



REPUBLIC OF KENYA



**In re Estate of the Late Peter Kipkurgat Kuto (Succession Cause E155 of 2019) [2024] KEHC 10109 (KLR) (13 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10109 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE E155 OF 2019  
RN NYAKUNDI, J  
AUGUST 13, 2024**

**BETWEEN**

**PRISCA TARKWEN RUTO ..... PETITIONER**

**AND**

**METHUSELAH KIPKEMBOI KUTO ..... 1<sup>ST</sup> OBJECTOR**

**ABRAHAM KIPRUTO ROTICH ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. What is pending before me for determination are summons dated 6<sup>th</sup> June, 2024. The applicant is seeking reliefs as follows:
  - a. Spent
  - b. That in the first instance, the Honourable court be pleased to issue an order restraining each of the respondents from accessing the sums of Kshs. 513,693 held at the KCB Bank Limited Account No. 1281670014 pending the hearing and determination of this application.
  - c. That the each of the shares of Kshs. 513,693 of the respondents namely MATHEW KIPLAGAT KUTO and NAPHTALI KIPROTICH KUTO be released to the applicant in her capacity as the legal representative of the estate of the late PETER KIPKURGAT KUTO – DECEASED being the part of the recovered proceeds of the sums of money misappropriated by the Respondents.
  - d. That the court be pleased to order that such part of the Respondents shares in the land parcel known as IR. No. 8267 LR. No. 772/8 be attached in order to restitute the balance of the sum of Kshs. 1,841,968 less the sum of Kshs. 1,027,386 to be recovered from the shares of money held at the KCB Bank Limited Account No. 1281670014 thus Kshs. 814,582 as amounts misappropriated by each of the Respondents.



- e. That the applicant to retain the sums recovered as estate administration costs in this matter.
  - f. That costs of this application be sourced by the respondents.
2. The summons is supported by an affidavit sworn by Prisca Tarkwen Ruto, who gives a background and contextualizes the cause and the reasons for the orders sought. She deposed as follows:
- a. That I am the administratrix of the estate of the late PETER KIPKURGAT KUTO – deceased who was my husband pursuant to a grant of letters of administration intestate issued herein.
  - b. That the Respondents in a surreptitious manner proceeded to institute Eldoret Chief Magistrate Ad – Litem Cause No. 349 of 2019 – Re. Estate of the late Peter Kipkurgat Kuto – deceased and obtained a limited grant of letters of administration ad – colligenda bona.
  - c. That by use of the grant they received a sum of Kshs. 15,198,000 from the National Land Commission as compensation for compulsory acquisition of the land Parcel known as IR. No. 8267 LR. No. 772/8 belonging to the estate of the deceased.
  - d. That the money was deposited into the KCB Bank Limited account No. 1281670014 by the National Land Commission.
  - e. That the Respondents made several withdrawals from the account and misappropriated the sum of Kshs. 1,842,968 which they have failed to account to date leaving the sum of Kshs. 13,356,032/= in the said account.
  - f. That upon learning of what had transpired, I moved the magistrate Court to revoke the grant and which order was granted on the 20<sup>th</sup> May, 2021.
  - g. That the court also made an order finding the respondents guilty of contempt of court by proceeding to withdraw funds from the account despite an order restraining them from doing so.
  - h. That the Respondents were also ordered to account for the monies withdrawn and pay the same over to me and of which they have failed to.
  - i. That a further order was made for the tracing of their assets.
  - j. That it is necessary that the respondents share of the estate as made to them in the amended grant be attached and the money restored to the estate.
3. The Respondents in response filed replying affidavits in opposition to the summons.
4. Mathew Kiplagat Kuto, the 1<sup>st</sup> Respondent deposed that it is no secret the deceased was polygamous with three houses, the applicant therefore cannot insinuate that she is the sole administratrix as the grant is in joint names with Methuselah Kuto as a representative of the first house and Elizabeth Jepchumba Kuto for the 3<sup>rd</sup> house. That there is no sufficient cause has been advanced as to why their shares as directed by the High Court should solely be released to her.
5. He further deposed that the substantive issues relating to the assets being land and cash awarded as compensation by the National Land Commission and now held by Kenya Commercial Bank is res judicata thus ought not be re-litigated.
6. That the funds ought to be distributed as determined by this court as per the identified rightful beneficiaries by the court. The same has not been appealed to date.



