



**In re Estate of Christopher Kipchirchir Sum (Deceased) (Succession Cause 38 of 2018) [2023] KEHC 18080 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18080 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 38 OF 2018  
JRA WANANDA, J  
MAY 26, 2023**

**BETWEEN**

**KENNETH KIPRPO SUM ..... PETITIONER**

**AND**

**VERONICA CHEPSAT SUM ..... OBJECTOR**

**AND**

**THE CATHOLIC DIOCESE OF ELDORET ..... APPLICANT**

**CELINE GEORGE POLAND ..... APPLICANT**

**AMBROSE KIPKORIR BITOK ..... APPLICANT**

**FIONA JERONO SUM ..... APPLICANT**

**VALERIE CHELAGAT ..... APPLICANT**

**RULING**

1. This ruling is in respect of the chamber summons dated May 12, 2022 filed by several persons and/or entities, seeking to be joined to this cause as interested parties and/or beneficiaries and for consolidation of this cause with two other succession causes.
2. This succession cause relates to the estate of the late Christopher Kipchichir Sum who was the son of the late Ernest Sum. The estate of the said Ernest Sum was or is being dealt with in Eldoret High Court succession cause No 23 of 1985. In that cause, the late Christopher Kipchichir Sum was allocated 150 shares of the estate as his inheritance. The petitioner herein, Kenneth Kiprop Sum, claims to be a son of the late Christopher Kipchirchir Sum and it is as a result of that claim that he filed this cause to pursue his alleged share of the allocation made to the late Christopher Kipchichir Sum (his alleged father) in succession cause No 23 of 1985. The petitioner claims that he is entitled to 200 acres out of the property known as LR No 2226 which is still registered in the name of the late Ernest Kimngetch Sum.



3. On January 30, 2019, letters of administration were issued herein in favour of the petitioner appointing him the administrator and on November 26, 2019, the grant was confirmed. However, on March 6, 2020, the objector filed summons seeking revocation or annulment thereof.
4. Since then, there has been a plethora of applications and counter-applications in this matter from both sides seeking various orders, mainly orders to preserve or conserve the subject matter, orders to be allowed to till or plough estate land, orders to maintain rival interpretations of what the parties deemed to be the prevailing status quo, among others. Indeed H. Omondi J (as she then was), in a ruling delivered on October 28, 2020 observed that “I take note that this matter is replete with applications by the two parties, each geared at “conserving/preserving” the property and any activities thereon”.
5. One of the applications successfully sought the citing of the petitioner for contempt of court orders and which, by the ruling delivered on May 20, 2021 by H. Omondi J (as she then was), culminated into committal of the petitioner to jail for 3 months for disobeying a court order over use of the said LR No 2226. The petitioner is currently out of jail on the basis of an interim order which temporarily released him on bail pending determination of some pending applications. From the record, there is indication that either the parties did or proposed to withdraw all earlier applications to enable them proceed to the main substantive issue before the court.
6. Be that as it may, as aforesaid, what is before court now is the chamber summons dated May 12, 2022 filed by several persons and/or entities, namely, Catholic Diocese of Eldoret, Celine George Poland, Ambrose Kipkorir Bitok, Fiona Jerono Sum, Vallerie Chelagat, The application is filed through Messrs Miyianda & Co Advocates.
7. I however note that two other persons, namely, Priscilla Jepkemoi Sitienei w/o Peter Sitienei and Kibiwott Seroney. who are mentioned in the body of the application as applicants have not been named as such in the title of the application. It is not apparent whether this omission was intended or whether it is an inadvertent mistake.
8. The applicants describe themselves as interested parties and/or beneficiaries of the estate of one Ernest Kimengich Sum and seek the following orders:
  - i. [.....] spent.
  - ii. That the Catholic Diocese of Eldoret, Celine George Poland, Ambrose Kipkorir Bitok, Fiona Jerono Sum, Vallerie Chelagat, Priscilla Sitienei w/o Peter Sitienei and Kibiowot Seroney be joined to this cause as interested parties/beneficiaries.
  - iii. That Eldoret HCP&A cause No 23 of 1985 in the matter of the estate of Ernest Kimngetch Sum and Eldoret HCP&A cause No 268 of 2000 – in the matter of the estate of Christopherr Kipchirchir Sum – be consolidated with this cause for hearing and determination.
  - iv. That the certificate of confirmation of grant to original grantee dated April 18, 1988 issued in HCP&A No 23 of 1985 be varied, amended and/or nullified.
  - v. That the grant of letters of administration intestate dated March 19, 2001 be varied, amended and/or nullified.
  - vi. That the honourable court do make and issue any further orders as may be deemed.
9. The application is premised under section 47 and 76 of the *Law of Succession Act* and rules 44 and 49 of the *Probate & Administration Rules* under the same Act . It is based on the grounds that the applicants are all beneficiaries of the estate of Ernest Kimngetch Sum, that the Catholic Diocese of



Eldoret, Celine George Poland and Valerie Chelagat are purchasers of portions of land from the estate, Ambrose Kipkorir Bitok is a son of Ernest Kimngetich Sum by another mother other than Veronica Sum and needs to be allocated an equal share as other family members, Fiona Jerono Sum is a daughter of Dennis Kirwa Kiptoo Sum claiming her father's share since the father is not interested in the land, the causes need to be consolidated to avoid duplicity and that the estate needs to be finally distributed to end wrangles and incessant applications.

