



In re Estate of the Late Shantilal Pitamber Jeshang Radia (Deceased) (Succession Cause E006 of 2020) [2024] KEHC 5910 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E006 OF 2020**

JRA WANANDA, J

MAY 24, 2024

**N THE MATTER OF THE ESTATE OF THE LATE
SHANTILAL PITAMBER JESHANG RADIA (DECEASED)**

BETWEEN

RADIA SANJAY SHANTILAL PETITIONER

AND

SUJEET SHANTILAL PITAMBER RADIA OBJECTOR

AND

BABHUBHAI CHAGANBHAI PATEL INTENDED INTERESTED PARTY

RULING

1. This Ruling is in respect to the Notice of Motion dated 29/09/2023 whereof the Applicant seeks to be joined to this Cause as an Interested Party.
2. This Succession Cause relates to the estate of the late Shantilal Pitamber Jeshang Radia who died on 29/07/2018 at the age of 81 years. On 23/10/2020, the Petitioner, in his declared capacity of being the executor of the Will and also a son of the deceased, filed the Petition dated 22/10/2020 seeking Grant of Probate of the Written Will and which Grant was then given on 21/06/2021. According to the Will, the deceased bequeathed his entire estate exclusively to the Petitioner and only should the Petitioner predecease the deceased would the estate then devolve to a grandson and a daughter-in-law of the deceased.
3. However, on 10/08/2021 through Messrs Nyairo & Co. Advocates and before an Application for Confirmation of the Grant could be filed, the Objector, in his capacity as also a son of the deceased, filed Summons seeking revocation of the Grant. The Application also sought interim conservatory orders restraining the Petitioner from interfering or intermeddling with the estate herein. The grounds of the Summons included the allegation that the Petitioner failed to declare all beneficiaries of the estate,



failed to declare that there was already in existence another prior filed Cause relating to the same estate, namely, Eldoret Chief Magistrates Court Probate & Administration Cause No. 79 of 2019, and that the Will cited by the Petitioner is suspicious and invalid in any case. By the order made on 18/08/2021, the interim conservatory orders restraining the Petitioner from interfering or intermeddling with the estate was granted.

4. On 29/10/2021, the Objector filed a second Summons seeking orders that the said Eldoret Chief Magistrates Court Probate & Administration Cause No. 79 of 2019, be transferred to this Court and be consolidated with this instant Cause. This Application, not being opposed, was allowed on 31/01/2021.
5. On 28/06/2022, the Objector filed a third Summons this time seeking orders that the Will be declared a forgery and be invalidated.
6. The aforesaid 1st and 3rd Applications filed by the Objector, namely Summons dated 10/08/2021 and 28/06/2022, respectively, are yet to be heard although by the directions given on 18/07/2022, it was ordered that the two Applications be heard together and by the further directions given on 19/05/2023, it was also ordered that the two be heard by way of viva voce oral evidence.
7. However, before the viva voce hearing could take off, the instant Application was filed on 2/10/2023 through Messrs RGO Advocates LLP. It seeks orders as follows:
 - i. [.....] Spent
 - ii. The Applicant be granted leave to join and participate in this case as the Interested Party represented by M/s RGO Advocates LLP.
 - iii. The ex parte orders given on 18th August 2021, regarding parcel number Eldoret Municipality Block 13/762 be reviewed, vacated and/or set aside.
 - iv. The orders given on 18th August, 2021 and registered against land parcel numbers Eldoret Municipality Block 13/890 be Eldoret Municipality Block 13/891 be lifted and/or vacated.
 - v. The costs of this Application be provided for.
8. The grounds of the Application are as appears on the face thereof and it is supported by the Affidavit of the Applicant, Bhabubhai Chaganbhai Patel.
9. In the Affidavit, the Applicant deponed that he is the Objector in the said Eldoret Chief Magistrates Court Probate & Administration Cause No. 79 of 2019 (hereinafter referred to as the “lower Court Cause”), that he is not a party to this Cause and only came to learn about it after the lower Court Cause was transferred to this High Court and consolidated with this Cause, that through his Advocates, he learnt of the existence of an Order given on 18/18/2021 whereof the Objector had obtained conservatory orders restraining the Administrator from interfering with and/or intermeddling with the estate herein in respect of properties which included Eldoret Municipality Block 13/762 pending determination of this Cause. He deponed further that the Order did not contain the description of the parcels of land to be affected by the order, that at the time the Order was issued, Eldoret Municipality Block 13/762 was no longer in existence having been subdivided into 3 parcels, including Eldoret Municipality Block 13/890 and Eldoret Municipality Block 13/891 owned by the Applicant, that the Order was presented at the Lands Registry on 11/05/2022 long after the subdivision and was filed in respect of the new parcels, that information pertaining to non-existence of the original parcel was not disclosed to the Court at the time it issued the Order, that the Applicant’s constitutional right to enjoy his properties is being restricted on the basis of the irregular orders, and that the said parcels of land do not form part of the estate herein and therefore not subject to this Cause.



