



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO 146 OF 2019**

**IN THE MATTER OF THE ESTATE OF THE LATE KIRONGO CHEPSIROR CHEPKWONY-(DECEASED)**

JOEL KIRONGO.....1<sup>ST</sup> APPLICANT

JOSEPHINE JEPKOSGEL.....2<sup>ND</sup> APPLICANT

EVERLINE JEROTICH.....3<sup>RD</sup> APPLICANT

FLORA JELIMO BITOK.....4<sup>TH</sup> APPLICANT

PRISCA JERUTO.....5<sup>TH</sup> APPLICANT

**VERSUS**

SHADRACK KIPRUTO KIRONGO.....1<sup>ST</sup> RESPONDENT

NATHAN KIPLAGAT MUTAI.....2<sup>ND</sup> RESPONDENT

**RULING**

The application dated 16<sup>th</sup> March 2020 is made pursuant to the provisions of section 45 and 47 of the Law of Succession Act and Rules 49 and 73 of Probate and Administration Rules, 1980 seeking for preservatory orders and that this court do set aside orders over the estate of the late **KIRONGO CHEPSIROR (DECEASED)** through the following substantive orders:

- a) To enjoin the 2nd respondent into this suit for purposes of this application.
- b) To set aside and or review the orders issued ex-parte by this court on 15<sup>th</sup> January 2020, and given on 11th December 2019 consequently allow the applicants herein to respond thereto for inter-parties hearing.
- c) In the alternative, this honourable court be pleased to order that pending hearing and distribution of the estate of **KIRONGO CHEPSIROR CHEPKWONY (Deceased)** the applicants herein and their families be allowed to continue occupation use and possession of the estate land parcel **NO. NANDI/KAMOYWO/2122 measuring 0.64 Hectares.**
- d) The OCS Mosoriot police station to observe compliance of this order.
- e) The respondent and the court process server namely Eliud Makhakha, be reprimanded, for misleading this honourable court, for perjury and making false affidavit of service dated 10th December 2019 alleging that he served the applicants herein yet he never did.

The contention of the applicants is that were never served with the application dated 28th November 2019 by the 1st respondent, and this resulted in their being condemned unheard contrary to their constitutional right to fair hearing under **Article 50 of the Constitution of Kenya 2010** and the principles of natural justice and fairness.

The applicants claim that on 9th March 2020 they stumbled upon photocopies of the court orders herein which were being ferried by a motor cycle rider namely **Arap Yego** from copies of the orders given on 11th December 2019 and issued on 15th January 2020 but the same have never been served to date. Consequently, they instructed their advocates on record to pursue the respective court orders and obtained

photocopies of the pleadings which necessitated filing of this application to prevent miscarriage of justice, law and order.

The applicants deny service and express surprised at what they term as falsehoods contained in the alleged affidavit of service purported to be choreographed and sworn by Eliud Makhakha on 10th December 2019 misleading this Honourable court on service of the applicants. Consequently, they prayed that the process server be reprimanded by the court for professional misconduct.

That on learning that the applicants had gained knowledge of the said orders, on 11th March 2020 the respondents (**Shadrack Kipruto Kirongo and Nathan Kiplagat Mutai**) descended on the estate property **NANDI/KAMOYIWO/2122** destroyed fences and planted maize on the said farm where the applicants had already cultivated in readiness to plant maize as usual (photographs of the status-in-quo with destroyed fences are annexed)

The 1st respondent thereafter installed the 2nd respondent into occupation possession and use of the estate property **NANDI/KAMOYIWO/2122** on 11th March 2020 without any colour of right and or permission and in total disregard of the orders of this Honourable court.

The applicants maintain that the 1st respondent misled this Honourable court into issuing the said orders ex-parte for the following reasons;

That whereas-

a) The same land **NANDI/KAMOYIWO/2122** was directly in issue in a parallel suit at

**Kapsabet Senior Principal Magistrates Court at Kapsabet in Kapsabet E&L No. 89 of 2019 between NATHAN KIPLAGAT MUTAI VS JOEL KIRONGO, JOSPHINE JEPKOSGEI AND EVERLYNE JEROTICH** where the 2nd respondent claims ownership of the subject estate which he alleges to have been in possession from 23/5/2015 under license from the 1st responded the 1st respondent herein.

b) The respondents having realized that their case at Kapsabet Senior Principal Magistrates Court at Kapsabet would not succeed since the defendants had raised a preliminary objection, then filed this parallel application at the High court without disclosing the application at disclosure of the Kapsabet matter. This is termed as a demonstration of mischief and unprofessionalism as is confirmed by the sequence of events dates of filing of the ruling (Marked J.J- 9 in the **said Kapsabet E&L No 89/2019**).

c) The respondents also failed to disclose that there is yet another succession cause over the same estate of **KIRONGO CHEPSIROR KIRONGO (Deceased)** in which the 1st applicant herein in liaison with the 2<sup>nd</sup> respondent to whom he sold a portion of the estate property to **John Kibitz Kemei –vide Kapsabet SPMC Succession cause No 164/2018 Estate of Kirongo Chepsiror Chepkwony** (copies of the Petition and gazette Notice of the said succession Cause No. 164/2019 are annexed).

