



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELCASE No. 584 OF 2016**

**IRENE CHEPNGETICH ROP (Suing as the legal**

**representative of the estate of RAEL CHEPKOSGEI ROP.....PLAINTIFF**

**VERSUS**

**SAMUEL KIBOWEN TOWETT.....DEFENDANT**

**RULING**

*(An application for injunction; respondent raised a preliminary objection that the dispute was pending in a succession court; applicant had obtained letters of administration ad litem limited for the purposes of instituting proceedings on behalf of the deceased's estate in court to protect the suit land; preliminary objection dismissed; held that a prima facie case had been established; application allowed)*

**Introduction**

1. This ruling is in respect of the Notice of Motion dated 19<sup>th</sup> December 2016, filed by the plaintiff. The plaintiff seeks the following orders in the application:

1. Spent.

2. THAT pending the hearing of this application inter-partes, the respondent, whether acting in person, by proxy, through its agents, servants, employees, officer or any other person acting at her behest, be restrained from proceeding with any construction work and/or trespassing into the parcel of land known as [Sic] by way of an injunction from interfering with the applicant's quiet possession of the parcel of land known as Shawa/Gicheha Block 1/134.

3. THAT pending the hearing of this application inter-partes, the respondent, whether acting in person, by proxy, through its agents, servants, employees, officer or any other person acting at her behest, be restrained from proceeding with any construction work and/or trespassing into the parcel of land known as [Sic] by way of an injunction from interfering with the applicant's quiet possession of the parcel of land known as Shawa/Gicheha Block 1/134.

4. THAT costs of this application be borne by the respondent.

2. The application is supported by the affidavit of the plaintiff.

**Applicant's Case**

3. The applicant's case is contained in the Notice of motion dated 19<sup>th</sup> December 2016, the supporting affidavit, the plaint as well as the documents accompanying the plaint and submissions by counsel for the plaintiff.

4. On 14<sup>th</sup> December 2016, the plaintiff obtained letters of administration *ad litem* of the estate of Rael Chepkoskei Rop (deceased) limited “for the purposes of instituting suit proceedings on behalf of the deceased's estate in court to protect parcel No. Shawa/Gicheha Block 1/134” in Succession Cause No. 344 of 2016. The deceased who was and remains the registered proprietor of the said parcel of land passed away on 20<sup>th</sup> March 2013.

5. The plaintiff accuses the defendants of trespassing on the suit property and commencing construction of a permanent house. The plaintiff argues that the defendant purportedly purchased a portion of the suit property on or about 13<sup>th</sup> September 2014 from Moses Kipkemoi Maiyo, one of the sons of the deceased. The said vendor had no legal capacity to sell since he was not and is not an administrator of the deceased's estate and since in any case the estate of the deceased has not been distributed pursuant to any confirmation of grant. The plaintiff thus accuses the defendant of exposing the deceased's estate to loss and damage. In conclusion the plaintiff submits through her counsel Mr. Opar that she has satisfied the conditions for grant of an injunction and urges the court to allow the application.

### **Respondent's Case**

6. The respondent has opposed the application through the statement of defence filed on 9<sup>th</sup> March 2017, Replying Affidavit filed on 9<sup>th</sup> March 2017 as well submissions by Mr. Ikua, counsel for the defendant/respondent.

7. The defendant confirms that he indeed bought  $\frac{3}{4}$  of an acre out of the suit property from a lawful beneficiary of the deceased's estate. He deposes that the beneficiary sold him his portion of the estate and not the plaintiff's or any other beneficiary's portion. He further deposes that the suit land has been subdivided among all the beneficiaries and each has been shown their respective share or part. Indeed, he maintains, other beneficiaries have also sold parts of their shares to third parties and the third parties have taken possession and developed their properties.

8. The defendant deposes that he has openly developed his land to the tune of Ksh.4million since the year 2014 and that the interim orders issued herein have occasioned him great lose since he has had to stop his development.

9. Mr. Ikua, counsel for the defendant submitted that the issues raised by the plaintiff concern distribution of the estate of the deceased and should therefore not be raised in this court but in the court dealing with the succession cause in respect of the deceased's estate. He referred the court to the preliminary objection at paragraph 2 of the defence and cautioned that there is a real risk of conflicting orders being issued by this court and the court handling the succession. He argued that the allegation against the defendant amount to being accused of inter-meddling with the deceased's estate. Such an accusation can only be dealt with by the court handling the succession cause. He thus urged the court to strike out the suit and refer the dispute to the court handling the succession.

