



**In re Estate of Kipterkech Arap Misoi (Succession Cause
14 of 2009) [2024] KEHC 5827 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5827 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 14 OF 2009
JRA WANANDA, J
MAY 24, 2024**

IN THE MATTER OF THE ESTATE OF KIPTERKECH ARAP MISOI

BETWEEN

JOSEPH KIMARU ROTICH PETITIONER

AND

GEORGE KIBUNGEI KEMBOI PETITIONER

RULING

1. The deceased, Kipterkech Arap Misoi died on 30/09/1996 and left behind 2 widows and several children. The deceased was also stated to have left behind the parcel of land known as No. 244/ Ngenyilel measuring 24 Acres. I gather that the 2nd Petitioner had earlier, in separate proceedings, applied for and obtained Grant of Letters of Administration but the same was subsequently revoked. Be that as it may, on 2/02/2008, the 1st and 2nd Petitioners in their capacity as sons of the deceased, jointly filed the present Cause, and applied for Grant of Letters of Administration Intestate.
2. The Application now before the Court for determination is the Summons dated 1/04/2009 and filed by the 1st Petitioner through Messrs R. Odede & Co. Advocates and seeks the following orders:
 - a. [.....] Spent
 - b. [.....] Spent
 - c. A declaration that the sale of the land parcel No. 244 Ngenyilel Scheme by the 2nd Petitioner/ Administrator, his servants, agents or assign be declared null and void.
 - d. Any other or further order that this Honourable Court may deem fit and just to grant.
 - e. Costs of the application be borne by the 2nd Petitioner/Administrator.



3. The Application is expressed to be brought under Section 45(1) of the Law of Succession Act and Section 3A of the Civil Procedure Act. The grounds of the Application are as set out on the face thereon and it is supported by the Affidavit sworn by the 1st Petitioner, Joseph Kimaru Rotich.
4. In the Affidavit, the 1st Petitioner has deponed that the deceased left behind 2 widows and 8 children, that he is from the 1st house while the 2nd Petitioner is from the 2nd house, that the 2nd Petitioner is notorious and continually acts in bad faith as he had once attempted to disinherit the rest were it not for the Court's intervention, that he has learnt that the 2nd Petitioner and/or his servants or agents have sold part of the estate of the deceased as per the list particularized, the estate is in danger of being wasted as some of the alleged purchasers had taken possession and were in the process of fencing and constructing houses, that one of the 1st widow's children, one Cheruiyot Kemboi, is the one who has been living on the said land together with the 2nd widow and her children, but because of the illegal sale, the purchasers have denied the said Cheruiyot Kemboi access to his home thus leaving him with no space to keep his cattle.
5. The 1st Petitioner added that he lives with his mother on his own plot No. 87 Ndalat Land since the 2nd widow's family are in possession and reside in the deceased's land, that the 2nd Petitioner, step-brothers and step-sisters have connived to push the 1st Petitioner's siblings out of the parcels land as they are in the process of wantonly constructing houses all over the same, and that numerous letters and calls to the 2nd Petitioner and/or to his Advocates have remained unanswered.

2nd Petitioner's Replying Affidavit

6. In opposing the Application, the 2nd Petitioner swore the Replying Affidavit filed on 21/04/2009 through Messrs Miyienda & Co. Advocates. He deponed that he has never attempted to disinherit the family of the 1st Petitioner and all he did was to apply for the Letters of Administration herein as the members of the 1st house were reluctant to move the Court. He conceded that it is true that his brother, John Kipngetch Sitienei and sister-in-law, Hellen Cherotich Ngetich sold to one Christine Shikuku 1 acre being a portion of the share of the 2nd Petitioner's late brother, Kirwa Ngetich, that he has never sold 2 acres to one Philemon Arap Keino as alleged and that it is his mother Anna Koei Misoi who sold the portion. He also denied selling 3 acres to one Cheptaiwa as alleged.
7. He added that Ngenyilel Settlement Scheme/244 is not part of the estate of the deceased but is a parcel that his mother purchased solely on her own, separate from the estate, that whatever has been sold does not form part of the estate, his family will therefore be laying claim over L.R. No. Ndalat Settlement Scheme/87 which is presently occupied by the 1st house family but belongs to the estate of the deceased. He deponed further that Cheruiyot Kemboi, a brother to the 1st Petitioner, has been staying on the land at the request of the deceased but he will have to eventually leave to settle at Ndalat where he has his share of land, it is not true that Ndalat Settlement Scheme/87 belongs to the 1st Petitioner as claimed but it is family land in which all of the family members claim shares. He denied knowledge of the alleged allocation letter dated 17/10/2008 and urged that the matter calls for full evidence by way of viva voce hearing before determination of distribution.
8. The 2nd Petitioner further deponed that those who have purchased some parcels from L.R. 244 cannot be evicted before determination on whether the land belongs to the estate of the deceased or otherwise. He then stated that his family has been lenient enough to allow the 1st house family to occupy the entire Ndalat/87 farm which belongs to the estate while the 2nd family had resolved to live in Ngenyilel/244 which belongs solely to the 2nd Petitioner's mother. He contended that Ndalat/87 will have to be shared between the two houses.



