



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION NO. 53 OF 2019**

**IN THE MATTER OF ARTICLES 57 AND 165(6) & (7) OF THE CONSTITUTION KENYA 2010**

**IN THE MATTER OF THE LAW OF SUCCESSION ACT,**

**CHAPTER 160 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE HIGH COURT (ORGANIZATION AND ADMINISTRATION ACT, 2015**

**AND**

**IN THE MATTER OF THE MAGISTRATES COURTS ACT, 2015**

**AND**

**IN THE MATTER OF THE ESTATE OF THE LATE CHELAGAT CHEBASA RIBISON ALIAS CHELAGAT CHEBASA**

**-BETWEEN-**

**MARIA JEBET ARAP MASOIN.....1<sup>ST</sup> APPLICANT**

**KIPKEMBOI EMMANUEL TOROITICH ALIAS EMMANUEL KIPTANUI.....2<sup>ND</sup> APPLICANT**

**-AND-**

**KIPKOECH LAGAT.....1<sup>ST</sup> RESPONDENT**

**TOROITICH CHELAGAT.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] The two applicants, **Maria Jebet Arap Masoin** and **Kipemboi Emmanuel Toroitich *alias* Emmanuel Kiptanui**, are mother and son. They moved the Court vide the Notice of Motion dated 7 March 2019 pursuant to the provisions of **Articles 165(3), (6) and (7) of the Constitution of Kenya, 2010, Sections 1A, 1B, 3, and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; Section 47 of the Law of Succession Act, Chapter 160 of the Laws of Kenya, Section 7(1) of the Magistrates Court Act, 2015, Section 5 of the High Court (Organization and Administration Act, 2015; as well as Rule 73 of the Probate and Administration Rules, 1980 and Order 50 Rule 1 of the Civil Procedure Rules 2010**, for the following orders:

[a] Spent

[b] Spent

[c] That the entire proceedings and any consequential order(s) arising therefrom in **Chief Magistrate's Succession Cause No. 236 of 2017** be set aside/vacated.

[d] That the Court be pleased to declare the entire proceedings and any consequential order(s) arising therefrom in the **Chief Magistrate's Succession Cause No. 236 of 2017** null and void *ab initio* for lack of jurisdiction.

[e] That the Court be pleased to call for **Succession Cause No. 236 of 2017** filed in the Chief Magistrates Court at Eldoret in respect of the estate of the late **Chelagat Chebasa Ribison alias Chelagat Chebasa** and admit the same at the High Court at Eldoret for hearing and determination.

[f] That the Court do issue such other orders/directions as it may deem fit and just to serve the ends of justice in the circumstances herein.

[g] That the costs of this application be provided for.

[2] The application was premised on the grounds that the Applicants reside, possess and occupy a portion of land **Parcel No. Cheptiret/Cheplaskai/Block 1 (Kipchamo)58** (hereinafter the Suit Property), which belonged to the late **Chelagat Chebasa Ribison alias Chelagat Chebasa**, the deceased herein, who was the father in law of the 1<sup>st</sup> Applicant and grandfather of the 2<sup>nd</sup> Applicant. It was further averred by the Applicants that, prior to his demise, the deceased had given the 1<sup>st</sup> Applicant 30 acres of the land comprising his estate as a gift *inter vivos* even before the demise of her husband, who was the 2<sup>nd</sup> born of the deceased; and therefore that the 1<sup>st</sup> Applicant has all along resided on her portion of Suit Property with her children, including the 2<sup>nd</sup> Defendant.

[3] The Applicants further averred that the Respondents, who are the sons of the deceased and therefore her brothers-in-law, have threatened to evict her and her children from the Suit Property yet they own separate pieces of land given to them by the deceased on which they reside. Thus, according to the 1<sup>st</sup> Applicant she is entitled to an inheritance not only as the daughter-in-law of the deceased whose husband pre-deceased the deceased; but also on account of the fact that the property in issue was given to her as a gift *inter vivos* by the deceased. On his part, the 2<sup>nd</sup> Applicant contended that he is entitled to the Suit Property as one of the grandsons of the deceased through **Kili arap Masoin** and that he has been staying on the property all his life.