10. Mr. Ikua further argued that the beneficiary who sold to the defendant only sold a portion of the said beneficiary's share and not the whole of the deceased's plot. The said beneficiary or vendor has not complained and the plaintiff herein is thus a busy body. He submitted that the argument that the transaction is a nullity since the estate has not been distributed cannot hold water because the vendor sold only a portion of the vendor's share. In conclusion, he urged the court to strike out the suit or dismiss the application.

### **Response by the applicant**

11. In a brief response, counsel for the plaintiff submitted that Succession Cause No. 130 of 2000 was in

respect of the estate of the deceased's husband and that Succession Cause No. 344 of 2016 was the one that concerned the deceased's estate.

### **Analysis and Determination**

12. I have considered the pleadings and affidavits filed by both parties as well as submissions made by counsel. Before dealing with the application, I have to deal with the preliminary objection contained in paragraph 2 of the defence. The objection states that the plaintiff has no capacity to bring the suit and is based on the following grounds:

- i. The estate of the late RAEL CHEPKOSGEI ROP pends determination by High Court Family Division Succession cause No. 130 of 2000
- ii. The plaintiff herein is not the administrator of the estate in the above case which was filed before this one.
- iii. The court with jurisdiction to determine matters of the said estate is not in this court but the succession one in the above quoted succession case.
- iv. There can never be two succession cases in respect of the estate of one deceased as it is the case herein where there is succession cause No. 130 of 2000 and 344 of 2016, and the plaintiff is guilty of abuse of court process.

13. A quick answer to part of the preliminary objection is found in Mr. Opar's response to the defendant's counsels submissions in which he clarifies that succession cause No. 130 of 2000 was in respect of deceased's husband's estate. The deceased herein passed away on 20<sup>th</sup> March 2013 and the succession cause started in the year 2000 cannot possibly be in respect of her estate since she was alive in the year 2000. It follows therefore that there are no two parallel succession causes in respect of the deceased's estate.

14. The other question raised by the preliminary objection is one of jurisdiction. The defendant's position is that the court with jurisdiction to determine matters of the estate is the succession court and not this court. As we have already observed, the plaintiff obtained letters of administration *ad litem* of the estate of Rael Chepkoskei Rop (deceased) limited **“for the purposes of instituting suit proceedings on behalf of the deceased's estate in court to protect parcel No. Shawa/Gicheha Block 1/134”** in Succession Cause No. 344 of 2016. This suit was filed pursuant to the said letters of administration. In the circumstances, the case is properly before the court. The preliminary objection is dismissed.

15. There is no dispute that the defendant purchased a portion of the suit property on or about 13<sup>th</sup> September 2014 from Moses Kipkemoi Maiyo, one of the sons of the deceased. The purchase was after the death of the deceased. There is also no dispute that the state of the deceased has not been distributed. No confirmed grant has been issued. In such circumstances can any of the deceased's sons or heirs sell any portion of the deceased's land? The defendant has argued that the beneficiary who sold a portion of the parcel of land known as Shawa/Gicheha Block 1/134 to the defendant only sold a portion of the said beneficiary's share of the land and not the entire plot. Since no confirmed grant has been issued, how does the vendor decide what portion is his so as to be able to sell it? Since there is a succession cause in respect of the deceased's it is the succession court that will have a final say on the distribution of the deceased's estate.

16. The defendant has argued that he has been in open occupation of the portion of the land since the year 2014 and that he has developed the property to the extent of KShs 4 million. Whereas the defendant exhibited photos that were said to be of his neighbour's developed properties, no documentary evidence was availed to support the allegation of expenditure of KShs 4 million.

17. The plaintiff holds letters of administration *ad litem* of the estate of Rael Chepkoskei Rop (deceased) granted to her for the purposes of instituting suit proceedings on behalf of the deceased's estate to protect

the suit property. I am therefore satisfied that the plaintiff has established a *prima facie* case with a probability of success. There is need to preserve the suit property. I do not think that damages can adequately compensate the estate.

18. In the circumstances, I grant an injunction restraining the defendant whether acting in person, by proxy, through his agents, servants, employees, officer or any other person acting at his behest from interfering with the plaintiff's quiet possession, proceeding with any construction work and/or trespassing into the parcel of land known as Shawa/Gicheha Block 1/134 pending hearing and determination of this suit.

19. Costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of April 2017.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff

Mr. Maina holding brief for Mr. Ikua for the defendant

Court Assistant: Gichaba