1st Petitioner's Supplementary Affidavit

9. In his Supplementary Affidavit, the 1st Petitioner deponed that the 2nd Petitioner obtained the Grant fraudulently and which was then revoked by this Court on 21/05/2007. Regarding the sale of 1 acre portion to Christine Shikuku, he deponed that same was sold after the demise of the deceased and is therefore null and void. Regarding the land parcel Uasin Gishu/Ngenyilel/244, he deponed that the deceased purchased the same way back in 1968 and has remained the registered proprietor since then to date. Regarding Ndalat Settlement Scheme Plot No. 87, he deponed that he is the one who purchased it and he resides thereon with his mother, that this was after his step-mother, the 2nd widow, evicted the Petitioner's mother from Uasin Gishu/Ngenyilel/244.

Hearing of the Summons

10. By the directions given by Hon. Lady Justice P. Mwilu (as she then was) on 16/11/2009, it was ordered that the 1st Petitioner shall be deemed to be the Plaintiff and the 2nd Petitioner the Defendant. It was then also directed that the matter would be heard via *viva voce* evidence.
11. The matter then proceeded for trial when 1st Petitioner testified before Hon. Justice F. Azangalala on 30/01/2012. He basically reiterated the matters already set out in his Supporting Affidavit and stated that the only parcel of land owned by the deceased, at the time of his death, was Plot. No. 244/Ngenyile/Kipkaren measuring 24 acres as evidenced by the Transfer Form dated 4/06/1968 from the Settlement Fund Scheme. As regards Plot. 87/Ndalat Settlement Scheme measuring 17 acres, he stated that the same is his having purchased it in 1966 as evidenced by the copy of title produced. He stated that the deceased was buried in the 1st Petitioner's said parcel of land Plot. 87/Ndalat, that some members of the 1st house family have sold parts of Plot. No. 244/Ngenyilel/Kipkaren totalling 8 acres, and some of the purchasers have built houses, that the sales were made after the death of the deceased, and that the 1st house was not involved. In conclusion, he prayed that each house be given 12 acres and the portions sold be taken into account.
12. In cross-examination, he stated that he purchased Plot. 87/Ndalat in 1966 but he could not remember the price. Regarding the burial of the deceased on the said land, he stated that under Nandi customary law, a "Mzee" with a family can be buried anywhere. He stated further that the deceased was visiting the 1st Petitioner, became sick and died and was therefore buried on the land Plot. 87/Ndalat, and that his brother Barnaba Cheruiyot has stayed on Plot. No. 244/Ngenyile/Kipkaren for 20 years but the members of the 1st house have prevented him from using it. In conclusion, he stated that both parcels of land have no formal title deeds.
13. Due to various reasons, particularly the filing of several Applications and also display of some lethargy on the part of Counsels on record, further hearing did not proceed for some time.
14. Eventually, PW2 testified on 23/01/2017, about 5 years later, before Hon. Lady Justice Githua. He was one Dan Mbuvi Kalami, the County Land Adjudication and Settlement Officer who attended Court pursuant to Witness Summons. He basically confirmed that Plot. 87/Ndalat was allocated to the 1st Petitioner, he produced a formal letter dated 17/10/2008 to that effect and stated that the transfer process was still ongoing. He also confirmed that Plot. No. 244/Ngenyile/Kipkaren was in the name of the deceased and produced supporting documents.
15. PW2 was later recalled, which he did before Hon. Lady Justice Sewe on 24/05/2021, more than 4 years later. He so returned and produced the Title Deed for Plot. 87/Ndalat which had, in the intervening period, been issued in the name of the 1st Petitioner.