The applicants also question the 1st applicant's fitness to be the administrator especially as he only filed the present succession to mislead this court in his attempts to defeat criminal charges which he is facing and he is being investigated for, being; -

a. **Kapsabet SPMC Criminal Case No.2360/2019 R Vs Shadrack Kipruto Kirongo-** where he is charged for intermeddling with the estate of the deceased by withdrawing Ksh. 240,000/= from the estate accounts by forging the estate chief's letters (Annexure marked J.J-4 being a copy of the charge sheet).

b. The 1st respondent has been inter-meddling with the estate of the deceased by selling the following properties; -

i. **NANDI/KAMOYIWO/2122** vide the agreements which he sold the estate illegally to the 2nd respondent herein dated 23/5/2015.- (As confirmed by the Annexure marked J.J-5 being a copy of the said agreement for **plot No. N/KAMOYIWO/2122** dated after the death of the deceased),

ii. **NANDI/KAMOYIWO/650** where he sold the estate illegally to **John Kemei** dated 3/7/2013 and 26/1/2014 (confirmed by Annexures marked J.J-6 A and B being a copies of two agreements for plot **No. N/KAMOYIWO/650** and Annexure marked J.J-8 being a copy of affidavit of the 1st respondent in Eldoret High Court Petition No. 23 of 2019 where he admits selling the estate property before succession).

The applicants together with the other beneficiary's lament that they have been greatly prejudiced by the exparte orders issued by this court on 15<sup>th</sup> January 2020 and given on 11th December 2019; and unless the same are set aside irreparable loss will be occasioned for the following reasons: -

a) That should the orders in question in favour of the respondent be retained by this court, it will amount to promotion and condoning of the 1st respondent's open illegalities and will serve as an open cheque and licence to commit crimes of intermeddling. Further it will as operate as a gag against the police investigation vide **OB No 12/15/11/2019 and 30/11/03/2020 at Cabinet Police Station** for admitted offences of intermeddling (As confirmed by Annexures marked J.J-7 A and being copies of OBs).

b) There is also the lament by the applicants that over 15 beneficiaries including 4 surviving widows who have now been evicted and rendered destitute by the said orders which have been misapprehended by the respondents herein and the police in the process of implementing these orders will suffer irreparable loss.

It is the applicant's further contention that the respondents are suspected criminals who ought to be shun by this court at all costs to prevent

miscarriage of justice and fairness, and they cannot benefit from any equitable remedy having tainted their hands. Moreover, that the conduct of the 1st respondent has caused many cases pitting the estate against third parties herein have solely been occasioned by the 1st respondent and as such he is putting the entire estate to great risk and wasteful expenses which this court ought to be aware of in order to prevent any further injustice by setting aside the ex-parte orders issued herein and reprimand the respondents.

The 1st respondent is said to have introduced some fictitious liabilities of Ksh5,000,000/- which simply illustrates his unfitness to administer the estate. That the alleged minutes (marked SKK-2) contains falsehood, as the subject property was being cultivated by the applicant herein who were respondents in the application dated 28/11/2019.

The 1st and 2nd respondents are said to have acted in cahoots to defeat justice where on 11th December 2019 who admit that there were two parallel case between the same parties that in Kapsabet E&L No. 89 of 2019 which proceeded on 11th December 2019 at Kapsabet and this file ELDORET HCC SUCCESSION CAUSE NO. 146 OF 2019 which proceeded on 11th December 2019 at Eldoret High Court. To support this argument, the applicants, rely on the decision in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**. It is submitted that the same circumstances prevail in the present case where the 1<sup>st</sup> respondent openly omitted to serve all the affected parties ranging from the 1st to 5th Respondents herein. That even if the return of service was true, (which is strongly denied), the 1st respondent has indeed admitted that he never served the 4th and 5th respondent despite acknowledging them as widows of the deceased Kirin go Chepsiror Chepkwony whom he lists at paragraph 6 of his replying affidavit and the main petition Form 5 (Annexed to the applicants Supplementary List of Witnesses Marked JJ-C).