[4] The application was supported by the affidavit annexed thereto sworn by the 1<sup>st</sup> Applicant wherein she furnished the background information to the instant application. At paragraphs 22 to 27, the 1<sup>st</sup> Applicant averred that she cited the Respondents herein to take out Letters of Administration vide **Eldoret High Court Citation Cause No. 22 of 2016** whereupon orders were issued compelling the Respondents to file a Succession Cause within 15 days from **24 April 2017**. She further averred that, while fully aware that the estate of the deceased is valued at over **Kshs. 20,000,000/=**, the Respondents filed **Succession Cause No. 236 of 2017** before the Chief Magistrate's Court at Eldoret; which matter was heard and finally determined after *viva voce* hearing that included the hearing of her Objection and Cross Petition. Her Objection and Cross Petition were dismissed by the Chief Magistrate vide the Ruling dated **1 February 2019**. In the circumstances, the Applicants approached this Court contending that the Chief Magistrate lacked the pecuniary jurisdiction to entertain the matter; hence the prayers aforesaid. To buttress this assertion, the Applicants relied on a Valuation Report annexed to the Supporting Affidavit and marked **Annexure MJAM-3** wherein the value of **Land Parcels No. Cheptiret/Cheplaskai Block 1(Kipchamo)/58** (measuring 44 acres) and **Cheptiret/Cheplaskai Block 1(Kipchamo)/59** (measuring 22 acres), as at **21 September 2016**, was given as **Kshs. 38,800,000/=**.

[5] The Respondents opposed the application and filed both Grounds of Opposition dated **24 March 2019** and the Replying Affidavit sworn by the 1<sup>st</sup> Respondent, **Kipkoech Lagat**, on **11 April 2019**. The grounds are that:

[a] The application is frivolous, vexatious, incompetent, fatally and incurably defective;

[b] The application is bad in law, unfounded in law and an abuse of the court process;

[c] The Court does not have jurisdiction to entertain the matter and issue the orders sought;

[d] The application does not disclose any cause of action;

[e] The application does not lie in law.

[6] In support of the aforesaid grounds, the 1<sup>st</sup> Respondent averred that, in addition to the Objection proceedings deposed to by the 1<sup>st</sup> Applicant, the Applicants filed a civil suit before the Eldoret Environment and Land Court, being **ELC Petition No. 16 of 2016** which petition was dismissed after full hearing; and there is an appeal pending from the said decision before the Court of Appeal, namely **Eldoret Civil Appeal No. 31 of 2018**. It was the 1<sup>st</sup> Respondents assertion that the issues raised in that petition and the pending appeal are the same as the subject matter herein.

[7] The application was canvassed by way of written submissions, pursuant to the directions given herein on **26 March 2019**. In his written submissions filed herein on **20 May 2019**, **Mr. Nabasenge**, learned counsel for the Applicants proposed the following three issues for determination:

[a] Whether this Court has jurisdiction to entertain the instant application;

[b] Whether the Chief Magistrate's Court had the pecuniary jurisdiction to deliberate on the estate of the deceased; and,

[c] Whether the orders sought herein should be granted.

[8] It was the submission of **Mr. Nabasenge** that the Respondents are misguided in asserting that this Court lacks jurisdiction to entertain the instant application, granted the provisions of **Article 165(3)(a)** of the **Constitution**; which gives the High Court unlimited jurisdiction in both criminal and civil matters; and **Article 165(6)** of the **Constitution**, by which the High Court is clothed with supervisory jurisdiction over subordinate courts. Thus, it is in that light that the Applicants moved the Court to call for the proceedings of the subordinate court and quash them for illegality. Further, it was the submission of the Appellants that **Section 47** of the **Law of Succession Act** also gives the High Court the jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. Hence, any argument that the Court has no jurisdiction ought to be dismissed.

