



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**PROBATE AND ADMINISTRATION CAUSE NO.23 OF 2021**

**IN THE MATTER OF THE ESTATE OF THE LATE COL. MESHACK KIPTOO BIRGEN-DECEASED**

**ESTHER JEROTICH BIRGEN....1<sup>ST</sup> PETITIONER/RESPONDENT**

**DAISY JESONDIN BIRGEN.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**=VERSUS=**

**TAMAR CHEPTOO BIRGEN.....OBJECTOR/APPLICANT**

**R U L I N G**

1. The objector/applicant herein Tamar Birgen filed an application dated the 20<sup>th</sup> of July 2020 seeking inter-alia: -

**a. An interlocutory preservative order to issue restraining the respondent from disposing off the entire or any portion of land parcels numbers NANDI/SASORA/122 and NANDI/SASORA/83 pending the hearing of the summons for revocation and conclusion of the court annexed mediation and**

**b. An interlocutory preservative order do issue restraining the interested party/2<sup>nd</sup> respondent or her agents from taking possession, entering, further grading, ploughing or in any way intermeddling with land parcel number NANDI/SASORA/83 pending hearing of the summons for revocation and conclusion of the court-annexed mediation.**

2. The application is premised upon the grounds in the body of the said application and on the supporting affidavit sworn by the objector/applicant on even date wherein she stated that she filed summons for revocation of grant dated the 30<sup>th</sup> of August 2018 and whose prosecution halted pending court annexed mediation. However, the applicant averred that in the meantime, the 1<sup>st</sup> respondent sold a substantial portion of the estate in particular land number NANDI/SASORA/83 to the 2<sup>nd</sup> respondent at about Kshs 13,000,000/=.

3. In this regard, the applicant averred that the 2<sup>nd</sup> respondent is about to take possession of the alienated land by grading the access road, fencing off and putting up a site house with the intention of commencing construction and agricultural activities. The applicant thus averred that the 1<sup>st</sup> respondent's action are unlawful since she is aware that the transfer was unlawful and that they hold titles to the deceased estate property as trustees and on behalf of heirs. It was her contention that the actions of the respondents are intended to defeat justice and deprive 90% of the deceased heirs of their lawful inheritance.

4. The applicant thus noted that there is need to stop the Respondent's from further inter-meddling with the deceased estate to the detriment of the rest of the heirs and that the intended alienation of the deceased estate will render the current court annexed mediation an exercise in futility.

5. The application is opposed by both respondents via their respective replying affidavits. The 1<sup>st</sup> respondent, Esther Jerotich Birgen, through her replying affidavit sworn on the 1<sup>st</sup> of December 2020 averred that she is the widow of the deceased and co-administrator of the deceased estate together with the 2<sup>nd</sup> respondent. Further, the 1<sup>st</sup> respondent averred that she is the registered owner jointly with the 2<sup>nd</sup> respondent of the suit properties having been issued with title deeds in the year 1998.

6. The 1<sup>st</sup> Respondent also averred that the distribution of the late Col. Meshack Kiptoo Birgen (deceased) estate was made upon confirmation of grant and admitted to have sold a portion of the land namely NANDI/SASORA/83 for treatment purposes as she is sick without any other source of income. The 1<sup>st</sup> respondent further deponed that there is a case pending before the Environment and Land Court at Eldoret as regards Land Number NANDI/SASORA/122.

7. Ultimately, the 1<sup>st</sup> respondent averred that she has not intermeddled with the estate of the deceased and that the applicant is misleading

court with the order sought of which are designed to deprive her the constitutional right to use her property.

8. The 2<sup>nd</sup> respondent on her part through her replying affidavit sworn on the 22<sup>nd</sup> of March 2020 reiterated the contents of the 1<sup>st</sup> respondent noting that transfer by transmission of the capital assets of the deceased has already been done and attached copies of certificate of official search for the suit properties. She further averred that despite the succession cause being gazetted in the Kenya Gazette, no objections were ever raised and as such, the estate of the deceased having been wound up and the shares of it transmitted to beneficiaries, there is nothing left of the deceased estate to preserve.

9. Finally, the 2<sup>nd</sup> respondent averred that the applicant herein has no authority to make the instant application for the preservation of the deceased estate as she is not one of the administrators of the estate to which the succession clause relates.

10. On the 7<sup>th</sup> of December 2020, the court directed all parties to file their submissions and all complied with this directive.

