



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 247 OF 2014

IN THE MATTER OF THE ESTATE OF KIMELO OLE KUYONI (DECEASED)

IN THE MATTER OF AN APPLICATION FOR PRESERVATION OF THE ESTATE OF THE DECEASED

BETWEEN

SALLY JEMASUNDE.....OBJECTOR/APPLICANT

AND

JANE CHEROTICH TUM.....1ST RESPONDENT

CHRISTOPHER KIPKEMBOI TIROP.....2ND RESPONDENT

RULING

[1] Before the Court for determination is the Summons dated **11 June 2019**. It was filed herein on **12 June 2017** by the Objector/Applicant, **Sally Jemasunde**, pursuant to **Sections 45 and 47** of the **Law of Succession Act, Chapter 160 of the Laws of Kenya, Rule 73 of the Probate and Administration Rules**, and all other enabling provisions of the law for orders that:

[a] Spent

[b] That the Court be pleased to issue orders to preserve the estate of the deceased, namely all that parcel of land known as **Plateau/Chepkongony Block (Rotuga) 148-152** measuring approximately 8.69 Ha., pending the hearing and determination of the application for revocation of Grant of Letters of Administration issued herein.

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

[2] The application was premised on the grounds that the Grant of Letters of Administration Intestate, which Grant has already been confirmed, was issued to the Respondents herein based on false allegations; and therefore that the Applicant has since filed an application for its revocation. It was further the averment of the Applicant that, since the Respondents are selling and transferring the assets comprising the deceased estate to third parties, it is in the interest of justice that they be restrained pending the hearing and determination of the revocation application.

[3] In her Supporting Affidavit sworn on **11 June 2019**, the Applicant deposed that she is one of the widows of the deceased. She averred that the Respondents secretly applied for Grant of Letters of Administration herein, and concealed crucial information from the Court relating to the correct number and identity of the beneficiaries of the deceased. She added that they have since gone ahead and subdivided the only asset comprising the deceased's estate into five pieces and sold some of the portions to third parties without her knowledge and before making provision for her as a beneficiary of the deceased. To buttress her assertions, the Applicant annexed to her affidavit a copy of the Green Card for the Suit Property along with a copy of the Grant.

[4] The Respondents opposed the application. They relied on the averments set out in their Replying Affidavits filed on **15 June 2019** and **21 June 2019**, respectively. According to the 1st Respondent, the Applicant is not being sincere in seeking to preserve the Suit Property; that her motive is questionable, since the subject property is not the only asset of the deceased. She averred that the Suit Property belongs to her and that the Applicant had tried to sell a portion of it in vain. She also denied that the deceased had a wife by the name **Cecilia Cherotich Chuma**; and otherwise asserted that the Grant was obtained properly and with the full knowledge of the Applicant. In the premises, the 1st Respondent urged for the dismissal of the application.

[5] On his part, the 2nd Respondent, **Christopher Kipkemboi Tirop**, averred that the Applicant was all along aware of the Petition for Grant and cannot claim otherwise. He also averred that the Applicant cannot seek to have the Suit Property preserved since she is not the registered owner thereof. He pointed out that the said property is not registered in the name of the deceased and therefore does not form part of his estate. It was his assertion that the property belongs to the 1st Petitioner; and that the Applicant is acting maliciously in following a piece of land that she does not have any colour of right to.

[6] Following directions that the application be canvassed by way of written submissions, **Mr. Omwenga**, learned Counsel for the Applicant, filed his written submissions on **14 October 2019**, in which he underscored the assertion that it is in the interest of justice that the deceased's estate be preserved pending the hearing and determination of the summons for revocation of Grant. He made reference to **Sections 45 and 82(a)** of the **Law of Succession Act** as well as the case of **Alexander Mutunga Wathome vs. Peter Lavu Tumbo & Another** [2015] eKLR in support of his submissions. He urged the Court to find that, in subdividing the Suit Property and selling portions thereof to third parties, the Respondents have, in effect been intermeddling with the estate and should not be allowed to continue on that wrongful course.

[7] The written submissions for the 1st Respondent were prepared and filed by **Mr. Mwaniki** on **15 August 2019**. He relied on the 1st Respondent's Replying Affidavit and urged the Court to find that the instant application is an abuse of the court process, granted the admission by the Applicant that the Suit Property is not registered in the name of the deceased. In his view, the instant application has been brought solely for the purpose of harassing the Respondents. Accordingly, **Mr. Mwaniki** urged the Court to dismiss the application dated **11 June 2019** with costs.