Objector's Replying Affidavit

10. In opposing the Application, the Objector filed the Replying Affidavit sworn on 19/10/2023. He deponed that the Applicant is a stranger to the deceased's family or estate, that the Applicant has not laid any basis as to how he acquired the land parcels Eldoret Municipality Block 13/890 and Eldoret Municipality Block 13/891 considering that on the face of the certificates of lease, the properties were registered in the name of the Applicant on 11/11/2021, almost 3 years after the demise of the deceased, that it would therefore be dangerous for the Court to grant the orders as the Applicant may well be an intermeddler to the estate, that the preservative orders granted on 18/08/2021 were properly obtained and were aimed at preventing the estate from being wasted and wade off intermeddlers such as the Applicant, that the orders cannot be set side on account of the Applicant's unsubstantiated claims, that the Application is made too late in the day and in any event, no prejudice will be suffered if the orders remain in force as the same have for the past 3 years not affected the Applicant, and that if at all the Applicant has a claim over the deceased's property then he ought to channel it in the correct forum.

Applicant's Further Affidavit

11. The Applicant filed a Further Affidavit on 17/11/2023 which although filed without leave, was, upon request, admitted and ratified by the Court. In the Affidavit, he deponed that a Succession Court is only concerned with the properties registered in the name of the deceased whose Succession proceedings is before the Court, that this Court is therefore not the proper forum for determining issues of ownership of land and the history relating to such ownership and that the Objector has the opportunity to approach the apt forum to challenge the titles registered in the name of the Applicant if he so desires, that when pronouncing itself on the preservation orders, the Court did not intend to interfere with any other third party's property and limit their right. In conclusion, he deponed that no passage of time can justify the unwarranted and irregular injunction orders

Hearing of the Application

12. While taking directions on the hearing of the Application, the Petitioner's Counsel, Mr. Munene, holding brief for Mr. Koech, informed the Court that he will not file any response to the Application or Submissions and would adopt the response filed by the Objector. Counsel for the Petitioner, Mr. Ogongo was absent. I however still gave all the parties the liberty to file and exchange written Submissions. However, by the time of concluding this Ruling, only the Objector's Submissions filed on 18/12/2023 was on record.

Objector's Submissions

13. On the prayer for joinder as an Interested Party, Counsel for the Objector, Ms. Odwa, submitted that the Law of Succession Act has not defined who an "Interested Party" is but from general knowledge, an "Interested Party" in a Succession matter can include beneficiaries, spouses, children, creditors and any person who has a legal claim to an estate. He cited the definition given in the case of Francis Karioko Muruatetu & Another v R & 5 Others [2016] and submitted that the Applicant has not demonstrated the personal interest and/or stake that he has in the estate apart from flashing out the Certificate of Lease, that there is no evidence on how he acquired the title or the procedure or process undertaken before the title was acquired, that no document has been exhibited to demonstrate that he was a purchaser and that in any case, both the Petitioner and the Objector have stated that the Applicant is unknown to them. Counsel submitted further that allowing the Applicant to be joined in this matter would only amount to this Court sanitising an illegality. She cited the case of In the Matter



of the Estate of Kungu Waigi (deceased); Ephraim Waigi Kungu v John Njuguna Kungu, Succession Cause No. 13 of 2017.

