



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**SUCCESSION CAUSE NO. 64 OF 2010**

**IN THE MATTER OF THE ESTATE OF THE LATE SIMON KIPROP CHERUIYOT (DECEASED)**

**IN THE MATTER OF**

**HELLEN CHERUTO LELEL.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**RAEL JEPKOECH SANGA.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**IN THE MATTER OF**

**MARGARET CHELAGAT CHEPTALAM.....OBJECTOR/APPLICANT**

**RULING:**

On **18/2/2021** the Objector/Applicant filed the instant application dated **18/2/2021** seeking for the following orders;

1. THAT this Honourable Court through the Deputy Registrar executes the completion/transfer documents on behalf of the Petitioners who have declined to do so.
2. THAT upon execution by the Deputy Registrar of this Honourable court in order (1) above the same be deemed as sufficient instrument for completion/transfer documents.
3. THAT this Honourable Court be pleased to give orders as to the compliance of the certificate of confirmation of grant dated **23/7/2021**.
4. THAT costs of this application be provided.

The application is anchored on the provisions of **Article 40** of the Constitution of **Kenya, 2010**, Section **83 (f) and (g)** of the Law of Succession Act; **Section 3, 34 and 63(e)** and **Order 51 Rule 1** of the Civil Procedure Rules.

The Court on **13/7/2013** confirmed grant of representation in respect of the deceased's estate, one **Simon Kiprop Cheruiyot** and a Certificate of Confirmation was issued to that effect.

It is alleged that the petitioners have refused to execute completion documents to effect the transfer of the properties to the respective beneficiaries hence the instant application.

On **1/3/2021** when this matter came up for directions, **Mr. Tarigo** counsel who was holding brief for Kipsei for the petitioners sought for **14 days** to file their response to the application; however, the court granted them 7 days. The court also directed parties to canvass the application by way of submissions which submissions were to be filed by **16/3/2021**.

**To date, none of the parties has filed their submissions.**

Having perused the application, the supporting affidavit thereto and the annexures in support of the application, two issues stands out for determination as follows;

- 1. Whether the application is un-opposed hence should be allowed as prayed.**
- 2. Whether or not the application is merited and therefore worth grant of the reliefs sought.**

## ANALYSIS AND DETERMINATION

It is worth noting that the application at hand has not been opposed. It should also be noted that none of the parties to this case has filed their submissions in support of the application.

It is trite law that even in circumstances where an application has not been opposed, it is not automatic that such an application must succeed. Instead, it is the duty of the Court to look into the merits of the application and analyse whether the prayers sought can *prima facie* be granted in absence of an objection.

On this, I rely on the wisdom of the supreme Court Judges in the following case;

**SUPREME COURT NAIROBI CIVIL APPLICATION NO. 26 OF 2018, GIDEON SITELU KONCHELLAH V JULIUS LEKAKENY OLE SUNKULI & 2 OTHERS [2018] eKLR**, where the Learned Lordships held;

***“.....The upshot is that as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had categorically stated that they do not oppose the application, the Court will be excused for therefore deeming the application as being unopposed entirely.***

***[10] Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court.....”***

Guided by the above principle, it is therefore the duty of this Honourable court to look into the merits of the instant application as unopposed as it is. Having determined on this issue, I now move to the next issue of whether the application is merited and worth of grant of the reliefs sought.

The application at hand invites the Court to make an order *inter alia* directing the Deputy Registrar to execute the completion/transfer documents on behalf of the Petitioners who have declined to do so and that upon execution by the Deputy Registrar of this Honourable Court, the same be deemed as sufficient instrument for completion/transfer documents.

The Court has also been invited to give orders as to the compliance of the certificate of confirmation of grant dated **23/7/2013**

Lastly, the Court has been invited to provide costs of this application. As indicated, it has been alleged that the Petitioners/Respondents herein have refused to execute completion documents in honour of a grant that was confirmed on **23/7/2013**.

### **Affidavit evidence by the applicant.**

In his supporting affidavit sworn on **18/2/2021**, **the applicant stated that she swore the affidavit on her** own behalf and on behalf of her children whom she holds trust for as beneficiaries of the Estate of the late **Simon Kiprop Cheruiyot**.

That the original letters of administration of the estate of the late **Simon Kiprop Cheruiyot** were granted to **Hellen Cheruto Lelei** and **Rael Jepkoech Sanga** on the **7/2/2011** as per the Annexed copy grant marked as "MCC I".

That she has been unable to comply with the court's order and enjoy quiet possession because **Hellen Cheruto Lelei** and **Rael Jepkoech Sanga** are unwilling to execute the said completion documents despite several demands. She annexed a demand letter to the Petitioners/Respondents issued on **10/9/2018** as well as the affidavit of service to prove service of the same upon the petitioners.

That she has been highly inconvenienced by the petitioners' acts of refusal to sign the completion documents and she therefore urges the court to order the deputy registrar of the court to sign the completion documents on behalf of the petitioners.

The application is premised on the provisions of **Article 40** of the Constitution of **Kenya,2010**; **Section 83 (f) and (g)** of the Law of Succession Act; **Section 3, 3A and 63(e)** and **Order 51 Rule 1** of the Civil Procedure Rules.