7. That the applicant ought not to disguise the application as an appeal in utter violation of the honourable courts rules and procedure that go to the root of fair trial.
8. That there has never been any misappropriation of the said funds as alleged. He stated that the same was held and/or utilized as their rightful award by the National Land Commission (NLC), a fact well known to the applicant. She never opposed the same or gave any grounds for objection to the NLC who were on ground severally to take views and objections.
9. That prior to NLC awards proper due diligence and procedure was conducted to determine the rightful beneficiaries and the same cannot be faulted by the applicant at this time. A Gazette notice was also published to that effect.
10. That whereas they received Kshs. 15,000,000/= the same was held on their own behalf and that of Rispa Jelagat Kuto, Gideon Kiplimo Kuto, Grace Jerono Barchigei and Mathew Kurgat with their full authority.
11. That from the said amount only Kshs. 899,000/= was withdrawn as can be seen from the statement of account and not Kshs. 1,842,968/= as alleged. At the time, no order restraining the same had been served upon them or at the bank thus the withdrawal was proper.
12. That the application is premised on falsehood and should not stand. That if the order the applicant claims were in contempt off had been served to the Bank and by the extend to us the bank could not have authorized the transaction. He deposed that no assessed cost in administration of the estate has been tendered by the applicant to warrant only our own share be used to cater for the same. That her grant was revoked and they only incurred expenses on the administration of the estate on their advocate on record.
13. In the 1<sup>st</sup> respondent's view, the applicant is guilty of undue delays and gimmicks to prolong conclusion of this matter. She is a vexatious litigant, since in another application before this court she is seeking rectification of the grant to reflect the true position of the amount in the account that should be distributed as determined.
14. The 2<sup>nd</sup> Respondent equally filed a replying affidavit, with averments which were more less the same as that of the 1<sup>st</sup> Respondent, essentially opposing the application for reasons that the substantive issues relating to the assets being land and cash awarded as compensation by the National Land commission and now held by Kenya commercial Bank is res judicata thus ought not to be re-litigated. Further that the funds ought to be distributed as determined by this court as per the identified rightful beneficiaries by the court. The same has not been appealed to date.

## **Decision**

15. The ideal outcome in succession matters, whether the deceased died testate or intestate, is for the family to peacefully take care of the liabilities and thereafter distribute the estate to the beneficiaries. This court vide its ruling dated 20<sup>th</sup> December, 2023 distributed the estate of deceased among the beneficiaries. The estate of the deceased had an award of compensation of Kshs. 15,198,000/= which was shared equally among the beneficiaries, each of them receiving Kshs. 513,693/=. Similarly, land parcel IR NO. 8267 LR 772/8 measuring 100 acres was divided equally among all beneficiaries and each of them received 3.85 Acres.
16. While this was ongoing, the applicant had obtained orders as against the Respondents in Eldoret Ad Litem Cause No. 349 of 2019. The Magistrates Court issued an order on 4<sup>th</sup> June, 2021 and ordered as hereunder:



- a. That the Respondents Mathew Kiplagat Kuto and Naphtali Kiprotich Kuto are guilty of contempt of court for the disobedience of the orders made on the 17<sup>th</sup> December, 2020.
  - b. That the Respondents Mathew Kiplagat Kuto and Naphtali Kiprotich Kuto do account to the Estate of the Late Peter Kipkurgat Kuto – deceased in respect of amounts paid by the National Land Commission into the KCB Bank Limited accounts in the names of the deceased and in their own names and withdrawn in breach of the court order made on the 17<sup>th</sup> December, 2020 and do pay all such monies to the applicant as the legal administratrix of the estate of the deceased.
  - c. That an order is issued to trace any asset the Respondents may have expended the monies withdrawn in breach of the order of the court made on the 17<sup>th</sup> December, 2020 and that the same be sold and the proceeds handed over to the applicant as the administratrix of the estate of the late Peter Kipkurgat Kuto – deceased.
  - d. That the costs of this application are awarded to the applicant.
17. The cardinal issue intertwined in this application is whether the Respondents were at liberty to dispose, to deal or intermeddle with the property of the deceased without having obtained certificate of confirmation of grant. Incidentally, from the record the limited grant of letters of administration, ad colligenda Bona under Section 67 of the *Law of Succession Act* dated 18<sup>th</sup> December, 2019 was meant to serve the following Objective: “Limited to the purpose only of collecting and getting the estate and doing such things that may be necessary for preservation of the same and until further representation be granted.”
18. It is the said order that the applicant herein wholly seeks to rely in satisfaction of the prayers in her application dated 6<sup>th</sup> June, 2024.
19. The *Law of Succession Act*, frowns at intermeddling of the deceased estate without having met the procedural and substantive threshold as codified in the Act. This is what Section 45 of the said Act provides for. To protect the estate from being wasted, dissipated or transmitted illegally or irregularly to the prejudice of other beneficiaries. in this provision, except so far as expressly authorised 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 intermeddle with any free property of deceased person. Any person who contravenes the provision of this section shall be guilty of the offence and liable to a fine of not exceeding of Ten Thousand (Kshs. 10,000/=) or to a term of imprisonment not exceeding one year or to both such fine and imprisonment and be answerable to the rightful executor or administrator to the extent of the asset with which he has intermeddled after deducting any payments made in the due course of administration.
20. This issue of intermeddling has gained notoriety given its importance in the adjudication of Succession as can be seen in the decisions in Veronica Njoki Wakagoto (deceased) (2013) eKLR
- “The effect of Section 45 is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The Law takes a very serious view of intermeddling and makes it a criminal offence.”