[8] **Mrs. Khayo**, learned Counsel for the 2nd Respondent, likewise, urged the Court to dismiss the application. She raised similar arguments as did **Mr. Mwaniki**, namely, that the subject property does not belong to the estate of the deceased; and that the Court cannot issue a preservatory order in respect of property that has no bearing to the estate of the deceased. She asserted that land Parcel No. **Plateau/Chepkongony Block (Rotuga) 58** was lawfully registered in the 2nd Petitioner's name in **2015**. Thus, Counsel rooted for the dismissal of the application with costs.

[9] I have given due consideration to the application; particularly the averments set out in the Applicant's affidavit and the annexures in support of the assertions, in the light of the responses made herein by the Respondents. I have also keenly looked at the written submissions filed by learned Counsel on behalf of the parties and the proceedings held herein to date. There is no dispute, and indeed the court record confirms that **Kimelo Ole Kuyoni**, the deceased person in respect of whose estate this Petition was filed, died intestate on **19 June 2012**. The Petition was filed by the Respondents in their capacities as widow and son, respectively; and in the Affidavit in Support of Petition, they averred that the deceased died intestate and was survived by three widows, namely:

[a] **Jane Cherotich Tum** (the 1st Respondent)

[b] **Janet Cherono Maraba**

[c] **Sally Jemesunde** (the Applicant)

[10] The Affidavit in Support of the Petition further shows that the only assets left behind by the deceased are land **Parcel No. Plateau/Chepkongony Block 6(Rotuga)/58** measuring 8.69 Ha, and land **Parcel No. Nakuru/Olengoruone/Cheptuech/201** measuring 5.6 Ha. The Petition was processed in the normal manner and a Grant of Letters of Administration Intestate was issued to the two Respondents on **9 October 2014**. That Grant was thereafter confirmed and a Certificate of Confirmation issued on **9 September 2015**.

[11] The Applicant thereafter approached the Court vide her application for revocation of Grant, dated **8 September 2017**, contending that the Grant and its confirmation were marred by fraud and concealment of material information; and therefore that the proceedings were defective both in form and substance. In the circumstances, the key issue for determination, for the purpose of the application dated **11 June 2019**, is whether sufficient cause has been shown for the preservation of the estate in whatever state it is in presently, pending the hearing and determination of the application for revocation of Grant.

[12] As has been pointed out herein above, one of the enabling provisions for this application is **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...”

[13] Whereas the Applicant was listed as one of the three widows of the deceased in the Affidavit in Support of the Petition, she was not enjoined as one of the Petitioners and a cursory look at the Consent document, Form 38, reveals that she may not have consented to the two Respondents Petition for purposes of **Rule 26** of the **Probate and Administration Rules**. It is also noteworthy that in their application for confirmation, the name of the Applicant was not included in the proposal for distribution, with the result that the two assets aforementioned were distributed in equal shares to the 1st Respondent and **Jane Cherono Tum**, to the exclusion of the Applicant. In the premises, it cannot be said that the application for revocation is frivolous or merely a waste of the Court's time.

[14] It is also noteworthy that, although the Respondents were resolute that the Suit Property does not belong to the estate of the deceased, the Applicant adduced evidence that shows otherwise. **Annexure “SJ2”** is a copy of the Green Card for **Land Parcel No. Plateau/Chepkongony Block 6 (Rotuga)/58**. It shows that the said property was indeed registered in the name of the deceased **Kimelo Ole Kuyoni** on **24 November 1992**; and that it was not until **3 November 2015** that it was transferred into the name of **Jane Cherotich Tum**, the 1st Respondent. The property was thereafter on **10 January 2018** subdivided and assigned new parcel numbers, namely, **Parcel Numbers 148 to 152**. In the premises, the Applicant has a valid cause for seeking the preservation of the land, notwithstanding the subdivision, pending the hearing and determination of her application for revocation.

[15] It is for the foregoing reasons that I find merit in the application dated **11 June 2019**. It is hereby allowed and orders granted in the following terms:

[a] That a temporary injunction be and is hereby issued against the 1st and 2nd Respondents restraining them from subdividing, selling, transferring, leasing, registering, wasting or any further disposal of land formerly known as **Plateau/Chepkongony Block(Rotuga)58**, now subdivided into:

[a] **Parcel No. Plateau/ChepkongonyBlock(Rotuga)/148,**

[b] **Parcel No. Pateau/Chepkongony Block(Rotuga)/149,**

[c] **Parcel No. Plateau/Chepkongony Block(Rotuga)/150,**

[d] **Parcel No. Plateau/Chepkongony Block(Rotuga)/151,** and [e] **Parcel No. Plateau/Chepkongony Block(Rotuga)/152,** pending the hearing and determination of the Summons for Revocation of Grant dated **8 September 2017**.

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

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MAY 2020

OLGA SEWE

JUDGE