14. On the prayer for lifting of the conservatory orders, Counsel recounted the matters already deponed in the Objector's Replying Affidavit and added that the Applicant has failed to set out the case he intends to make before the Court, that the Certificate of Lease was issued after the Court issued the preservatory orders and which only means that the Certificates of Lease were obtained illegally and fraudulently. She submitted further that the Applicant has not demonstrated any discovery of new and important matter evidence, mistake or error apparent on the face of the record or any other sufficient reason to warrant review of the orders, and that the Applicant is also guilty of laches. In conclusion, she cited the case of *Shah v Mbogo and Another* [1967] EA 116.

Determination

15. The issues for determination are evidently the following:
 - i. Whether the Applicant should be granted leave to join and participate this Cause as an Interested Party.
 - ii. Whether the conservatory orders issued on 18/08/2021 should be reviewed, vacated and/or set aside.
16. In respect to claims made against an estate of a deceased by third parties, I refer to the remarks made by Musyoka J in the case of *In the matter of the Estate of Stone Kakbuli Muinde (Deceased)* [2016] eKLR. As herein, the case involved an Application by third parties for joinder into a Succession Cause. In dismissing the Application, the Judge stated as follows:
 24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.
 25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.
 26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.
 27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.



28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the [Civil Procedure Act](#) and the [Civil Procedure Rules](#). This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.
29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.”
17. There is also the case of [In Re Estate of Mbai Wainaina \(Deceased\)](#) [2015] eKLR, in which again, W. Musyoka J, held as follows:
- “ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the law of succession Act is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land court. Consequently, and for the reasons above stated, I wish to find and hold that this court has no mandate to resolve the proprietary interest on land based on the alleged trust”.
18. Similarly, in the case of [In re estate of Solomon Mwangi Waweru \(deceased\)](#) (2018) eKLR, A.K. Ndungu J remarked as follows:
- “Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”
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- “It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.
19. While I associate myself and agree with the said decisions and affirm that ordinarily, a person claiming an interest in a parcel of land in a Succession Cause will generally not be allowed to join in as a party in the Cause and his remedy will lie in a different litigation forum, there is a marked difference in this matter. The difference is that in this matter, the properties in question and being amongst those bequeathed under the Will alleged herein are registered in the name of the Applicant. It is therefore the



estate that is seeking to reclaim the properties, not the other way round. In other words, it is the estate that is claiming an interest in the Applicant's properties. It is therefore the estate that will shoulder the burden of proving that the properties should revert to the estate Unless therefore the titles are revoked or annulled, on the face of it, the properties would not comprise the estate herein..

