



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 311 OF 2017

MIKE KIPNGETICH SAINA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE KIPSAINA ARAP TARUS (DECEASED)).....PLAINTIFF/APPLICANT

VERSUS

RACHEL TARUS.....1ST DEFENDANT/RESPONDENT

SUSAN MASAI.....2ND DEFENDANT/RESPONDENT

PRISCA BORE.....3RD DEFENDANT/RESPONDENT

RHODA SAMOEL.....4TH DEFENDANT/RESPONDENT

EUNICE JEMELI.....5TH DEFENDANT/RESPONDENT

HOSEA K. SAINA.....6TH DEFENDANT/RESPONDENT

CHEPTOO KIMUTAI.....7TH DEFENDANT/RESPONDENT

KIPRUTO TOIYOI SAINA.....8TH DEFENDANT/RESPONDENT

RULING

This ruling is in respect of a preliminary objection dated 4th and 9th October 2017 respectively by the defendants herein.

The 1st preliminary objection dated 4th October 2017 was by the 7th and 8th defendants on the grounds that the plaintiff/applicant obtained a limited grant of letters of administration

Ad litem from a court which did not have jurisdiction pursuant to the provisions of sections 48 and 49 of the law of Succession Act Cap 160 of the laws of Kenya. The other ground was that this case is purely a succession Cause which should be handled by the High Court.

Before this preliminary objection could be heard the 1st to 6th defendants also filed another preliminary objection dated 9th October 2017 on the grounds that the court lacks jurisdiction and that the plaintiff lacks locus standi to bring this suit and as such it is an abuse of the court process. Parties agreed to canvass both preliminary objections by way of written submissions.

7TH AND 8TH DEFENDANTS' WRITTEN SUBMISSIONS

Counsel for the 7th and 8th defendants submitted that plaintiff is the son of KipsainaTarus who died on 1/6/2017 as shown by the death certificate. The 1st defendant is allegedly the estranged wife of the deceased while the 2nd 3rd 4th 5th 6th are children of the deceased. The 7th defendant is wife to the eldest deceased brother of KipsainaTarus (deceased) that is to say sister in-law. The 8th defendant is son to the eldest brother of KipsainaTarus who is also deceased (nephew).

It was Counsel's submission that the Kapsabet SPM's court did not have jurisdiction to issue the grant pursuant to Section 48 (l) of the Succession Act which provides as follows:

"Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of Section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under Section 76 and to determine any dispute under this Act and pronounce any decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings. Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the

High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act."

Section 49 of the Act provides:

"The Resident Magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by Section 48.

It was Counsel's submission that the deceased person herein Kipsaina Tarus had two brothers whose father left behind a parcel of land measuring 30 acres upon his demise in 1963 which comprised of L.R. No. Nandi/Sigot/50. He stated that the families of the 7th and 8th defendants were each to get a share of 10 acres but the said Kipsaina Tarus (deceased) converted the entire 30 acres or ancestral/family land under Nandi/Sigot/50 which measures approximately 105 acres. The 7th and 8th defendants have a pending suit in Eldoret H.C.E. & L. No. 59 of 2015 which was due for defence hearing but the said Kipsaina Tarus died thus the matter is pending substitution.

Counsel submitted that from the provisions of sections 48 and 49 of the law of Succession Act Cap 160 Laws of Kenya, it is clear that the Limited grant of representation Ad litem was given by the court over an estate whose gross value runs into millions of shillings as shown by the number of properties shown in the pleadings.

That the assets of the estate do exceed one hundred thousand shillings. The Resident Magistrate's Court is only empowered under section 49 (iii) of the Act to make temporary grants of representation Limited to collection of assets and payment of debts within its area. This suit is therefore filed without a proper Grant conferring authority upon the plaintiff. It was further Counsel's submission that once the pleadings in this suit refer to the estate of a deceased person, then it automatically deprives this court the requisite jurisdiction.

Mr. Miyianda submitted that it is clearly admitted that the plaintiff is not an administrator of the estate of the deceased. That the plaintiff only attempted to obtain an ad litem Limited grant to enable him act as a "legal representative of the estate of the deceased" as captured in paragraph 5 of the Plaintiff. Paragraph 7 of the Plaintiff. Further that the Plaintiff does not describe the 7th and 8th defendants in the Plaintiff. No claim is raised against the two defendants. Counsel therefore urged the court to uphold the preliminary objection as this is a succession matter which falls under the jurisdiction of the High Court.

