



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION No.95 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE KIMETO ARAP KILI

THROUGH

HELLEN CHEPTUM KEBENEI & 3 OTHERS.....APPLICANT

VERSUS

KIPLAGAT STEPHEN KITUR.....RESPONDENT

RULING

By a notice of motion dated **28th September 2017**, and the supporting affidavits sworn by **HELLEN CHEPTUM KEBENEI and SAMOEI arap METTO** (the applicants) as well as the annexures, seeking an order restraining

a) **KIPLAGAT STEPHEN KITUR, PASCALY KIMOSBEI SIRTUI**, by himself, or through his agents, servants, officers or otherwise, from attaching, selling, disposing off, alienating, transferring or interfering with parcel **No NANDI/MUTWOT/712** and **No NANDI/MUTWOT/713**.

b) That the titles of the aforementioned parcels, held by the respondent, and **PASCALY KIMOSBEI SIRTUI**, be deposited in this court for preservation

c) That this court do order for cancellation and revocation of those titles and the same do revert to the estate of the deceased

The application is premised on grounds that while the succession cause was pending, the respondent (**PASCALY KIMOSBEI SIRTUI**), fraudulently procured the title deeds over the said parcels of land, purportedly arising out of sub-division of **No NANDI/MUTWOT/203**. It is pointed out that when PW1 and PW2 testified on **26th August 2015**, the parcel **No 203** was subject of to a caution, and a restriction had been lodged. That in perpetuation of the said fraud, the respondent intends to fraudulently dispose of the parcels to third parties, so as to defeat the ends of justice. The deceased who died on **17th October 2008**, is said to have had 5 wives and is survived by 16 beneficiaries, and that prior to the demise of the deceased, the said parcel **No NANDI/MUTWOT/203 measuring 67 acres** was intact, and all the 4 beneficiaries namely **SAMOEI METTO, JEROTICH SIRTUY, THOMAS KEBENEI, and PASCALLY SIRTUY** had a portion to live on and till. That is how the applicant, who us the widow of **THOMAS KEBENEI**, lived on a portion of the land with her children.

However, the position changed after the death of **THOMAS KEBENEI**, and **PASCALLY SIRTUY** (respondent) encroached onto the portion she had lived on and utilized with her late husband. Further, the respondent has bequeathed the two aforementioned parcels of land to himself, even before the cause has been finalized, claiming that he is enforcing the contents of a purported will, whose validity is hotly contested. As a matter of fact, the applicant reported his actions to **Kapsabet Police Station vide OB No 21/25/2017**.

In opposing the application, the respondent describes it as frivolous and an outright abuse of the court process, which ought to be dismissed, as the applicant has approached this court with unclean hands. He deposes in a replying affidavit that t the deceased (who was his father) bequeathed to them various parcels of land from his estate, and wrote a will to express his wishes. That he bequeathed to him **27 acres** of the portion known as **NANDI/MUTWOT 713, and an equal share in parcel No. NANDI/MUTWOT 712** measuring about 40 acres, which was transferred to him by the deceased in the year 1998. In support of this, he has annexed copies of the application for consent, a copy of Transfer of Land Form and Mutation.

He confirms that he occupies **5 acres** of the suit land (whose description is not given), while **SAMOEI METTO** occupies **15 acres**, which the respondent wants the said **SAMOEI** to vacate saying it was given to him by their father. Further, that the sais **SAMOEI** was given **40 acres** of land in **KITALE**. The respondent also claims that his sister **CHETROTICH** occupies 20 acres of the unspecified parcel. He contends that in **ELDORET HCMisc. App No. 218 of 1998**, the court ordered **THOMAS KEBENEI** to file a case within 21 days, but this never happened.

He denies the claims that his brother's widow **HELLEN** is in occupation of the suit land, saying her late husband (**THOMAS**) has an estate comprising 100 **acres in NGERIA**- where he relocated to in **1967**, and lived with his family until his demise. That their late father had sued **THOMAS** over his attempt to invade the land at **KAPSABET LAND DISPUTE TRIBUNAL**, which awarded the land in their father's favour.

The respondent admits that parcel **No NANDI/MUTWOT/203** was subdivided to become **No NANDI/MUTWOT/712 and No NANDI/MUTWOT/713**, but registration was not effected because **THOMAS** had sued their father in **ELDORET HCMisc. App No. 218 of 1998** which stopped the processing of the title titles. However, before their father's demise, he executed all the transfer documents and consents to transfer the land were obtained between the years 2007-2008, although he only collected the title documents in the year 2016. The respondent denies selling any of the parcels given to him by his father. He contends that his family has been on the suit land for about 40 years, and the applicants have no right to interfere with his quiet possession. He laments that prayers sought by the applicants will result in their eviction to an unknown place.