20. In the circumstances, I doubt that it will be good practice to litigate over the properties when the person registered as owner thereof is locked out from participating in the litigation and is denied a hearing. One of the roles and duties of a Probate Court is to identify the properties comprising the estate and where a property alleged to be part of the estate is registered, not in the name of the deceased, but in the name of a third party, I do not agree that the right of such third party to be heard can be curtailed. That will be against the tenets of the Constitution. Fair hearing dictates that such third party be allowed to ventilate his side of the story including demonstrating that the properties in question are not part of the estate. Being the registered owner, the Applicant possesses all the rights to be present and participate when the properties are being discussed.
21. The Applicant, having also presented evidence showing that one of the properties bequeathed is in fact non-existent having been long subdivided and the two portions referred to hereinabove registered in the name of the Applicant, it is important that he be given an opportunity to prove this fact since if true, the Court will be engaging in the futile effort of sanctioning the bequest of property to a beneficiary when the property may well be non-existent.
22. For the above reasons, I find that the Applicant ought to be allowed to join this matter as an Interested Party, not because he claims part of the inheritance as a beneficiary, but to assist the Court to accurately narrow down on and/or identify the properties comprising the estate and available for distribution amongst the beneficiaries.
23. Regarding the second issue, namely, "whether the conservatory orders should be varied or set aside", I agree with the Objector's observation that the Applicant has not explained or demonstrated how he acquired the said properties which were at all material times registered in the name of the deceased. I also note the Objector's observation that on the face of the evidence presented, the Certificates of lease for the properties were registered in the name of the Applicant on 11/11/2021 almost 3 years after the demise of the deceased on 29/07/2018. This is not to say that I have not observed that the process of sub-division and issuance of the titles seems to have commenced much earlier and way before the demise of the deceased. However, in the absence of any explanation or documentation at all on how the Applicant acquired the property viz-a-viz the questions raised on the bona fides of the acquisition, I find that it will be unsafe for the Court to lift the conservatory orders at this stage. Lifting the preservatory orders may lead the Applicant to place the properties out of the reach of the Court and the parties herein before the Court makes a conclusive determination on whether indeed the properties are not part of the estate herein and consequently, unavailable for distribution.
24. Regarding the prejudice that may be caused to the Applicant if the preservatory orders are not lifted, I note that the Application has been brought more than 3 years after the orders were issued on 18/08/2021. Although the Applicant has explained that he only recently came to learn about the orders, I find no serious prejudice or irreparable loss that shall be suffered by the Applicant if the orders remain in force considering that the same have for the past 3 years not affected him. Granted, retaining of the orders will cause some inconvenience and anxiety to the Applicant but considering the circumstances of this case, my view is that lifting the same before the relevant determinations are made, will cause more harm than good to the administration of justice. I am therefore not inclined to lift or set aside the orders.



25. As I pen off, I reiterate my earlier caution that ordinarily, a Succession Court will not delve into making determinations on the legality or otherwise of title deeds relating to properties alleged to comprise the estate of a deceased but claimed by a third party. That is a preserve of the Environment & Land Court (ELC). There are of course acceptable situations under the Law of Succession Act pursuant to which a Succession Court may be entitled to declare the transfer of properties of a deceased person to a third party unlawful and revert the same to the estate of the deceased. One such situation is, for instance, where it is demonstrated that such properties exchanged hands subsequent to the death of the deceased and thus obviously irregularly and therefore amount to intermeddling which is prohibited under Section 45 of the Law of Succession Act. In this case, the question that will arise is; at what point did the Applicant “acquire” the properties? Was it before the demise of the deceased or was it after?
26. As aforesaid, the reason why this Court has allowed the joinder of the Applicant hereto is because some of the properties alleged to comprise the estate are in fact registered in the name of the Applicant and may therefore not be available for distribution herein. If therefore any party wishes to challenge the registration of the properties in the name of the Applicant when such registration is demonstrated to have occurred before the demise of the deceased, then I believe that the above caution will guide his next step.
27. I may also mention in passing, for whatever it is worth, that as I was concluding this Ruling, I came across a consent letter dated 13/03/2024, filed on 8/04/2023 through the Judiciary e-filing system and executed by the Petitioner and the Objector wherein the two have agreed that the Grant herein be revoked and the Petitioner and the Objector be appointed joint Administrators. I believe that if adopted by the Court, this consent will conclusively determine the prayer for revocation of the Grant as made in the Objector’s Summons dated 10/08/2021 earlier referred to hereinabove.

Final Orders

28. The upshot of my findings above is that the Applicant’s Summons dated 29/09/2023 partially succeeds and as a result, I order as follows:
- i. The Applicant is hereby granted leave to join and participate in this Cause as an Interested Party save that the nature and/or extent of his participation in this Cause may be limited or curtailed by further orders or directions that may be made by this Court at any stage of the Cause.
 - ii. The prayer for the review, vacation or setting aside of the preservative orders given on 18/08/2021 relating to the properties described as parcel number Eldoret Municipality Block 13/762, Eldoret Municipality Block 13/890 and Eldoret Municipality Block 13/891 and/or lifting of registration of the orders against the titles is declined.
 - iii. The costs of this Application shall be in the Cause for.

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

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WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Munene h/b for Mr. Koech for Executor

Ms Sibika h/b for Ms Odwa for Objector



Mr. Ogongo for Interested Party

