



REPUBLIC OF KENYA



**Kimaiyo v Kibor (Succession Cause 275 of 2015)  
[2023] KEHC 3511 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3511 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 275 OF 2015  
RN NYAKUNDI, J  
APRIL 28, 2023**

**BETWEEN**

**PHILIP KIMAIYO ..... OBJECTOR**

**AND**

**FRANKLINE KIPCHUMBA KIBOR ..... PETITIONER**

**RULING**

1. What is pending before the court is the application dated October 5, 2020 where the applicant seeks the following orders;
  - a) Spent
  - b) That pending the hearing of this summons inter-parties, this honourable court be pleased to grant an order of preservation of the estate of the late Chemitei Kimeto and directing the respondent herein either by himself his agents and/or servants from intermeddling with the estate to wit parcel no Cherangany/Chebororwa/3XX
  - c) That this Honourable court do order the rectification of the register in respect of that property known as Cherangany/Chebororwa/3XX to reflect the name of the deceased which title was fraudulently and illegally changed into the name of the respondent herein Frankline Kipchumba Kibor
  - d) That the grant issued in favour of the petitioner/respondent be revoked
  - e) That the costs of the application be borne by the respondent
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the same.



### **Applicant's Case**

3. The applicant's case is that the deceased was his father and he had two wives. That from his first house, he had a daughter, Kimoi Kipkemoi, now deceased. In the second house, he had four children namely Paul Chemitei, deceased, William Chemitei, deceased, Philip Kimaiyo, the Applicant and Annah Kulei. He submitted that the deceased died intestate and left the property identified as Cherangany/Chebororwa/3XX measuring 5.9 hectares. He submitted that the petitioner who is great grandson of his sister forged documents and obtained a grant of letters to the estate of the deceased. He urged that after obtaining grant of letters, the Respondent has gone ahead to transmit to himself the tittle to Cherangany /Chebororwa/3XX and he excluded other beneficiaries of the estate of the deceased yet he is not entitled in priority to the estate. He stated that the deceased had two surviving children who were not mentioned until they filed the objection proceedings. He stated that Rule 26 (2) of the *Probate and Administration Rules* required the Petitioner to have sworn an affidavit confirming that the current Applicant and his sister, renounced their right to administer the estate. It was his case that the petitioner failed to do this and that he did not declare all the assets of the deceased. He urged that the grant dated July 23, 2019 be revoked and the parties be ordered to provide new names of the administrators and steps be taken to administer the estate.

### **Respondent's Case**

4. In opposition to the application, the respondent stated that the deceased died in 1980 leaving several beneficiaries and properties which he had allocated to his two wives prior his demise as follows;
5. House A -Teriki Kimeto who is the mother to Kimoi Kipkemoi - LR No Cherangany/Chebororwa/3XX
6. House B-tinyo Kimeto who is the mother to Paul Chemitei, William Chemitei and Philip Kimaiyo-  
Lr No Cherangany Chebororwa/2XX  
Lr No Cherangany Chebororwa/3XX
7. Further, that Kimoi Kipkemoi had a son surviving her, Peter Kibor (deceased) who married Monica Kibor (deceased)and both were blessed with children; Frankline Kibor (respondent), Rhoda Kibor, Everlyne Kibor, Gladys Kibor and Hosea Kibor. The said Kimoi Kipkemoi a daughter of the deceased, at the age of 75 years commenced succession proceedings in respect of the parcel of land known as Cherangany/Chebororwa/3XX and was issued with grant of letters of administration on January 26, 2016.
8. The respondent submitted that the objector testified that he has never done succession proceedings in respect of the estate of the deceased despite several request from the respondent. He then disposed of parcels no Cherangany/Chebororwa/2XX and Cherangany/Chebororwa/3XX which belong to the deceased to strangers unknown to the estate without following due process and is now claiming her sister's parcel of land which she lived in for over 40 years.
9. The respondent submitted that under section 29, grandchildren are listed under the second degree of consanguinity as dependants and therefore can inherit the estate of a deceased. He cited the cases of *Gabriel Simali & 7 Others vs George Oduor Oloko* (2020) eKLR and *In Re Estate of Florence Mukami Kinyua (Deceased)* (2018) eKLR in support of his submission. He stated that he is a dependant under section 29 and 66 of the *law of succession act* as he is categorized under the second degree of consanguinity as a grandchild stepping in the shoes of his late parents to take up their share.



10. The respondent stated that the late Kimoi Kipkemoi was the only daughter to the late Chemitei Kimeto and Teriki Kimeto and being the rightful heir, she commenced succession proceedings partially in respect of parcel of land namely Cherangany/Chebororwa/3XX which had been allocated to her late mother. Upon filing the said proceedings, the same was gazetted and confirmed and a grant confirmed on January 26, 2016 however at the distribution of the estate, she passed on. He then applied to be an administrator of the estate and took over distribution of the estate. He followed the due process in petitioning for the grant and there being no objection the grant was confirmed in favour of the late Kimoi Kipkemoi.
11. It is the respondent's case that the objectors have not provided any evidence to prove their claim for material concealment and fraud in their affidavit in support of the summons hence their averments cannot stand. He urged that the same be dismissed with costs.

### **Analysis & Determination**

12. Upon consideration of the application, responses and submissions thereto, the following issue arises for determination;
  1. Whether the petitioner is a dependant
  2. Whether the grant should be revoked
13. Section 76 of the *Law of Succession Act* states;

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.”



14. This provision has been discussed extensively over various decisions. *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR it was stated that:

Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

15. The applicant questioned whether the respondent was a dependant and stated that he had no priority to make the application for grant of letters of administration intestate. It is not in dispute that the petitioner is a great grandson to the deceased. Section 29 of the *Law of Succession Act* provides as follows;

For the purposes of this Part, "dependant" means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
  - (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
  - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
16. Further, it is apparent that the petitioner sought a grant to administer the estate of his grandmother as she had failed to complete the administration of the estate of her parents before passing away and her children had also passed away, therefore leaving her grandchildren as the only beneficiaries. It follows that the petitioner could only file a grant of letters of administration of the estate with regard to properties that his grand mother was to inherit from the deceased as the rest of the estate had been distributed to the second house. I have considered the sequence of events and it is clear to me that the petitioner was merited in seeking a grant of letters of administration intestate.
17. The burden of proof of proving whether there was fraud or concealment of material facts rests with the applicant herein. The allegations of fraud are not to be taken lightly in any circumstance and therefore,



any party alleging the same must provide evidence to that effect. The applicant has not provided this court with any evidence that the petitioner forged documents to obtain the impugned grant.

18. The crux of the application is that the petitioner is not a dependant to the deceased but upon examining the unfortunate deaths of the administrators before distribution of the estate it is my considered view that the petitioner is a dependant under the definitions of section 29 of the *Law of Succession Act*. Further, as there was no objection to the confirmation of grant, I find that the correct procedure was followed by the petitioner. Whereas Rule 26 of the probate administration requires notice to be issued to every other person who may be entitled to petition for the same, it is clear that there was a gazette notice on the same and therefore the same cannot be deemed to not have been issued. The applicant is misguided on the position that he was not 'served' with notice as this not a situation where one must serve notice.
19. In the premises, the appeal is unmerited and the other prayers cannot be entertained as the applicant has failed to prove that there was any fraud in obtaining the grant of letters of administration. The application is dismissed, each party shall bear its own costs.

**DELIVERED VIA EMAIL DATED AND SIGNED AT ELDORET ON THIS 28<sup>TH</sup> DAY OF APRIL 2023**

.....

**R. NYAKUNDI**  
**JUDGE**