16. Thereafter, the matter came up on several occasions for hearing of the 2nd Petitioner's case. This was on 24/05/2021, 19/07/2021, 25/10/2021, 7/03/2022, 20/06/2022, 20/03/2023 and 20/06/2023. However, for various reasons, basically the 2nd Petitioner not being ready to proceed and also one or two instances of non-attendance by him and/or his Counsel, the hearing did not take off and adjournments were granted on various dates. When the matter came up for hearing on 18/12/2023, there was no again appearance by the 2nd Petitioner nor his Counsel. Considering the history of the matter, the fact that the hearing date had been fixed by consent of the parties, the many adjournments already granted and the long delay in concluding the matter, upon request by the 1st Petitioner's Counsel, I marked the hearing as closed. I then gave the parties liberty to file written Submissions and fixed the matter for Mention for 18/12/2023.
17. On 18/12/2023, Counsels for both parties attended Court. However, only the 1st Petitioner's Counsel had filed Submissions. Upon request by Counsel for the 2nd Petitioner, Mr. Miyianda, I granted him an extension up to 20/01/2024 to file his Submissions. Up to the time of concluding this Ruling however, I had not come across any Submissions from the 2nd Petitioner.

1st Petitioner's Submissions

18. In his Submissions, Counsel for the 1st Petitioner submitted that the 1st Petitioner (1st born in the 1st house) currently lives on Plot. No. 87/Ndalat Settlement Scheme, that the 2nd born Malakwen Boit (now deceased) was buried on Plot. No. 244/Ngenyilel/Kipkaren while the 3rd born Barnaba C. Kemboi lives together with the 2nd house family on Plot. No. 244/Ngenyilel/Kipkaren. He added that the 1st Petitioner took in his sickly mother when she was ousted by the 2nd wife, she died and was buried on Plot. No. 87/Ndalat, that his father, the deceased, was visiting the 1st Petitioner's mother (deceased's 1st widow) when he too fell sick, died and was also buried on Plot. No. 87/Ndalat Settlement Scheme.
19. In conclusion, Counsel submitted that the 1st Petitioner had proved that Plot. No. 244/Ngenyilel/Kipkaren belongs to the estate of the deceased and Plot. No. 87/Ndalat Settlement Scheme, belongs to the 1st Petitioner.

Determination

20. The substantive prayer in the Summons herein is for a declaration that the sale of the land parcel No. 244 Ngenyilel Scheme by the 2nd Petitioner/Administrator, his servants, agents or assign be declared null and void.
21. The 2nd Petitioner however introduced issues relating to the Plot. No. 87/Ndalat Settlement Scheme. Pursuant thereto, matters relating to ownership, occupation and possession of this second property featured prominently at the trial, alongside matters touching on parcel No. 244 Ngenyilel Scheme. From the matters canvassed in the trial, it is clear that the parties wished that this Court makes declarations on ownership, occupation and possession of both the two properties.
22. In view thereof, and also considering the long period of time that this matter has taken in Court, I accept and agree to analyze and answer all the said issues presented before this Court and proceed to make determinations thereon. Determining these live matters at this stage will be the only way to expedite the conclusion and resolution of this long-standing dispute herein. Only then will this matter move forward. Postponing to determine the said matters will therefore, in my view, be dereliction of duty on the part of this Court.



23. I therefore find the issue that arise for determination in this matter to be as follows:

“whether the parcel No. 87/Ndalat Settlement Scheme and parcel No. 244 Ngenyilel Scheme belong to the estate of the deceased and therefore, whether both parcels are available for distribution among the beneficiaries of the estate.”

