



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

SUCCESSION CAUSE NO. 35 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE KIPKORIR ARAP CHEBOGOIYO (DECEASED).

BETWEEN

MUTAI PARES1ST PETITIONER

RICHARD PARES2ND PETITIONER

VERSUS

JONAH KIPKOECH BARES.....1ST OBJECTOR/APPLICANT

RICHARD KIMUTAI LANGAT.....2ND OBJECTOR/APPLICANT

PAUL KIPNGETICH BARES.....3RD OBJECTOR/APPLICANT

RULING

Background

1. This matter was commenced by an Application dated 24th March 2015 by Mutai Pares, the 1st Petitioner herein. He Petitioned for Letters of Administration. The Petition was gazetted vide the Kenya Gazette dated 26th June 2015. It appears that a Grant was issued but the same was not captured in the proceedings.

2. A second Application for Revocation of Grant dated 9th November 2015 was filed by an Objector, Jonah Pares. The same was heard on diverse dates. The parties involved requested for time for them to come to an agreement and record a Consent regarding the representation of each house. The court adopted the Consent dated 15th September 2016 as it reflected most of the beneficiaries. In a Ruling dated 26th October 2016, Muya J, directed that Letters of Administration be issued to Mutai Pares and Richard Pares, being the representatives from each house. For avoidance of doubt, the beneficiaries of both houses were Kiptuya Pares, Mutai Pares, Juliana Cheronon Langat, Sofia Chepkurui Maritim, Anyesi Chepkemoi Kaplelach, Grace Pares, Joel Kiplangat Towett, Jonah Kipkoech Pares, Paul Kipngetch Pares, Richard Pares, Esther Chepkirui Talam, Anna Chebet, Teresia Chelangat Kongasis and Simon Rotich.

3. A third Application dated 21st November 2016 was filed by Paul Kipngetch Pares which sought orders to restrain the Respondent Petitioners herein and KETRACO LIMITED from receiving and paying out compensation funds respectively for the construction of an electricity line through the land parcel number KERICHO/EAST SOTIK S.S/203. In a Ruling dated 8th December 2016, Muya J dismissed the Application.

4. A fourth Application dated 27th June 2017 was filed by Mutai Pares and Richard Pares for the Confirmation of Grant of Letters of Administration. The Grant of Letters of Administration was confirmed on 10th October 2017 by Muya J and a Certificate was issued.

5. A fifth Application dated 23rd May 2018 was filed by Jonah Kipkoech Bares. He sought among others orders for stay of the Ruling dated 10th October 2017 and for the Honourable Court to cancel any titles that may have been issued with respect to the parcel of land registered as KERICHO/EAST SOTIK S.S/203. In an Order issued on 21st November 2018 by Muya J, the application for revocation of grant was dismissed. The Court further ordered the DCIO, Bomet to investigate allegations of obtaining fake titles being KERICHO/EAST SOTIK SS/1414, KERICHO/EAST SOTIK SS/1415, KERICHO/EAST SOTIK SS/1417, KERICHO/EAST SOTIK SS/1419, KERICHO/EAST SOTIK SS/1420, KERICHO/EAST SOTIK SS/1421 and KERICHO/EAST SOTIK SS/1422.

6. The DCIO filed a Report in court relating to the aforementioned Titles. In an Order issued on 20th May 2019, the titles for

KERICHO/EAST SOTIK SS/1414, KERICHO/EAST SOTIK SS/1415, KERICHO/EAST SOTIK SS/1417, KERICHO/EAST SOTIK SS/1419, KERICHO/EAST SOTIK SS/1420, KERICHO/EAST SOTIK SS/1421 and KERICHO/EAST SOTIK SS/1422 were cancelled and they reverted to original title which was KERICHO/EAST SOTIK SS/203.

The Present Application.

7. The Objectors, Jonah Kipkoech Bares, Richard Kimutai Langat and Paul Kipngetch Bares filed a Notice of Motion dated 1st April 2019. The same was stated to be brought under Order 9, Order 51 Rules 1, 3 and 10, Order 22 Rule 49 of the Civil Procedure Rules, Section 3A and Section 63 (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya.

