



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 327 OF 2013

MARGARET ISUTSA KIRUIPLAINTIFF

VERSUS

ELIJAH CHEBELYON DEFENDANT

RULING

(An application for striking out of an originating summons; originating summons raising issues that have been conclusively determined in a succession cause; proceedings held to be res judicata and abuse of process of the court; application allowed; originating summons struck out)

1. This ruling is in respect of the defendant's Notice of Motion dated 11th April 2013. The application is brought under sections 7 and 17 of the Environment and Land Court Act and Order 2 rule 15 (1) (b), (c), (d) and (3) of the Civil Procedure Rules, 2010.

2. Proceedings in this matter were commenced by the plaintiff on 23rd August 2012 when she filed Originating Summons dated 29th May 2012. In it she stated and prayed as follows:

Let ELIJAH CHEBEYON of Post Office 299 Kericho in the Republic of Kenya within fifteen (15) days after service of this summons on him enter appearance to this summons which is issued on the application of MARGARET ISUSTSA KIRUI who claims to be co-owners in equal shares with the defendant of Land Reference Number 11336 (I.R 20773) situated in Molo in Nakuru County (hereafter referred [sic] as the suit property" for ORDERS:

1. THAT the suit property be divided and partitioned into two equal parts and separate titles thereof be issued in the names of the defendant and the plaintiff.

2. THAT the plaintiff and the defendant do sign and execute the necessary transfers, papers and documents for the survey and sub-division of the suit property into their separate names and the issuance of titles, leases or certificate of leases in respect thereof.

3. THAT in default of either party signing and executing the necessary documents and papers for sub-division, transfer and issuance of titles in respect of the sub-divisions the Deputy Registrar of this court be authorized and empowered to sign and execute all the necessary documents, transfer, deeds and papers to give effect to the said sub-divisions, transfers and issuance of titles thereof.

4. THAT the costs of these summons be paid for by the defendant.

3. The originating summons was supported by the affidavit of the plaintiff in which she deposed inter alia as follows:

1.

2. *THAT I am a widow to the late Zakayo Kipkoech Kirui who died on the 3rd November 2004 (hereinafter called “ the deceased”)*

3. *THAT at the time of his death the deceased was co-owner of the piece of land known as R No. 11336/1 jointly with the defendant in common in equal shares.*

4.

5.

6. *THAT I applied for and became administrator of the deceased's estate and was registered as co-owner of the property with the defendant.*

4. The defendant responded to the originating summons through a short one-page affidavit filed on 18th January 2013 in which he deposed inter alia as follows:

3. *THAT Margaret Isutsa has no locus standi to institute the application. I am currently dealing with Rosemary Chepkorir Sang who is the administrator to the estate of the late Zakayo Kipkoech Kirui ...*

4. *THAT on 2nd June 2009 Honourable Lady Justice Kalpana Rawal while sitting in the High Court then did revoke a grant issued to the applicant which she has annexed as “MIK4” ...*

5. Subsequently on 25th April 2013 the defendant filed Notice of Motion dated 11th April 2013 in which he prayed for the following orders:

1. *[Spent]*

2. *THAT the respondent's suit be struck out or as the court may please, be dismissed with costs to the applicant.*

6. The application is supported by an affidavit of the defendant in which he deposes inter alia that:

3. *THAT the subject property known as I.R. 20773 is registered in my name and that of the late Zakayo Kipkoech Arap Kirui as tenants in common and in equal shares.*

4. *THAT Rosemary Chepkorir Sang is the administrator to the estate of the late Zakayo Kipkoech Kirui The current suit has been brought by the respondent without disclosing to the court the fact that she has no grant in order to prevent the administrator from performing her duties in respect to the estate.*

5. *THAT on 2nd June 2009 Honourable Lady Justice Kalpana Rawal while sitting in High Court Family Division then, did revoke a grant issued to the respondent ...*

The defendant also filed a further affidavit on 5th December 2013.

7. The plaintiff responded to the application through her replying affidavit sworn and filed on 4th October 2013 and supplementary affidavit sworn and filed on 3rd March 2017.

8. The defendant filed written submissions in support of the application. The plaintiff on the other hand opted not to file any submissions but instead relied entirely on her two affidavits on record.