24. Regarding parcel No. 87/Ndalat Settlement, the 1st Petitioner (PW1) testified that the same belongs to him exclusively and that he is the one who paid for it. PW2, the Land Adjudication Officer & Settlement Officer, corroborated the above testimony and produced official records supporting the same. PW2 was therefore emphatic that the allottee of the parcel of land was the 1st Petitioner and stated that the transfer process was ongoing. In the intervening period, the process of issuing the title deed for the property was said to have been concluded and the same was then issued in the name of the 1st Petitioner. PW2, upon being recalled, returned to Court and produced a copy of the title deed issued on 25/04/2018.
25. The 2nd Petitioner, having not testified nor called any witness, the testimony given and supporting documents produced by the 1st Petitioner and PW2 remain uncontroverted and unchallenged. In the circumstances, I accept the evidence of the 1st Petitioner and PW2 and find and hold that the parcel of land No. 87/Ndalat Settlement (more particularly described as Uasin Gishu/Ndalat Settlement Scheme/87), belongs exclusively to the 1st Petitioner. The same is therefore not available for distribution amongst the beneficiaries of the deceased as it does not form part of the estate of the deceased.
26. Regarding the parcel of land No. 244 Ngenyilel Scheme, both the 1st Petitioner and PW2 in their testimonies, stated that the parcel of land belongs to the deceased, that it is the deceased who paid for it and received the discharge, and that the deceased died before the process of registration into his name had been concluded. Indeed, PW2 produced a copy of the Transfer dated 4/08/1968 confirming that the parcel of land was transferred from the Settlement Fund Trustees to the name of the deceased.
27. Once again, the 2nd Petitioner having opted not to testify or call any witness, there is no evidence to support the allegation made in his Replying Affidavit that Ngenyilel Settlement Scheme/244 is not part of the estate of the deceased because it was allegedly his mother who purchased it solely on her own. In the circumstances, I hold and find that the parcel of land No. 244 Ngenyilel Scheme belongs exclusively to the estate of the deceased and is the parcel of land available for distribution amongst the beneficiaries.
28. Regarding sale of portions of the parcel of land No. 244 Ngenyilel Scheme by members of the 2nd house, comprising the 2nd Petitioner, I observe that the same has not been seriously denied. Since I have found that the parcel of land belonged to the estate of the deceased, sale or purchase of any portion thereof by any person before confirmation of the Grant and/or distribution, amounted to intermeddling with the estate and which is prohibited under Section 45 and 82(b)(ii) of the *Law of Succession Act*. Accordingly, any such sale is void.
29. Before I pen off, I note that the 1st Petitioner has urged this Court to issue signed copies of Letters of Administration Interstate since the one on record is not signed. I have perused the Court file and I have indeed confirmed that there is no signed Grant therein. Since the Petitioners seem to have complied with all the requirements, I find no reason why a formally signed Grant of Letters of Administration should not be issued as prayed.



Final Orders

30. In the end, I rule, order and declare as follows:
- i. The parcel of land described as Uasin Gishu/Ndalat Settlement Scheme/87 belongs exclusively to the 1st Petitioner, Joseph Kimaru Rotich, and is therefore not available for distribution amongst the beneficiaries of the deceased herein as it does not form part of the estate of the deceased.
 - ii. The parcel of land described as Uasin Gishu/Ngenyilel/244 belongs exclusively to the estate of the deceased, Kiptergech Arap Misoi, also known as Kipterkech Misoi Cheres, also known as Kiptergich A. Misoi, and is therefore the property available for distribution amongst the beneficiaries.
 - iii. Sale of any portion of the parcel of land Uasin Gishu/Ngenyilel/244 to any third party subsequent to the death of the deceased and prior to confirmation of the Grant and/or distribution of the estate of the deceased, amounts or amounted to intermeddling with the estate which is a criminal act punishable by law. Accordingly, any such sale is hereby declared void.
 - iv. In distributing the parcel of land Uasin Gishu/Ngenyilel/244 amongst the beneficiaries of the estate, that parcel of land shall be shared equally between the two houses (1st house comprising the family of the 1st widow – Christine Jemesunde Misoi, and the 2nd house comprising the family of the 2nd widow – Ann Koei Misoi). If therefore the property is 24 acres as stated, then each of the two houses shall be entitled to 12 acres each.
 - v. The portions of the parcel of land Uasin Gishu/Ngenyilel/244 sold by members of the 2nd house to any third party subsequent to the death of the deceased and prior to confirmation of the Grant and/or distribution of the estate, is hereby declared to comprise part of the ½ share thereof devolving to the 2nd house.
 - vi. In the circumstances, although sale of any portion of the parcel of land Uasin Gishu/Ngenyilel/244 to any third party subsequent to the death of the deceased and prior to confirmation of the Grant and/or distribution of the estate, has hereinabove been now declared void, purchasers of such portions and members of the 2nd family and/or the Vendors shall be at liberty to enter into negotiations between themselves with a view to reaching an amicable settlement thereon. Should there be no agreement, either party shall be at liberty to approach the Environment and Land Court for appropriate remedies or reliefs.
 - vii. In preparing and filing Summons for Confirmation of the Grant of the Letters of Administration Intestate issued herein, the parties shall be guided by the above findings, directions, orders and/or declarations.
 - viii. A duly signed Grant of Letters of Administration Intestate shall now be issued to the Petitioners.
 - ix. The Petitioners, jointly, or either of them, individually, shall now, within a period of thirty (30) days from the date that they shall receive the signed Grant of Letters of Administration, file Summons applying for confirmation of the Grant of Letters of Administration Intestate.
 - x. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF MAY 2024



WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Ms. Oduor for 1st Administrator

N/A for 2nd Petitioner

