



**In re Estate of the Late Kipleting Arap Choi (Succession Cause  
001 of 2022) [2023] KEHC 336 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 336 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
SUCCESSION CAUSE 001 OF 2022  
RN NYAKUNDI, J  
JANUARY 26, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPLETING ARAP CHOI**

**BETWEEN**

**FRANCIS KIPCHUMBA KOGO ..... 1<sup>ST</sup> PETITIONER**

**JANE CHEPKEMBOI CHOI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**FRANCISCA LAGAT CHEMUTAI ..... OBJECTOR**

**RULING**

1. The applicant approached this court vide a summons for revocation or annulment of grant seeking the following orders;
  1. That the certificate of confirmation of grant issued on March 28, 2022 be revoked/annulled or amended
  2. That the applicant herein be enjoined as a liability to the estate of the deceased.
  3. That the pleadings be amended to be Francisca Lagat Chemutai in place of William Kipsongok Lagat who has since passed on.
  4. Spent
  5. Costs.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn in support of the application.
3. The applicant contends that the grant was obtained by making of false statement and concealment of material facts. The applicant stated that her late husband bought property from the deceased on



August 3, 1973. When a certificate of confirmation of grant was issued on respect of the estate, she realized that neither she or the estate of her husband, William Kipsongok Lagat had been included as part of the liabilities of the estate. Since there were pending issues in relation to the estate the court ought to have resolved with regard to the objection to the grant, she deposed that the certificate was obtained by concealment of material facts.

4. She sought to have the prayers granted in the interest of justice.
5. The respondents opposed the application vide a replying affidavit filed on November 4, 2022. They stated that there were no defects in the issuing of the grant. Further, they contended that the applicant is not a survivor of the deceased, a dependant or a beneficiary by virtue of section 29. She is not ranked under the law in priority to the respondents and their children.
6. The respondents stated that the applicants' claim was time barred as she could not come to court to enforce a sale agreement after 40 years. Further, that the applicant had commenced a suit before the environment and land court in Kapsabet, ELC No E002 of 2022 (OS) that is pending hearing. The respondents also commenced ELC Case No E026 of 2022 before the same case seeking eviction orders against the applicant.
7. The respondents deposed that this court cannot determine issues of ownership for want of jurisdiction. This is a land claim that is to be dealt with by the Environment and Land Court. They asked the court dismiss the application with costs.

#### **Issues for Determination**

8. Upon consideration of the pleadings and response to the application, the following issues arise for determination;
  1. Whether the court has jurisdiction to determine the application
  2. Whether the grant should be revoked

#### **Whether The Grant Should Be Revoked**

9. The grounds under which a grant of letters of administration are set out in section 76 of the [\*Law of Succession Act\*](#) which provides;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
  - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - (ii) to proceed diligently with the administration of the estate; or



(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

10. The relevant paragraphs in the judgements of *Jamleck Main Njoroge v Mary Wanjiru Mwangi* [2015] eKLR the court had this to say on revocation of grant thus:

“.....The circumstances that can lead to the revocation of grant have been set out in section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (Emphasis added.)

11. Similarly in the case of: *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No 158 of 2000 Mwitat J summarised the essence of section 76 of the Law of Succession as follows:

“...Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

12. The present claim is based on the concealment of material facts, the material fact being that there was a pending objection that was not determined by the court before the confirmation of the grant. I have perused the record of the court and I note that there indeed exists a consent order dated April 3, 2019, the import of which is that the petitioners were named the administrators of the estate land Nandi/Ollessos/80 in the matter of the estate of Kipleting Arap Choi. The applicants’ estate was made a protestor to the distribution of the estate as well. The petitioners’ acknowledged the protest to the mode of distribution in their summons for confirmation of grant. However, it is not clear from the record if the issue was ever determined. The probate court had an earlier opportunity to pronounce itself on the effect of the objection proceedings before issuance of the certificate of confirmation of grant. That error by the trial court has the legal effect of irregularity on the validity of the confirmed grant. This the very question which has featured prominently in the instant application. Section 76 of the act permits the court to exercises its discretion to annul or revoke a grant of representation at any time. Although that window runs contrary to the time line provided for in the act on the conclusion of the probate proceedings set at 6 months after gazettelement and making of the grant of representation it follows that binding precedents set by the court to state otherwise. The dictates of justice therefore demands that the issue distribution be re-opened so that the objector may be heard upon the issue as to whether this is the right forum of convenience or her claim is to be adjudicated elsewhere. My reading of the claim raised by the objector does not call for this court to revoke the entire certificate of the confirmed grant for that is likely to occasion prejudice or injustice of the other beneficiaries. The content of the application can easily be canvassed by an order of setting aside the proceedings



on confirmation of grant referred to by the objector. It appears to me what the court is required to interrogate is the nature of the sale agreement annexed to the objection proceedings against the making of the grant of representation. This to establish whether the grant so impugned by the objector was obtained in consequence of untrue allegations of facts essential in point of law to justify the grant being revoked.

### **Whether The Applicant Should Be Enjoined As A Liability To The Estate**

13. The applicant is a widow to the late William Kipsongok Lagat who she claims purchased the suit land from the deceased. She produced a sale agreement as annexure FL3 and contended that the deceased had lived on the land for 50 years until his demise.

14. In my judgement the respondent appears to raising a fundamental jurisdiction issues pursuant to Limitation of Actions act cap 22 of the laws of Kenya. Secondly the objector's affidavit evidence and submissions lays down the circumstances in which a cause of action is stated to be litigated within the provisions of the enabling statute as premised by parliament. The invocation of the probate court jurisdiction by the objector presupposes the existence of a claim under section 93 of the Succession Act against the petitioners alleged to be at the time when the action is brought to the owners of the suit land. With that notwithstanding the possession have taken in terms of section 76 of the Act the issue of jurisdiction remains a live issue to be raised at the earliest opportunity by this court in respect of the materials being agitated by the objector. I will not be surprised if the argument of the objector which was urged and urged most strongly may not suffer the same fate in line with the decision in the Owners of the Motor Vessel "Lilian S v Caltex Oil (Kenya) Ltd (1989 eKLR In this landmark jurisprudential setting precedent the court has this to say:

“.....By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constitute, and may be extended or restricted by the like means. If no restrictions or limit is imposed the jurisdiction is said is said to be unlimited. A limitation may be particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both this characteristics. If the jurisdiction of an inferior court or tribunal (including and arbitrator) depends of the existence of a particular state of facts, the court or tribunal has jurisdiction, but except where the court or tribunal has been given power to determine conclusively whether the facts exist, where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”.

15. The onus is on the objector to demonstrate at an appropriate time that this court is not drained of the jurisdiction to entertain the proceedings germinating from her claim against the petition. In the first place I put the objector on notice that there can be no adjudication on the merit of the issues raised unless the huddle on jurisdiction has been passed. It is for this reason I did not take the liberty of dismissing the claim in its entirety in view of the rival submissions presented before this court. The limits of this legal power or authority exercised is circumscribed by the statute under which the court is constituted and may be extended or restricted by similar manner. It is therefore left to the objector to canvass for one reason or other that there is a feature of this objection proceedings which allows the court to exercise jurisdiction.

16. For those reasons, the strength of the objector's application lies in the borderline which it is her duty to surmount.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> DAY OF JANUARY 2022.**

.....

**R NYAKUNDI**

**JUDGE**