[9] The Appellants further argued that the Chief Magistrate's jurisdiction is limited to estate's worth no more than **Kshs. 20,000,000/=**; and therefore it lacked the pecuniary jurisdiction to entertain **Succession Cause No. 236 of 2017** in the light of the Valuation Report marked **Annexure MJAM-3** which gives the value of the two pieces of land comprising the estate of the deceased to be **Kshs. 38,800,000/=**. Counsel relied on **Section 7(1)(a)** of the **Magistrate's Courts Act, 2015**, which limits the pecuniary jurisdiction of a chief magistrate to **Kshs. 20,000,000/=**; and the case of **Owners of Motor Vessel Lillian 'S' vs. Caltex Oil (Kenya) Ltd [1989] KLR 1**. The cases of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others** and **Kenya Ports Authority vs. Modern Holdings (EA) Limited [2017] eKLR** were also cited for the proposition that jurisdiction can only be donated by the Constitution or legislation; but not by judicial craft.

[10] While conceding that the Applicants willingly acquiesced to the jurisdiction of the Chief Magistrate by filing an objection and a cross-petition, the Applicants took the view that that was inconsequential; and that parties cannot clothe the court with jurisdiction by consent or acquiescence to it. Counsel relied on **Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577** to buttress this argument that the Applicants' participation in the proceedings before the Chief Magistrate did not in any way validate the same or confer the Chief Magistrate's court with jurisdiction; and therefore, that the said proceedings are null and void *ab initio*. Counsel for the Applicants also referred me to the persuasive decisions of the High Court in Chuka, Siaya and Kajiado; namely, **Re Estate of M'Nkiria A Rugeti (Deceased) [2019] eKLR**; **Joseph Odera Ombayo vs. Robert Ombayo Wambogo [2019] eKLR** and **Isaac Gathungu Wanjohi vs. Simon Moloma Nkaru & Another [2019] eKLR**; to underscore their submission that the pecuniary jurisdiction of the Chief Magistrate at all material times was limited to **Kshs. 20,000,000/=** by virtue of **Section 7(1)(a)** of the **Magistrates Courts Act**.

[11] Counsel for the Respondent, on the other hand, urged the Court to focus on the competence or otherwise of the instant application in the light of the orders sought. In his view, the application is not only incompetent, but also a nullity in itself; for the reason that proceedings can only be commenced by way of complaint, petition or originating summons. He relied on **Nyahururu ELC Miscellaneous Application No. 24 of 2017: Kiptuya Ngerechi Too vs. Peris Wangui Macharia & Another [2018] eKLR** to support this argument. It was also his submission that the application is an abuse of the process of the Court granted that the parties have litigated over the same subject matter on several platforms, including **Eldoret ELC Petition No. 16 of 2016**, from which there is a pending appeal; and **Eldoret CM's Succession No. 236 of 2017**. Counsel added that the myriad of proceedings over the same subject matter has the potential of exposing the courts concerned to the embarrassment of arriving at conflicting decisions. Counsel urged the Court to note that the Valuation Report on which the instant application is premised was available in **2016** and therefore ought to have been brought to the attention of the Chief Magistrate's court in **Succession Cause No. 236 of 2017**. Counsel, likewise, made reference to the case of **Owners of the Motor Vessel Lillian 'S' vs. Caltex Oil (Kenya) Limited** (*supra*) but for the holding that a question of jurisdiction ought to be raised at the earliest opportunity. He accordingly prayed for the striking out and/or dismissal of the application with costs.