#### **Applicant's Submissions**

11. The applicant via her submissions dated the 7<sup>th</sup> of April 2021 submitted that the 1<sup>st</sup> respondent conceded to selling part of the land which forms the estate of the deceased for medical reasons. Secondly, the applicant noted that the 1<sup>st</sup> respondent though admitting she sold part of the land, is concealing information by being scanty with details concerning the acreage sold, the consideration and to whom the parcel was sold to. The applicant thus submitted that it is obvious that the respondents are intermeddling with the property of the deceased.

12. In this regard, the applicant submitted that she has thus satisfied the conditions requisite for the grant of the orders sought and that the Court has jurisdiction to entertain the instant application and grant the orders sought. The applicant thus relied on Section 47 of the Law of Succession Act, Section 73 of the Probate and Administration Rules and the case of *Floris Piezzo & Another vs Giancalo Falascom [2014] eKLR*.

13. The applicant also submitted that the crux of the matter is that she was left out and did not get a share of the estate of the deceased and that it is irrelevant and immaterial whether the estate has been distributed or not or whether the respondents have registered the estate in their names. She relied on a replying affidavit of the 1<sup>st</sup> respondent sworn on the 8<sup>th</sup> of February 2019 which has since been retracted by the 1<sup>st</sup> respondent, to the effect that the applicant and her children belong to the third house and that the said house was entirely left out in the succession proceedings and distribution of the estate.

14. Finally, the applicant submitted that Section 76 of the Law of Succession Act provides for revocation of grant whether confirmed or not confirmed and if confirmed, the same can still be revoked regardless of whether distribution has already taken place or not.

#### **Respondents Submissions**

15. The 1<sup>st</sup> respondent via her submissions dated the 21<sup>st</sup> of December 2020 submitted that there are only two issues for determination namely whether the court has jurisdiction and secondly, whether the applicant is entitled to the orders sought.

16. On the first issue, it was submitted that the suit ordinarily comes to an end where court renders decision and that decision has been acted upon or executed. The 1<sup>st</sup> respondent thus submitted that the upon confirmation of the grant and official pronouncement of the law on action by Court on the 20<sup>th</sup> of March 1997, the estate of the deceased was distributed to the beneficiaries who transferred and registered themselves as the owners of the said parcels and title deeds issued.

17. The 1<sup>st</sup> respondent then relied on Sections 24 and 101 of the Land Registration Act together with the case of *Owners of Motor Vessel 'Lilian S' vs Caltex Oil Kenya Ltd [1989] eKLR* and submitted that the said title was acquired legally without any fraud or misrepresentation hence the application before court ought to be dismissed for lack of jurisdiction.

18. On the second issue, the 1<sup>st</sup> respondent submitted that the applicant has no capacity to apply for preservation of the estate as she is not a beneficiary to the estate and neither is she a dependant. It was thus submitted that if the applicant was indeed a beneficiary, she should have filed objection at the time and not do the same 21 years after the grant was confirmed and the estate distributed. The 1<sup>st</sup> respondent thus relied on the case of the *Estate of Chege Kabiru [2013] eKLR* submitting that the application has been brought in bad faith and ought to be dismissed.

19. The 2<sup>nd</sup> respondent on her part via her submissions dated the 10<sup>th</sup> of March 2021 submitted that the only issue for determination is whether this Court has jurisdiction to grant the orders sought. In this regard, it was submitted that the answer is to the negative and reliance was placed on the fact that the grant was confirmed more than 21 years ago and the estate is already distributed. The 2<sup>nd</sup> respondent further submitted that under Section 45 of the Law of Succession Act, only the free property of the deceased can be preserved and considering that the estate has already been distributed, there is nothing left to be preserved as the said properties no longer form part of the estate of the deceased.

20. The 2<sup>nd</sup> respondent thus relied on the case of *Abdalla Mutembei Gisage vs Pamel Gacheri Patrisio & 5 others [2014] eKLR* and submitted that the Court is in want of jurisdiction to hear and determine the application as it relates to properties already registered in the name of the respondents and further, that the applicant lacks locus to move this court.

#### **Analysis & Determination**

21. Taking into consideration the parties' pleadings, rival submissions and annexures; it is my opinion that there are two issues for determination namely;

- i. whether the court has jurisdiction and if so,
- ii. whether the applicant has met the threshold for grant of the orders sought.

**Whether the court has Jurisdiction.**

22. The respondents in their submissions indicated that the Court has no jurisdiction to hear and determine this application. In particular, the 2<sup>nd</sup> respondent submitted that the court is bereft of Jurisdiction since the application relates to properties that are already registered in the names of the respondents and the estate distributed. On the other hand, the applicant submitted that this court has jurisdiction to issue the order sought regardless of whether the estate has been distributed or not or the grant confirmed.