On this limb this court to set aside the orders granted to the 1st respondent and be guided by the same authority of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] EKLR** where in concurring with the decision to vary, set aside and or review the orders in the interest of justice and fairness since it was the same court that had issued the same by holding, stated that: -

*“...Order 10 Rule 11 of the Civil Procedure Rules the trial court has unlimited discretion to set aside a default judgment; that there was sufficient evidence upon which the High Court found that the decree and vesting orders were irregularly obtained ...”*

#### **INTERMEDDLING AND EQUITY**

It is argued that the action by the 1<sup>st</sup> respondent to dispose of two properties of the deceased being **NANDI/KAMOYWO/650 AND NANDI/KAMOYWO/2122** to third parties amounts to intermeddling. That in any event he has admitted the fact by swearing the affidavit (Annexure and marked J.J-8 being a copy of the affidavit of the 1st respondent in Eldoret High Court Petition No. 23 of 2019) In support of this argument the applicant cites the case of **David Julius Nturibi M’Ithinji (Deceased) [ 2012] eKLR** where it was stated:

*“The respondent is not authorized by the law of Succession Act or grant of representation under the law of Succession Act to take possession or dispose of or otherwise intermeddle with the free property of the deceased David Julius Nturibi...”*

*Consequently, this conduct deprives the respondent his right to enjoy and benefit from the equitable right having soiled his hands subject to the maxim “He who comes to equity must come with clean hands”.*

As regards the respondent’s arguments that he has planted maize, the applicants in a supplementary affidavit insist that the respondents invaded the land, evicted them using the orders of this court which they had to comply with, then planted maize, and this should **NOT** be allowed to stand. That the fact that a party uses illegal means to acquire status forced and fraudulent quo should not be encouraged by this court since the same will lead to lawlessness and anarchy. That in any case, this court never authorized the applicant to evict the respondents nor destroy they partitioning fences.

This court is urged to consider that the applicants are so emotionally and irreparably affected by the eviction and the only justice this court can render, is to grant the prayers.

In opposing the application, the 1<sup>st</sup> respondent maintains that the Applicants were served with the Application dated 28<sup>th</sup> November, 2019 but they failed to respond. The 1<sup>st</sup> Respondent also refers to the minutes of the meeting held on 27 April, 2012 pointing out that, upon the demise of the deceased the family sat down on 27<sup>th</sup> April, 2012 and agreed on the mode of distribution of the properties of the deceased which was agreed upon by all the family members including the Applicants herein, outlining the interim mode of distribution that was agreed upon at the time. Each of the family members was given a portion to utilize, pending the determination of the succession cause proceedings, and eventual distribution. That none of the Applicants indicated at the time that they were dissatisfied with the arrangement agreed upon in the minutes and that no one has called a family meeting to revisit the interim distribution.

The 1<sup>st</sup> Respondent insists that the parcel of land in question being **Nandi/Kamoywo/2122** was given to **Taming Chelagat Chepngok**, the mother of the deceased herein. That the responsibility of looking after the said Taming Chelagat Chepngok was given to the 1<sup>st</sup> Respondent and as such he was naturally the person to utilize the disputed parcel of land.

The 1<sup>st</sup> Respondent claims to have incurred huge bills to meet the medication of his grandmother and eventually the funeral expenses when she passed on. That he remained in occupation of the said parcel of land and that part of the expenses were given by Nathan Kiplagat Mutai, the intended 2<sup>nd</sup> Respondent herein on the understanding that he would confer an interest on part of the parcel of land upon obtaining title deed in his name.

The 1st Respondent maintains that he was never a party to the succession proceedings instituted at Kapsabet law courts which were in any event a nullity as the court lacks the necessary pecuniary jurisdiction to entertain the claim

## ANALYSIS AND DETERMINATION

The main issues for determination are:

1. Whether the Applicants have met the threshold for review/and or setting aside the orders given on 11/12/2019 and issued on 15/01/2020.
2. Whether the applicants have met the threshold for issuance of injunctive orders.
3. Whether there has been intermeddling of the estate contrary to section 45 of the Law of succession act Cap 160.
4. Whether the 1<sup>st</sup> respondent a suitable administrator

The Applicants maintain that they have been in occupation of the suit land and that the 1st Respondent has installed the 2nd Respondent into occupation of the suit land contrary to the order issued by this court. The Applicants also have an issue with a suit instituted by **Nathan Mutai being Kapsabet E&L No. 89 of 2019 between Nathan Mutai Vs Joel Kirongo, Josephine Jepkosgei and Everline Jerotich**. I take note that this institution of the matter in Kapsabet is not denied

The Applicants also maintain that the 1<sup>st</sup> Respondent has been involved in intermeddling of the estate including selling parcel **No. Nandi/Chemuswo/650 and Nandi/Kamoiywo/2122**.