10. The application is supported by the affidavit of Ambrose Kipkorir Bitok sworn on May 12, 2021. In the affidavit, he depones that he is authorized by the rest of the applicants to swear the affidavit on their behalf, that the late Ernest Kingetich Sum is the registered proprietor of all that parcel of land known as LR No 2226 situate at Moiben, within Uasin Gishu county, the objector (Veronica Chepsat Sum) is the administrator of the estate of the said Ernest Kimngetich Sum, the late Christopher Kipchirchir Sum is the son of Ernest Kimngetich and the objector, the petitioner is the son of Christopher Kipchirchir Sum and thus the grandson of Ernest Kimngetich Sum and the objector, the deponent (Ambrose Kipkorir Bitok) is the biological son of Ernest Kimngetich Sum by another mother other than the objector and is entitled to his full share as a son, Fiona Jeruto Sum is the daughter of Dennis Kirwa Kiptoo Sum, a son of the late Ernest Kimngetich Sum and the objector – thus their granddaughter - and is intent on claiming her father's share as of right since her father is not interested in claiming his share of the estate, Valerie Chelagat is a purchaser of 2 acres from the estate of Ernest Sum through her deceased mother, Celine George Poland is a purchaser of 100 acres of land from the estate and needs a title for that share, Catholic Diocese of Eldoret purchased 115 acres for putting up a church, a school for destitute children and a public utility, Priscila Jepkemboi is the wife of Peter Sitienei (now deceased) the driver of the late Ernest Kimngetich Sum who was allocated 5 acres by the late Ernest Kimngetich Sum and she needs the title, Kibiwot Seroney is a purchaser of 2 acres from the estate and needs his title.
11. The deponent then states that he is aware that the objector obtained a certificate of confirmation of grant over the estate of his late grandfather Ernest Kimngetich Sum on April 18, 1988 in Eldoret HCP&A cause No 23 of 1985, that the cause be consolidated with this cause for determination as the matters are related, since the confirmed grant did not cater for all the beneficiaries and it was done unilaterally by the objector at the time, it be nullified and the same be redistributed, the deponent was not accommodated in the said grant confirmed in 1988 and yet the objector knows very well that the deponent is her step-son, in fact it is the objector who brought him to her home just after the death of his father, the objector obtained a grant of letters of administration over the estate of Christopher Kipchirchir Sum in Eldoret HCP&A No 268 of 2000, when the petitioner herein applied for representation in this cause, he did not know that the objector had obtained a grant in the year 2000 because she kept all things to herself, there is therefore duplication of matters affecting the same estate and it is only fair that Eldoret HCP&A No 268 of 2000 be consolidated with this cause for determination, it is the desire of all beneficiaries to have this matter touching on the estate of Ernest Kimngetich Sum resolved with finality to the satisfaction of all, it is proposed that all the beneficiaries each record their statements of claim, avail relevant documents in proof of their claims and they give *viva voce* evidence in open court for this matter to be brought to an end in the best way possible, the application be allowed and that no party will suffer any prejudice if the application is granted.
12. Together with the application, the law firm of Miyienda & Co Advocates also filed an 11-paragraph document of the same date which it described as “case summary” giving a synopsis of the background to this matter. In the “case summary”, the advocates also listed 14 applications which had by that date been filed in this cause. They then proposed that all these applications be dealt with by way of directions instantly to pave way for *viva voce* evidence and ultimate distribution of the estate.



13. It is not clear whether leave of the court was sought before filing of the “case summary” and also why the statements made therein could not be included in the supporting affidavit and properly sworn as required under the Civil Procedure Rules. Be that as it may, since no challenge has been raised by the objector’s counsel on the document and since I do not believe any prejudice has been occasioned, I will say no more about it.

### **Objector’s Response**

14. In opposing the application, the respondent filed her replying affidavit sworn on May 16, 2022. The same was filed through Messrs Kutto & Kaira Nabasenge Advocates.
15. I note that the objector also filed a notice of preliminary objection on May 16, 2022, at the same time that she filed her replying affidavit. The notice is premised as follows:

“Take notice that the objector herein, Veronica Chepsat Sum, shall at the hearing of this instant cause *vide* petition cause dated September 11, 2018 raise a preliminary objection (PO) based on the following points of law .....

16. From the drafting above, the preliminary objection is expressly against the entire succession cause itself, not against the present application. Considering that the preliminary objection, if heard and allowed, could lead to the possible striking out of this entire cause, I will be hesitant to consider it within the present application since the court has not been moved to hear it. It will also be unjust to determine the preliminary objection within the present application when the application has been brought by the applicants and not the objector.
17. I will therefore not deal with the preliminary objection within this ruling. The objector is not doubt at liberty to properly move this court at any time, to hear and determine the preliminary objection.

### **Objector’s Respondent’s Replying Affidavit**

18. In the affidavit, the objector depones that the application is baseless, frivolous and untenable in law, that the applicants as alleged interested parties, have not entered appearance nor filed affidavits as required by the provisions of rule 60 of the Probate & Administration Rules under the Law of Succession Act, the applicants should be expunged from the court record, that the applicants seek to be joined to this cause as interested parties/beneficiaries but being a succession cause, by dint of section 29 and 30 of the Law of Succession Act, a claim in the estate of the deceased estate is of two folds; either as a beneficiary/heir and/or a dependent, by dint of the Law of Succession Act, the applicants are neither beneficiaries/heirers and/or dependents nor creditors, parties to a succession cause must lay their claim in the estate as either of the said categories but not as interested parties, the suit land in question which is a subject of inheritance is registered in the name of the late Ernest Sum of which the purported interested parties are neither beneficiaries/heirers and/or dependents of the estate comprised in the suit land LR No 2226, by dint of section 39 of the Law of Succession Act, the alleged interested parties have no locus or basis to be joined to this cause. She deponed further that the applicants cannot be joined into this cause since they have not demonstrated any interest in the estate since they failed to file pleadings and/or documents as per the said rule 60 of the Probate & Administration Rules.
19. Regarding consolidation of the different succession causes, the objector deponed that this cause is totally different from Eldoret High Court succession cause No 23 of 1985, the deceased therein does not relate in any way to this cause, the said Ambrose Kipkorir Bitok who claims to be the objector’s step-son (which allegation is disputed) ought to have objected in the said succession cause No 23 of 1985 instead of seeking to be joined in this cause, that Eldoret High Court succession cause No 268 of



2000 was finalized and certificate of confirmation of grant was issued to her, the objector was the only beneficiary of the deceased estate insofar as succession cause No 268 of 2000 is concerned by virtue of being a mother of the deceased - Christopher Kipchichir, the grant in succession cause No 268 of 2000 has never been challenged nor revoked, the present succession cause is premature and cannot qualify to be consolidated with any other succession cause.

