



**REPUBLIC OF KENYA**

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

**HIGH COURT PROBATE AND ADMINISTRATION CAUSE NO 37 OF 2020**

**IN THE ESTATE OF BENJAMIN KIPYEGO ARAP MUTAI (DECEASED)**

**PRISCILLA JEPKEMBOI MUTAI.....PETITIONER/APPLICANT**

**VERSUS**

**SAMUEL KIPCHIRCHIR YEGO.....RESPONDENT**

**RULING**

By a summons dated 12<sup>th</sup> May 2020, PRISCILLA JEPKEMBOI MUTAI (PETITIONER/APPLICANT) seeks:

- 1. That protection orders issue against SAMUEL KIPCHIRCHIR YEGO (RESPONDENT), prohibiting interference and intermeddling with the assets of the estate of BENJAMIN KIPYEGO ARAP MUTAI (the deceased) pending hearing and determination of this cause**
- 2. That preservatory orders issue in respect of land parcel No MOIBEN/MOIBEN BLOCK 2 (SEGERO) / 349, pending hearing and determination of this cause**
- 3. That restraining orders do re-issue restraining the respondent from harassing, threatening and physically abusing the petitioner and her siblings pending determination of the summons**
- 4. That an inhibition be registered on land parcels No MOIBEN/MOIBEN BLOCK 2 (SEGERO) / 349, which belongs to the deceased**
- 5. That the administrators of the estate do open an estate account with a reputable bank in which income derived from the agricultural activities at the farm, or any other income from the estate shall be deposited**
- 6. That no payment be made out of the estate account without leave of the court**
- 7. That funds held in the estate account be utilized only for general maintenance and improvement of the family members**

The application is premised on grounds that the applicant is a beneficiary to the estate, and the respondent has interfered with, and has been misusing property entrusted to him by the family to manage, and intentionally uses the said property only for his benefit, and to the detriment of all the other beneficiaries who are entitled to the estate.

The respondent is accused of continually mismanaging the estate, and that as a result of his negligence, the productivity of the farm has greatly declined. It is contended that the respondent has denied his siblings any chance to participate in any decision making as regards use of the agricultural land, and the estate is being wasted.

The applicant deposes in the supporting affidavit that she is the second born child in a family of eleven children born to the deceased and his widow **JULIA JEBOAGUI KIPYEGO**. The deceased died intestate on 26<sup>th</sup> September 2015, and since then, the respondent has unilaterally used the land parcels **No MOIBEN/MOIBEN BLOCK 2 (SEGERO) / 348 and MOIBEN/MOIBEN BLOCK 2 (SEGERO) / 349** which is about 84 acres, and forms part of the vast estate, to the exclusion of his siblings

The applicant maintains that she, together with the other siblings have been contributing financially towards the management and running of the farm as well as the livestock, so as to make the farm more productive, but the respondent has not been happy about this.

That on 28<sup>th</sup> April 2020, the applicant made an impromptu visit to their home, and found the respondent, their local chief **NAOMI BITOK**

and their mother at home. At the same time, the respondent was writing a letter (**PMJ2**) addressed to the Chief of **SEGERO** area, purporting it to be written by their mother, expressing her desire to take into her custody all the assets of the deceased to the exclusion of all.

She doubts the bona fides of that letter, pointing out that their mother is old, sickly, and with no formal education, so she could not fully understand what she was doing, and was unduly influenced by the respondent. It is the applicant's contention that the intention of the letter was to disinherit her and her siblings, which is why there is need for an order of inhibition. Further, the latter came fast on the heels of an earlier letter her advocate had written to the area chief requesting for a letter for purposes of filing a succession cause. However, the chief refused to accede to her request, and instead gave the letter to the respondent who is her brother.

Moreover, the respondent has gone ahead to alienate 2 acres of the said land where he has now planted coffee for his own personal benefit before the formal distribution of the estate. She states that their late father's wish was that the land be owned equally by all his children, and be utilized agriculturally as a whole to ensure maximum productivity, so the respondent's action of alienating part of the land without the consent of the other family members, or an order of the court, amounts to intermeddling in the estate.

The respondent is accused of being physically abusive to the extent of sending threatening messages to the applicant, and a report has been made to **ZIWA police station vide OB 16/8/5/2020**.

The respondent by a replying affidavit states that after the burial of their father, a family meeting was held in which he was nominated to pursue succession cause alongside their mother as intended administrators of the estate. They were yet to consult and agree on appointing a lawyer to represent them in the intended cause, when to his surprise the applicant filed this cause without consultation from any other family members.

He denies knowledge of any letter, and says the land parcels referred to are intact, and have not been subdivided or alienated. He explains that during the deceased's lifetime, he had been given a portion of land where he built his house and tilled, and no one ever complained. That the remainder of the portions are being utilized by their mother for farming activities, and any proceeds are deposited in an account at **NATIONAL BANK**, where the applicant and their mother are signatories.

In a supplementary affidavit, the applicant denies that there was ever such a family meeting, and insists that the respondent has taken advantage of their aged mother to negatively influence her so as not to take up letters of administration jointly with her. She states that no one has complained over the portion of land where the respondent has established a home, saying the only portion in dispute is the farm land which the respondent has taken exclusive control over, and is using proceeds from sale of the farm produce.