23. It is trite law that a Court without jurisdiction cannot proceed further. Thus, when an issue of jurisdiction has been raised, the Court must first address itself to the jurisdictional challenge raised before proceeding on other issues.

24. In *Sir Ali Salim v Shariff Mohammed Sharray 1938 KLR* the court noted thus: -

***“If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the court in which they are rendered but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver or their part cannot make up for the lack of jurisdiction.”***

25. In *Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd [1989] eKLR*, the Court affirmed and rightly so, that ‘Jurisdiction is everything. Without it, a Court has no power to make one more step.’

26. In the instant case, the court must indeed examine whether the properties in question belonged to the deceased and if so, whether the same were distributed.

27. There is no doubt that the suit properties in question namely NANDI/SASORA/122 and NANDI/SASORA/83 formed part of the estate of the deceased, the late Col. Meshack Kiptoo Birgen. This has not been disputed by any party. In fact, all parties acknowledge that the suit properties belonged to the deceased.

28. Furthermore, there is every indication that the suit properties have already been distributed pursuant to the grant issued and confirmed to the respondents jointly on the 30<sup>th</sup> of May 1996. This can be seen from the certificate of official search marked DJB 3(a) that shows land parcel Number **NANDI/SASORA/122** as freehold title in favour of the respondents herein jointly. The search certificate further confirms that a title was issued on the 21<sup>st</sup> of May 1998. Indeed, a copy of the title deed confirms the respondents as the registered owners of this piece of land.

29. In the same vein, the official certificate of search marked DJB 3(b) indicate the respondents as joint registered owners of **NANDI/SASORA/83** measuring approximately 58.0 hectares and further, the search certificate confirms that a title deed has been issued. A copy of the title deed annexed confirms the same.

30. In the foregoing, it is my finding that the suit properties indeed belonged to the deceased and have already been distributed pursuant to the grant issued to the respondents. As a result, those properties no longer form part of the estate of the deceased and thus cannot be the subject of preservation by the succession court. This position finds support in *Abdalla Mutembei Gisaga v Pamela Gacheri Patrisio & 5 others [2014] eKLR* where the court while dealing with a similar scenario as herein held that: -

***“The estate having been distributed and taken over by the respective beneficiaries cannot be the subject of preservation by the succession court. Any dispute arising concerning property already distributed should be dealt with in the Environment and Land Court.”***

31. Furthermore, I am convinced that the application at this stage would really be about the title of the respondents and not inheritance as distribution of the estate has already taken place—at least in relation to the suit properties. As such, it is my finding that this court lacks jurisdiction to determine a claim against the estate of the deceased as in effect the court would be making a determination on the ownership of title which should appropriately be handled by the Environment and land Court.

32. The Law of Succession does not confer on the Succession Court the power to determine the ownership of a parcel of land where estate has already been distributed. In my view, this is a preserve of the Environment and Land Court. As such, where are third parties having a claim of ownership against the deceased or the estate of the deceased then that falls under the exclusive jurisdiction of the Environment and Land Court. See *In the Matter of the Estate of Peter Igamba Njoroge, Succession Cause No.432 of 2009 (unreported) quoted in Succession Cause 488 of 2010 In re Estate of the Late Jonathan Kinyua Waititu - (Deceased) [2017] eKLR and High Court Succession Cause No.864 of 1996 [2015] eKLR*.

33. I would hold otherwise if the same related to intermeddling which is not the case herein since the sale of the land by the 1<sup>st</sup> respondent was done where she had the authority to do so by virtue of a valid grant of representation and registration of the disputed parcels in her

name. The application was filed long after the ship had undocked.

34. In the foregoing, this Court lacks jurisdiction to grant the orders sought as that is the preserve of the Environment and Land Court.

35. Consequently, the applicant's application dated the **20<sup>th</sup> of July 2020** is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF NOVEMBER, 2021.**

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**S. M. GITHINJI**

**JUDGE**

**In the presence/absence of:**

1. Ms Meloi holding brief for Mr Ngigi for the 2<sup>nd</sup> House, and in the absence of;
2. Mr Kipnyekwei for the Objector/Applicant
3. Mr Muraya for the 1<sup>st</sup> Petitioner
4. Mr Tum for the 2<sup>nd</sup> Petitioner
5. Ms Gladys – Court Assistant