It is also contended that the 1st Respondent is not fit to become an administrator of the estate of the deceased

## SERVICE

There is a rather curious narrative as to how the applicants stumbled on the orders which were in the possession of a motor-cycle rider, several months after their issuance. They deny being served and claim that the process server is being untruthful. I would expect that if this really is the true state of affairs, then nothing would have been easier, than to apply to have the process server summoned to court for cross examination. I draw from the case of **Joseph Nathaniel Kipruto Arap Ng'ok & another v Eabs Bank Limited [2014] eKLR** it is contended by the respondents that there is always a presumption on regularity of service. The court in that decision stated:

*"That further underscores the need to examine on oath the deponents of the two affidavits, if the court was to thereafter make an informed and accurate decision,*

Also, that in the case of **MIRUKA VS ABOK & ANOTHER [1990] KLR. 541**, the process server was cross-examined about the service of summons which the defendants had disputed, and Omolon J. (as he then was) quoted with approval the following words of Platt J.A in **BAIYWO VS BACH [1987] KLR 89** to the effect that;

*"There is a qualified presumption in favour of the process server recognized in MB Automobile Vs Kampala Bus Service [1966] E A 480 at page 484, as having been the view taken by the Indian courts in construing similar legislation. On Chitale and Annaii Rao; "The Code of Civil Procedure vol II page 1670, the learned commentators say; '3. Presumption of Service There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put in the witness box and opportunity of cross-examination given to those who deny the service".*

I concur with the argument presented in the present instance is that the Applicants have not sought to cross-examine the process server on the contents of his Affidavit of Service dated 10<sup>th</sup> December, 2019 so there is no good reason to fault the Process Server on the same. The respondents contend that applicants were served with the application dated 28/11/2019, and there was no need to serve the 4<sup>th</sup> and 5<sup>th</sup> Applicants herein since they were not parties to the application dated 28/11/2019. Of course the only question on this is why they were left out of the application, yet the orders affected them. Was it an act of mala fides? On the issue of service, I am unable to fault the respondents and find no basis to either summon or reprimand them or the process server.

## INTERMEDDLING AND THE NEED TO PRESERVE THE ESTATE

The respondents point out that curiously the Applicants did not list the disputed parcel of land **Nandi/Kamoiywo/2122** as part of the estate of the deceased, and contend that it is obvious from the totality of the evidence presented by all the parties that the Applicants were not in occupation of **Nandi/Kamoiywo/2122** but only tried to do so as part of their purge of the persons who were in occupation and were deemed strangers to the estate of the deceased. That this was done without a court order but by taking the law into their own hands.

The 1st Respondent insists that the parcel of land in question being **Nandi/Kamoiywo/2122** was given to **Tamining Chelagat Chepngok**, the mother of the deceased herein. However, the legal position is that the parcel remains registered in the names of the deceased herein, and only legal distribution after confirmation of the grant would settle that issue. As for the argument that the responsibility of looking after the said Tamining Chelagat Chepngok was given to the 1<sup>st</sup> Respondent and as such he was naturally the person to utilize the disputed parcel of land, that is a rather warped up way of reasoning, and I need not say more.

That in any event the 1st Respondent incurred huge bills to meet the medication of his grandmother and eventually the funeral expenses when she passed on, and as such he remained in occupation of the said parcel of land and that part of the expenses were given by Nathan

Kiplagat Mutai, the intended 2nd Respondent herein on the understanding that he would confer an interest on part of the parcel of land upon obtaining title deed in his name. **WAS THIS WITH CONSENT OF ALL?** Again, this would require formal evidence, and confirmation that such expenditure was incurred on the understanding that it would be recovered through a takeover of the asset in the estate. I have no hesitation in concluding that the actions by the respondent, including alienating the property by assigning it to a third party amounts to interfering with the property of a deceased person before grant has been confirmed, and distribution effected, and makes a case for consideration in light of the provisions of **sec 45 of the Law of Succession Act.**

The respondents do not deny that part of the impugned conduct in dealing with the deceased's estate, has taken place without sanction of the court, and that what is being used to effect those actions include minutes whose veracity is now contested.

