



REPUBLIC OF KENYA



In re Estate of James Kipkemoi Tesot (Deceased) (Miscellaneous Succession Application E002 of 2023) [2023] KEHC 17906 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS SUCCESSION APPLICATION E002 OF 2023**

JK SERGON, J

MAY 30, 2023

BETWEEN

ROBERT HAMISI NGENO APPLICANT

AND

MARGARET JESANG BUSIENEI 1ST PETITIONER

SAMUEL KIPLANGAT RUTTO 2ND PETITIONER

ANNE CHEMUTAI 3RD PETITIONER

RULING

1. The application for the court’s consideration is the summons for revocation or annulment of grant dated March 10, 2023 seeking the following orders;
 - i. Spent
 - ii. That the grant confirmed on July 5, 2022 and collected by Margaret Jesang Busienei by this court be revoked/annulled.
 - iii. That the issue of confirmation of the grant was not notified to the applicant despite having notified the court over the strangers.
 - iv. That the estate of the deceased has been distributed to strangers as they are not beneficiaries of the estate
 - v. That a temporary injunction be and is hereby issued restraining the petitioners/ respondents herein from disposing, transferring, sub dividing, evicting the applicant, dealing and/or interfering in any manner whatsoever with the deceased property known as Kunyak Settlement Scheme Plot Number 289 pending the hearing and determination of this Application.



- vi. That an injunction do issue against the Petitioners from entering, transferring, sub dividing, selling, interfering or dealing with the suit property of the deceased pending the hearing and determination of this suit.
 - vii. That the Director of Lands Adjudication and Settlement be served with the orders of the court to maintain status quo as today's date.
 - viii. That the honourable court be pleased to make such further orders as it may deem fit and just to grant in the interest of justice.
 - ix. That the costs be provided for upon determination
2. The application is supported by grounds on the face of it and an affidavit in support of summons for the revocation and/or annulment of grant sworn by Robert Hamisi Ngenoh the Applicant herein.
 3. The applicant avers that James Kipkemoi Tesot (deceased) was his neighbor until his demise and had no family at the time they lived together at Kunyak Settlement Scheme. The Applicant further avers that the deceased was allotted a plot known as Kericho/Kunyak Settlement Scheme/289 in January 1989 annexed and marked as "RHN 1A" is a certificate of allotment and that during his lifetime the deceased sold 5.5 acres to the Robert Hamisi Ngeno (the applicant) herein and he was placed into immediate possession and occupation of the said land parcel in 1996.
 4. The applicant avers that the 1st, 2nd, 3rd petitioners herein are strangers to the estate of the deceased. The applicant attached their full particulars as per the records held by the National Registration Bureau annexed and marked as "RHN 9-15". The applicant contended that these strangers made claims to the estate of the deceased and subsequently, the certificate of confirmation of grant was issued to the strangers on July 5, 2022 annexed and marked as "RHN 17".
 5. The applicant maintained that the deceased was not their parent and that their parents are well known hence these persons were strangers to the estate of the deceased.
 6. The applicant contended that the matter was brought to the attention of the court and the court declined to sign the grant dated March 29, 2022 annexed and marked as "RHN 16" and he was therefore skeptical that the Judge's signature was forged in the grant dated July 5, 2022 annexed and marked as "RHN 17".
 7. The applicant contended that his interests as a creditor to the estate had not been addressed, and further that he was being evicted from the suit land by strangers to the estate.
 8. The applicant further stated that the letter by the Area Chief annexed and marked "RHN 6" confirmed that the deceased was not married and that he was survived by his brothers and further that the applicant herein had a proprietary interest in 5.5 acres of the suit land, which was sold by the deceased in his lifetime.
 9. The applicant reiterated that in the circumstances it was fair and just that the grant issued to the three strangers be revoked or annulled.
 10. The Application was opposed by Margaret Jesang Busienei who filed a replying affidavit dated April 26, 2023 on behalf of Samuel Kiplangat Ruto and Anne Chemutai.
 11. The Respondents stated that they were administrators of the estate of Arap Tesot who is the proprietor of land parcel no. Kericho/Kunyak/Settlement Scheme/289 annexed and marked as "MJB1" are the letters of administration dated 6th May, 2019.