20. The objector deponed further that the instant succession cause offends the provision of section 3 of the [Law of Succession Act](#) which defines deceased estate to mean “free property of a deceased person”, the section defines free property to mean “property which the deceased was legally competent to freely dispose during his lifetime, and in respect of which his interest has not been terminated by his death”, in view of the foregoing, this instant cause has no basis in law since what the petitioner is purporting to inherit is comprised in the estate of the late Ernest Sum *vide* succession cause No 23 of 1985 which cause is finalized and is pending final distribution, the objector is the administratrix of the estate of Ernest Sum by virtue of being the widow, the basis of this cause is a certificate of confirmation of grant in succession cause No 23 of 1985 which has been partially distributed, the estate comprised in the parcel LR No 2226 in terms of share, as much as the petitioner - Kenneth Kiprop Sum has alleged to be the beneficiary of 150 shares through his alleged deceased father - Christopher Kipchichir Sum - in respect of land parcel LR No 2226 comprised in the estate of Ernest Sum *vide* succession cause No 23 of 1985, the said beneficial interest has not crystallized and ripe for succession since the said land, which is the subject of this instant cause is still registered in the name of the late Ernest Sum, that in view of the foregoing, the only available option is for the petition herein to be struck out.
21. The objector depones that under prayers 4 and 5 of the application, the applicant is seeking that the grants in succession cause No 23 of 1985 and be varied, amended or nullified, the prayers cannot be granted because the court lacks authority, mandate and jurisdiction to deliberate on a succession cause within a succession, the beneficiaries in succession cause No 23 of 1985 are different from the alleged beneficiaries in this instant cause, a grant can only be nullified based on the grounds envisaged under section 76 of the [Law of Succession Act](#), the said Abraham Kipkorir Bitok has neither sought the revocation of the grant issued in succession cause No 23 of 1985 nor demonstrated any ground for nullification, it is not true that the said Ambrose Kipkorir Bitok has been given authority by the other alleged applicants to file the application on their behalf, he has not supplied any such authority, authority to plead, depone, testify and/or to act on behalf of another person must be express in accordance with order 1 rule 13 of the [Civil Procedure Rules](#) as read together with rule 60 of the [Probate & Administration Rules](#).
22. The objector proceeds to state that one of the applicants, Celine George Polland’s claim in the land LR No 2226 comprised in the estate of Ernest Sum was dismissed *vide* Environment & Lands Court No 418 of 2012, therefore she has no proprietary interest in the estate of Ernest Sum comprised in the suit land, one cannot delegate his beneficial interest in a given deceased’s estate, whoever is seeking a beneficial interest in an estate must enter appearance and file affidavits in accordance with rule 60 of the [Probate & Administration Rules](#), she is not a beneficiary of the estate of Ernest Sum and more so he has not filed any claim against the estate of Ernest Sum and as such cannot seek that succession cause No 23 of 1985 be joined with this instant cause, the said Ambrose Kipkorir Bitok has not claimed any beneficial interest in the estate of Christopher Kipkorir Sum the subject of this instant cause, it is true as stated in the applicant’s supporting affidavit that the late Ernest Sum is registered as the owner of the land in question and as such the applicants’ claim of inheriting the land by virtue of being a step-son is not only untenable in law but also an abuse of the process of succession,
23. The objector added that this instant cause is premature and as such offends section 3 of the [Law of Succession Act](#) since the asset being claimed to be owned by the deceased -Christopher Kipchichir - is



200 acres forming part of land LR 2226 which land is comprised in the estate of the late Ernest Sum, the alleged grandfather to the petitioner, the basis of the instant cause is the certificate of confirmation issued in succession cause No 23 of 1985, the said 200 acres are yet to be transmitted to the said Christopher Kipchirchir and as such the beneficial interests therein are yet to be crystallized and ripe for inheritance, the petitioner is not the administrator of the estate of the late Christopher Kipchichir Sum and the only administratrix of the estate is the objector, the mother of the late Christopher Kipchichir, that the letters of administration have since been confirmed vide certificate issued on April 6, 2001 of which the only asset that belonged to the late Christopher Kipchichir and which asset transmitted to the Objector is the land parcel Soy/Kipsomba Block 9(Kapsumbeywet)146, in fact the petitioner forged the death certificate in respect of the late Christopher Kipchirchir Sum whom he claims to be his father and yet the genuine death certificate was issued to the objector, in view of the foregoing, it is clear that there is nothing to be succeeded by the petitioner from the estate of Christopher Kipchichir since the said Christopher Kipchichir is not a title holder in respect of LR No 2226, the objector is the administratrix of the estate of Ernest Sum her late husband, the land in question is still registered in the name of the late Ernest Sum, this instant cause is therefore premature, the objector is the mother of the late Christopher Kipchichir Sum who was not survived by any child and hence the objector is also the administratrix of his estate, the objector is also the only beneficiary of the estate of Christopher Kipchichir Sum by virtue of being his mother.