Under **Section 83(f)** of the Law of Succession Act, the administrator(s) of a deceased's estate have a duty to distribute the estate to the beneficiaries. Under **Section 83 (g)** of the Act, the administrator(s) have a duty to render accounts

At the completion of administration, the administrator has the duty of rendering accounts to the court. The powers exercised by the personal representatives flow from a court instrument, the grant of letters of administration.

**The Court is therefore entitled to know whether those powers have been properly exercised, and whether the duties imposed have been properly discharged. Being a statutory duty to account to the court, the personal representative does not have to wait for a court order directing them to render accounts, they must render the accounts as a matter of course.**

The duty to render accounts is so critical that failure to do so is listed in **Section 76(d)(iii) of the Act** as one of the grounds upon which the

Court may consider revoking a grant.

The consequences of an administrator's failure to sign completion documents were well elaborated in;

***KERUGOYA SUCCESSION CAUSE NO. 36 OF 2013, RE ESTATE OF WILFRED MUNENE NGUMI (DCD) [2020] eKLR***, where the learned judge stated;

***Section 83(g) of the Act mandates administrators of an estate to, within six months of confirmation of grant or longer period as the court may allow, complete the administration of the estate, and to produce to the court a full and accurate account of the completed administration.***

***This undertaking cannot be done unless the necessary documents are executed by the relevant parties.....”***

The court further cited Rule 49 of the Probate and Administration Rules which provides: -

**A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary, by affidavit.**

**It also cited Rule 73** which provides for the inherent powers of the court to make such orders as may be necessary to meet the ends of justice, or to prevent abuse of the process of the Court.

The court while allowing the application for the Deputy Registrar of the court to execute completion documents thus held;

***“.....It is evident from the Applicant's affidavit in support of the application and oral arguments by her Advocate, Mr. Kahiga, that the respondents have refused to sign the necessary documents to facilitate execution of the court's Judgment/decree. To prevent abuse of the court process, by the above legal provisions, this court has inherent powers to prevent such abuse. I therefore find, and hold that the petitioner's summons dated 23/9/2019 and filed on the 25/9/2019 to be merited.....”***

This position was further reiterated in; ***EMBU HIGH COURT SUCCESSION CAUSE NO. 13 OF 2003; RE ESTATE OF THE LATE KUBUTA KAMARA NGUURO ALIAS PHARIS NJEGEGU (DECEASED) [2021] eKLR, LUCAS NJAGI NJEGEGU & 6 OTHERS VS JERUSHA WAMBUI MUSA***, where the court had the following to say when faced with a similar situation;

***“..... This state of affairs is not healthy and should not be countenanced by the court. The applicants prayed that the Executive Officer/Deputy Registrar do sign all the documents on behalf of the respondent. In Rose Wanjiku Kuria -vs- Nganga Mugwe [2003] eKLR and which decision I agree with, the court held that by virtue of Section 79 of the Law of Succession Act, the administrator gets all the property of the deceased vested in him/her and the court further stated that *the Court's Registrar or his deputy or any other officer of the court not having been granted Probate or letters of administration and therefore having had no property of the deceased vest in him and no powers and duties in accordance with provisions of the Law of succession Act, cannot become an executor or administrator and as such cannot administer the estate of the deceased person and the court to order him or authorize him to administer by signing any of those documents as requested in this summons, is to make an order which is not supportable under the Law of Succession Act.****

**25. However, this court being a succession court has ample powers donated to it by Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to resort to, in order to meet the ends of justice. The task of administering the estate is still on the shoulders of the respondent (administrator). As I have already noted, despite the grant having been confirmed in the year 2007 and even after the subsequent amendment by Muchemi J (which included the Wang'uru Plot in the certificate), the respondent has nonetheless failed to administer the estate. I believe that court orders ought not to be issued in vain but must be complied with. Further, the office of administrator of estate of a deceased person is an office which is built on the foundation of trust and goodwill. Where such is seen to be lacking, then the court ought to invoke its powers to ensure that justice is done to the beneficiaries more so where the administrator puts the beneficiaries in an unenviable position.**

**26. In the instant case, the administrator having failed to distribute the estate and without any valid reason, the Deputy Registrar of this court ought to be ordered to sign all the relevant documents to effect the transfer of the properties to the beneficiaries. As such I allow prayer 5 of the application.....”**

In the instant case, and from the documents annexed to the application, it is clear that the administrators in this case have refused to sign transfer documents in order to bequeath the beneficiaries their share of entitlement to the deceased's estate as per the certificate of confirmation of grant issued on 23/7/2013.

Guided by the Court's holding in the above cited authorities, I will proceed to allow the application and order as follows;

- 1. The Deputy Registrar of this Honourable court is hereby directed to execute the completion/transfer documents on behalf of the Petitioners who have since declined to honour the Certificate of Confirmation of grant issued on 23/7/2013.**
- 2. Upon execution by the Deputy Registrar of this Honourable court of the completion documents, the same be deemed as sufficient instrument for completion/transfer documents.**
- 3. The administrators are directed to render full and final accounts in respect of the estate in compliance with Sections 83 (f)**

and (g) of the Law of Succession Act and the same to be filed in court within 60 days from the date of issuance of titles deeds as per the confirmed grant.

4. This being a succession cause and which involves family members, each of the parties shall bear their own costs.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF APRIL, 2021.**

In the presence of:-

Mr. Oyaro for the Objector.

Mr. Taringo holding brief for Miss Kipsei for the Petitioner.

Gladys - Court Assistant