



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 15 OF 2017 (O.S)**

**SUSAN CHEPKEMOI MOTELIN ..... PLAINTIFF**

**VERSUS**

**THOMAS KIPLANGAT ARAP SOI ..... 1<sup>ST</sup> DEFENDANT**

**PETER KIPKOECH ARAP SOI ..... 2<sup>ND</sup> DEFENDANT**

**VINCENT KIPYEGON ARAP SOI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

What is coming up for determination is the Notice of Motion dated 7<sup>th</sup> February 2017 brought pursuant to the provisions of sections 3A and 63 (c) of the Civil Procedure Act and Order 40 rule 1 as well as Order 51 Rule 1 of the Civil Procedure Rules. The application seeks an order of inhibition barring the registration of any disposition in the registers of land parcels number KERICHO/CHESOEN/2922, 2923, 2924, 2925 and 2926 pending the hearing and determination of this suit. The application is based on the grounds stated in the Notice of Motion and the applicant's affidavit sworn on the 7<sup>th</sup> February 2017.

A brief background of the case as captured in the rival affidavits is necessary in order to put the matter into perspective. The parties to this suit are the children of the late Edward Kipsoi Belsoi who died on 17<sup>th</sup> March 1992. Upon his death, a Grant of letters of Administration was issued to his widow and the mother of the parties herein Grace Tabsinei Belsoi (now deceased) in Nakuru High Court Succession Cause No. 139 of 1992. The said Grace Tabsinei Belsoi died on 15<sup>th</sup> January 2016 before the grant was confirmed. It is the Plaintiff's case that the defendants have gone ahead and sub-divided one of the parcels of land that forms part of their late father's estate known as land parcel number KERICHO/CHESOEN/1550 into 5 portions and registered them as follows:

- i. L.R No. KERICHO/CHESOEN/2922 comprising 3.4 hectares in the name of Grace Tabsinei Belsoi (Deceased)
- ii. L.R No. KERICHO/CHESOEN/2923 comprising 3.05 hectares in the name of the 3<sup>rd</sup> Defendant
- iii. L.R No. KERICHO/CHESOEN/2924 comprising 4.4 hectares in the name of the 1<sup>st</sup> defendant
- iv. L.R. No KERICHO/CHESOEN/2925 comprising 4.4 hectares in the name of Grace T. Belsoi (Deceased)
- v. L.R No. KERICHO/CHESOEN/2926 comprising 4.4 hectares in the name of the 2<sup>nd</sup> Defendant.

The applicant alleges that she has together with her two sisters, Betty Chemutai and Nancy Cheron, been excluded from the distribution of their late father's estate. She further alleges that the purported sub-division and transfer of the above mentioned parcel of land was unlawful and unprocedural and therefore null and void as it was done in the absence of a confirmed Grant of Letters of Administration.

On the other hand, the defendants allege that their late mother had distributed the estate of Edward Kipsoi Belsoi (Deceased) in her capacity as the Administratrix of his estate pursuant to the Grant issued in Nakuru High Court Succession Cause No. 139 of 1992. They further allege that the said sub-division of land parcel number KERICHO/CHESOEN/1550 into 5 parcels and subsequent transfer into their names was done by their late mother in July 2014.

The parties agreed to canvass the application by way of written submissions and the learned counsels for the respective parties duly filed their submissions.

The issues that emerge for determination are as follows:

i. Whether the Administratrix of the estate of Edward Kipsoi Belsoi, the late Grace Tabsinei Belsoi could lawfully cause the sub-division of land parcel number KERICHO/CHESOEN/1550 into L.R No. KERICHO/CHESOEN/2922, 2923, 2924, 2925 and 2926 and transfer the same to the Defendants herein without the Certificate of Confirmation of Grant.

ii. If the answer to i) is in the negative, then whether the sub-division was caused by the fraudulent acts of the Defendants to defeat the applicant's and her sisters' claim over the estate of their deceased father.

iii. Whether the Defendants should be barred from registering any disposition, dealing with, selling, alienating or in any other way interfering with the registers in respect of all those parcels of land comprised in land parcel number KERICHO/CHEPSOEN/2922,2923,2924,2925 and 2926

iv. Whether the application herein meets the standards set for issuance of an order of a temporary injunction

v. Who should bear the costs of this application?

Regarding the first issue, it has been submitted by the Respondents that Grace Tabsinei Belsoi conducted the sub-division of L.R No KERICHO/CHESOEN/1550 and registration of L. R Numbers KERICHO/CHESOEN/2922,2923,2924,2925 and 2926 in the names of the Defendants in line with her powers and duties under section 82 and 83 of the Law of Succession Act Cap 160 of the Laws of Kenya, but she died before she distributed the entire estate of the late Edward Kipsoi Belsoi.

Section 82 of the Law of Succession Act provides for the powers of the personal representatives generally. Section 83 (f) which specifically talks about the duties of the personal representative with regard to distribution of the estate of a deceased person states as follows:

83( f) "*Personal representatives shall have the duty **subject to section 55**, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom according to the respective beneficial interests therein under the will or intestacy as the case may be*".

Section 55 provides that:

*"No grant of representation, whether or not limited in its terms shall confer power to distribute any capital assets, or make any division of property **unless and until the grant has been confirmed as provided in section 71**" (emphasis mine)*

It has been submitted on behalf of the applicant that the sub-division was conducted by the defendants without the knowledge of either the Administratrix or any of the beneficiaries of the estate of the late Edward Kipsoi Belsoi and as such it amounted to intermeddling with the estate of the deceased. As was stated in the case of **Beatrice Wangui Kamau V John Kariuki Kamau (2016) eKLR**, nothing can be conducted in the estate of a deceased person without the letters of administration issued having been confirmed.