24. She further deponed that the said Ambrose Kipkorir Bitok is not the objector's grandson or the grandson to the objector's late husband, Ernest Sum and is not a son to the late Christopher Kipchirchir Sum as alleged, regarding Fiona Jerono Sum, her father is one Denis Sum who is the objector's son and he is still alive, the objector wonders how the said Fiona Jerono Sum can purport to inherit his father's share comprised in the suit land which share is yet to be crystallized and/or transmitted, this instant cause is not related to succession cause No 23 of 1985 since the two estates are different and revolve around different deceased persons who have different beneficiaries and/or dependents, it is a cardinal principle of succession law that a court cannot deliberate on a succession matter within a succession as it is the case herein, the said Ambrose Kipkori Bitok cannot purport to challenge a grant issued in succession cause No 23 of 1985 in this instant cause, despite being aware of the said confirmed grant in succession cause No 23 of 1985 he has not challenged the same but wants that Cause to be joined to this instant cause, the said Ambrose Kipkorir Bitok has not claimed any interest in the estate of Christopher Kipchichir which is the subject of this instant cause, the objector does not know the said Ambrose Kipkorir Bitok, he is not the objector's step-son, if at all he had beneficial interest in the estate of the late Ernest Sum whose certificate of confirmation was issued, he would have filed an objection and sought the revocation and/or annulment of the certificate of confirmation which he has not, this court has no jurisdiction to consolidate succession causes that are not related, the mere act of consolidating the causes will not nullify and/or revoke the grants issued in succession cause No 23 of 1985 and succession cause No 268 of 2000, it makes one wonder why the said Ambrose Bitok who has no interest at all in this instant cause and in succession cause No 268 of 2000 and whose alleged claim lies in succession cause No 23 of 1985 wants all of them to be consolidated, if the prayers sought are granted, the beneficiaries to the estate of the late Ernest Sum shall suffer prejudice since this court lacks jurisdiction to deliberate on issues raised in succession cause No 23 of 1985 in this instant cause, not only are the beneficiaries in the two causes different but the properties to be inherited are also different since some are yet to crystallize and/or transmitted.

### **Hearing of the Application**

25. It was then directed that the application be disposed of by way of written submissions.



26. Pursuant thereto, the applicants filed their submissions on June 17, 2022. on their part, the objector filed hers on April 24, 2023 through Messrs Momanyi Gichana, her new Advocates.

### **Applicants' Submissions**

27. Counsel for the applicants submitted that the Catholic Diocese of Eldoret purchased land - 100 acres from the late Ernest Kimngetich Sum during his lifetime, the administrator has not transferred the land to the church, the church has been using the land, the objector has been and continues to bar the church from the land, Celine George Poland also purchased a portion measuring 100 acres from the late Ernest Kimngetich Sum in or around 1982 during his lifetime, she has been using the land but it has never been transferred to her, the objector contests that Celine George Poland never bought the land during the lifetime of the deceased, Ambrose Kipkorir Bitok is the son of Ernest Kimngetich Sum by another mother other than the objector, the administrator needs to allocate him an equal share of the estate with other family members, he was not catered for in the unilateral distribution that was done in 1985, Fiona Jerono Sum is a granddaughter to the objector, she is the daughter of Dennis Kiptoo Kirwa Sum, the son of Ernest Kimngetich Sum, the registered proprietor of the parcel of LR No 2226, Fiona Jerono Sum is claiming her father's share because the father seems to have different priorities and does not follow the issue of distribution of the estate, Priscilla Jepkemboi Sitienei is the wife of Peter Sitienei, she was allocated land by Ernest Kimngetich Sum and Veronica Chepsat Sum because he was a driver to Ernest Kimngetich Sum, Kibiwot Seroney was also given a portion of land measuring about 5 acres, it has not been carved out for him.
28. Counsel added that the main asset available for distribution is LR No 2226 measuring 1,276 acres, there may be other smaller assets which need to be distributed, there are 3 separate causes involved, Eldoret HCP&A No 23 of 1985 – Estate of Ernest Kimngetich Sum, the grant of letters of administration was issued to the objector on April 18, 1988, the grant allocated some shares to family members, the list did not include the applicants, the acreage of land available for distribution is approximately 1,267 acres but the 1988 grant only adds up to 500 acres, the remainder needs to be distributed to the unlisted beneficiaries, the distribution done by the objector in 1985 needs to be varied so that the entire parcel of land is distributed to the family members without leaving out any person, the objector and her daughters have sold other smaller parcels of land allocated in different areas but the petitioner does not wish to delve into these smaller parcels although the law requires that all assets of the estate be disclosed and accounted for, Eldoret HCP&A No 268 of 2000 involves the estate of Christopher Kipchichir Sum who was the 1<sup>st</sup> born of Ernest Kimngetich Sum and the objector, it was filed by the objector, at the time the petitioner was a very young man, he did not know about the existence of the cause, it only came to light in this current cause when the objector annexed a copy of the grant in opposition to this cause.
29. Counsel submitted further that the petitioner is the only son of the late Christopher Kipchichir Sum, once the objector disclosed the existence of the cause, as counsel they advised the petitioner that they could not continue pursuing two causes touching on the estate of the same deceased person, it is upon this advice that they urged the other beneficiaries to file the present application to bring on board all of them to claim their shares as against the administrator after seeking consolidation, this instant succession cause No 38 of 2018 was filed as a matter of right by the petitioner who desired to inherit/succeed his deceased father, what also moved the petitioner to file this cause is the fact that whenever the petitioner ploughed the portion of land belonging to his deceased father, the objector's daughters started interfering with his usage of the land, due to the interference by the daughters, the determination of this cause changed course necessitating the filing of the numerous applications as listed in the case summary filed in court on May 16, 2022.



30. The rest of the matters contained in the applicants' submissions are in response to the notice of preliminary objection dated May 16, 2022 which I had already referred to above and declined to entertain in this ruling since, inter alia, and as already aforesaid, the same is premised as challenging the entire cause, and not specifically the present application.

