



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CAUSE NO. E 007 OF 2020

IN THE MATTER OF THE ESTATE OF THE LATE: CHRISPUS KUROSWO NDIEMA

PHANICE CHEMASIS MASAI.....APPLICANT

VERSUS

ALICE CHESAMBU NDIEMA.....1ST RESPONDENT

VICTOR CHEMININGWA NDIEMA.....2ND RESPONDENT

RULING

The applicant herein has filed these summons applications dated 3/12/2020 seeking the following orders;

- a) *The Grant for letters of Administration Intestate issued on 25.02.2020 and confirmed on 29.10.2020 be Revoked and/Annulled.*
- b) *Cost be provided for.*

The application is supported by the Supporting Affidavit sworn by **Phanice Chemasis Masai** on 3/12/2020 and a supplementary affidavit sworn on 11/3/2021. The respondents have vehemently opposed the application via an undated replying affidavit sworn by one **Alice Chesambu Ndiema**.

In their replying affidavit the deponent admits that indeed the grant was confirmed but denies that it was through concealment of material information. She deposes that she is the legal wife of the deceased and that she has not disinherited any beneficiary as alleged.

She further deposes that **P& A Cause Number 96 of 2019** was published in Kenya Gazette and therefore anyone who had any objection had a chance to raise his or her concern with the Court or file objection proceedings.

That the deceased was domiciled in Elgon View Estate in Eldoret and therefore the Eldoret Court has jurisdiction to handle the matter. She has also deposed that the deceased's property is valued at **Ksh.10,000,000/=**.

That the **Chepkube** farm alleged by the applicant is an ancestral land and could not form part of the estate. She has also deposed that the Kitale and Chepkube farms belong to the deceased and that the same had been distributed by the deceased to the beneficiaries at the time of his death.

On the other hand, the applicant in her Supporting Affidavit has deposed that she was in an intimate relationship with the deceased before his demise and that they were blessed with a child by the name **Cynthia Mangrita Ndiema** and that the deceased took care of them before his demise. She also deposes that the Respondents herein knew of her existence together with her child even before the deceased's demise. That after his death, the Respondents herein prepared eulogy and left out her child to avoid her being recognized as part of the family.

That later after the demise of the deceased the Respondents herein proceeded to secretly file succession proceedings excluding her and **Cynthia Mangrita Ndiema**. She further deposes that since the deceased's body was buried in **Mount Elgon**, Bungoma Court was the proper court to have handled the matter and not **Eldoret Law Courts**. She has also deposed that the value of the estate is far beyond **Ksh.20,000,000/=** hence the proper court to have handled the matter is the High Court and not the lower court.

She has further deposed that the Petitioners/ Respondents have included land parcel known as Eldoret Municipality **Block 14/410** in the

Eldoret CMC P& A 96 of 2019 with a view of the whole of it being transmitted to themselves yet the same is registered in the names of the deceased with **Chrispine Owuor Oduor** and that the same was charged in KCB Bank in respect of a loan of **Kshs.5,000,000/=**.

In her Supplementary affidavit sworn on **11/3/2021**, the applicant reiterated the contents of the supporting affidavit and added that she was willing to have her child **Cynthia Mangrita Ndiema**, undergo a D.N.A test as long as the Respondents shall meet the cost.

The Petitioner's/Respondent's Written Submissions

Counsel for the Petitioners/Respondents in his submissions has reiterated the averments in their replying affidavit and Supplementary affidavit and argued that the Applicant has not shown this court as to what ceremony took place to signify her marriage to the deceased, so as to qualify her and her daughter as a dependant under **Section 29 of the Law of Succession Act**.

The claim that the Applicant had a child with the deceased is not sufficient proof of a marriage between herself and the deceased and that even if the court was to hold that the minor was the deceased's child, a fact which is denied by the Respondents, that in itself does not qualify the Applicant to be a dependant under **Section 29 of the Law of Succession Act**. He also submitted that the applicant has not proved that She qualifies to be a wife under **Section 3(5) of the Law of Succession Act**.

In **Beatrice Adhiambo Sijenyi v Josephine Kapukha Khisa & 2 others 120181 eKLR** the Court of Appeal when considering whether a party was a dependant pronounced itself as follows:

"In the present case Esther did not lead any evidence to show that the deceased had rented the premises she was staying in, that the deceased ever lived or spent days in those premises as one of his homes; or whether how and where the deceased held her as a wife. To my mind she was only able to prove that she had relationship with the deceased which resulted in children being born. Giving birth is not evidence of any marriage. To my mind Esther only proved that she was a dependant of the deceased and not a widow."