SUBMISSIONS ON BEHALF OF THE 1ST TO 6TH DEFENDANTS

Counsel for the 1st to 6th defendants raised a Preliminary objection dated 9th October 2017 on the grounds that:

- a. The court lacks jurisdiction
- b. The Applicant lacks the locus standi
- c. The Application is an abuse of the court process

Counsel reiterated 7th and 8th defendants submissions on the provisions of section 48 of the law of succession Act Cap 160 Laws of Kenya that gives jurisdiction to the Magistrate's Court to entertain any application and make orders with respect to any estate whose gross value does not exceed the pecuniary limit prescribed under section 7 (l) of the Magistrate's Courts Act 2015. Counsel further submitted that Section 7 (l) of the Magistrates Act limits the jurisdiction of the Chief Magistrate to Kenya Shillings Twenty Million (Kshs.20,000,000/=). The Senior Principal Magistrate pecuniary Jurisdiction is fifteen million (Kshs 15,000,000/=) while the Senior Resident Magistrates Court is 7 Million.

It was Counsel's submission that the properties owned by the deceased as clearly stated by the plaintiff/Applicant was way beyond the jurisdiction of the Magistrate's court. The properties are as follows;

- a. NAND1/SIGOT/50 measuring 41.8 Ha. (103 acres)
- b. NAND1/SIGOT/8 measuring 16.8 Ha. (41.5 acres)
- c. NAND1/SIGOT/ 23 measuring 2.83 Ha. (7 acres)
- d. NAND1/SIGOT /47 measuring 7.2 Ha. (17.8 acres)
- e. NAND1/SIGOT/ 51 measuring 6.07 Ha. (15 acres)
- f. NAND1/SIGOT /54 measuring 4.4 Ha. (10.87 acres)

g. NANDI/SIGOT /123 measuring 0.2 Ha. (1/2 acres)

h. NANDI/SIGOT /125 measuring 3.2 Ha. (7.9 acres)

Counsel stated that the suit property is more than 203.5 acres. She therefore submitted that the court lacked jurisdiction to issue the grant. On the issue of locus standi Counsel submitted that the plaintiff/applicant lacks capacity to institute the suit in view of the fact that he obtained grant before the court which lacks jurisdiction. Counsel therefore submitted that in view of the above the suit is an abuse of the court process and should be struck out.

THE PLAINTIFF'S SUBMISSIONS ON THE DEFENDANTS' PRELIMINARY OBJECTIONS DATED 4/10/2017 AND 9/10/2017

It was the Plaintiff's Counsel's submission that the Plaintiff prior to institution of this suit, applied to the Principal Magistrate's court in Kapsabet and obtained a Special Limited Grant on 8th September, 2017, whereby he moved the court to prevent wastage of the deceased's estate and to protect the estate from intermeddlers.

Counsel submitted that the prayers sought in the plaint and the application dated 18th September, 2017 all relate to land which belonged to the deceased Mr. Kipsaina Arap Tarus who died on 1st June, 2017. It was further his submission that the family of the deceased have not moved the court and or filed for succession proceedings in respect to the estate of the deceased. Counsel also submitted that that this suit was necessitated by the Defendant's actions of moving onto the deceased's land without any right to do so, constructing a house and settling therein on the deceased's land before succession is done and without the express consent of the other beneficiaries.

It was submitted by Counsel that the deceased had four (4) wives at the time of his death having been divorced by his 2nd wife who is the 1st Defendant herein and who would have made the total number of wives to the deceased to be five (5) had she not divorced and unless the instant suit is sustained and orders maintained pending the hearing and determination of the succession case to be filed the estate of the deceased risks going to waste.

Counsel further submitted that this court has jurisdiction to hear and determine this matter as this is a High court with original and appellate jurisdiction in land matters and therefore the suit before this court and, the application for injunctive orders is properly before this court and ought to be allowed to proceed and the orders sought and granted at the interim stage sustained in order to maintain law and order in the family of the deceased regarding land.