### **Objector-Respondents' Submissions**

31. Counsel for the objector basically reiterated the matters already deponed in the affidavit. In summary, he submitted that by dint of section 29 and 39 of the Law of Succession Act, the applicants are neither beneficiaries/heirers nor dependents to the estate herein, they have also not brought any objection under section 76 of the Act as read with rule 17(1) of the Probate & Administration Rules, the applicants cannot lay a claim to the estate as "interested parties", they cannot be joined to this cause since they have not demonstrated any interests in the estate. He cited the decisions in Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama (2014) eKLR and also Otieno v Ougo [1986-1989] EALR and submitted that a litigant is clothed with *locus standi* upon obtaining letters of administration, the applicants have not made any attempt to take out the said letters.
32. Counsel added that succession cause No 23 of 1985 does not relate in any way to the instant succession cause, section 3 of the Act defines deceased estate to mean the "free property of a deceased", what the petitioner purports to inherit is comprised in the succession cause No 23 of 1985 - estate of Ernest Sum, that succession cause was finalized and is pending final distribution, the objector is the administratrix of the estate of the late Ernest Sum by virtue of being her widow, a certificate of confirmation of grant has already been granted and which has been partially distributed, the estate of the late Ernest Sum is comprised in the parcel LR No 2226.
33. He added that in Eldoret High Court succession cause No 268 of 2000, the objector was the only beneficiary by virtue of being the mother to the deceased - Christopher Kipchichir, the deceased was not survived by any children hence the objector being appointed the administratrix. He cited the decision in Estate of Joshua Orwa Ojodeh (2014) eKLR and added that the grant in the cause has never been challenged or revoked. Counsel added that even though the petitioner has alleged to be the beneficiary of 150 shares in the parcel LR No 2226 through his alleged father, Christopher Kipchichir Sum, the land parcel is comprised in the estate of the late Ernest Sum *vide* succession cause No 23 of 1985 and the said beneficial interest has not crystallized, it is not ripe for succession since the land is subject to this instant succession and is still registered in the name of the late Ernest Sum, there is nothing to be succeeded by the petitioner from the estate of Christopher Sum since the said Christopher Sum is not a title holder in respect of the property LR No 2226, this court lacks jurisdiction to deliberate on a succession within a succession. He cited the decision of the Supreme Court in Samuel Kamau Macharia v KCB & 2 others, civil application No 2 of 2011.
34. Counsel further submitted that the letters of administration and/or certificate of confirmation in succession cause No 23 of 1985 and succession cause No 268 of 2000 cannot be varied, amended or nullified in this instant cause, the beneficiaries are different, the applicants have not challenged the grants in those other causes. He further submitted that there is no proof that the Catholic Diocese of Eldoret purchased land from the estate, and that "he who alleges must prove". He cited the decision in Mary Wambui Kabugo v Kenya Bus Services (2021) eKLR and added that regarding the similar allegations by Celine George Poland, her claim was dismissed *vide* Environment & Lands court case No 418 of 2012, in the case of Ambrose Kipkorir Bitok, he has not claimed any beneficial interest in the estate of Christopher Kipchichir Sum, the subject of this instant cause, Fiona Jerono Sum is Denis Sum's daughter, Denis Sum is the son of the objector's son and is still alive, the said Fiona Sum cannot purport to inherit his father's share comprised in the suit land which share is yet to be crystallized, in



the case of Valerie Chelagat, there is no proof to show that she purchased land from the estate of Ernest Sum, she has not adduced evidence for the same.

35. In conclusion, counsel submits that in light of the foregoing, there is no need to consolidate the succession causes since the estates are different and revolve around different deceased persons who have different beneficiaries and/or dependents, consolidating the causes will not nullify and/or revoke the respective grants in the succession causes No 23 of 1985 and No 268 of 2000 and that therefore there is no duplicity of causes as alleged by the petitioner and intended interested parties. He prayed that the application be dismissed.

### **Analysis and Determination**

36. I have carefully considered the application, response thereto, submissions by counsel and the decisions cited. I must mention that the parties have raised numerous issues which in my humble view cannot be conclusively dealt with in this application. This is so because what is before court is simply the application seeking to join the applicants and to consolidate this cause with other earlier succession causes. Commenting on the secondary matters raised may amount to prejudging matters that are yet to be canvassed.
37. Similarly, and for the reasons already stated, I will not in this ruling consider or determine the objector's notice of preliminary objection dated May 16, 2022. The same shall be canvassed when the court will have been properly moved to hear and determine it.
38. I also observe that the petitioner, who is the originator and therefore "the owner" of these proceedings has not filed any response either in support or in opposition to the application. However, it is not lost on me that the same law firm, Messrs Miyenda & Co, acting for the applicants is the same one on record for the petitioner. I can therefore safely presume that the petitioner is on the same side as the applicants and is therefore in support.

### **Issues for Determination**

39. In the circumstances, I find the following to be the issues that arise for determination:
- i. Whether the applicants should be joined to this cause.
  - ii. Whether this cause should be consolidated with the other succession causes mentioned.
  - iii. Whether the grants issued in the other succession causes can be varied, amended or nullified in this cause.
40. I now proceed to analyze and determine the said issues
- i. Whether the applicants should be joined to this cause
41. What I find curious in the application before court is that despite alleging to be either beneficiaries or dependents or interested parties, the applicants have not exhibited any evidence to support such allegations. For instance, the Catholic Diocese of Eldoret and Celine George Poland are both alleged to have been purchasers of 115 and 100 acres, respectively, of the parcel LR No 2226. Valerie Chelagat is also alleged to be claiming on behalf of her deceased mother who was also an alleged purchaser of a portion of the same parcel. However, no single document, not an agreement for sale or correspondence or evidence of purchase price payment, has been exhibited to support these claims.
42. Similarly, nothing has been exhibited to demonstrate the allegation that the said Ambrose Kipkorir Bitok is a son of the late Ernest Kimngetich Sum. Falling into the same script is the allegation made