21. Additionally, in the case of the Estate of M’Ngarithi (2017) Eklr it was held that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

22. Put in context, the impugned grant was issued to Mathew Kiplagat Kuto and Naphtali Kiprotich Kuto for a specific purpose of collecting, conserving and preservation of the estate pending the issuance of the Certificate of Confirmation of Grant and generally they were under duty to administer the estate and at the end of it all to render a just and true account of the estate. However notwithstanding that legal command, acting in excess of jurisdiction as administrators, they moved the bank by making withdrawals of Kshs. 1,841,968/= which was in violation of the terms of the grant of letters ad Colligenda Bona.

23. The Respondents’ fiduciary duty is to manage the estate responsibly and in the best interest of the beneficiaries. It goes without saying that the Respondents were dealing with monies belonging to the estate and not their own and therefore they must carefully keep records for all transactions. It is important for the Respondent to maintain a meticulous record on all the transactions made on behalf of the estate. If at any point an executor/administrator obtains money from an estate account that is not meant for the estate benefit, he/she owes the duty of care to the other beneficiaries to account for the asset or be condemned to repay back the unlawful wastage. The respondents as administrators were to hold the property in trust pending the summons for confirmation and grant of the certificate which decrees the model adopted by the beneficiaries or by a decision of the court to transmit the estate in compliance with Section 35,36,37,38,40 & 41 of the Law of Succession Act.

24. By this one act committed by the respondents, it deprived the applicant enjoyment of her share to the estate. If left undone, it will constitute unconscionable and unjust enrichment on the part of the Respondents. There was an implied trust that the appointed administrators shall act in good faith as trustees set out to collect and preserve the assets of the estate pending the hearing on distribution to the heirs.

25. The equitable remedy available to the applicant is in the nature postulated in Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 48 at paragraph which states as follows on Constructive trust:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest.



The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

26. The Court of Appeal in *Twalib Hatayana & another v Said Saggar Ahmed Al-Heidy & 5 others*, Civil Appeal No. 51 of 2014 (2015) eKLR dealt with the issue and held as follows:

“A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”

27. Generally speaking, though the legal representatives under the Succession Act are referred to as administrators, their role and duties are akin to that of a trustee. It is the responsibility that arises by operation of the law where it will be unconscionable for them to hold or intermeddle any asset in the intestate estate to deny the beneficial interest of another beneficiary. The functions of administrators under Section 83 are imposed by law to act in good faith as legal representatives in the administration of the intestate estate.
28. Following the endorsement of the interim special grant, the two respondents went on to dispense with the Certificate of Confirmation of grant and on that basis alone withdrew huge sums of money totalling to Kshs. 1,841,968/= to the detriment and prejudice of other beneficiaries. Given the nature of the Respondents' negligent conduct the court revoked the Special grant ad colligenda bona occasioning all consequential orders null and void. The orders as captured elsewhere in this ruling have never been complied with rendering each one of them in contempt of court.



29. The persuasive case in *Attorney General vs Times Newspapers Limited (1974) AC 273* at 302 put this disobedience by the Respondents in context as follows:

“In an ordered community, courts are established for the pacific settlement of disputes, and for the maintenance of law and order. In the general interest of the community, it is imperative that the authority of the court should not be imperilled, and that recourse to them should not be subject to unjustifiable inferences. When such unjustifiable interference is suppressed, it is not because those charged with the responsibilities of administering justice are concerned for their dignity; it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted, and the authority wanes and is supplanted.”

