



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
SUCCESSION CAUSE NO. 56 OF 2012
IN THE MATTER OF THE ESTATE OF ISAAC KIPCHUMBA MAIYO (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR PRESERVATORY ORDERS

BETWEEN

LENAH JERONO ROTICH.....APPLICANT

AND

PRISCAH SIGE MAIYO.....RESPONDENT/PETITIONER

RULING

[1] This ruling is in respect of the Summons dated **30 October 2015**. It was filed by **Lenah Jerono Rotich**, the objector herein, pursuant to **Section 47** of the **Law of Succession Act** and **Rule 49** of the Probate and Administration Rules, for orders that:

[a] the application be certified as urgent and be heard *ex parte* in the first instance.

[b] A preservatory order do issue directing the **Kenya Electricity Transmission Company Limited** to deposit in court and/or in an account to be opened and to be jointly owned by the petitioner and the objector and/or in the names of the Advocates on record all proceeds in respect of compensation for the Eldoret-Kitale 132KV power line way leave acquired by **Kenya Electricity Transmission Company Ltd** over land parcel numbers KITALE MUNICIPALITY BLOCK 15/KOITOGOS/1679 and ELDORET MUNICIPALITY/BLOCK 24 (KIPKENYO)/25 pending the hearing and determination of the application *inter partes*.

[c] The petitioner/respondent and/or any other person claiming as a beneficiary to the estate of **Isaac Kipchumba Maiyo** be restrained by this Court from pursuing, claiming and/or receiving any monies from **Kenya Electricity Transmission Company Limited** as compensation in his and/or her private capacity pending the hearing and determination of this application *inter partes*.

[d] All proceeds in respect of compensation for the Eldoret-Kitale 132 KV power line way leave acquired by Kenya Electricity Transmission Company Ltd over land parcel numbers KITALE MUNICIPALITY BLOCK 15/KOITOGOS/1679 and ELDORET MUNICIPALITY/BLOCK 24 (KIPKENYO)/25 be deposited in Court or in a joint interest earning account in the names of the petitioner and the objector and/or in the names of the Advocates on record pending the hearing and determination of the objection proceedings.

[e] The Court be pleased to make any further and/or other orders to preserve the estate of the deceased.

[f] The costs be in the cause.

[2] The grounds set out on the face of the application are that the deceased, **Isaac Kipchumba Maiyo**, died intestate on **31 October 2011**; and that so far no administrator has been appointed over his estate because the applicant's objection application is still pending hearing and determination. It was further averred that, whereas the two pieces of property aforementioned form part of the deceased's estate, the **Kenya Electricity Transmission Co. Ltd** (hereinafter, "**KETRACO**") acquired way leave over the property for purposes of constructing the Eldoret-Kitale 132 KV transmission line.

[3] The applicant is aggrieved by the fact that the petitioner has been illegally posing and holding herself out as the owner of the two parcels of land, notwithstanding that to date no administrator has been appointed. Thus, the applicant reads malice in the petitioner's posturing, citing the fact that she has neither been consulted nor recognized by the petitioner in these proceedings as a widow of the deceased. It was therefore her prayer that preservative orders be made that will see the funds from **KETRACO** deposited in a joint interest earning account in the names of the petitioner and the objector pending the hearing and determination of these proceedings.

[4] In response to the application, the petitioner relied on her Replying Affidavit, sworn on **15 April 2015** and filed herein on **18 April 2015**. She conceded that a notice was issued for the acquisition of wayleave by **KETRACO**; but averred that the deceased's property known as **KITALE MUNICIPALITY BLOCK 15 (KOITOGOS)/1679** (the Kitale Property) does not appear on the said notice, and was therefore not affected by the intended acquisition. According to her, no compensation is payable in respect of the Kitale Property. She further averred that, prior to his demise, the deceased had charged **LR No. ELDORET MUNICIPALITY/BLOCK 24 (KIPKENYO)/25** to **National Bank of Kenya Limited** for a loan; and that, by a demand notice dated **13 March 2013**, the Bank informed the estate that it would exercise its statutory power of sale to recover the outstanding sums. Thereupon, one of her sons with the deceased, **Reuben Kirwa Maiyo**, took action by obtaining a loan in his name for the purpose of repaying the loan owed by the deceased's estate. That the said **Reuben Kirwa Maiyo** accordingly approached the Bank with the proposal, which the Bank accepted. It was therefore the contention of the petitioner that, upon paying off the debt owed by the estate of the deceased, **Reuben Kirwa Maiyo** became a creditor of the deceased's estate.