- on behalf Priscilla Jepkemboi Sitienei that her husband was allocated a portion of the land by the late Ernest Kimngetich Sum because he was the deceased's driver. The claim by Kibiwot Seroney that he too was allocated 5 acres out of the said parcel has also not been supported by any evidence whatsoever. How then is the court expected to form an opinion whether a *prima facie* case has been established?
43. Regarding Celine George Polland's claim over the parcel LR No 2226, the objector has exhibited a judgment delivered in Environment & Lands Court No 418 of 2012 by Ombwayo J. It is clear that in that suit, Celine George Polland's sought an order that, being an purchaser of a portion of the said parcel LR No 2226, she was entitled to a share thereof. The suit was heard and determined after a full trial and was dismissed. A reading of the judgment reveals that the court was not satisfied that the alleged purchase was proved. The authenticity of the judgment has not been challenged nor controverted.
  44. Since the claim raised herein is the same claim already canvassed and determined by the Environment & Land Court, it is clear that the issue of Celine George Polland's entitlement to a share in the said property or lack thereof has already been canvassed and conclusively determined by a court of a status equal to this High Court. This court cannot purport to sit on appeal on the judgment or review it. Since the defendant sued in that suit was the same objector herein, the issue is no doubt now *res judicata* and cannot be re-opened in this cause. In light of the said judgment, I agree with the objector's counsel that the said Celine George Poland has failed to demonstrate that she has any proprietary interest in the parcel LR No 2226 or the estate of the late Ernest Sum.
  45. This court also takes note of the fact that the applicants did not even disclose the existence and determination of the said earlier Environment & Land Court Case No 418 of 2012. Had the objector not revealed this fact, this court would not have known about it. Considering the nature of the matter, I find the applicants guilty of deliberate concealment and suppression of a material fact. They have therefore come to court with unclean hands.
  46. On this issue of separation of jurisdiction between the High Court and the Environmental & Lands Court, I also take note that allegations similar to that of Celine George Poland has been made that the Catholic Diocese of Eldoret also purchased 115 acres of the parcel LR No 2226 from the late Ernest Kimngetich Sum during his lifetime, that Priscilla Jepkemboi Sitienei's husband was allocated land by Ernest Kimngetich Sum because he was a driver to Ernest Kimngetich Sum, and that Kibiwot Seroney was also given a portion of land measuring about 5 acres which has not been carved out for him.
  47. On these allegations, I refer to the decision of Musyoka J in the case of *In the matter of the Estate of Stone Kakhuli Muinde (deceased)* [2016] eKLR. As herein, the case involved an application by third parties for joinder into a succession cause. In dismissing the application, Musyoka J 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.”
48. I fully associate myself with the above view as advanced by Musyoka J. I am satisfied that the claims made in the present Application are matters that are squarely within the province of the Environment & Lands Court and not this High Court. As was correctly done by Celine George Poland, the said applicants too, need to move the Environment & Land Court to determine those matters. article 162(b) of the *Constitution* of Kenya 2010 gives to the Environment and Land Courts the sole mandate and jurisdiction to determine issues of ownership, use and occupation of land. If and when the Environment & Lands Court rules in their favour and confirms their claims, then they can return to the succession court handling the correct estate for redress.
49. I therefore decline to entertain any arguments on whether or not the said applicants purchased portions of the land parcel LR No 2226.
50. There is also the interesting claim made on behalf of Fiona Jerono Sum, who is claimed to be a granddaughter of the late Ernest Kimngetich Sum, being a daughter to one Dennis Kiptoo Kirwa Sum who is alleged to be a son of Ernest Kimngetich Sum. It is claimed that the said Dennis Kiptoo Kirwa Sum is either disinterested in inheriting from his father's estate or has renounced his entitlement thereto. Fiona Jerono Sum is therefore stated to be claiming the share that her father would be entitled to. The question is: can she bypass her father who is still alive and proceed to lodge a claim directly in the estate when in law, her entitlement to her grandfather's estate can only be through her father?



51. On this issue, again Musyoka J, in *Re Estate of Wabome Njoki Wakagoto* (2013) eKLR held as follows:
- “Under part v, grandchildren have no right to inherit their grandparents who die intestate after July 1, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”
52. My view is therefore that a grandchild can only be a direct heir to the estate of his/her grandparent where the parent is not alive. Only then does a grandchild then step into the shoes of his/her deceased parent to take the parent’s share in the estate of the grandparent. I therefore harbour serious doubts whether, as long as her father is still alive, Fiona Jerono Sum can directly claim inheritance from the grandfather’s estate.
53. I also note that each applicant has alleged an interest that is evidently unique and distinct to each applicant, different and separate from each other. While some are claiming as purchasers, others are claiming as heirs and others as having been gifted land. In the circumstances, I would have expected each applicant to swear his/her own separate affidavit to demonstrate his/her own distinct interest. The curious situation that I have noted is that only Ambrose Kipkorir Bitok has sworn an affidavit on his own behalf and also purporting to advance the cases of all the other applicants. To me, this is a strange mode of proceeding in a court of law.
54. In fact, some aspects of the deponent’s affidavit appear to be clear hearsay accounts of what he can only have been told or heard from other people. For instance, how can the deponent purport to advance the narrative that the Catholic Diocese, Celine George Poland and Vallerie Chelagat’s mother purchased land from Ernest Kimngetich Sum, or that the deceased allocated land to Priscilla Jepkemboi Sitienei’s husband because he was his driver or that Kibiwott Seroney was gifted land by the deceased? The deponent does not allege that he was present when these purported transactions were carried out or that he participated therein, which can only mean that what he is advancing in his affidavit is nothing but hearsay evidence and mere speculation. To make matters worse, he does not even disclose his sources of information.
55. Similarly, how can the deponent be the one to be advancing the unique narrative that Fiona Jerono Sum’s father is disinterested in inheriting his father’s estate and that therefore Fiona Jerono Sum wants to directly claim his father’s share. On what basis can the deponent purport to have knowledge of such intimate matters of a family that he does not even belong to? Why can’t he let the family speak for itself by swearing their own affidavits?
56. I would want to believe that, if truly they were purchased as alleged, then the portions of land claimed by the respective applicants either as beneficiaries or purchasers or giftees are quite valuable to them. What then was so difficult for them to swear their own respective affidavit to enable them give their own account of events? Coupled with the fact that no single supporting document has been exhibited to demonstrate the veracity of their respective claims, this court has serious doubts whether the other applicants are even aware of the filing of this application or whether it is true that they authorized the said Ambrose Kipkorir Bitok to swear this affidavit on their behalf.
57. Indeed, the objector in her affidavit raised similar doubts on whether the deponent truly possessed any authority from the other alleged applicants to swear the affidavit. Despite this challenge and notice, the



