



**In re Estate of Kugo Arap Cheborer (Deceased) (Miscellaneous Application E30 of 2023) [2023] KEHC 26057 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26057 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E30 OF 2023  
HM NYAGA, J  
NOVEMBER 29, 2023**

**BETWEEN**

**ELIZABETH KEMUNTO ANGWENYI ..... APPLICANT**

**AND**

**RICHARD KOSKEI TOWETT ..... 1<sup>ST</sup> RESPONDENT**

**REUBEN KIPLANGAT TOWETT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application before me is a Notice of Motion dated 29<sup>th</sup> May, 2023 filed by the Applicant. The Application seeks for Orders: -
  1. Spent
  2. That this Honourable Court do issue an order allowing the Applicant to substitute James Kipkirui Towett (deceased) and Richard Koskei Towett the beneficiaries of Land Parcel Number Nakuru Municipality/Block 24/1175.
  3. That the Deputy Registrar be authorized to sign necessary transmission documents in favour of the Applicant.
2. The Application is premised on grounds on its face and supported by an affidavit of the Applicant sworn on the even date.
3. In a nutshell, the Applicant's case was that pursuant to the grant confirmed by this court on 11<sup>th</sup> February 2010, the 1<sup>st</sup> Respondent with his brother James Kipkirui Towett who is currently deceased was allocated Land Parcel known as Nakuru Municipality Block 24/1175 measuring approximately 0.0576Ha and subsequently vide a sale agreement dated 7<sup>th</sup> June, 2012 they sold the said Land to her and after the conclusion of the transaction, they granted her vacant possession and surrendered the original title to her advocate.



4. She averred that to date the transfer has never taken place despite following up on the matter for the last ten (10) years as the two beneficiaries immediately relocated from Nakuru Town to their rural areas.
5. She contended that the death of James Kipkirui Towett has made it more difficult for the transfer of the said property to be effected.
6. She deponed that she is now an elderly citizen without a viable source of income to cater for her daily needs and medication and would like to sell the property to cater for her financial needs.
7. It was her deposition that unless this court grants the prayers sought her fate will be uncertain and she will be unable to transact on the said property which will cause her grievous pain and suffering not forgetting huge loss financially.
8. The Application is not opposed.
9. On 24<sup>th</sup> July, 2023, the Applicant filed her submissions in which she submitted that she should not suffer and be condemned for not owning what is hers due to the Respondents' ignorance and misdeeds.
10. In support of her submissions she relied on Article 50(1) of the Constitution 2010 and Sections 3A & 63 (e) of the Civil Procedure Act.

### **Analysis & Determination**

11. The only issue for determination is whether the Applicant is entitled to the orders sought.
12. It is trite law that he who alleges must prove. The Evidence Act, places the burden of proof of any fact on the person who wishes to rely on the same. Section 107 of the Evidence Act provides as follows:-
 

“Burden of proof

  - (1) Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
13. It was incumbent upon the Applicant therefore to prove her case to the required standard.
14. This is a miscellaneous application but it draws its origins from Succession Cause No. 398 of 2008. I have perused the said certificate of confirmation of grant dated 11<sup>th</sup> February, 2010 and I do confirm that the property herein was given to Richard Koskei Towett and James Kipkirui Towett (deceased). A subsequent rectified certificate of confirmation of grant dated 16<sup>th</sup> May, 2011 shows that this property was wholly allocated to the said parties.
15. The Applicant has annexed a sale agreement dated 7<sup>th</sup> June, 2012 showing that the land in issue was sold to her by Richard Kipkoskei Towett (who is the 2<sup>nd</sup> respondent and administrator of the deceased estate, 1<sup>st</sup> Respondent and James Kipkirui Towett (deceased).
16. On record there is a consent duly executed by the parties herein dated 24<sup>th</sup> July, 2023 in the following terms:-
  - i. That the Applicant bought land parcel number Nakuru Municipality Block 24/1175 and paid the full purchase price.



- ii. That the 1<sup>st</sup> Respondent is the beneficiary while the 2<sup>nd</sup> respondent is the administrator of the estate of Kugo Arap Cheborer as per the confirmation of grant dated 11<sup>th</sup> February, 2010.
  - iii. The 1<sup>st</sup> respondent together with the James Kipkirui Towett (Deceased) are the beneficiaries of the said parcel of land.
  - iv. That the Respondent herein consent to the Substitution of the 1<sup>st</sup> respondent and his brother James Kipkirui Towett (deceased) by the Applicant in the transfer of land parcel Number Nakuru Municipality Block 24/1175.
17. In my view, even though the parties have a consent, all these proceedings ought to have taken place in the succession cause, not in this miscellaneous file. The substitution of a beneficiary involves the revocation of the grant and the subsequent issuance of a fresh grant and confirmation with the required amendments. That can only happen in the succession file, pursuant to an application by the administrator, Reuben Kiplangat Towett, the 2<sup>nd</sup> Respondent herein.
  18. From the foregoing, I find the Application as drawn cannot be used to alter an existing grant which has been duly confirmed. All proceedings regarding the grant should be done in the succession file.
  19. I disallow the application with no orders as to costs. A proper application may be made in the succession file.
  20. Orders Accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

Ms Ndiego for Applicant

N/A for Respondent