[12] It emerges quite clearly from the application, the Supporting and Replying Affidavits and Grounds of Opposition, as well as the written submissions filed herein by learned Counsel for the parties that the key issue for determination is that of jurisdiction. The issue of jurisdiction has been raised at two levels; the first one being whether this Court can validly entertain the instant application; and if so, whether the lower court had the pecuniary jurisdiction to hear and determine **Eldoret CM's Succession Cause No. 236 of 2017**. And, as was recognized by the Court of Appeal in **the Owners of Motor Vessel "Lillian s" vs. Caltex Oil (K) Ltd (supra)** the question of jurisdiction is a critical one, and must be resolved *in limine*. The Court held that:

**"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

[13] And in the work, **The Major Law Lexicon, Volume 4**, jurisdiction is defined thus:

**"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."**

#### **On the Jurisdiction of this Court:**

[14] Whereas **Article 165(3)(a)** is explicit that the High Court has unlimited original jurisdiction in criminal and civil matters, various constitutional and statutory provisions delimit the manner in which the jurisdiction is to be exercised. For instance, **Sub-Article (5)(b)** of **Article 165** of the Constitution admits no controversy that, whereas the High Court has unlimited original jurisdiction in civil matters, that jurisdiction does not extend to disputes relating to land.

[15] Similarly, by dint of **Article 165(6)** of the Constitution, the High Court has the supervisory jurisdiction over the subordinate courts; it is to be recognized that that jurisdiction is best exercised by way of judicial review; a *sui generis* kind of proceedings that is neither civil nor criminal as was aptly explicated by the Court of Appeal in **Emfil Limited vs. The Registrar of Titles Mombasa [2014] eKLR** at paragraphs [19]

**“Judicial Review proceedings are proceedings of a *sui generis* nature subject to its own peculiar rules. While we appreciate Article 159 of the Constitution and the need to apply substantive justice, that article provides no justification for a court to ignore a specific procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest. Thus, the court was bound to apply the specific provisions of Order 53 of the Civil Procedure Rules...”**

[16] The instant application seeks the setting aside and/or nullification of the entire proceedings and ruling in **Eldoret Chief Magistrate’s Succession Cause No. 236 of 2017**. A copy of the final decision of the Chief Magistrate dated **1 February 2019** was annexed to the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant and is marked **Annexure MJAM-12**. In that ruling, the Chief Magistrate came to the following determination:

**“...If it was supposed that the allocation of land was to be a gift, it did not fit in with the provisions of section 31 of the law of succession act since it was made 11 years before the death of the deceased. The requirement is that it should be made contemplating the possibility of death.**

**According to the petitioners they are willing to make provision for the children who were abandoned by the objector but object to Maria staking any claim to any share that may be due on behalf of the late Kiili.**

**In the authorities cited by the petitioners it was held that a will should be attested to by at least two competent witnesses and comply with the law. If there is a gift it is only valid if it is made in contemplation of death. The two grounds advanced by the objector do not satisfy the requirements of the law.**

**Having considered the evidence, the application and submissions the court is satisfied that the objection and cross petition lack merit and are dismissed with costs.”**

[17] It is manifest therefore that the lower court having finally determined the matter before it, the prayers that this Court be pleased to call for **Succession Cause No. 236 of 2017** and admit the same at the High Court for hearing and determination are untenable, if not altogether misconceived. The only options open to the Applicants, in the circumstances were, either to file an appeal to the High Court pursuant to **Order 42 of the Civil Procedure Rules** or to file an application to the trial court for review under **Order 45 of the Civil Procedure Rules**. None of those options was employed by the Applicants.

[18] The instant application not being an application for judicial review, the question to pose is whether it is tenable from the standpoint of **Article 159(2)(d) of the Constitution**. As has been pointed out herein above, for the Court to be seized of the requisite power to entertain the application, it was imperative for the Applicants to satisfy the procedural requirements in that regard. Consequently, **Article 159(2)(d)** of the Constitution would offer no refuge in the circumstance. As was stated by the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012** :

**“...it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1 B of the Civil Procedure Act Cap 221 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases.”**

[19] The foregoing being my view of the matter, I would agree that the application is incompetent and therefore undeserving of a merit consideration. I would accordingly strike it out with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 9<sup>TH</sup> DAY OF OCTOBER, 2019**

**OLGA SEWE**

**JUDGE**