- deponent still did not deem it necessary to seek the court's leave to address the concerns by producing evidence of such authority.
58. The applicants' claims are that they are entitled as beneficiaries or purchasers or grantees of portions of the land parcel LR No 2226. It is however not in dispute that the land is still registered in the name of the late Ernest Kimngetich Sum whose estate is being or was dealt with in the different cause - Eldoret High Court succession cause No 23 of 1985. This being so, it has not been explained why the applicants cannot lodge their claims in that other succession cause No 23 of 1985 which clearly is where their interest, if any, can be determined. The parcel LR No 2226 is said to measure approximately 1,276 acres. I have looked at the petition filed herein and observed that out of the said acreage, the petitioner only claims 200 acres thereof as being his share. It is therefore only this 200-portion acres that is the subject of this instant petition. Even assuming that the 220 acres could be isolated and determined separately in this cause, the rest of the acreage would still be under administration in the said succession case No 23 of 1985.
59. Regarding the deponent (Ambrose Kipkorir Bitok) in particular, he claims to be the biological son of Ernest Kimngetich Sum by another mother other than the objector and therefore claims to be entitled to his full share as a son. If that is the case, then what is his interest in this separate estate of Christopher Kimngetich Sum when he readily admits that his claim is against the estate of the alleged father, the late Ernest Kimngetich Sum?
60. I also agree with the objector's counsel that the proper procedure available for the applicants to come into these proceedings, if they wished to lodge or present their objections, answers or applications, is not by applying to be joined as interested parties, but the one provided under rule 17(1)(2) of the [Probate and Administration Rules](#). It provides as follows:
- (1) Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.
  - (2) A request by an intending objector for an extension under section 68(1) of the Act of the period specified in the notice under rule 7(4) shall be made to the registry at which the application for a grant was made or by which the notice was issued, as the case may be, by summons supported by an affidavit, if necessary, and upon notice to the applicant for the grant."
61. The applicants have also not complied with rule 10 of the same [Probate and Administration Rules](#) which provides as follows:
- "Every interested person (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in form 26 in the registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the applicant may with leave of the court file an affidavit in reply."
62. In their submissions, the applicants state that they are not coming into these proceedings as objectors. They have also not claimed to be beneficiaries or dependents or grantees of the late Christopher Kipchichir Sum whose estate is the subject of this Cause, but of his father, the late Ernest Kimngetich Sum whose estate was or is being dealt with in the separate succession cause No 23 of 1985. In



the circumstances, what business can the applicants have in this cause relating to late Christopher Kipchichir Sum?

- ii. Whether this cause should be consolidated with the other succession causes mentioned
63. The applicants have also prayed that Eldoret HCP&A cause No 23 of 1985 - estate of Ernest Kimngetch Sum and Eldoret HCP&A cause No 268 of 2000 - estate of Christopher Kipchirchir Sum, be consolidated with this cause for hearing and determination.
64. Faced with a similar application, Gikonyo J, in *Cecilia Kiajimbai & another v Evangeline Tirindi Iosphat & another* [2015] eKLR ruled as follows:

“(5) I have keenly and meticulously considered all matters and arguments that each party has presented in a rather forceful manner. The law on consolidation is now settled by a long line of judicial authorities as well as eminent literary works. According to the *Black’s Law Dictionary* (8<sup>th</sup> Edition), a consolidation of suits means;

“...to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment or, sometimes, separate judgments....”

A consolidation of suits does not necessarily result into a single judgment; it may lead to separate judgments. But the important thing to note is that, consolidation will be ordered:

- a. Where there are two or more suits or matters pending in the same court;
- b. Some common question of law or fact arises in both or all of them; or
- c. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
- d. For some other reason it is desirable to make an order for consolidating the suits.

See the case of *Nyati Security Guards & Services Ltd v - Municipal Council of Mombasa* [2004] eKLR. But even in making an order for consolidation of suits, the court is minded to ensure that the course taken will serve the overriding objective of the law to attain efficient and expeditious disposal of disputes as an enabler of fair hearing in the suits. Therefore, a consolidation should not lead into injustice or prejudice or unnecessary hardships to any party. See *Korean United Church of Kenya & 3 others v Seng Ha Sang* (2014) eKLR. Looking at both suits, there are no common issues of law and fact except that the deceased are father and son, and the two disputants are common in both causes. The estates are distinct and relate to different properties. It has not been claimed that the two deceased persons had properties in common ownership. Accordingly, care should be taken not to consolidate causes in respect of different estates, except in only very clear cases. As a matter of law and fact, a careless intermingling of two distinct estates through consolidation may result into; a distortion of entitlement of heirs as well as the distribution of the estates in question; or injustice or prejudice to one or more of the beneficiaries thereof. Such distortion is likely to occur in these causes if they are consolidated especially given the arguments being preferred by the applicant. Similarly, such arguments by the respondent that these two estates are governed by different laws as one of them the deceased died in 1970 before the enactment of the *Law of Succession Act* while the other died in 1991 are not trivial or inflated trivial matters; they are real and substantial legal matters which make a lot of legal