He cited the case of Susan Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR ,High Court of Kenya at Kiambu Commercial Case and Tax Division Case No 2 of 2016 in which it was held that:

"The correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis. In all honesty, it would not be possible for such direction to come from the Constitution or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.... When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. Happily, this is the approach taken by our Courts to the question. In this regard, I can do no better than quote Justice Abuodha of the Employment and Labour Relations Court, who, faced with a "mixed grill case" delivered this jurisprudential gem

Counsel therefore submitted that the Preliminary Objections are total misconceptions of the law unfounded in law and must fail with costs. Further on the issue of locus standi it was Counsel's submission that the plaintiff having obtained a special limited grant before the Kapsabet court has locus to institute the suit as per the law. As the same has not been invalidated on account of lack of jurisdiction to issue it. The prayer at the Magistrate's court was never to administer the estate of the deceased as a whole but to institute suit to prevent wastage of the estate. He prayed that the preliminary objection be dismissed with costs.

Analysis and determination

The defendants have raised a preliminary objection on the grounds that the court lacks jurisdiction to hear and determine this suit. The other issue is that the court that issued limited grant to the plaintiff for purposes of filing this suit lacked jurisdiction therefore the plaintiff has no locus standi to institute this suit.

Sections 48 & 49 of the Law of Succession Act Cap 160 gives the Magistrates jurisdiction to handle succession matters within their jurisdiction with a cap of property not exceeding Kshs.100,000/ as quoted above. The Special limited grant that was issued by the Kapsabet

Principal Magistrate's court was not for administering the estate but was for purposes of instituting this suit for the preservation of the estate pending the filing of the full grant.

It is admitted that the plaintiff filed a cause for a limited grant and not a full grant in the Magistrates court. If the plaintiff had done so then the court would have found that the court did not have jurisdiction to handle matters whose value is beyond their jurisdiction. Having said that I find that the court was within its mandate to issue a limited grant for purposes of filing a suit.

The above also squares the issue that the plaintiff does not have locus standi to file this suit. It is in the affirmative that the plaintiff having obtained a limited grant had the capacity to file this suit.

On the issue that this court does not have jurisdiction to handle this suit as it is a succession dispute, the court has the jurisdiction to entertain issues relating to land but if the orders prayed for are best handled by a succession court then the best way is to allow the High Court to handle the matter conclusively. The Court can give an order for the preservation of the suit land but cannot deal with the distribution of the estate of a deceased person.

Looking at the plaint herein the plaintiff prays for a declaration that parcels of land mentioned in the plaint but leaves it hanging. I do not know what the plaintiff wants the court is to declare. Further the plaintiff seeks for a permanent injunction seeking to restrain the defendants from interfering with the suit lands before the distribution of the estate of the deceased.

The plaintiff has not stated why he has not endeavored to file a Succession Cause. He has just stated that the family of the deceased is a big family. This matter would be handled effectively and conclusively by the High Court who will determine all the issues of distribution of the estate and the entitlements of all the beneficiaries including orders of stopping intermeddling of the estate.

This court may give orders of injunction which will interfere with the distribution of the estate. The best option for the plaintiff is to file a succession cause in the relevant court.

The succession proceedings provide for filing of an objection if certain beneficiaries are left out or are not provided for. The plaintiff has also mentioned that the 1st defendant filed a suit vide Eldoret High Court Civil Suit No. 178 of 2011 (OS) but has not told the court the nature or the status of that case.

In dealing with preliminary objections the court is alive to the principles as was laid down in the Mukisa Biscuits case. The Preliminary objection must be based on a point of law. Having considered the pleadings the submission and the authorities I find that the issue of lack of jurisdiction by the Kapsabet court to issue a limited grant does not hold any water and therefore the plaintiff has locus to institute this suit. However, I find that this matter is best suited to be handled by the High Court to deal conclusively with the distribution of the estate of the deceased. I order that the status quo be maintained pending the filing of the succession cause if the parties so desire. In the meantime this matter is hereby stayed with costs in the cause.

Dated and delivered at Eldoret this 19th day of March, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Isiji for the Plaintiff/Respondent, Mr. Miyienda for 7th & 8th Defendants and Mrs. Lagat for 1st to 6th defendants.

Mr. Koech: Court Assistant.