12. The respondents stated that they made an application on September 23, 2019 for confirmation of grant through their lawyer Mwamu and Company Advocates annexed and marked as “MJB2” is the application dated September 20, 2019 and that soon thereafter a caveat and opposition to the letters of administration was filed by Joseph Maritim Kilel annexed and marked as “MJB3” is the caveat and affidavit dated September 25, 2019 and that on January 29, 2021 the court gave a ruling advising the protestor to lodge a case in the right court annexed and marked as “MJB4” is a copy of the said ruling.
13. The respondent stated that the objector failed to appear in court and the court dismissed the summons, removed the caveat and confirmed the summons issued to the respondents vide a ruling on March 28, 2022.
14. The respondent stated that the letters were subsequently confirmed by the court annexed and marked as “MJB6”
15. The respondent stated that the issues raised by the applicant herein Robert Hamisi Ngeno were raised by Joseph Maritim Kilel and dismissed by the Court.
16. The respondents were adamant that their mother Pauline Chemaiyo Tesot was buried on the suit property in 1977 and that the protests challenging their hereditary rights were baseless.
17. The respondents averred that sometime on May 2, 1989 the children of James Kipkemoi Tesot wrote a letter to the District Settlement Officer stopping the officer from interfering with the suit land annexed and marked as “MJB7” is a copy of the said letter.
18. The Respondents maintained that the applicant herein has always tried to use fraudulent means to obtain the suit land and that he had on a prior occasion used her uncles Kipngeno Korir Arap Tesot and Chekwony Arap Tesot to obtain letters of administration while stating that their father (now deceased) was not married and subsequently had no children.
19. The respondents stated that in the application for grant filed in this court on November 26, 2018, her uncles stated that the reason for the grant was to transfer suit land to the applicant herein.
20. The respondent stated that they instructed their lawyers at the time E.K Korir to file an application to revoke the grant appointing their uncles as administrators and appoint the Respondent and her two siblings Samwel Kiplangat Ruto and Ann Chemutai as administrators annexed and marked as “MJB 10” is the application, which then forced them to write to the DCI Kericho to investigate the circumstances under which they were being disinherited annexed and marked as “MJB11” is the letter dated March 6, 2019 and subsequently a meeting held by the family on April 16, 2019 in which it was resolved that Samuel Kipngeno Korir and David Kiprono Chepkwony should hand over administration to the petitioners/respondents herein annexed and marked as “MJB12” are minutes of the said meeting and that the applicant herein did not attend the same meeting as he is not a member of the family.
21. The respondents stated that the applicant in a bid to lay claim to the suit land, took their ailing father to Bomet to their grandfather’s land and upon his demise he was buried in Bomet, they therefore conceded that he was not buried next to his wife Pauline in Kunyak Plot No. 289.
22. The respondents denounced the allegation that they forged the judge’s signature in the certificate of confirmation of grant.
23. The respondents maintained that James Tesot (deceased) was their father, he left them with settlement confirmation cards and reiterated that they would not be disinherited by strangers annexed and marked as “MJB14” are the settlement confirmation cards.



24. The respondents maintained that Kipruto Busienei was their guardian while they were young owing to family disputes, they argued that it was not uncommon for children to have national identity cards in the name of their guardians not their biological parents.
25. The respondents further stated that they have no land in Kipruto Busienei's family because they were not his children.
26. The respondents contended that what triggered the instant application by the applicant was that after they obtained confirmation of grant, they filed a suit to have the applicant evicted and stopped from working on the suit land annexed and marked as "MJB15" are the pleadings therein.
27. The Respondents stated that immediately after he was served with summons to enter appearance in the suit he went and fenced off the plot to show that he had been in possession.
28. The respondent contended that the applicant does not have the capacity to bring the instant application by virtue of section 29 (a) and (b) of the Law of Succession Act which lists dependants and further should the applicant herein have a claim against the estate of the deceased he should prosecute the same before the Environment and Land Court.
29. The matter came up for inter parties hearing on May 8, 2023 and counsel submitted orally, Mr. Nyaingiri counsel submitted that the chief had confirmed that the deceased herein had no children and that Margaret, Samuel and Anne were children of Kipruto Busienei who died in 2022 and further that the suit land was allocated in 1989. Counsel for the applicant argued that there was material non-disclosure, that the petitioners had never been on the suit land, there was no grave yard in the suit land and that the petitioners never attended the funeral of Tesot and that there are other siblings of the late Kipruto Busienei. He further submitted that Mzee Tesot was buried in Bomet County and that Samuel K. Ruto is a son to Kipruto, Chesang Busienei is the daughter of Busienei. Counsel for the applicant further argued that the applicant had been on the suit land since 1996 after Mzee Kipruto sold land to him, hence the applicant herein was a creditor of the estate of the deceased and should therefore be allowed to complete the administration of the estate.
30. Mr. Mwamu, counsel representing the Petitioners/Respondents submitted that he would rely on the contents of replying affidavit to oppose the application, the applicant is a mere creditor to the estate hence he is not entitled to take out letters of administration hence his application is defective. Counsel further submitted that the grant was issued in May, 2019, and there was no application for revocation.
31. Mr. Mwamu further stated that on January 29, 2021 Lady Justice Ongeru made a determination and the grant was subsequently confirmed in the names of the Respondents herein. Counsel referred to the replying affidavit reiterating that there were minutes confirming the holding of a family meeting regarding the administration of the estate of the deceased. Counsel further argued that the court was being asked to sit on appeal under section 29 of the Law of Succession Act and further that the court could not rely on a eulogy to establish paternity and therefore at the instant application should be dismissed.
32. Mr. Nyaingiri counsel for the applicant on his part he maintained that the trio were guilty of material non-disclosure and that they are many sources showing that they were not children of the deceased. I wish to indicate from the onset that the Applicant should have filed the instant application in Kericho HCSC. No.246 of 2005 where the grant was confirmed instead of filing a new Miscellaneous Application.
33. I have considered the application for revocation or annulment of grant, the replying affidavit and oral submissions made by Learned Counsels and I find that the sole issue for determination is whether the



grant herein should be revoked and or annulled for material non-disclosure. The applicant herein is not a survivor of the deceased, for he claims, not as surviving spouse or child or grandchild of the deceased, but as a creditor of the estate.

34. There is also doubt whether the High Court, in this case sitting as probate court has jurisdiction to make determinations relating to title to land use and occupation of land.
35. It would appear that jurisdiction lies with the Environment and Land Court, by virtue of articles 162 (2) and 165 (5) (b) of the Constitution. The applicant should therefore agitate his claims through the channels established under the Constitution and the relevant statutes.
36. In the case of Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR Musyoka J. held as follows; “... 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.”
37. In the end, I find no merit in the application, dated March 10, 2023, and I hereby dismiss the same, with no order as to costs.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 30TH DAY OF MAY, 2023

J.K. SERGON

JUDGE

In the presence of;

C/A Rutto

Mwamu for the Respondent

Nyaingiri for the Applicant

