for value; and while it is not clear from whom he bought it, it appears to be his assertion that he bought the property during the deceased’s lifetime. He averred, in paragraph 5 of his Supporting Affidavit that he has been in occupation of the property since the year **2003**. Viewed from that prism, it would appear that the submissions of **Ms. Tum** to the effect that the land sale amounted to intermeddling, for purposes of **Section 45** of the **Law of Succession Act**, would be untenable, granted that the deceased died on **11 November 2010**. In any event, that argument is premature and does not squarely fall for determination in the instant application.

[15] In the premises, and because none of the orders prayed for in the instant application can be validly made against the respondent, it is my finding that the said application is incompetent and is hereby struck out, with no order as to costs. The applicant is not without recourse, noting that he has already filed an Affidavit of Protest, and will therefore be entitled to audience at the hearing of the application for confirmation of Grant. Hence, it is further hereby ordered that the application for confirmation be set for hearing forthwith, and that, in the meantime, the applicant be allowed peaceful enjoyment of the 1.0-acre piece of the property known as **Nandi/Komoiywo/1160**, that he has been occupying, pending further orders of the Court.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF APRIL 2021

OLGA SEWE

JUDGE