



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

SUCCESSION CAUSE NO. 206 OF 2015

IN THE ESTATE OF THE LATE KIBET ARAP KIMARUN ALIAS KIBET KIMARON

SIMEON KIPKEMOI SIGILAI.....APPLICANT

VERSUS

KIPKORIR ARAP MWEI.....1ST ADMINISTRATOR/RESPONDENT

RICHARD KIPKEMOI SIGEI.....2ND ADMINISTRATOR/RESPONDENT

RULING

1. This Ruling is in respect of a preliminary objection dated 22nd February 2021 filed by Kipkorir Arap Mwei and Richard Kipkemoi Sigei who are the Petitioners and Administrators in this Succession Cause. They raised the Preliminary objection in response to an application dated 25th February 2019 filed by Simeon Kipkemoi Sigilai (Applicant) seeking annulment of the grant. The Respondents Kipkorir Arap Mwei and Richard Kipkemoi Sigei were issued Grant of Letters of Administration Intestate on 29th March 2016 by Ong'udi J. The Grant was in respect of the estate of the late Kibet Arap Kimaron alias Kibet Kimaron. The Grant was confirmed and a Certificate of Confirmation of Grant issued on 21st September 2016 by Muya J. For avoidance of doubt, the estate of the deceased Kibet Arap Kimaron alias Kibet Kimaron comprised of L.R No. KERICHO/SILIBWET/833.

2. Simeon Kipkemoi Sigilai, being an Objector, filed an Application for Revocation of the aforementioned Grant dated 25th February 2019 on the grounds that the Grant was obtained fraudulently by making false statements and concealment of material facts and that the Grant was obtained with the intention to defraud him.

3. Patrick Kiplangat Ngeno, being an Interested Party, filed a Notice of Motion Application under Certificate of urgency dated 20th January 2021 seeking the following Orders;

i. Spent.

ii. **THAT** pending the hearing and determination of this application, this Honourable Court be pleased to order the Land Registrar Bomet to file a report pertaining the status of the parcel of land formerly registered as Kericho/Silibwet/833 and its green card.

iii. **THAT** this Honourable Court be pleased to order the Land Registrar Bomet to avail the parcel file formerly registered as KERICHO/SILIBWET/833 and the appropriate Registry Index Maps to aid the hearing and determination of the application.

iv. **THAT** the Certificate of Confirmation of Grant issued to Richard Kipkemoi and Kipkorir Arap Mwei (the 1st and 2nd Petitioners herein) issued on 21st September 2016 be revoked.

v. **THAT** upon granting prayer 4 above, this Honourable Court be pleased to cancel Titles of the parcels of land registered as Kericho/Silibwet/4287-4314 issued pursuant to the Grant dated 21st September 2016 that might have been issued with respect to the parcel of land registered as Kericho/Silibwet/833 with effect from 21st September 2016.

vi. **THAT** the court do make any other or further orders in the interest of justice.

vii. **THAT** the costs of this application be provided for.

4. Before the aforementioned Applications could be heard and determined, the 1st and 2nd Petitioners filed the present Notice of Preliminary Objection dated 22nd February 2021 seeking to strike out the Application dated 25th February 2019 on the following grounds:-

i. **THAT** the application dated 25th February 2019 is offending the rule against sub-judice since the matter is before a Judge in Kericho in the **Environmental and Land Court Kericho ELC Case No. 68 of 2017** on the same subject matter and the same parties awaiting full determination.

ii. **THAT** this Honourable Court lacks jurisdiction to hear and determine the application.

iii. **THAT** the application is brought without due consideration and scope of Section 76 of the Law of Succession Act.

5. The Applicant/Respondent Simeon Kipkemoi Sigilai filed a Replying Affidavit dated 17th March 2021. In compliance with the directions of the court, the parties filed written submissions, along with authorities. The Respondent's submissions are dated 17th March 2021, while the Interested Party's submissions are dated 18th March 2021.