As to whether the grant was obtained and/or confirmed fraudulently, counsel submitted that the Respondents have never met and interacted with the Applicant as alleged and therefore they were not aware of her existence or that of her child prior to being served with documents in respect of this matter.

That they did not exclude any properties from the succession proceedings. For instance, Chepkube Farm is ancestral land and does not qualify as free property while Kitale Farm and Chepkube Plot had already been distributed by the deceased to the beneficiaries at the time of his death and therefore the suit property was not the free property of the deceased within the definition of **Section 3 of the Law of Succession Act**.

He further cited **Section 42 of the Law of Succession Act** which provides for *inter vivos* gifts and in relation to this, he cited the case of; **Peter Ndiritu Kibui v Ann Mugure Kibui [20161 eKLR** where the court held:

"In my view this Section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected."

In respect to land parcel **No. Eldoret Municipality Block 14/410**, he submitted that it is jointly owned with **Chrispine Owuor Oduor** and that the title deed is still in the joint names of the deceased and the said **Chrispine Oduor**.

As to whether the Magistrate's court had jurisdiction to entertain the Petition, counsel submitted that the Magistrates Court had both pecuniary and territorial jurisdiction to entertain and confirm the grant since the property is valued at **Kshs.20,000,000/=**. He cited **Section 7(1) of the Magistrates Court Act, 2015**.

As regards territorial jurisdiction, he has submitted that the deceased died domiciled at Eldoret and that his matrimonial home is in Elgon View which is within the jurisdiction of the Eldoret Magistrate's Court and that the Certificate of Death clearly indicates that the deceased died within Eldoret.

He cited **Section 49 of the Laws of Succession Act** which provides that:

"The Magistrate's court within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed the pecuniary limits set out in Section 7 (1) of the Magistrate's Courts Act, 2015, have in respect of that estate the jurisdiction conferred by Section 48."

Counsel further argued that this court has no jurisdiction to entertain this application by dint of **Sections 23 and 24 of the Magistrates Courts Act, 2015** which gives jurisdiction to magistrates' courts to revoke grants that they have powers to make. That the said sections amended **Section 48(1) and Section 49 of the Law of Succession Act**, as follows; "23. The Law of Succession Act is amended, by repealing **Section 48(1)** and substituting therefore the following new Sub-Section -

"Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates Courts Act, 2015."

Section 49 of the Law of Succession Act is amended —

1. **By deleting the words "Resident Magistrate" and substituting therefor the words "Magistrate's Court"; and**
2. **By deleting the words "one hundred thousand shillings" and substituting therefor the words "the pecuniary limits set out in section 7(1) of the Magistrates Courts Act, 2015."**

He further relied on the case of *Re Estate of Charles Boi (Deceased) [2020] eKLR* and urged the court to dismiss the objector's application for want of jurisdiction.

The Objector/Applicant's Submissions

On behalf of the objector/applicant, counsel has submitted and reiterated contents in her supporting affidavit.

He cited **Musyoka** in his case book on the law of succession *at page 581* where he has stated that:

"Where the assets have been misapplied by personal representative and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person having such property."

He also cited the case of;

"Ibrahim vs Hassan & Charles Kimengi Macharia, interested party 2019 e KLR;

Where he submits that the Court adopted the same position.

As to whether the Court had jurisdiction to entertain the succession cause, counsel reiterated that the value of the estate is far beyond **Ksh.20,000,000/=** and therefore Eldoret Chief Magistrate's Court did not have Pecuniary jurisdiction to entertain, hear and determine the matter.

He further submitted that the deceased was buried in **Mt. Elgon Sub County in Bungoma County** and therefore the Eldoret Chief Magistrate's Court did not have the Territorial jurisdiction to entertain, hear and determine the matter and that it ought to have been filed in Bungoma High Court or in one of the subordinate courts in Bungoma County with both territorial and pecuniary jurisdiction.

In conclusion, he urged the court to find that the land parcel known as **Eldoret Municipality Block 14/410** was jointly owned by the deceased and **Mr. Chrispine Oduor Oduor** and Kenya Commercial Bank in respect of the loan interest of **Kshs. 5,000,000/=** who are not part of these proceedings. He further urged the court to find that **Chepkube farm, Kitale Farm, Plot in Chepkube trading center, Death benefits from Masinde Muliro University of Science and Technology and funds in Kenya Commercial Bank Account Number 418875120425031** formed part of the deceased's estate at the time of instituting this cause.

That the actions of the Petitioners/ Respondents herein of failing to include the Objector/ Applicant together with her child (**Cynthia Mangrita Ndiema**) in these proceedings and other interested parties/ beneficiaries was illegal, irregular and / or unprocedural.