sense. Therefore, combining the two estates will introduce legal as well as factual complexities around the forgoing issues - a path which will just convolute the two causes for nothing. I do not also wish to brush aside the respondent's arguments that the applicant lacks capacity to litigate in these proceedings; it has been claimed that (1) he is not a beneficiary in this estate or in the alleged trust; (2) the person he is pretending intervene for has denied the alleged trust; and (3) his intention in asking for consolidation is to get more share than the respondent. These issues and that of capacity are important and will be properly canvassed by keeping these causes separate. If the children of the respondent or the beneficiaries of the alleged trust have any objections, such should be properly raised by them and determined in each cause. I also do not see the basis of the applicant's fear that the respondent will conceal the facts of cause No 274 of 2012 when such judicial proceedings may be tendered in evidence in another judicial proceeding. In fact, the applicant is already pleading the facts of those proceedings in this cause and nothing will prevent him from relying on the said cause in evidence herein to prove his claims. The fears expressed and points being raised by the applicant in his arguments will be best and conclusively resolved when these causes are kept separate, except, however, there is nothing wrong to have the two matters heard back-to-back so that anything useful may be drawn from one to the other as a matter of evidentiary diffusion, if at all. In the premises, there is absolutely no reason or anything which makes it desirable to make an order for consolidation of the two causes. Accordingly, I dismiss the request for a consolidation of and the two causes shall remain distinct and separate, and be so heard and determined. The course I have taken will allow the suits to be dealt with separately and in a more efficient manner. It is so ordered."

65. I have already, in determining issue (i) above, ruled that Eldoret HCP&A succession cause No 23 of 1985 –estate of Ernest Kimngetch Sum, is separate and different from this instant cause. The only relation that I can discern is that one relates to administration of the son's estate while the other relates to the estate of the father. This connection alone cannot justify consolidation of the two. Apart from only 200 acres in LR No 2226, the rest of the properties involved are different, the beneficiaries are also different. As submitted by counsel for the objector a court cannot engage in determining "a succession within a succession". Accordingly, I decline to order for consolidation of this cause with Eldoret succession cause No 23 of 1985.
66. Regarding Eldoret HCP&A cause No 268 of 2000 - estate of Christopher Kipchirchir Sum, I had stated that I will refrain from making comments on it since it is still the subject of the yet to be heard objector's preliminary objection dated May 16, 2022. I however quote the following statements made at paragraphs 20, 21 and 22 of the supporting affidavit of Ambrose Kipkorir Bitok:
20. That I have also been informed that Veronica Chepsat Sum obtained a grant in of letters od administration over the estate of Christopher Kimngetch Sum in Eldoret HCP&A No 268 of 2000 (see copy marked "B")
21. That I am also ably advised by my advocate herein, with the occurrence of the petitioner herein, Kenneth Kiprop Sum that when Kenneth Kiprop Sum applied for representation in this Cause, he did not know that Veronica Chepsat Sum had obtained a grant in the year 2000 because she kept all these things to herself.
22. That I am further advised by my advocates that there is therefore duplication of matters affecting the same estate and it is only fair that Eldoret HCP&A No 268 of 2000 be consolidated with this cause for determination.



67. The applicants therefore readily concede that there are now two parallel succession causes existing side by side and both relating to the estate of the same deceased - Christopher Kimngetich Sum. While the first one was filed in the year 2000 by the objector, there is now this second one filed subsequently by the petitioner herein in the year 2018. Do the rules allow this situation to continue prevailing? Of course not.
68. My view is that where subsequent proceedings relating to an estate is commenced when there was already an earlier one in existence over the same estate, save in exceptional cases, the remedy or cure is not to consolidate the two causes but to terminate the second one. It is not and cannot be an excuse that the second one was filed without knowledge of the first one. As soon as the existence of the earlier one comes to the knowledge of the initiator of the subsequent proceedings, he needs to move fast to terminate it.
69. I subscribe to the principle that a court should not proceed with the trial of proceedings in which the matter in issue is also directly in issue in another court in previously instituted proceedings between the same or similar parties, over the same subject matter. In the circumstances. This is also known as the res sub-judice rule.
70. As earlier stated, I refrain from commenting further on this issue lest I be accused of prejudging the outcome of the yet to be canvassed objector's notice of preliminary objection dated May 16, 2022. All I would state at this juncture is that for the reasons aforesaid, I decline to order consolidation of this cause with Eldoret High Court succession cause No 268 of 2000.
- iii. Whether the grants issued in the other succession causes can be varied, amended or nullified in this cause
71. From the determinations that I already have made on issue (i) and (ii) above, it must be now evident that this court cannot in this present succession cause, purport to vary, amend or nullify the letters of administration and/or certificates of confirmation issued in the separate proceedings, succession cause No 23 of 1985 and succession cause No 268 of 2000.
72. Those other causes are separate and are not before this court. Any variation, amendment or nullification can only be pursued in those other causes. Section 76 of the Law of Succession Act has therefore been improperly invoked.

### **Findings**

73. In view of my above analysis, the conclusion becomes irresistible that the application dated May 16, 2022 does not satisfy the prerequisites for the court to grant the orders sought.

### **Final Orders**

72. In view of the foregoing, the chamber summons dated May 12, 2021 is hereby dismissed with costs to the objector.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023**

.....

**JOHN R. ANURO WANANDA**

**JUDGE**