30. Just an observation, this order was made way back on 4<sup>th</sup> June, 2021 but the Respondents have continued to play it safe against the rules of the game of litigation. This kind of contempt is punishable on the face of the record for it flows from a defective and fatal instrument used to misappropriate the estate funds. The court in *Balogh vs. Crown Court at St. Albans (1974) 3 ALL E.R. 238* was very categorical on this subject and the power of the courts to punish contempt. Lord Denning remarked as follows:

“This power of summary punishment is a great power, but is a necessary power. It is given so as to maintain the dignity, and authority of the judge, and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent, and imperative to act immediately – so as to maintain the authority of the court – to prevent disorder - to enable the witness to be free from fear – and jurors from being improperly influenced and the like. It is of course to be exercised with scrupulous care, and only, when the case is clear and beyond reasonable doubt.”

31. It has been correctly submitted that the respondents have not purged the contempt by refunding the money wrongly and unlawfully withdrawn from the estate account. The justification for this indolence is contrary to the interests of justice. I am not prepared to accede to the proposition that the respondents shall continue being in contempt even having been condemned by the court below.

32. This case is the ideal vehicle for resolving the distribution of the estate of the late Kipkurgat Kuto. First, the court takes judicial notice that the applicant Prisca Tarkwen Ruto though being a spouse to the deceased, her interest and entitlement to the estate are peculiarly not captured in the original Certificate of Confirmation of Grant dated 20<sup>th</sup> December 2023 nor the subsequent one dated 29<sup>th</sup> April, 2024. More important, is the life interest under the succession Act which confers the right to the surviving spouse over the intestate estate. It is emerging that the applicant’s name as a surviving spouse is not incorporated in the distribution matrix referencing all beneficiaries consistent with Section 29 of the Act.

33. The natural limb of distribution in this estate as nuanced in the Certificate of Confirmation of Grant, seems not to have been in compliance with Section 35 of the Act, which is a complete code of succession matters. To be more specific, the court in *Tau Kakungi v Margrethe Thorning Katungi & Another (2014) eKLR, Musyoka J* purposed as follows on the issue:

“The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate... the device is designed to safeguard the position of the surviving spouse.



The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance.”

34. *The Constitution* in Art. 27 on equality before the law and freedom from discrimination speaks directly to this issue in subsection 4, which provides as follows:

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

35. In the arena of international law, which are part of our sources of law as prescribed in Art. 2(5) & (6) of *the constitution*, discrimination and the basis of gender is explicit. For example, the Convention of elimination of all forms of discrimination against women is instructive that any allocation of unequal inheritance of shares to widows and daughters contravenes the convention. Likewise, the protocol to the African Charter to the Rights and women of Africa also speak to the issues that a widow shall have the right to an equitable share in the inheritance of the property of the husband. A widow shall have the right to continue to live in the matrimonial house..... in the same Protocol, women and men shall have the right to inherit, in equitable shares, their parents’ properties.

36. It is therefore to be acknowledged that the administrators have a duty to revisit and review the metrics of inheritance as ordained in the primary certificate of confirmation of grant as duly amended on 29<sup>th</sup> April, 2024.

37. I take the view in this matter that the administration of justice is a human activity and accordingly cannot be made immune from errors of law or fact. When a claimant, litigant, plaintiff, petitioner or Respondent or defendant or their respective legal counsels makes such mistakes on the face of the record, justice requires that he/she be allowed to put it right even if it causes delay and expense. This is done not to occasion prejudice or injustice to the other party.

38. For those reasons, the court has been asked to pronounce itself on this matter and other antecedents touching on this intestate estate of the deceased. As a consequence, thereof the following orders shall abide:

- a. That the Respondents purge the contempt by surrendering their share equivalent to Kshs. 513,693 each in Kenya Commercial Bank account number 1281670014 as compensation for the loss occasioned in breach of their fiduciary duty to the estate of the deceased. This will be in compliance with Section 38 as read with Section 40 and 41 of the *Law of Succession Act*.
- b. That the Branch manager at the Kenya commercial Bank, Eldoret be and is hereby directed to ensure compliance with clause (a) above.
- c. That a freezing order be and is hereby issued against the Respondents accessing any cash at bank without leave of the court or as administrators filing the necessary instrument pending final transmission of the estate to the beneficiaries as identified in the Petition for grant of representation.



- d. That the issue of land known as IR NO. 8267 LR. NO. 772/8 before final orders are made, the administrators find it fit to have a valuation report which will inform the court with regard to prayer No. 4 in the summons dated 6<sup>th</sup> June, 2024.
- e. This being a family matter, the costs to be in the cause.

**DATED SIGNED AND DELIVERED AT ELDORET, THIS 13<sup>TH</sup> DAY OF AUGUST 2024**

**R. NYAKUNDI**

**JUDGE**

