REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 138 OF 2012

IN THE MATTER OF THE ESTATE OF KOIMA CHERUIYOT-DECEASED

VICTOR KIPRUTO KOIMA ..... PETITIONER

VERSIS

WILSON KIPKAZI KOIMA …..... OBJECTOR

RULING

The summons dated 25th April 2012 was filed by Wilson Kipkazi Koima seeking orders that this court be pleased to; (1) Issue temporary injunction against the petitioner/respondent restraining Victor Kipruto Koima, from entering, ploughing, tilling, felling trees, constructing or trespass into the objector\'s share of 71/2 acres hived off from Land Reference Number Baringo/Perkerra 101/136 measuring approximately 12.95 Hectares; (2) The petitioner be stopped from intermeddling with the estate of the deceased; (3) the Objector be included as heir and beneficiary of the estate of the deceased and the parties maintain status quo until this succession cause is heard and determined. The application is based on the grounds found in the supporting affidavit of Wilson Kipkazi Koima. The deceased, Koima Cheruiyot, had two wives namely Kabon Koima and Elizabeth Koima. The Objector contends that he is the only child of the deceased from the first wife, Kabon Koima and used to live on the suit property, Baringo/Perkerra 101/136, for a long time. The second wife was blessed with three sons and two daughters. After the demise of Koima Cheruiyot, the family held several meetings which are evidenced by the minutes marked as exhibit B. The objector attended all the meetings which deliberated on the distribution of the estate of the deceased. In the minutes of the meeting held on 4.08.2007, the Objector was registered as one of the six children of the deceased and as beneficiary of his estate at min 1/12/09/08 of the meeting held on 12.09.2008. The family agreed to subdivide the **Baringo/Perkerra 101/136** among the four sons of the deceased with each getting approximately 7.5 acres. The Objector has now filed an application before this court stating that the petitioner has chased him away from the property which is wasting away despite this being planting season. His name was also not included among the children of the deceased in a letter drawn by the chief, Perkerra Location, dated 20th February 2012. The objector has initiated contempt proceedings against the Petitioner for disobeying a court order issued by Omondi J on 26th April 2012.

The Petitioner opposed the application. He filed a Preliminary Objection dated 4th May 2012 and swore a Replying Affidavit. The grounds of opposition are based on the application being brought under the wrong provisions of law, that is **Order 39** which was repealed by **Civil Procedure Rules 2010** and therefore he urged the court to dismiss it. In the Replying Affidavit, the petitioner stated that the Objector was not a son of the deceased; that the first wife was not blessed with any children and after living in the suit property for a while returned to her home. According to the Petitioner, the objector was a son of the deceased’s brother, Chepngeno Cheruiyot and was allocated land by the deceased in Kapkein out of love and affection.

The Petitioner brought this application under **Order XXXIX** of the **Civil Procedure Rules** which were repealed in 2010. The relevant provision for grant of temporary injunction and interlocutory orders is under **Order 40** of the **Civil Procedure rules, 2010**. The Objector thus terms this application as bad in law and fatally defective and it should be dismissed. The Constitution however does offer refuge to the Objector under **Articles 159 1 (d)** which states:-

"Justice shall be administered without undue regard to procedural technicalities".

Section 1A and **1B** of the **Civil Procedure Rules 2010** also recognize the above provisions of the Constitution.

The test on whether the proceedings are a nullity or merely an irregularity was developed my Lord Denning in **Macfoy v United Africa Co. Limited [1961] 3 All E.R. 1169** where he said:

"No Court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw?"

Applying this test to the instant case, the respondent did not point to any prejudice that will be occasioned to either party by considering the Objector\'s application in its current form. The irregularity will not occasion any failure of justice. It is therefore curable by **Article 159 1 (d)** of the **Constitution** and **Section 1A** and **1B** of the **Civil Procedure Rules**.

I have considered the affidavits sworn by all the parties. The objector claims that the Petitioner attempted to obtain the Grant of letters of administration irregularly and fraudulently. The Objector claims that his uncle, Kibet Cheruiyot, was all along in possession of the original Death Certificate of the deceased and Title Deed of **Baringo/Perkerra 101/136** and the copy used by the Petitioner to apply for Grant of letters of administration was obtained out of malice, hence irregular and fraudulent. I have no reason to doubt the Objector\'s claim, simply because the Petitioner in his further replying affidavit annexed a demand letter addressed to Kibet Cheruiyot, demanding release of the original Death Certificate and Title Deed which were in his possession within three days. This letter was dated 21.02.2012. It seems Kibet did not heed to the petitioners demand and the petitioner went ahead to obtain another Death Certificate which is dated 29.02.2012, which he used to petition this court, seven days after the demand letter. If at all this Death Certificate is genuine it should not predate the petitioners demand letter. The same can only have been irregularly obtained.

The broad issue falling for determination in this dispute is whether the Objector, Wilson Kipkazi Koima, is a son of the deceased and hence entitled, like all the other beneficiaries, to inherit the suit property on equal shares basis. The deceased had two houses, the objector contends he was the only child from the first house. This was denied by the Petitioner who annexed a letter from the chief to confirm the same. However the letter does not carry much weight because the Objector left the location (suit property) in 1986 and therefore the chief may not have concrete information of the family history. He could only rely on the information given to him by the Petitioner.

The brother to the deceased swore an affidavit in which he depones that the Objector was the son of the deceased from the first wife. The Objector was also included in the meetings as a member of the family. This line of thought makes more sense especially when married to the undisputed facts. For example, both parties to the suit do agree that the first wife returned to her parents at one point in her life and that is where she was buried upon her demise. This could be the reason that also made the Objector (her son) leave the suit property and was allocated land by the deceased in Kipken.

In the affidavit sworn by Kibet Cheruiyot, the only surviving brother to the deceased knows the history of the family. Furthermore, he was the one entrusted with the original Death Certificate of the deceased and the original Title Deed of the suit property. The family must have therefore approved him as a man of integrity. However the petitioner and objector having taken two views on whether or not the objector is the son of the deceased and therefore a beneficiary, is a matter that should be investigated further. The

petitioner should have taken directions on whether the issue should be determined on affidavit evidence or by way of viva voce evidence. It is my view therefore that the prayer that the objector be regarded as one of the beneficiaries is premature and must not be granted at this stage. Directions have to be taken and parties agree on how it should be determined.

However, as to the first prayer, I find that there is a real dispute as to who are the heirs to the deceased and whether the objector is one of them. It is therefore only proper that the estate be preserved pending determination of that issue. I therefore grant an order of injunction restraining the petitioner from intermeddling with the estate and in anyway disposing off, selling or in any way interfering with 71/2 acres hived off from LR No. Baringo/Perkerra 101/136 (12.95 Ha) pending the hearing and determination of the other issues.

In the end I grant prayer 2 and part of prayer 3 of the Chamber Summons dated 25/4/2012. Costs to be in the cause.

DATED and DELIVERED this 5th day of October, 2012.

R.P.V. WENDOH
JUDGE
PRESENT:
Mr. Ms Sieling for the petitioner

Mr. Otieno holding brief for Mr. Ogeto for the objector

Kennedy – Court Clerk