#### **VARYING ORDERS AND INJUNCTION:**

The order dated 11/12/2019 and issued on 15/01/2020, which set heads rolling provided that:

**a) Pending the hearing and distribution of the estate of KIRONGO CHEPSSIROR CHEPKWONY DECEASED) the applicant herein and his family do continue occupation and use of the parcel of land known as NANDI/KAMOYWO/2122 MEASURING 0.64 HA registered in the name of the deceased**

**b) The OCS Mosoriot Police Station to ensure observance**

It is on account of this that the applicants say, they had no choice but to comply with the order and vacate the contested property. So what was the meaning of "do continue to use"? Who moved where, when? The order specified **NANDI/KAMOYWO/2122 MEASURING 0.64 HA registered in the name of the deceased**

From what has been presented to this court, the orders in question in favour of the respondent if retained by this court, will amount to promotion and condoning of the 1st respondent's open irregularities. It is also not denied that the respondents already reported the conduct of the respondents to police if the orders remain, then they will serve as an open cheque and effectively operate as a gag against the police investigation vide **OB No 12/15/11/2019 and 30/11/03/2020 at Kabiyeet Police Station** for purportedly admitted offences of intermeddling (As confirmed by Annexures marked J.J-7 A and being copies of OBs). This in my considered view constitutes establishing a prima facie case with probability of success as to warrant an equitable remedy of injunction.

Secondly, it is also not denied that over 15 beneficiaries including 4 surviving widows who have now been evicted and rendered destitute by the said orders which have the police in the process of implementing these orders will suffer irreparable loss.

Yet the quagmire created by that order is not so simple to resolve because although it is acknowledged that to meet the ends of justice, the estate of the deceased needs to be preserved and guarded against waste by whoever party pending determination of the succession proceedings., There is need of maintaining the status quo so that each of the parties involved should continue living **where they already are and utilizing the portion already utilizing** and avoiding exploitation of permanent nature on the land, like cutting down of trees. And herein lies the dilemma- what was the status quo before the contested orders were issued? Does this mean the 1<sup>st</sup> Respondent who is in occupation of **Nandi/Kamoywo/2122** should remain there because, issuing the orders sought herein amounts to evicting him? Was he in occupation prior to the orders or did he move in after the orders? What about the fact that he has now planted maize and taking judicial notice of the current rains, and the food security in this country, what would be the fairest approach? And what about the 2<sup>nd</sup> respondent?

I have agonized at length over the submissions that if the orders in question in favour of the respondent are to be retained by this court, it will amount to promotion and condoning of the 1st respondent's open illegalities and will serve as an open cheque and licence to commit crimes of intermeddling is an issue which this court cannot ignore.

The greatest dilemma is does the court allow the respondent to remain on the parcel, courtesy of the contested orders, and thus essentially evict him now, but also that would mean condoning what is termed as an illegality. Or does the court say that the parties now retain the existing status quo to avoid causing even more confusion?

#### **Determination:**

I have considered the precedents in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** which held that:

***"... We have already emphasized that the once an irregular default judgment is brought to the notice of the court, the court will set it aside as a matter of right and that the court may set aside such judgment even on its own ...***

***The former Court of Appeal for Eastern Africa, in Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. concurred, stated thus:***

***"On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by***

***Lord Greene, MR.” (Emphasis added) ...”***

I am persuaded that the only way to balance the scales of justice is to set aside the orders which have caused a lot of acrimony aside and which technically resulted in an eviction of the applicants. In my view staying the orders may only cause greater confusion and chaos. Giving the alternative prayer that parties remain where they were prior to the issuance of the orders is an even bigger recipe for greater chaos.

I deem it appropriate to set aside and or review the orders issued ex-parte by this court on 15th January 2020, and given on 11th December 2019 consequently allow the applicants herein to respond thereto for inter-parties hearing. I think it is also critical that the 2nd respondent who has benefitted from such irregularity be restrained from using the property at all as a way of preserving the estate.

I direct that

- a) the parties, save for 2<sup>nd</sup> respondents shall remain where they are currently**
- b) The applicants do e-file and serve their responses to the application within 3 days from today**
- c) The respondent is at liberty to file a supplementary affidavit within 3 days of service**
- d) Matter be listed for mention before High Court 1 on 19/06/2020 to confirm compliance and take directions on hearing of the application**

As regards the issue of administration, it is submitted that the issue can only be determined once the parties have complied with the rules and not at this preliminary stage, and I agree, taking note that the Applicants have not lodged objection proceedings to enable the court adjudicate on the matter with finality.

Each party shall bear its own costs

**Delivered and dated this 10<sup>th</sup> day of June 2020 at Eldoret**

**H.A. OMONDI**

**JUDGE**