9. I have considered the application, the affidavits filed in support and reply as well as the submissions.

10. There is no dispute that Zakayo Kipkoech Kirui (deceased) passed away on 3rd November 1994 and that High Court succession cause No. 1559 of 1995 (Nairobi) was commenced in respect of his estate. Letters of administration were initially issued to the plaintiff herein on 28th September 1995 but the same were subsequently revoked on 2nd June 2009 and a new grant issued to the defendant herein on the same day. The grant to the defendant was confirmed on 9th May 2013 and the estate was accordingly distributed.

11. A perusal of the certificate of confirmation of grant dated 9th May 2013 shows that L.R. No. 11336 which is the suit property herein was among the properties comprising the estate of the deceased which were distributed. Consequently, as at 23rd August 2012 when the originating summons herein was filed, there was an ongoing succession cause in respect of the deceased's estate and wherein the suit property herein was one of the assets for distribution.

12. The plaintiff deposed as follows at paragraphs 10 and 11 of her supplementary affidavit:

10. THAT the essence of the orders of stay reverted the matter to where I am the administrator of the deceased's estate giving me the appropriate "locus standi" to bring this action.

11. THAT in any case I am a beneficiary of the deceased's estate and the law is clear, that any person with a beneficial interest in a property of a deceased person can as of course take out originating summons.

Indeed, the plaintiff was allocated 35 acres of the suit property at the confirmation of grant. Needless to state, the plaintiff is dissatisfied with the confirmation of grant and is appealing against it. In addition, the plaintiff has obtained stay of execution of the orders of confirmation of grant. In short, the plaintiff is actively litigating her claim to the suit property in High Court Succession Cause No. 1559 of 1995 (Nairobi) and also in the court of Appeal.

13. The Originating summons was stated to be brought under Order 37 rule 10 of the Civil Procedure Rules, 2010. I believe that what was meant is Order 37 rule 1 since rule 10 deals with the entirely different matter of partnerships. Order 37 rule 1 states:

*1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, **without the administration of the estate** or trust, of any of the following questions -*

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust; [Emphasis supplied]

14. It is important to note the caveat under rule 1 that the issues to be determined by an originating summons under the rule do not include the administration of the estate.

15. The question then arises: Can the plaintiff who is an active participant in ongoing litigious succession

proceedings commence parallel proceedings by way of originating summons under Order 37 rule 1 seeking division or distribution of an asset of the estate which is already subject of the succession proceedings? I am afraid she cannot. If she is permitted to do so and as is the case herein, there is already an order of confirmation of grant wherein the estate has been distributed, there is real risk of conflicting decisions emanating from this court and the court determining the succession proceedings. In any case, Order 37 rule 1 expressly excludes anything touching on the administration of the estate. To my mind, division or distribution of an asset forming part of the estate certainly amounts to administration of the estate.

16. The other question that arises is whether the matter *res judicata*. Section 7 of the Civil Procedure Act provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

17. The issue of who is entitled to inherit the deceased's share of the property known as Land Reference Number 11336 (I.R 20773) situated in Molo in Nakuru County has been decided by the High Court in High Court Succession Cause No. 1559 of 1995 (Nairobi). The plaintiff participated in the said High Court succession proceedings and has filed an appeal in the court of Appeal. The matter is certainly *res judicata*.

18. The application under consideration is stated to be brought inter alia under Order 2 rule 15 (1) (a) (b), (c), (d) and (3) which state as follows:

15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in

law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the

action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2)

(3) So far as applicable this rule shall apply to an originating

summons and a petition.

19. I am alive to the drastic nature of the relief sought and that it should be resorted to only in the clearest of cases. If a suit can be sustained or revamped by way of an amendment then it ought not be struck out. Where however a case is made on merit for striking out the court ought not to shirk responsibility. The suit herein cannot be cured whether by amendment or otherwise. It is beyond salvage.

20. I have no hesitation in finding that the originating summons is for striking out for being an abuse of the process of the court and for raising issues that are *res judicata*.

21. In sum, Originating Summons dated 29th May 2012 is struck out. Costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 21st day of April 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Karanja Mbugua for the plaintiff

Mr. Siele for the defendant

Court Assistant: Gichaba