



REPUBLIC OF KENYA



**Sang & 3 others v Bitok & another (Land Originating Summons E002 of 2024) [2024] KEELC 6338 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6338 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
LAND ORIGINATING SUMMONS E002 OF 2024  
MN MWANYALE, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**MARY SANG & 3 OTHERS & 3 OTHERS ..... PLAINTIFF**

**AND**

**ISAAC BITOK & ANOTHER & ANOTHER ..... DEFENDANT**

**RULING**

1. Vide the Notice of Motion dated 20<sup>th</sup> May 2024, the Applicant namely Mary Sang, Priscillah Bungei, Hillary Kipkemboi Rotuk, and Leonard Kipkoech Cheruiyot seek injunctive Orders against the Respondent Issack Bitok And Silves Cheruiyot.
2. The Orders they seek are
  - i. Spent
  - ii. That this honourable court be pleased to issue restraining Orders to the Respondents herein from evictions, interfering with the Applicant's quiet possession and /or dealing with the Land Nandi/Ndalat/260 pending and determination of the originating Motion or the application interparties.
  - iii. That permanent injunction do issue to the Defendant herein from evicting, interfering with the quiet occupation and dealing with the land known as Nandi/Ndalat /260 with the application is heard and determined.
  - iv. That the Respondent to bear the costs of this application.
  - v. That costs of this application be provided for:-
3. The application is made on grounds inter alia, that here is a threat to evict the Applicants against their
  - i) Equitable rights



- ii) Constructive trust rights
  - iii) Adverse possession rights and beneficial rights and that the Respondents were issued with a grant to hold the suit property in trust for them all.
4. The application is supported by the Supporting Affidavit of Mary Sang who deposes interalia that she has lived in the suit property for over 20 years courtesy of their late father Taptubor Arap Chirchir that a grant had been issued to the Defendants for letters of administration in High Court Succession Cause No 754/2008 and they therefore cannot be evicted as the property belonged to their late father and the Respondents are holding the same in Trust for them.
  5. When the file was placed before court at the *ex parte* stage directions were issued for service of the application and for a Response to be filed as well as a further affidavit if need be and matter was scheduled for interparty hearing on 2<sup>nd</sup> July 2024.
  6. Before the interparty hearing of 2<sup>nd</sup> July 2024, the applicants having not been granted interim orders in the application dated 30/5/2024 filed another application dated 19<sup>th</sup> June 2024 seeking status quo orders.
  7. On 2<sup>nd</sup> July,2024 when the matter come up for interparte hearing, Mr. Songok for the Respondents stated that he had filed a Notice of Preliminary Objection as well as a Replying Affidavit both dated 27/6/2024.
  8. The court thereafter directed filing of submissions on the application with the PreliminaryObjection being treated as a Response to the application together with the Replying Affidavit.
  9. In the Notice of Preliminary Objection, the Respondents state that the suit is Resjudicata as the issues of distribution of the Estate of Taptubor Arap Chirchir. The Replying Affidavit equally raised the issues of Resjudicata and that the issues raised in the suit relate to the Distribution of the Estate of Taptubor Arap Chirchir, which issues were initially settled in Kapsabet Succession Cause No 754/2008 as well as by the Court of Appeal in Eldoret Civil Appeal No 61/2015. That the 3<sup>rd</sup> and 4<sup>th</sup> Applicants are grandchildren in the Estate of Taptubor Arap Chirchir their parents Petronila Kebenei and David Rotuk had litigated in the succession cause as well as the Appeal.
  10. The Respondents have annexed a copy of the court of Appeal decision in Eldoret Civil Appeal No 61/2015 in oppositions to the orders sought and have sought for dismissal of the present application.

### **Applicant's Submissions**

10. It is the Applicant's submission that by dent of the Court of Appeal decision in Civil Appeal No. 61/2015 be same having been annexed by the Respondents they are entitled to the suit property.
11. The Applicant's place reliance on The Trust Act as well as the Registered [Land Act](#) and the decision in Petition No 18 E020 of 2022) Shah and 7 others = VRS= Mombasa Brian & 5 Others and that they have equitable rights on the property.
12. The Applicants further place reliance on the Maputo protocol and its objects of promotion, realisation and protection of human rights of women and girls in Africa.
13. The Respondent in text submission submit that the judgment of the High Civil Succession cause having been affirmed by the Court of Appeal cannot be carried by way of this suit especially as a new suit seeking to redistribute the property and that the in so far as the distribution of the Estate of Taptubor Arap Chirchir was concluded the present suit is an attempt at an appeal against the decision of the succession court and the court of Appeal,



14. The Respondent submit that their Preliminary Objection is meritorious and ought to be allowed and placed reliance on the decision of Mukiso Biscuit Vrs West End Distributors Ltd and on the strength of the above the Respondent seeks a dismissal of the Application.