In a rejoinder by way of a supplementary affidavit sworn by **SAMOEI arap METTO**, it is reiterated that the respondent effected transfer of the property when the proceedings involving dispute over distribution were already pending in court. That the subdivision of the parcel by the respondent was fraudulent and irregular, and the respondent has in-fact been charged in **KAPSABET Criminal Case No. 30 of 2018 with the offence of obtaining false registration of the said parcels by false pretences- a copy of the charge sheet is annexed as SM2.**

He confirms that there was a dispute between the deceased and his son **THOMAS**, over the said parcel, and eventually the court in **ELDORET Misc Appl. No 238 of 1998** issued orders prohibiting subdivision and transfer of parcel **No. NANDI/MUTWOT/203**. Those orders have never been set aside.

In their written submissions, the applicant states that the respondent, acting with impunity, subdivided the contested parcel, fully aware of the prohibition orders issued by the court on **16th September 1999**. Further, the validity of the will which the respondent relies on to defend his actions is contested, and in any event, the property is the subject of litigation in court.

The respondent in urging this court to dismiss the application, submits that this court lacks jurisdiction to issue the orders of injunction sought because such orders ordinarily fall under the Civil Procedure Rules. It is also argued that the applicant's reference to **Section 45** of the Law of Succession Act does not salvage the situation as that specifically addresses the issue of intermeddling with the estate. In support of this argument, reference is made to the case of **In the matter of the estate of Moraa Mokandu (Deceased) Kisii High Court Succession Cause No 709 of 2011**. It is further argued that it would be superfluous to issue an order of injunction as parcel **NANDI/MUTWOT/203** no longer exists. As for the pending criminal case, the respondent maintains that he is legally presumed innocent, until proven guilty.

It is common ground that parcel **No NANDI/MUTWOT/203** was registered in the name of the deceased, who was the family's patriarch. It is also common ground that there is a disagreement as regards the distribution of the estate particularly as concerns the property under reference. It is also a fact that despite a court order which prohibited subdivision and transfer, whatever other explanation there may be, the respondent went ahead to effect transfer in the year 2016. Further there are court proceedings pending in relation to the said property and I share the views expressed in **The Estate of Solomon Muchiri Macharia [2016] eKLR** which held that:

“...The common doctrine of *lis pendens* effectively provides that during the pendency of a suit in which any right to immovable property, the property cannot be transferred by any party to the suit so as to affect the rights of other parties...” The court referred to the case of **K.N. Aswathnarayana Setty (D) Tr. LRs & Ors v State of Karnataka & Ors** which discussed the principle of *lis pendens* as being in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation, that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.

The situation prevailing here demonstrates an intention by one party to alienate immovable property by transferring it to his name, (having had it subdivided, and given new numbers) so as to adversely affect the rights of the other beneficiaries, and done while the suit is pending. This certainly offends the principle of *lis pendens*. There is a deliberate attempt by the respondent to evade accountability by invoking some technicality about the property having changed identity so as to render the court helpless. This in my view is mischievous, and reeks of impunity. I think that for the court to acquiesce to such machinations before the matter is heard and determined would be tragic, and a mockery to justice and good conscience.

As for jurisdiction to grant injunctions in a succession cause, I can do no better than refer to **rule 73 of the Probate and Administration Rules** which provides that:

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”

It therefore follows that in the light of the actions by the respondent which adversely impacts on the property and the rights of the other beneficiaries, this court is not entirely helpless. In any case what the respondent has done is actually to intermeddle with the estate and fits in with what is envisioned under section 45 (1) and 47 of the Law of Succession Act. I therefore find it equitable and just to ensure that the contested property is preserved pending hearing and determination of this cause, and for clarity order that a temporary injunction do issue restraining the respondent by himself, his agents, servants, officers from attaching, selling transferring, leasing disposing of, or in any manner adversely dealing with parcels **No NANDI/MUTWOT/712 and No NANDI/MUTWOT/713 (original No NANDI/MUTWOT/203)**, pending hearing and determination of this suit.

The costs of this application shall be borne by the respondent.

Delivered and Dated this 19th day of September 2019 at Eldoret

H. A. OMONDI

JUDGE