8. The Application sought the following Orders:

i) Spent.

ii) THAT the status quo herein be maintained pending the hearing and determination of this application.

iii) THAT pending the hearing and determination of this application, this Honourable Court be pleased to order the county surveyor to visit the land formerly registered as KERICHO/EAST SOTIK SS/203 and file a comprehensive report as to the status of the land and the Officer in Charge, Bomet Police Station to assist in compliance of the said order.

iv) THAT pending the hearing and determination of this application, this Honourable Court be pleased to review and or set aside orders of this Honourable Court dated 19th November 2018, wherein the Applicants' Application dated 23rd May 2018 was dismissed.

v) THAT consequently upon granting prayer 4 above, this Honourable Court be pleased to cancel any titles that might have been issued with respect to the parcel of land registered as KERICHO/EAST SOTIK SS/203 as a result of the confirmed grant dated 10th October 2017.

vi) THAT the Certificate of Confirmation of Grant issued to Mutai Pares and Richard Pares (the 1st and 2nd Petitioners herein) be revoked and a fresh Certificate be issued.

vii) THAT this Honourable Court be pleased to appoint the Applicants herein as Co-administrators of the deceased's estate.

viii) THAT this court be pleased to make any other orders as it deems fit in the circumstances.

ix) THAT costs of this application be provided for.

The Objectors' case.

9. The Application was supported by the sworn affidavit of Jonah Kipkoech Bares. In various averments, the objectors stated that the Petitioners (Mutai Pares and Richard Pares) concealed material facts as they were never summoned to attend court when the Grant was confirmed on 10th October 2017. That the Honourable Court was misled into confirming the Grant without the input and presence of all the beneficiaries. The objectors stated that the Grant was confirmed prematurely as the said date was scheduled for a Mention and that they were not served.

10. The Objectors were aggrieved that their Application dated 23rd May 2018 which was filed to revoke the Grant issued on 10th October 2017 was dismissed. It was their further case that this Court ordered the DCIO Bomet to investigate the allegations of fake titles. That the investigations were done and a Report was filed in Court. The Objectors averred that the report was extensive and revealed overwhelming facts and it supported the allegations that were raised by the Applicants in their application dated 23rd May 2018.

11. The Objectors urged this court to look extensively at the said Report and the alleged criminal acts that were committed by the Petitioners and the Land Registry Bomet. They also urged this court to consider the purchasers who bought the land and have lived on the said land for over 20 years.

12. It was the Objectors' case that the Petitioners had obtained money from the said purchasers and that was against fairness and their culture as Christians. That the Petitioners intermeddled with the deceased's property and encouraged the intermeddling during the succession process.

13. The Objectors averred that most of the beneficiaries including the Petitioners had already shared or sold their respective portions to third parties who have been in occupation even before the succession cause was filed and thus the Grant was a way of unjustly enriching themselves.

14. It was the Objectors case that the Grant was denying other beneficiaries their respective shares of the deceased's estate. They are also apprehensive that the Petitioners/Administrators would sell, transfer, and waste the estate of the Deceased.

The Objectors' submissions.

15. The Objectors submitted that the Application for Review was hinged on Section 80 of the Civil Procedure Rules and Order 45 of the Civil Procedure Rules. It was their further submission that new and important information was discovered after the delivery of the Ruling on 19th November 2018. They submitted that the orders sought to be reviewed were delivered before the DCIO's Report was filed. That the said Report was presented before this court on 27th February 2018. They relied on the case of **Turbo Highway Eldoret Limited vs. Synergy Industrial Credit Limited (2016) eKLR**, to support their submission.

16. The Objectors submitted that the recommendations and findings of the DCIO Bomet left no doubt that the title deeds in question were obtained fraudulently and that the Petitioners intermeddled with the deceased's property. It was their further submission that they were never served with the Summons for Confirmation of Grant and that they had filed an Objection to the Confirmation, an Application that has not been determined.

17. It was the Objectors' submission that if the said titles were not revoked, it would result in serious miscarriage of justice as there were people already living on the deceased's land and the issue of the fraudulently issued Title Deeds would destabilize them.

18. The Objectors submitted that Section 76 of the Law of Succession Act empowered this court to revoke a Grant either on its own motion or by an application of a party. That in the matter herein, mandatory procedural steps had been omitted as the date of confirmation of the Grant was never given on notice and that the confirmation was done on a day that was scheduled for a Mention. That additionally, the whole process was marred with misrepresentation of facts and concealment of important matters.

The petitioners' case.

19. The Petitioners filed Grounds of Opposition and a Replying Affidavit both dated 3rd October 2019 in response to the Application dated 1st April 2019.

20. It was the Petitioners' case that they have never concealed any material facts from the court. That on 10th October 2017, the court proceeded to hear and determine the matters before it. They annexed this Court's Orders of 28th November 2018 and 17th May 2019.

21. It was their case that on 17th May 2019, this court made an order that the Objectors' application for review be filed and heard in the normal manner. That the Objectors did not file an application for Review but instead fixed the instant application for hearing.

22. The Petitioners averred that the instant application did not seek to review or set aside the orders of 28th November 2018 or 17th May 2019. The Orders of 28th November 2018 dismissed the prayer for revocation of Grant in the Application dated 23rd May 2018 and further ordered the DCIO Bomet to investigate the allegations of obtaining fake Titles being KERICH0/EAST SOTIK/1414, 1415, 1416, 1417, 1419, 1420, 1421 and 1422. The Orders of 17th May 2019 cancelled the Titles KERICH0/EAST SOTIK/1414, 1415, 1416, 1417, 1419, 1420, 1421 and 1422. The Honourable Judge additionally stated that the application for Review be filed in the normal manner.

23. It was the Petitioners' case that Summons for Revocation of Grant were dismissed for lack of merit and that the distribution of the original KERICH0/EAST SOTIK SS/203 among the beneficiaries and the cancellation of KERICH0/EAST SOTIK/1414, 1415, 1416, 1417, 1419, 1420, 1421 and 1422 remain undisturbed and that the instant application was not capable of reversing distribution and the cancellation.

24. The Petitioners stated that the matters raised in the supporting affidavit relate to issues that had been earlier raised and determined and they could not be re-opened without filing of a competent application for review and injunctive orders.

25. It was their case that all the rightful beneficiaries had been catered for as per the Grant and that the 2nd Objector, was not entitled to a share since his purported share was within that of his father, Kiptuiya A. Pares.

The petitioners' submissions.

26. The Petitioners submitted that the Objectors' application for review of this Court's orders of 17th May 2019 was not brought within the purview of Order 45, Rule 1(1) of the Civil Procedure Rules. That the Objectors have not shown what new and important evidence they have discovered or shown that there was a mistake or error on record. It was their submission that the application for review was misconceived and was bad in law.

27. The Petitioners submitted that the Objectors have not laid any foundation for the revocation of Grant as they have not alleged any of the matters mentioned in paragraph 76 (a), (b), (c) of the Law of Succession Act. That in the initial stage, this court decided the said issue of administrators.

28. It was the Petitioners' submission that the Objectors claimed to be purchasers of the deceased's estate and that they had been in occupation for a long time. The Petitioners submitted that the alleged purchase or occupation was done without a Grant and that those actions were criminal. That the Objectors could not use their illegal titles to support their application.

29. It was the Petitioners' further submission that the prayers vaguely sought by the Objectors herein were similar to those canvassed in the application dated 23rd May 2018 which was canvassed and conclusively determined and that therefore the instant application was res judicata. That the application was therefore misconceived, bad in law, frivolous and an abuse of the court process and they prayed the same be dismissed with costs.

30. To appreciate the background to the present Application, I have perused the Applications dated 24th March 2015, 9th November 2015, 21st November 2016, 27th June 2017, 23rd May 2018 and the attendant orders. With respect to the present application dated 1st April 2019 I have considered the Objectors' Supporting Affidavit, the Objectors' Written Submission dated 6th July 2021, the Petitioners Grounds of Opposition and Replying Affidavit both dated 3rd October 2019 and the Petitioners Written Submissions dated 5th December 2019. I discern two issues for determination as follows:-

i) Whether the Notice of Motion Application dated 1st April 2019 is *res judicata*.

ii) Whether the Objectors have satisfied the requirements for a Review Order.

i) Whether the Notice of Motion Application dated 1st April 2019 is *res judicata*.

31. The law on Review is founded on the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Section 80 of the Civil Procedure Act provides as follows:-

“Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

32. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

“Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

33. In the case of **Republic Vs Advocates Disciplinary Tribunal Ex-Parte Apollo Mboya (2019) eKLR**, Mativo J. held that:-

“A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

34. In his Order dated 19th November 2018, Muya J dismissed the Application for Revocation of Grant dated 23rd May 2018. He also directed the DCIO Bomet to investigate the allegations of obtaining fake titles being KERICHO/EAST SOTIK SS/1414, KERICHO/EAST SOTIK SS/1415, KERICHO/EAST SOTIK SS/1416, KERICHO/EAST SOTIK SS/1417, KERICHO/EAST SOTIK SS/1419, KERICHO/EAST SOTIK SS/1420, KERICHO/EAST SOTIK SS/1421 and KERICHO/EAST SOTIK SS/1422.

35. The Report by the DCIO Bomet was filed in court on 27th February 2019. The recommendation of the Report was that the 8 title deeds mentioned above were not only fake but were fraudulently procured or registered contrary to Section 157 (1) (c) and (d) of the Land Act. This court (Muya J.) consequently cancelled title deeds numbers KERICHO/EAST SOTIK SS/1414, KERICHO/EAST SOTIK SS/1415, KERICHO/EAST SOTIK SS/1416, KERICHO/EAST SOTIK SS/1417, KERICHO/EAST SOTIK SS/1419, KERICHO/EAST SOTIK SS/1420, KERICHO/EAST SOTIK SS/1421 and KERICHO/EAST SOTIK SS/1422 and further ordered that they revert back to the original title.

36. The DCIO Report was filed in court on 27th February 2019 way after this court had dismissed the Application for Revocation of Grant dated 23rd May 2018. It is my finding that the Report by the DCIO revealed new information of fake Titles which had been procured fraudulently. The court was not privy to this information when it made its Ruling. It is my further finding that the Objectors have made their case for a Review of the Court's Ruling dated 19th November 2018 dismissing the Application for Revocation of the Grant.

ii. Whether the Grant of Letters of Administration Intestate dated 1st November 2016 should be revoked.

37. Having found that the Objectors made their case for Review of this Court's Ruling dated 19th November 2018, I will now review the

decision not to revoke the Grant dated 1st November 2016.

38. The law on revocation or annulment of Grant is captured in Section 76 of the Law of Succession Act which states:-

“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.”

39. In the case of **Tirus Mwaniki Njiru Vs Jane Igandu (2021) eKLR**, Njunguna J. held that:-

“These grounds ought to be proved with evidence as the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously.”

40. In the present case, the Report by the DCIO found that:-

“The Court confirmed the distribution of the estate of the 14 beneficiaries from the two households

However it has been discovered that the beneficiaries started selling the matrimonial (Sic!) land long before the confirmation of certificate of grant was issued as evidenced I sub files B-32 to B-56 land sale agreements

For example (1) Richard Pares Kipsiele sold 0.09 acres which was excised from Kericho/East Sotik SS/203 on 23/8/00 to one Samuel Sigeti and witnesses by several witnesses by appending their signatures.

(2) Jonah Kipkorir Pares sold a parcel approx. 0.8 acres to one William Kiplangat Torongi which was excised from land parcel Kericho/East Sotik SS/203 on 19/04/2006 before a village elder Mr. Kipkemoi Arap Cheruiyot.

(3) Jonah Kipkoech Pares also sold 2.05 acres to one Pater Kipkorir Ngeno which was excised from Kericho/East Sotik SS/203 on 07/09/2007.

(4) Paul Kipnetich Pares sold 0.04 acres to Wesley Kipyegon Bor which was excised from Kericho/East Sotik SS/203 on 9/5/2005.

(5) Also Paul Kipnetich Pares sold 0.25 acres of land to one Naomi Chelangat which was excised from Kericho/East Sotik SS/203 on 14/5/2009.”

41. The Report revealed that the deceased’s property had been intermeddled with prior to this succession suit being filed. The Administrators herein, Mutai Pares and Richard Pares concealed these facts which were material to this case. The Administrators failed to inform this court that part of the deceased’s estate had been sold and the whole of KERICHO/EAST SOTIK SS/203 was not available for Succession as they had portrayed.

42. I have also noted that the Objectors sought revocation of the Certificate of Confirmation of Grant. I am persuaded by the reasoning of Musyoka J the case of **Re Estate of Joel Cheruiyot Rono (2016) eKLR**, that revocation of a certificate of confirmation is not a viable option. He aptly stated that:-

“A certificate of confirmation of a grant is not a grant representation, but a certificate to the effect that the grant had been

confirmed by the court. The discretion given to the court by the provisions in section 76 of the Law of Succession Act is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the court to revoke a certificate of confirmation of grant. As can be seen from the outset, the said application stands on shaky ground.

The reasons given for the application are that the applicant had not been notified of the hearing of the confirmation application, hence there was no attendance on his part, and the hearing proceeded to his detriment. He urges that the certificate be revoked.

I am being invited to revoke a certificate of confirmation of grant. The certificate is not an order of the court. A certificate is not a judicial order. It is an extract from a court order made in the confirmation proceedings. The certificate is generated from the court order. It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of the grant. A grant is a court order; it is a judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of grant on the other side merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself.

I wonder whether any purpose would be served by revoking the certificate without touching the orders that gave rise to the certificate. If I revoke the certificate dated 29th February 2012, another certificate can still be generated from the orders of 29th February 2012, for the revocation would leave those orders intact.”

43. In the interest of justice, no purpose would be served if the Certificate of Grant is revoked and the Grant is left standing. Having found that there was material non-disclosure of facts by the Administrators, the Grant has fallen foul of Section 76 (b) of the Law of Succession Act and consequently, the Grant of Administration Intestate dated 1st November 2016 issued to the Petitioners is revoked.

44. Regarding the issue of status quo, this court is unable to determine the issue of status quo without knowing the exact status of KERICHO/EAST SOTIK SS/203. In the case of **The Chairman Business Premises Tribunal at Mombasa Ex-Parte Baobab Beach Resort Msa Misc. Application No. 26 of 2010**, Muriithi J held that:-

“In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon the establishment of a right, or at an interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to the pending proceedings before the hearing and determination thereof.

It does not depend on proof of right or prima facie case, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint”.

45. In essence therefore, a status quo is meant to preserve the subject matter or leave matters as they were at the day of making the order. It follows therefore that before granting such an order the court must establish what the status quo is from the pleadings, evidence on record or submissions of the parties. At this stage, the only thing that is clear to the court is that legally, the property of the deceased has reverted to the mother title being Kericho/East Sotik 55/203. What obtains on the ground as status quo is not clear.

46. In the final analysis I grant the following orders:-

- (i) This court grants prayer 3 of the Application dated 1st April 2019 and directs the County Surveyor to visit the suit property and file a comprehensive report on its status. The relevant OCS to provide security for that purpose.
- (ii) The Grant of Letters of Administration Intestate dated 1st November 2016 and granted to the Petitioners is hereby revoked.
- (iii) The beneficiaries of the Estate to take necessary steps in pursuit of a new grant.
- (iv) The Administrators being Mutai Pares and Richard Pares are directed to give an account of how they have dealt with the Estate under the grant issued to them.
- (v) I decline to grant prayers 2 and 7 of the Application dated 1st April 2019.
- (vi) Prayer number 5 in the Notice of Motion Application dated 1st April 2019 has been overtaken by events, the same having been earlier granted by Muya J.
- (vii) This being a family matter, each party shall bear their costs.

47. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 21ST DAY OF DECEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in open court in the presence of Mr. Koske for the Petitioners, Ms. Chepkemai holding brief for Mr. Mugumya for the Objectors.