6. I have considered the affidavits and the submissions. The starting point is the issue of jurisdiction. I am guided in this respect by the time honoured principle that jurisdiction is everything. As stated in the case of **Owners of the Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) LTD (1989)** where the Court held that:-

"Jurisdiction is everything. Without it, a court has no power to make to take one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

7. The Respondents have argued that this Court does not have jurisdiction to hear and determine the Application dated 25th February 2019 seeking to revoke the Grant issued on 29th March 2016 under Section 76 of the Law of Succession Act and Rules 44 (1), (2) and 73 of the Probate and Administration Rules and Section 3A of the Civil Procedure Act. They have stated that there is a matter in Environmental and Land Court in Kericho, **ELC Case No. 68 of 2017** on the same subject matter and the same parties. They argue that Section 13 of the Environmental and Land Court Act clothes the Environmental and Land Court with original and appellate jurisdiction to hear and determine all disputes regarding the environment and the use and occupation of, and title to land.

8. Section 76 of the Law of Succession Act provides that a Grant of Representation, whether or not confirmed may at any time be revoked or annulled if the court decides, either on application by any interested party or on its own motion. Rules 44 (1) and (2) of the Probate and Administration Rules provides for the process of applying to the High Court for the relief of revoking a Grant. Rule 73 provides that nothing shall limit or otherwise affect 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.

9. Section 47 of the Law of Succession Act provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make orders therein as may be expedient.

10. From the above, the law is clear that the High Court is clothed with such jurisdiction as provided under Section 47 of the Law of Succession Act. The Application dated 25th February 2019 was brought and/or filed properly in accordance to Section 76 of the Law of Succession Act, Rules 44 (1) (2) and 73 of the Probate and Administration Rules. Therefore, this Court has proper and competent jurisdiction to hear the said application.

11. It is my finding that the Environmental and Land Court is not clothed with jurisdiction to hear an Application for Grant of Revocation of Grant. The ELC however has jurisdiction to determine any issues relating to any title.

12. Section 6 of the Civil Procedure Act provides that:-

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

13. The purpose of the sub-judice rule is to prevent the filing of multiple suits between the same parties or those claiming under the same subject matter so as to avoid an abuse of the court process. For the court to decide whether or not a case falls under Section 6 above, evidence must be laid before it to show that the parties were the same and the matters in issue were the same. In this respect therefore, it is doubtful that the issue of sub-judice can be raised as a Preliminary Objection in this application. As stated by the Court of Appeal in **Mukhisa Biscuit Manufacturers Limited –Vs– West End Distributors Limited (1969) E.A 696:-**

"So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a Preliminary Objection may dispose of the suit"

14. The 1st and 2nd Respondents submit that the parties in this Application and the ELC matter in Kericho are the same. They further submit that the main issue in the two suits is the disputed ownership of **KERICHO/SILIBWET/833**. The Interested Party on the other hand submits that the impugned application seeks orders for Revocation of Grant issued by this court and that such orders can only be ventilated before a Succession Court and not an ELC Court. The Applicant Simeon Kipkemoi Sigilai (now Respondent) submits that the prayers sought in the

ELC matter in Kericho are prayers specifically targeting KERICHO/SILIBWET/1676 and ostensibly which dispute is purely civil in nature.

15. In the case of **Oraro Vs Mbaja (2005) eKLR**, the Court held that:-

“I think the principle is abundantly clear. A Preliminary Objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

16. I find that in order to determine whether the rule of sub judice has been offended, the court has to delve into material facts of the case and the Application, call for pleadings, examine and/or interrogate them to help it determine if the facts in issue are similar. This necessarily puts the matter outside the ambit of a Preliminary Objection.

17. In this respect, I agree with the decision in **Henry Wanyama Khaemba –Vs- Standard Chartered Bank LTD & Another (2014) eKLR**, cited by the Interested Party where the court pronounced itself as follows:-

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

18. I am further persuaded by the court’s holding in **George Kamau Kimani & 4 Others Vs County Government of Trans Nzoia & Another (2014) eKLR**, where the court stated:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are amended to enable the court to determine whether the current suit is res judicata.”

19. It is my finding that the issue of sub judice arising from the present Application and Kericho ELC Number 68 of 2017 will be better ventilated through a normal Application to the court. The court needs more information than what is currently provided to enable it make a proper determination as regards the issue of sub-judice. The issue of sub-judice cannot be determined by way of the Preliminary Objection for reasons explained above.

20. In the upshot, I find that this Court has jurisdiction to hear and determine the Application dated 25th February 2019. The Preliminary Objection dated 22nd February 2021 therefore fails. It is dismissed with costs.

21. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 18TH DAY OF MAY, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered electronically to the parties as per their consent to the addresses provided as mugumyarogers@gmail.com, dleteipa@gmail.com and godwilkiletyen@gmail.com