



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 82 OF 2016

PHILIP CHEPKWONY.....PLAINTIFF/APPLICANT

VERSUS

BENJAMIN TARUS.....1ST DEFENDANT/RESPONDENT

ISAAC CHEPKWONY.....2ND DEFENDANT/RESPONDENT

DORCAS JEMELI.....3RD DEFENDANT/RESPONDENT

BOAZ KOSACHTAI.....4TH DEFENDANT/RESPONDENT

DAVID NGETICH.....5TH DEFENDANT/RESPONDENT

RULING

Philip Chepkwony hereinafter referred to as plaintiff is a son and one of the beneficiaries of the Estate of Malakwen Kimugu Tarus (deceased) who died on 15.8.2014. On the 4.4.2016, the plaintiff was issued with a limited grant of letters of administration *ad litem* to file a suit. The late Malakwen Tarus alias Malakwen Kimugu Tarus (hereinafter “the deceased”) had three wives and twenty five children but one wife and three children are deceased.

The plaintiff's allegations against the defendant jointly and severally is that the 1st, 2nd and 3rd defendants have leased out and/or sold part of the deceased estate to the 4th and 5th defendants. The 1st, 2nd and 3rd defendants jointly and severally have without authority and/or legal basis to leased and/or sold part of the deceased's estate.

The plaintiff's claim against the defendant is for an order of injunction to permanently restrain the 1st, 2nd and 3rd defendants and/or their servants and/or agents from entering into trespassing, occupying, transferring, encumbering, wasting or otherwise interfering with the deceased's estate until proper representation and distribution is done and costs of the suit.

The defendants have filed a preliminary objection on grounds that this Honourable court lacks the requisite jurisdiction to hear and determine this matter as the matter relates to Probate and Administration and the jurisdiction is vested in the High Court. That the suit offends the Provisions of Section 47 of the Law of Succession Act, Cap 160, Laws of Kenya. That the suit is incompetent as the plaintiff/applicant does not have the *locus standi* to sue the defendants/respondents. According to the defendants, The issues relating to inter-meddling with the estate of a deceased person can only be dealt with by the High Court, hence this Honourable Court lacks jurisdiction to entertain this suit.

That the plaintiff/applicant's application is therefore frivolous, vexatious, scandalous, misconceived, bad

in law and an abuse of the court process hence should be dismissed with costs.

Mrs. Cheso, learned counsel for the defendants submits that the suit is misconceived as the court has no jurisdiction in view of Section 47 of the Law of Succession Act, Cap. 160 which provides for the Jurisdiction of High Court thus that the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

She further submits that section 13 of Environment and Land Court does not arise in such matters of succession.

Mr. Nyandoro, learned counsel for the applicant submits that the matter falls within the jurisdiction of this court as they seek for an order of injunction as their claim is based on use and occupation and title to land. On *locus standi*, the plaintiff argues that he has a grant of letters of administration *ad litem*.

I have considered the preliminary objection and do find that Article 162 of the Constitution which sets out the system of courts provides that the superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2) which provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. The Article in sub Article 3 further provides that Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2). Section 47 of the Law of Succession Act, Cap. 160 provides for the jurisdiction of the high court.

I do find that the dispute before court relates to use, occupation and title to land as envisaged by Article 162 of the Constitution and therefore, the dispute falls within the jurisdiction of this court. It also relates to trespass to the estate of the deceased, an issue that can be determined by this court under the provisions of section 13 of the Environment and Land Court Act.

On *locus standi*, I have looked at section 54 of the Law of Succession Act, Cap. 160 which provides that a court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act. I have seen a limited grant of letters of administration *ad litem* issued by the Chief Magistrate's Court through the registry at Eldoret on 7.4.2016 to Philip Kipkemboi Chepkwony in respect of the Estate of Malakwen Tarus alias Malakwen Kimugu Tarus who died on 15.8.2014 which by law devolves and vest in his personal representative. The import of the limited grant is that the plaintiff has capacity to file suit on behalf of the estate of the deceased.

This court finds that the issue of inter-meddling can be dealt with by the High Court under the provision of section 45 of the Law and Succession Act, Cap. 160 which provides that there should be no inter-meddling with property of a deceased person except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise inter meddle with, any free property of a deceased person. Any person who contravenes the provisions of this section shall-(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and -(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has inter meddled after deducting any payments made in the due course of administration and the Environment and Land Court Act under Section 13 of the Environment and Land Court Act for purposes of preservation of the Estate.

Section 13 of the Environment and Land Court Act provides that the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the Act or any other law applicable in Kenya relating to environment and land. Subsection (2) provides that In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

This court finds that it has jurisdiction to hear and determine all disputes relating to the use and occupation of land but not a succession dispute which is purely relating to intestate and testamentary succession and the administration of estates of deceased persons. The suit herein is not a succession dispute but a claim against persons allegedly inter meddling with the estate of the deceased by occupying and using the same allegedly without the personal representative's permission..

The upshot of the above is that the preliminary objection is not merited. The same is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF JUNE, 2016.

ANTONY OMBWAYO

JUDGE