### Issues For Determination

15. The court frames the following as issues for determination:
1. Whether the Applicant has established a prima facie case to be entitled to the reliefs sought.
  2. Whether the Application and the suit are Resjudicata?

### Analysis And Determination

16. In the grounds in support of the application, the Applicants claim that they are entitled to by the suit property by virtue of equitable rights, constructive Trust as well as adverse possessions. It is their case that their said entitlement arises from the fact that they are so entitled as beneficiaries of the Estate of Tapburor Arap Chirchir on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants as daughters thereof , while the 3<sup>rd</sup> and 4<sup>th</sup> Applicants as grandchildren thereof.
17. It is the Respondent’s case that the issue of distribution of the Estate of Tapburor Arap Chirchir was finalised by the High Court in the succession cause which was affirmed by the Court of Appeal and the Applicant are merely re-litigating issued which had been finalised by the Court of Appeal , and however couched the issues are Resjudicata.
18. The Court is aware that at the Interlocutory stage, it has been presented with issues that ordinarily it should not make final findings but the issue of Resjudicata has to potential of determining the suit in Limine if found to have been proven . The Notice of Preliminary Objection as filed fails to test of the Mukisa Biscuits as framed the P/O invites the court to interrogate factual issues of the existence of the succession causes.
19. By filing a Replying affidavit which is similar to the P/O the court was able to make findings of fact about the succession cause and shall Revert to the same in due course.
20. On the issue of whether a prima facie has been established, the Applicants are beneficiaries of the Estate of Tapburor Arap Chirchir and not third parties. Their rights to the suit property whether equitable, and/or the existence of a constructive Trust and/or adverse possession by beneficiaries ought to be determined before distribution as was stated in the case of Re Estate of Mumbia Mutua where Musyoka J has observed as follows interalia,

“The law of succession Act and Rules made thereunder are designed in such a way that they confer jurisdiction to the probate court with respect to determine the assets’ of the deceased, the survivors of the deceased and persons with beneficial interest and finally distribution of the assets amongst the survivors and beneficiaries and distribution of the assets. Disputes of course do arise. The provisions of the law of succession Act of the Probate and Administration Rules are tailored for resolutions between the personal representatives of the deceased and the survivors’ beneficiaries and dependents. However, claims by and against third parties. Meaning persons who are neither survivors of the deceased nor beneficiaries are for resolution outside the framework set out in the law of succession Act and the probate and Administration Rules...”



21. In the present case, the Applicants having been beneficiaries in the succession cause ought to have filed an Objection to the distribution of the Estate, an objection was filed by David Rotuk which was dismissed and an appeal preferred, the said Appeal affirmed the distribution as made by the succession court.
22. Can the applicants who were beneficiaries of their father's estate commence a suit before the ELC for redistribution of the estate ostensibly claiming equitable rights conferred to them by virtue of them being in occupation as beneficiaries. I think not, from the decision cited above as well as the decision by the Court of Appeal in Disaproperty limited and 10 others another v Githae civil Appeal No, E155 of 2023 as consolidated with Civil Appeal no E157 Of 2023 at paragraphs 33-40 the Court rendered itself on the jurisdiction of the ELC as well as the High Court on succession matters. And from the said decision the ELC Court would have jurisdiction to determine ownership claims by third parties before and after the distribution of a deceased Estate.
23. In this case the Applicants as Claimants are beneficiaries of their Late father's Estate and not third parties, their recourse would have been before the Succession Court for rectification of the Grant and as to whether that would be possible noting that the Court of Appeal already affirmed the distribution is another thing altogether but what is clear is they cannot seek another redistribution of that Estate before the ELC as pleaded herein.
24. The court therefore finds no prima facie case has been established to warrant issuance of the interim Orders and proceeds to dismiss the application, having found no prima facie case the court shall not interrogate the issue of Resjudicata, the costs shall be in the cause.

**DATED AT KAPSABET THIS 23<sup>RD</sup> DAY SEPTEMBER, 2024.**

**HON. M.N. MWANYALE**

**JUDGE**

In the presence of

Ms Luseria for the respondent

Mr. Muhatia for the Applicant.

**HON. M.N. MWANYALE**

**JUDGE**