[5] To buttress her assertions, the petitioner annexed to her affidavit copies of the demand letters issued by the Bank, the payment cheques and pay in slips proving payment by **Reuben Kirwa Maiyo**, as well as a letter dated **5 March 2014** from the Bank confirming full settlement of the debt. It was therefore the assertion of the petitioner that the sums due from **KETRACO** to the estate by way of compensation have already been paid directly to **Reuben Kirwa Maiyo** to enable him service the loan he took on behalf of the estate. The petitioner accordingly prayed for the dismissal of the instant application with costs.

[6] In the light of the foregoing, it was the submission of **Mr. Too**, learned counsel for the petitioner, that the application dated **30 October 2015** has been overtaken by events; and therefore that the application is an abuse of the process of the Court. **Ms. Wahome**, counsel for the objector, however maintained the stance that, no payment can be made to the estate in the prevailing circumstances; given that an administrator is yet to be appointed. She underscored the need to preserve the estate in the interest of justice, and urged the Court to note that it involves a polygamous family. It was therefore her view that the objector's application has merit and ought to be allowed as prayed.

[7] A perusal of the court record confirms that when the petitioner filed her petition on **22 February 2012**, she made no indication that the deceased has a second family, or that the objector is also a widow of the deceased. In her Answer to the Petition and Cross-Application for Grant, the objector alleges that she is a widow of the deceased; and the mother of the deceased's children whose particulars were set out in paragraph 4 of the Affidavit in Support of the Cross-Application. She annexed copies of their Certificates of Birth, which all bear the name of the deceased as their father. She also annexed a copy of an Affidavit sworn on **3 January 2000**, which adverts to the fact that the objector and the deceased got married on **15 August 1984** under Nandi customary laws.

[8] Hence, there can be no doubt that the objector has demonstrated sufficient cause for her application. **Section 47** of the **Law of Succession Act**; which 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 such orders therein as may be expedient...”

[9] While it is appreciable that it took the intervention of **Reuben Kirwa Maiyo** to save the **LR No. ELDORET MUNICIPALITY/BLOCK 24 (KIPKENYO)/25** from being auctioned by the Bank, there is absolutely no other option for the disposal of assets belonging to the estate of the deceased outside the framework provided for in the **Law of Succession Act**, however well-intentioned. It is for this reason that **Section 45** of the **Law of Succession** provides that:

Except 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] Nevertheless, it is a cardinal principle that no court order should be issued in vain. I have perused the notice issued by the **National Land Commission** in connection with the Eldoret-Kitale powerline wayleave; and it is manifest that the Kitale Property, **LR No. KITALE MUNICIPALITY BLOCK 15 (KOITOGOS)/1679**, is not included therein. Moreover, there is no indication as to how much, by way of compensation is due to the deceased's estate for the Eldoret Property. It is more like groping in the dark; with the likelihood that the preservative orders sought by the objector may not meet the needs of the parties, should it turn out the funds have in fact already been paid.

[11] Faced with a situation in which it was being asked to issue a stay order in respect of a High Court case that had ran its course to conclusion, the Court of Appeal had the following to say in **Tanzania Roads Agency vs. Kundan Singh Construction Ltd & Another** [2013] eKLR:

“...whichever way one looks at it, progress has been made in the Milimani case towards its conclusion so that even if this Court was to allow or dismiss this appeal, such an outcome will have no impact on the Milimani case. If anything there is a high risk of such eventuality turning into a legal absurdity. For instance, if we were to allow the appeal, effectively, we will be saying that the two cases should proceed to hearing simultaneously but separately. However, as we already know, the Milimani case has been heard and is pending either enforcement of the decree or a ruling on an application for its dismissal presumably for want of prosecution. So that at the end of the day, we would have issued an order in vain...We will be doing what one may say closing the stable when the horse has already bolted...”

[12] In the premises, the orders that commend themselves to me are to defer my final orders herein in respect of the application dated **30**

October 2015 for the Court to be apprised on the exact position of the **KETRACO** funds. In the meantime, the status quo now prevailing shall be maintained pending further orders herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF MAY, 2020

OLGA SEWE

JUDGE