Counsel finally urged this court to hold that the trial court was not seized with both territorial and pecuniary jurisdictions to entertain, hear and determine the cause in respect to the instant estate and therefore urged the court to grant the prayers sought in the Application pending the hearing and final determination of the objections proceedings herein.

Issues for Determination

The issues that arise for determination in this matter are;

1. **Whether this Court is seized with jurisdiction to entertain the instant application and if so whether the trial court had jurisdiction to entertain the succession cause that led to this application.**
2. **Whether the application is merited to warrant the grant of the orders sought.**

Whether This Court Is Seized With Jurisdiction To Entertain The Instant Application And If So Whether The Trial Court Had Jurisdiction To Entertain The Succession Cause That Led To This Application.

It has been argued by the Objector/Applicant that the Eldoret Chief Magistrate's Court was not seized with both territorial and pecuniary jurisdiction to entertain the Succession Cause via **P & A Cause Number 96 of 2019**, reason being that the subject matter of the cause exceeded **Ksh.20,000,000/=** and that the deceased was buried in **Mt. Elgon Sub County in Bungoma County** which falls within the jurisdiction of **Bungoma Law Courts**.

On the other hand, the Petitioners/Respondents have argued that the deceased was a resident of **Elgon view Estate** in Eldoret and therefore the Eldoret Chief Magistrate's Court had jurisdiction to entertain the matter. They have further argued that the property of the deceased is valued at **Ksh.10,000,000/=** which is below the pecuniary jurisdiction of a Magistrate's Court.

They have further argued that this court does not have jurisdiction to entertain the instant application by dint of **Sections 23 and 24 of the Magistrates Courts Act, 2015** which gives jurisdiction to magistrates' courts to revoke grants that they have power to make.

The legal framework for the revocation and/or annulment of grant is set down in **Sections 48 and 49 of the Law of Succession Act** as amended by **Sections 23 and 24 of the Magistrates Courts Act**.

The **Magistrates Courts Act, 2015**, commenced on **2nd January 2016**. The amendment to **Section 48(1) of the Law of Succession Act** became effective from that date, meaning that from that date onwards, the magistrate's court had power to revoke grants made by that court.

This basically means that effective from that date the High Court lost the exclusive jurisdiction to revoke grants made by magistrates' courts; and, therefore, obviating the necessity to have such applications made at the High Court. On this issue the High Court sitting at Kakamega pronounced itself as follows in; -

Kakamega High Court Miscellaneous Succession Cause No. 10 Of 2018; In the Matter of The Estate of Charles Boi (Deceased) [2020] Eklr.

“The taking away of jurisdiction from the High Court, with respect to revocation of grants, made by the magistrate's court, would mean that the High Court no longer has original jurisdiction to address that issue, and that its jurisdiction, over the issue, would be as an appellate court, from a ruling of the magistrate's court, on a summons for revocation of the grant issued by that court. I have no jurisdiction, therefore, sitting as a High Court, to entertain a summons for revocation of grant, where the applicant has not filed such application at the magistrate's court in the first instance, since the Law of Succession Act, as currently framed, does not vest me with such jurisdiction. Secondly, the issue of revocation of the grant made by the magistrate's court has not been placed before me in invocation of my appellate jurisdiction.”

It is worth noting that jurisdiction is everything, without which the court downs its tools. This position was pronounced in the *locus classicus* case of; **Owners of The Motor Vessel “Lillian S” Vs. Caltex Oil (Kenya) Ltd [1989] Klr 1** where the court held that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Having so found it is therefore clear that this court lacks jurisdiction to entertain this application hence cannot interrogate whether the trial court had the requisite jurisdiction to entertain the Succession Cause that led to this application.

From the foregoing, I do find that the summons for revocation of grant is incompetent for want of jurisdiction. It is clear, that where there is no jurisdiction, the court should waste no time, but should stop promptly on its tracks. I will therefore not dwell into the second issue as to whether the application has met the threshold to warrant the grant of the orders sought.

In view of the foregoing, the final orders that I make in this matter, in the circumstances, are as follows:

- 1. That I do not find any merit in the application dated 3/12/2020 and I hereby dismiss the same.**
- 2. The applicant shall bear costs of this application.**

RULING FOR ELDORET DELIVERED VIRTUALLY at MALINDI on this 18th day of October, 2021.

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S. M. GITHINJI

JUDGE

In the absence of;

1. Mr Kiboi for the Applicant and
2. Mr Kinyanjui for the Respondent