



REPUBLIC OF KENYA



KENYA LAW
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**Kipchumba v Chebii (Succession Cause 352 of 2009)
[2022] KEHC 13273 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 352 OF 2009
EKO OGOLA, J
SEPTEMBER 27, 2022
IN THE MATTER OF THE ESTATE OF THE LATE
ELKANA KIMUTAI KIPCHOGE (DECEASED)**

BETWEEN

MARY JEPKEMOI KIPCHUMBA PETITIONER

AND

JACOB KIPCHUMBA CHEBII OBJECTOR

RULING

1. The objector herein filed an application dated November 26, 2021 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this honourable court do issue an order of temporary stay of injunction restraining the petitioner, her agents or any other person acting on her behalf from interfering in any manner with the land parcels known as Land Parcel No Trans Nzoia/Kapkarwa/ 135 and 136 measuring 10 acres pending the hearing and determination of the summons for revocation of grant.
 - d. That the rectified certificate of confirmation of grant issued to the petitioner on November 3, 2021 be revoked.
2. The application is supported by the grounds set out therein and the supporting affidavit sworn by the applicant, and the supplementary affidavit sworn by the applicant on March 10, 2022.
3. The application is based on the grounds that the deceased sold the parcels of land in issue to the applicant on June 16, 1989 and he was paid kshs 200,000/- as consideration. The deceased surrendered



the original letter of allocation of land, original charge and original receipts of payment of the loan to the applicant, who took immediate possession of the suit land and has been in possession of the same since the year of 1989 to date. He later gave a land parcel measuring 10 acres to his wife as a gift and she was issued with a letter of consent by the Cherangany land control board during the lifetime of the deceased. The settlement fund trust of Trans Nzoia county issued him with several demand notices of payment of arrears of settlement trust fund with regard to the land in question but his application to settle the arrears was rejected.

4. The applicant avers that the widow to the deceased petitioned for letters of administration in 2009 and was issued with a certificate of confirmation of grant in 2012 where the suit parcels were not mentioned. She then applied for rectification of the certificate of confirmation of grant to include the suit parcels and was successful in having it rectified. The applicant is apprehensive that the suit lands will be sold as his application to settle the arrears was declined. As a result, he filed the present application.

Applicant's Case

5. The applicant submitted that he adduced enough evidence to prove that the deceased sold him the land and he paid the consideration of kshs 200,000/-; that is crystal clear that the suit land parcels relate to the transaction the deceased completed during his lifetime and that the court should find that the parcels are not part of the estate of the deceased. He cited section 76 of the Law of Succession Act and submitted that he has *locus standi* to file this application. The applicant did not file any objection at the time of petition for grant of letters of administration as the parcels were not included in the summons for confirmation of grant. The applicant did not have any interest in disinheriting the beneficiaries. It is clear that the petitioner was well aware of the interests and occupation of the land by the applicant since 1989.
6. The applicant cited the case of Giella v Cassman Brown (1973) EA and the case of Mrao Limited v First American Bank of Kenya Limited and 2 others (2003) KLR 125 on the issue of temporary injunctions. He also cited the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR where the court held that for one to prove that he/she will suffer irreparable damage, the applicant has to prove the following; That the property in question is unique and peculiar and has sentimental value attached to the suit land. If the respondent is not restrained, he will continue with his unlawful acts to the detriment to the appeal. There is no remedy open to the applicant by which he will protect himself from the consequences of the apprehended injury.
7. The applicant avers that his interest in the property in question is unique and peculiar as he bought it and has occupied it for thirty years. If a temporary injunction is not granted the petitioner will use the rectified confirmation of grant to cheat the public into entering into land transactions with regard to the suit land.
8. The applicant contended balance of convenience tilts in his favour since he has been in possession of the suit land since 1989 to date. The petitioner will not suffer any prejudice since the instant application was filed without inordinate delay. He cited rule 73 of the Probate and Administration Rules and urged the court to exercise its inherent powers judiciously and grant all the prayers.