But even assuming that the sub-division and transfer was done by Grace T Belsoi, the Administratrix of the estate of the late Edward Kipsoi Belsoi, she had no legal authority to do so as the Grant issued to her in Nakuru HC Succession Cause No 139 of 1992 had not yet been confirmed.

The second issue is whether the sub-division was caused by the fraudulent acts of the Defendants to defeat the applicant's and her sisters' claim over the estate of their deceased father. From the material presented to the court so far and also from the averments of both parties, their late mother Grace T. Belsoi who was the Administratrix of the estate of the late Edward Kipsoi Belsoi had prepared form RL 7 and presented the same to the Lands Office on 22<sup>nd</sup> March 2012 for her name to be registered in the register in respect of land parcel number KERICHO/CHESOEN /1550 for transmission to all the beneficiaries upon confirmation of the Grant. It is also common ground the sub-division and transfer of the titles resulting from land parcel number 1550 took place in 2014 during the life-time of the Administratrix and three of the titles were transferred to the Defendants while two titles remained in the name of the Administratrix. The title was then closed on 2<sup>nd</sup> August 2016 on sub-division. I must say that at this point it is difficult to state with certainty whether the defendants deceived their late mother into sub-dividing and transferring the parcels of land into their names without involving the plaintiff and her sisters. This will only become clear during the hearing when both parties present their evidence and it is tested by cross-examination.

The third issue relates to the prayer for an order of inhibition and whether the same should be issued. Section 68(1) of the Land Registration Act provides as follows:

*"The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further orders, the registration of any dealing with land, lease or charge".*

In arriving at a decision as to whether to grant the order for inhibition I am guided by the case of **Michael Kimani Thuo & Another V Sospeter Kariuki Ndoro (2017) eKLR** where the court stated as follows:

*In considering such an application, the court will take into account several factors including;*

*Whether the land in dispute is in danger of being alienated; whether the suit may be rendered nugatory unless the order is issued; whether the applicant has made out an arguable case; the conduct of the parties and any prejudice that may be caused to the respondent*

From the material presented to court, the respondents have obtained titles arising from the sub-division of land parcel number

KERICHO/CHESOEN/1550. The applicant has stated in her affidavit that she has information that the 1<sup>st</sup> Respondent is preparing to charge one of the titles to the bank in order to secure some advances. The property is therefore in danger of being alienated. Additionally, having established that the said sub-division and transfer of the said titles to the Respondents was unprocedural as the Grant issued to Grace T. Belsoi had not been confirmed, it would be in the interest of justice to prohibit any further transactions on the land until the matter is heard and determined.

An inhibition is in the nature of an injunction as it seeks to preserve the property in dispute until the suit is determined or until further orders are made. It is for this reason that the court must determine the third issue as to whether the Plaintiff has met the threshold for the grant of a temporary injunction as set out in the case of **Giella V Cassman Brown 1973 EA 358** which are as follows:

***“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”***

A further test for the grant of an injunction has emerged from the approach adopted by Ojwang J (as he then was) in the case of **Amir Suleiman V Amboseli Resort Limited (2004) eKLR** where he relied on the English case of **Films Rover International 1986 3 All ER 772**. In this case the court stated as follows:

***“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong”.***

The first issue that the court must determine is whether the plaintiff has established a prima facie case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

***“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”***

In the instant case the applicant has demonstrated that being one of the beneficiaries of the estate of the late Edward Kipsoi Belsoi, together with her two sisters, their rights appear to have been infringed as they were not involved in the sub-division and subsequent transfer of the deceased parcel of land comprised in L.R number KERICHO/CHESOEN/1550. Even though the estate of the deceased has not been fully distributed, there is need to ensure that the process is done in an inclusive manner and in accordance with the law. The applicant has therefore established that she has a prima facie case with a probability of success.

Regarding the second test set out in the Giella case which requires the applicant to show that he or she might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages, I have already found that the applicant has an arguable case. Her claim is in respect of her late father’s estate, which includes land parcel number KERICHO CHESOEN/1550. This being a dispute over land, I am guided by the decision of the Court of Appeal in **Muiruri V Bank of Baroda Ltd (2001) KLR 183** where the court observed as follows:

***“Besides, disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”.***

I am therefore persuaded that the applicant has satisfied the second test in the **Giella** case.

Even though I need not consider the third test, I hasten to add that in the circumstances of this case, there would be a much larger risk of injustice if I found in favour of the Respondent than if I determined the application in favour of the Applicant.

Having carefully considered the pleadings, application, affidavits and submissions and the relevant law, I have come to the conclusion that the application is merited and I therefore make the following orders:

- a) An order of inhibition is hereby issued barring the registration of any disposition in the registers in respect of all the parcels of land comprised in L.R No KERICHO/CHESOEN/2922,2923,2924,2925 and 2926 pending the hearing and determination of this suit.**
- b) A copy of the order of inhibition under the seal of this court, with particulars of the land parcels be served upon the Land Registrar, Kericho for its registration in the appropriate register.**
- c) The parties shall comply with pre-trials within 45 days so as to expedite the hearing and determination of this suit.**
- d) The costs of this application shall be in the cause.**

Dated, signed and delivered at Kericho this 17<sup>th</sup> day of November 2017

J.M ONYANGO

**JUDGE**

In the presence of:

Mr. Mwita for the Plaintiff/Applicant

No appearance for the Defendants/Respondents

Court Assistant Wambany