The applicant argues that the respondent has intermeddled in the estate of the deceased, and should not be carried away by the mere fact that he is a son of the deceased. She laments that the Respondent was entrusted by family members to help in the running of the day to day activities of the farm with the help of other family members including the Petitioner upon the demise of their father, however the Respondent has continually acted ultra vires by taking forceful possession and control of the entire farm (suit land) measuring approximately 84 acres which forms part of the vast estate to the exclusion of some of her siblings including the Petitioner and her sisters four of whom work and reside abroad.

The contention is that the respondent has further alienated two acres of the suit land and planted coffee contrary to his late father's wish and family tradition of planting wheat and maize for commercial purposes.

She refers to the case of **John Kasyoki Kieti vs Tabitha Nzivulu Kieti & Another in Machakos High Court Civil Case No. 95 of 2001** which defines what actions amount to intermeddling as doing anything affecting the estate of a deceased person amounts to intermeddling and Re **Estate of Ndiba Thande (Deceased) [2013] eKLR, Musyoka (J)** in defining what amounts to intermeddling stated;

***"It is fallacious for a spouse or child to imagine that they cannot be guilty of intermeddling when they handle property belonging to their dead spouse or parent without a grant of representation. Intermeddling can be committed by any person so long as the handler has no grant of representation."***

The respondent's position is that the non-joinder of the deceased's renders the entire claim and prayers fatal, as there are serious allegations against the widow, such as that she wants to take custody of the entire estate, and she may be condemned unheard. That in any event, the widow ranks higher in priority in seeking administration of the estate.

As regards intermeddling, it is submitted on behalf of the respondent that he is a beneficiary like all his siblings, and should not be stopped from handling the estate. That in any event the portion he occupies and uses was gifted to him *inter vivos*.

There seems to be some contradiction in the applicant's claim, after-all she has stated in her submissions that after the death of their father Benjamin Kipyego Arap Mitei in the year 2015, the family had a meeting on or about the year 2018 and appointed the Respondent herein to manage their farm situated on land parcels **No. Moiben/Moiben Block 2(SEGERO)/348 and Moiben/Moiben Block 2(SEGERO)/349**, but with the help and contribution of all the family members pending final administration of the estate. This implies that the activities the applicant has conducted on the farm were with the consent and authority of all the beneficiaries, so as to sustain the estate before a grant was issued, she shoots herself on the foot and cannot now cry wolf.

What evidence has been presented that the respondent is tilling the entire 84 acres, selling the produce and benefitting from the proceeds? When and where did the sale of produce from the farm take place?

**66 of the Law of Succession** provides that:

**66. Preference to be given to certain persons to administer where deceased died intestate**

**When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—**

**(a) surviving spouse or spouses, with or without association of other beneficiaries;**

**(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V**

In my view, the applicant seems to have been driven by a sense of turf righteousness that clouded her judgement as to who has priority to take up letters of administration. Indeed, I concur with the respondent's counsel that if the widow declined to petition for grant of letters of administration, then the appropriate avenue for redress is to file a citation

**BANK ACCOUNT NECESSARY?**

The court is urged to issue an order that the appointed administrator/s open an estate account in which income derived from the agricultural activities at the farm shall be deposited and only paid out with leave of court and an order that the said monies be utilized only for general maintenance of the farm and family members. The applicant argues that such measures shall help maintain peace and protect the interests of all beneficiaries pending final administration of the estate. If she is seeking orders to restrain the respondent from interfering and intermeddling with the property, and in the same vein she claims that their mother is too old to even think for herself, then pray, who will be tilling the land, harvesting and selling the produce so as to realize the proceeds she so wishes to have deposited in a bank, and be used on adult members of the family, before distribution?

The applicant has not demonstrated that any of the beneficiaries are in such dire financial straits as to require financial aid from the estate before confirmation of grant of letters of administration, and subsequent distribution thereof. In fact from her own averments in the affidavits, she paints a glossy picture of siblings who are managing their lives so well, to the extent that they have some spare cash to send towards managing the estate.

**INHIBITION ORDERS, PRESERVATORY AND RESTRAINING ORDERS**

The common refrain which runs in the applicant's case is that that the Respondent who was entrusted by family members to guard their interests in the estate of their late father but he has since turned against her sisters and herself by acting ultra vires and his actions amounts to intermeddling in the said estate since he doesn't have a grant of administration. It is submitted that the applicant has met the threshold for grant of preservatory orders as was set out in the case of **Japheth Kaimenyi M'ndatho v M'ndatho M'mbwiria [2012] eKLR to include**

***That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservatory orders of inhibition are issued.***

***b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.***

***c. That the applicant has arguable case."***

Drawing from the provisions of Section 68(1) of the Land Registration Act the applicant urges this court to issue preservatory orders in the form of inhibition. The section provides:

"The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

Again the applicant is not very clear on what she really wants. In one breath, she seeks restraining orders, and laments about a takeover of 2 acres where the respondent has purportedly planted coffee bushes. Then she makes a turn around and says no one is complaining about the portion where the respondent occupies and tills. The question is, does that portion form part of the 84 acres? And does it fall in parcel **Moiben/Moiben Block 2(SEGERO)/348 OR Moiben/Moiben Block2(SEGERO)/349**, or is it in the rest of the "vast estate" alluded to? Again there is no clarity. It is on account of these very many loopholes that I reach the conclusion that the application lacks merit and is dismissed with costs to the respondent.

**Delivered and dated this 16<sup>th</sup> day of July 2020 at Eldoret**

**H. A. OMONDI**

**JUDGE**