Respondent's Case

9. The respondent opposed the application *vide* a replying affidavit filed on January 26, 2022. She contended that the applicant is a stranger and is not a dependant or beneficiary of the deceased. No objection was sought initially and the applicant has no capacity to seek the revocation of grant. She was aware of the parcels of land and did not include them when petitioning as she did not have the title deeds.



10. She deposed that the consent dated June 24, 1996 supposedly issued on November 1, 1989 over LR Parcel No Kipkarwa/135 transferring the land from the deceased to Purity Wamboi Kipchumba is misleading as the parcel does not measure 10 acres. The land control board consent that was obtained on July 16, 2008 was purported to be executed on July 14, 2008 during which time the deceased had passed away. Further, that the applicant has not explained to the court why it took him so many years to lay and establish his claim. She submitted that the applicant had not met the threshold set out under section 76 of the *Law of Succession Act*.

Upon perusing the application, responses and submissions I have identified the following issues for determination;

a. Whether The Rectified Grant Of Letters Of Administration Should Be Revoked

11. Section 76 of the *Law of Succession Act* provides;

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

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;
 - or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

12. The applicant's case is based on the fact that he purchased the land from the deceased and when the deceased's wife applied for rectification of grant of letters of administration she included the property sold to him as part of the estate.

13. In order to determine whether the grant should be revoked, it must be established whether he indeed purchased the said portions of land from the deceased in his lifetime. He produced annexure JKC 2a which was a letter of allotment indicating that the deceased had been allocated 10 acres of land in Kitale. He also produced as JKC2b, a charge on the land in the name of the deceased. He produced as JKC4(a)



and (b) receipts proving that he made payments to the deceased on the land. I notice that there is no sale agreement to prove that he entered into an agreement with the deceased over the said land. He also produced a land control board consent that as JKC 5 showing that the transfer from the deceased to his wife was approved. The consent is dated June 24, 1996 whereas the deceased passed away on November 5, 2003. There is a letter annexed as JKC 11b from the Ministry of Lands that appears to clarify the issue of ownership. However, this court does not have the jurisdiction to determine the ownership of the land and therefore I cannot pronounce myself on who the rightful owner of the land is at this juncture. The same is the preserve of the Environment and Land Court.

14. A court's jurisdiction flows from either the *Constitution* or legislation or both. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia v KCB & 2 others*, Civil Application No 2 of 2011 stated thus:-

“A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

15. Pursuant to article 162(2) of the *Constitution*, the *Environment and Land Court Act* 2011 was enacted and in section 13 it confers the Environment and Land Court with jurisdiction as follows:-

(2) In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the court shall have power to hear and determine disputes-

- a) Relating to environment planning and protection, climate issues, land use plannings, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) Relating to compulsory acquisition of land;
- c) Relating to land administration and management;
- d) Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and
- e) Any other dispute relating to environment and land.

16. The applicant had claimed that the letters be revoked on grounds that the properties included belonged to him; that there was non-disclosure of material facts; these being that he had purchased the land from the deceased.

17. Whereas the applicant has not shown that he had ownership of the suit land by way of any registration document, or that the land he alleges was transferred to his wife was indeed transferred to her and she had title, it is clear that there is a dispute as to the ownership of the land in question.

18. It is my view that this court, lacking the jurisdiction to determine the ownership of the contested land, cannot determine the issue of revocation of the rectified grant as the issue of non-disclosure of material facts cannot be effectively determined. In the premises this court has no option but to down its tools.

19. In the premises the reasonable thing to do is to allow the application to preserve the suit premises as the parties heed to the Environment and Land court to determine the issue of ownership of the suit property.

20. I therefore give the following orders:



- i. A conservatory order of stay is granted in terms of prayer no (c) of the motion pending any reference by the parties to Environment and Land Court.
- ii. The conservatory orders above, shall, in any event, not last for more than six (6) months from the date herein, but may be extended in the envisaged proceedings in the Environment and Land Court.
- iii. Parties to bear own costs of the motion.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE

