



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 36 OF 2018**

**IN THE MATTER OF THE ESTATE OF CHEPKULUL ARAP MUGUN (DECEASED)**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT**

**BETWEEN**

**JOSHUA KIBET CHOGE.....APPLICANT**

**AND**

**CHEROTICH MUGUN.....1<sup>ST</sup> RESPONDENT**

**SAMSON KIBET RONO.....2<sup>ND</sup> RESPONDENT**

**JAMES KIPKOSGEI RONO.....3<sup>RD</sup> RESPONDENT**

**RULING**

[1] Before the Court for ruling is the application dated **15 June 2020**. It was brought pursuant to **Sections 47 and 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**; and **Rules 17 and 73** of the **Probate and Administration Rules** by **Joshua Kibet Choge (hereinafter, “the applicant”)**. He approached the Court through the law firm of **Terer Kibii & Company Advocates**, for the following orders:

[a] Spent

[b] That a conservatory order be issued restraining **Cherotich Mugun, Samson Kibet Rono** and **James Kipkosgei Rono** jointly and severally, by themselves, their employees and or agents, from interfering with the applicant’s peaceful and actual possession of an identified and demarcated portion of **Land Parcel No. Nandi/Kamoiywo/446**, measuring 7 acres, pending the hearing and determination of the application.

[c] That a conservatory order be issued restraining **Cherotich Mugun, Samson Kibet Rono** and **James Kipkosgei Rono** jointly and severally, by themselves, their employees and or agents, from interfering with the applicant’s peaceful and actual possession of an identified and demarcated portion of Land Parcel No. **Nandi/Kamoiywo/446**, measuring 7 acres, pending the hearing and determination of the Objection proceedings herein.

[d] That the Petition for Grant of Letters of Administration to the estate of **Chepkulul Arap Mugun** made to **Cherotich Mugun, Samson Kibet Rono** and **James Kipkosgei Rono** be revoked or annulled on the ground that the petitioners willfully and intentionally omitted the applicant, who is a beneficiary of the said estate.

[e] That costs of the application be provided for; and in any event be borne by the petitioners.

[2] The application was premised on the grounds that the proceedings to obtain the grant herein were defective in substance; and that the grant was obtained fraudulently by the making of a false statement or by concealment from the Court of something material to the case; namely that on **22 May 2017**, the applicant bought a portion of the land known as **Nandi/Kamoiywo/446**, measuring Seven (7) acres from **Annah Mugun** and **Charles Kiprotich Rono**. The applicant further averred that, after the purchase, he proceeded to develop his portion and has been living thereon to date. He asserted therefore that the respondents were under obligation to disclose these facts to the Court and involve him in the proceedings.

[3] It was further the contention of the applicant that the respondents are now using the grant to interfere with his peaceful occupation of the 7-acre portion that he bought, with the intention of evicting him therefrom. He added that he stands to suffer irreparably unless the orders sought are granted by the Court to protect his interests and the right of his family to food and shelter. The applicant annexed to his Supporting Affidavit copies of the sale agreement as well as a letter from the area chief to prove that **Annah Mugun** is the second widow of the deceased; while **Charles Kiprotich Rono** is one of the sons of the deceased. He further deposed in his Supporting Affidavit that **Annah Mugun** and **Charles Kiprotich Rono** used the proceeds from the sale of the aforementioned portion of 7 acres to purchase another piece of land within Nandi County, known as **Nandi/Kaptich/233**. He likewise produced a sale agreement to that effect as his **Annexure JKC-2 (a & b)** to the Supporting Affidavit.

[4] The applicant further averred that there is a pending dispute between the parties at the Environment and Land Court, being **Eldoret ELC Case No. 320 of 2017: Samson Kibet Rono vs. Annah Mugun & 2 Others**; in which **Annah Mugun** and **Charles Kiprotich Rono** acknowledged under oath in separate affidavits that they had sold 7 acres of **Nandi/Kamoiywo/446** to him. Copies of the said affidavits, sworn on **22 November 2017** and **24 November 2017**, respectively; were also annexed to the applicant's Supporting Affidavit as **Annexure JKC-4**. The applicant accordingly prayed that his application be allowed and that orders be granted in his favour as prayed therein.

[5] In response to the application, **Samson Kibet Rono** (the 2<sup>nd</sup> respondent) and **James Kipkosgei Rono** (the 3<sup>rd</sup> respondent) filed Grounds of Opposition dated **22 June 2020**, contending that:

[a] the application is a non-starter as the applicant lacks the *locus standi* to participate in the proceedings herein, he being neither a beneficiary nor a creditor/purchaser of the estate of the late **Chepkulul Arap Mugun**;

[b] the applicant did not interact or transact with the deceased during his lifetime; and as such cannot claim any interest in his estate;

[c] the application is an abuse of the court process, as there is a valid court order in force vide **Eldoret ELC Case No. 320 of 2017**, restraining the applicant from entering, ploughing or constructing any structures on the deceased's property pending the conclusion of this Succession Cause;

[d] the transaction made between the applicant and one of the widows, which is the basis of this application, was done under absolute protest from the other beneficiaries; and is therefore null and void for having been made 5 years after the demise of the deceased;

[e] the applicant had been warned against entering into the transaction but ignored all the warnings and proceeded to enter into an illegal agreement;

[f] the applicant has no interest whatsoever in the estate of the deceased; and that his only recourse is to follow up the inheritance of the said widow and her son, Charles, after the conclusion of the Succession Cause;

[g] due process was followed to obtain the grant and there is no defect or concealment of material facts;

[h] the application is defective and misconceived as the applicant wants to benefit from proceedings which he seeks to have annulled or revoked.

[6] The respondents also relied on the Replying Affidavit sworn on **22 June 2020** by the 2<sup>nd</sup> respondent, **Samson Kibet Rono**; wherein he reiterated that the alleged agreement between the applicant and the 2<sup>nd</sup> widow of the deceased was made on **22 May 2017**, about 5 years after the death of the deceased; and was therefore null and void. He also pointed out that the said widow, **Annah Mugun**, was not one of the administrators of the deceased's estate and therefore had no right to enter into any such transaction. The 2<sup>nd</sup> respondent also pointed out that the applicant is a neighbour and was therefore fully aware of the foregoing facts but nevertheless ignored them, as well as the protest to the sale transaction by the beneficiaries of the deceased. He annexed copies of the letters of protest, among other documents, to buttress his averments.

[7] At paragraphs 12 of his Replying Affidavit, the 2<sup>nd</sup> respondent averred that the applicant took advantage of his mother, **Annah Mugun**, who is elderly and illiterate, to entice her into an illegal transaction; and that when he got to know of it, he applied for limited grant of letters of administration on **12 June 2017** for the purpose of filing **Eldoret ELC Case No. 320 of 2017**; and that he did file the suit and obtained conservatory orders to preserve and protect the estate of the deceased from being wasted away. The 2<sup>nd</sup> Respondent also mentioned that a consent order was recorded in the ELC matter for the maintenance of the status quo pending distribution; and therefore averred that the instant application is an abrogation of that order. He produced the pertinent documents as **Annexures SKR-4, SKR-5 and SKR-6** to his affidavit.

[8] The application was canvassed by way of written submissions, pursuant to the directions given herein on **24 June 2020**. Thus, in their written submissions dated **17 July 2020**, **M/s Terer Kibii & Co. Advocates**, counsel for the applicants, proposed the following issues for determination:

[a] Whether the applicant purchased a portion of land measuring 7 acres within the whole of that parcel of land known as **Nandi/Kamoiywo/446** from **Annah Mugun** and **Charles Kiprotich Rono**;

[b] Whether the said **Annah Mugun** and **Charles Kiprotich Rono** used the proceeds from the sale of the said portion of land measuring 7 acres within the whole of that parcel of land known as **Nandi/Kamoiywo/446** to purchase another parcel of land known as **Nandi/Kaptich/233**, measuring 2 acres;

[c] Whether or not the applicant lacks *locus standi* to institute these proceedings;

[d] Whether the applicant was ever issued with demand letters from the firm of **Kipkosgei Choge & Company Advocates**;

[e] Whether the applicant will suffer irreparable loss should he be evicted/locked out vide this Succession Cause from the portion of land measuring 7 acres which he purchased from **Annah Mugun** and **Charles Kiprotich Rono**;

[f] Whether the applicant has approached the Court with clean hands;

[g] Whether justice and equity tilts in favour of the applicant;

[h] Who is to bear the costs of the application.

[9] Counsel for the applicant urged the Court to resolve the first two issues in favour of the applicant, on the basis of the documents marked **Annexures JKC-1, JKC-2, JKC-3 and JKC-4** to the Supporting Affidavit. He took the view that the said documents offer uncontroverted proof that the applicant purchased a portion of land measuring 7 acres within the whole of that parcel of land known as **Nandi/Kamoiwo/446** from **Annah Mugun** and **Charles Kiprotich Rono**; and that the said **Annah Mugun** and **Charles Kiprotich Rono** used the proceeds from the sale of the said portion of land measuring 7 acres within the whole of that parcel of land known as **Nandi/Kamoiwo/446** to purchase another parcel of land known as **Nandi/Kaptich/233**, measuring 2 acres.

[10] On the question of *locus standi*, **Mr. Misoi** relied on **Section 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, as well as the cases of **Kajiado High Court Succession Cause No. 36 of 2017: Khalid Abdi Ibrahim vs. Asha Ibrahim Hassan & Another** and **Otieno vs. Ougo** [1986-1989] EALR 468, to support his argument that any party interested in the estate of a deceased person may bring the application contemplated under that section. He also referred the Court to **Rule 2** as read with **Rule 17(1)** of the **Probate and Administration Rules** in urging the Court to find that it is sufficient that the applicant bought a piece of land comprising part of the estate of the deceased.

[11] According to **Mr. Misoi**, the applicant had approached the Court with clean hands; and that although he did not undertake due diligence before purchasing the property, he is entitled to the intervention of the Court vide its inherent jurisdiction under **Article 159** of the **Constitution** and **Section 73** of the **Law of Succession Act**; granted that the applicant has invested heavily in the property. Counsel also cited the case of **Githere vs. Kimungu** [1976-1985] EA 101 for the proposition that the rules of practice in the administration of justice are intended to be that of a handmaiden rather than a mistress; and that the Court should not be too far bound and tied by the rules at the expense of substantive justice. He prayed that the application dated **15 June 2020** be allowed; and that there be no order as to costs.

[12] On her part, **Mrs. Chumba** for the respondents, relied on her written submissions dated **6 October 2020** wherein she proposed the following issues for determination:

[a] Whether the applicant has the *locus standi* to apply for revocation of grant;

[b] Whether the applicant has satisfied the threshold for granting the prayers sought;

[c] Whether the application is an abuse of the court process;

[d] Whether the respondents followed the due process in filing the petition and obtaining the temporary grant;

[e] Whether there was defect or concealment of material facts in filing the Petition for Grant of Letters of Administration;

[f] Whether the applicant's application is defective.

[13] **Mrs. Chumba** took the posturing that the applicant is not an interested party to the estate. She relied on the definition of an interested party as furnished in the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, and submitted that the applicant has no identifiable stake in the estate of the deceased; for he is neither a beneficiary of the deceased nor a creditor who interacted with the deceased in his lifetime. She pointed out that the applicant engaged in the sale transaction 5 years after the demise of the deceased, and in disregard of a caution that had been placed by the administrators against the subject property.

[14] Counsel further submitted that the applicant, having failed to meet any of the grounds for revocation of grant, set out in **Section 76** of the **Law of Succession Act**, is not entitled to the orders sought. She also urged the Court to note that there is already a *status quo* order to preserve the suit property, issued in **Eldoret ELC Case No. 320 of 2017**; and therefore that the prayer for conservatory orders are misplaced. It was also the submission of **Mrs. Chumba** that, since **Annah Mugun** was not an administrator of the estate of the deceased, **Chepkulul Arap Mugun**, she had no authority to enter into a land sale transaction with the applicant in respect of the estate property. She therefore concluded her submissions by stating that the cases relied on by the applicant's counsel are distinguishable and therefore inapplicable to the facts of this case, granted that the applicant herein has no relationship with the deceased. Thus, **Mrs. Chumba** prayed for the dismissal of the application dated **15 June 2020** with costs.

[15] The background to the application is that, the deceased, **Chepkulul Arap Mugun**, died intestate on **12 March 2013** at Saniak in Nandi County. According to the Affidavit in Support of the Petition, Form P&A 5, the deceased was survived by his widow, **Cherotich Mugun** and the following sons and daughters:

- [a] Philip Some Rono – son
- [b] Jane Chelagat – daughter
- [c] Hellen Jemeli – Daughter
- [d] Christine Jepkirui – Daughter
- [e] William Cheruiyot Rono – Son
- [f] Elijah Kimutai – Son

[16] The assets of the deceased, as set out in Form P&A 5, were the following pieces of land, worth approximately **Kshs. 30,000,000/=**:

- [a] Nandi/Kamoiwo/455
- [b] Nandi/Kamoiwo/446
- [c] Nandi/Kamoiwo/426

[17] In support of the petition for Grant of Letters of Administration Intestate filed on **4 September 2018**; **Cherotich Mugun** filed a letter from the area chief dated **27 September 2016**, stating that the deceased was survived by, not just one, but two widows; who included **Annah Mugun**, with whom the deceased had the following children:

- [a] Samson Kibet Rono
- [b] Salomon Kiplimo Rono
- [c] James Kipkosgei Rono
- [d] Charles Kiprotich Rono
- [e] Joyline Jerop

[18] There is another letter on the record, dated **27 September 2016**, attributed to the same chief; and in addition to reiterating the fact that the deceased was married to two wives, it states that, prior to the death of the deceased, the 1<sup>st</sup> widow, **Cherotich Mugun** had been occupying **Plot No. 455** measuring 11.33 Ha; while **Annah Mugun** was living and using the deceased's two pieces of land known as Land Parcel **No. 446** measuring 5.0 Ha and Land Parcel **No. 426** measuring 2.2 Ha. It emerged therefore that the deceased had more dependants than had earlier been disclosed. The record also reveals that, in the course of time, two of the sons of the deceased, namely **Samson Kibet Rono** and **James Kipkosgei Rono** (both from the 2<sup>nd</sup> house), were enjoined as co-petitioners with the 1<sup>st</sup> widow, **Cherotich Mugun**.

[19] A fresh letter of consent was also filed on **25 October 2018** bearing the following names as the correct list of the deceased's beneficiaries:

- [a] Anna Mugun- 2<sup>nd</sup> widow
- [b] Solomon Rono
- [c] Eunice Jepchirchir
- [d] Clara Jeruto
- [e] Magdaline Jeptum
- [f] Charles Kiprotich Rono
- [g] Sarah Jepkemboi
- [h] Milka Jepkoech
- [i] Joyline Jerop

[20] The petition was thereafter processed and a Grant of Letters of Administration Intestate issued on **17 June 2019** to **Cherotich Mugun**, **Samson Kibet Rono** and **James Kipkosgei Rono** with the knowledge and consent of the 2<sup>nd</sup> widow and the other beneficiaries. It was therefore interesting to note that one of the administrators, **James Kipkosgei Rono**, opted to file the summons dated **13 February 2020**

through the law firm of **J.C. Chumba & Co. Advocates**, seeking for an order of temporary injunction to restrain the 1<sup>st</sup> widow and her sons, **William Cheruiyot Rono** and **Philip Some Rono** from evicting him from the parcel of land known as **Nandi/Kamoiywo/445** pending the confirmation of grant. Thus, the ensuing scenario is that, while the firm of **Kalya & Co. Advocates** is on record as acting for all the petitioners, including **James Kipkosgei Rono**, the application dated 13 February 2020 is being prosecuted by him through **J.C. Chumba & Co. Advocates**, against his co-administrators who have the mandate to act for the other beneficiaries for purposes of the orderly administration of the estate.

[21] It is also noteworthy that **Philip Some Rono** has since come on record as one of the administrators, following the demise of the 1<sup>st</sup> widow, **Cherotich Mugun**. An application to that effect dated **2 June 2020** was allowed by consent of all the parties on **26 June 2020**. It is also manifest from the record that, apart from the application dated **13 February 2020** and the instant application, **Philip Some Rono** and **William Cheruiyot Rono** also filed an application dated **23 June 2020**, praying for orders of injunction to restrain **James Kipkosgei Rono** from intermeddling with some 5 acres forming part of **Nandi/Kamoiywo/445**. Those two applications are pending hearing and determination.

[22] In the light of the foregoing background, the key issues for determination in respect of the application dated **15 June 2020** are:

- [a] Whether the applicant has the requisite *locus standi* to bring the instant application; and if so,
- [b] Whether the applicant has made out a case for the revocation of the grant issued herein on **17 June 2019**;
- [c] What, if any, is the effect of the orders issued in respect of the subject property by the Environment & Land Court in **Eldoret ELC Case No. 320 of 2017**.

[23] On *locus standi*, there is no dispute that the applicant, **Joshua Kibet Choge**, is neither a son nor a dependant of the deceased. His stake herein is premised on the contention that he entered into a land sale agreement for the purchase of a piece of the estate property known as **Nandi/Kamoiywo/446**. He produced the sale agreement dated **22 May 2017** as an exhibit in proof thereof; and to demonstrate that he bought 7 acres for **Kshs. 2,500,000/=** which he paid to the 2<sup>nd</sup> widow **Annah Mugun**. Such an agreement, if valid, would bestow on the applicant, as a purchaser, an identifiable stake in the estate of the deceased as a creditor; for **Section 76** of the **Law of Succession Act** recognizes that:

**"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 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 has ordered or allowed; 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 material particular; or
- (e) That the grant has become useless and inoperative through subsequent circumstances." (emphasis added)

[24] And, for purposes of **Section 76** of the **Law of Succession Act**, the Court of Appeal made it clear in **Musa Nyaribari Gekone & 2 others vs. Peter Miyienda & another** [2015] eKLR that:

"The expression **"any interested party"** as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of sections 66 and 39 of the Law of Succession Act. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an 'interested party' for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the Law of Succession Act. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the Law of Succession Act when he held that the 1<sup>st</sup> respondent has the *locus standi* to present the application for revocation of the grant. We agree with the learned Judge that the 1<sup>st</sup> respondent's interest as a purchaser of the property of the deceased qualifies him as an 'interested party' with standing to challenge the grant."

[25] Needless to say that the creditors envisaged within the framework of the **Law of Succession Act**, and in particular under **Section 66** thereof, are those persons who transacted with the deceased during his lifetime; In the instant matter, the sale agreement was made on **22 May 2017**; slightly over 4 years after the death of the deceased, and at a time when the grant was yet to be applied for or issued. Clearly therefore, **Annah Mugun** had absolutely no right to sell a portion of the estate property to the applicant, since **Section 45** of the **Law of Succession Act** is explicit that:

**"(1) Except in so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."**

[26] Moreover, the proviso to **Section 82** of the **Law of Succession Act** is clear that **"...no immovable property shall be sold before confirmation of grant..."** It is plain therefore that both the applicant and Anna Mugun violated the provisions of **Sections 45** and **82** of the **Law of Succession** in engaging in a land sale agreement in respect of the property of a deceased person. Having thus flouted the law, the applicant was ill-advised to move the Court for relief on the basis of their illegal contract; for the maxim of *ex turpi causa non oritur actio* would come into play. In **Scott vs. Brown, Doering, McNab & Co.** (3) [1892] 2 QB 724, a case that has been followed in numerous court decisions in this jurisdiction, it was held that:

**"This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."**

[27] The foregoing being my view of the matter, it would be pointless to engage into a consideration of the merits of the application dated **15 June 2020**. The same is accordingly hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 15<sup>TH</sup> DAY OF DECEMBER 2020**

**OLGA SEWE**

**JUDGE**