



REPUBLIC OF KENYA



**In re Estate of Chelombet Arap Chemisto alias Chelambet Arap Chemisto (Deceased) (Probate & Administration Appeal E001 of 2022) [2025] KEHC 2815 (KLR) (11 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2815 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PROBATE & ADMINISTRATION APPEAL E001 OF 2022  
RN NYAKUNDI, J  
MARCH 11, 2025  
IN THE MATTER OF THE ESTATE OF CHELOMBET  
ARAP CHEMISTO ALIAS CHELAMBET AAP CHEMISTO**

**BETWEEN**

**DISMAS KIPRUTO KEROR ..... APPELLANT**

**AND**

**MOKICHO CHEPKURUI CHEPTOO ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the ruling in the Senior Principal Magistrate's court at Iten delivered by Hon. Caroline R.T. Ateya on 28<sup>th</sup> April, 2022. By way of background, the deceased in this cause died on 20<sup>th</sup> January, 1980. The Petitioner is his sister whereas the Objector who seeks to have the grant of letters of administration revoked is a nephew to the deceased. The trial court proceeded to hear the objection by way of viva voce evidence. The Objector called 5 witnesses in support of his objection while the petitioner called 4 witnesses in opposing the same, evidence which has been well articulated in the trial court's judgment.
2. The trial court in its judgment noted that after several court appearances it emerged that the person who had objections was actually the daughter in-law to the deceased, whose husband, the son to the deceased, had also passed away. The court went further to highlight that from the evidence presented before court, it was confirmed that the petitioner is the sister to the deceased. That at the time of death of the deceased, he had no wife or children. The objector was born in the year 1997. This was 12 years after the deceased passed on. That the objector is the son to Hellen Jepchirchir Chemisto. Hellen was married to Joseph Kipkeror Chemisto. Joseph was the brother to the deceased herein. Further, according to the trial court, the evidence also indicated that the Objector was not the son to Joseph. That at the time Hellen got married to Joseph in the year 2007, the Objector was 10 years old. This means that the Objector was the step-son to the brother of the deceased.



3. The trial court proceeded to consider the summons for revocation under the lens of Section 76 of the *Law of Succession Act* and found the same without merit. In affirming this position, the learned magistrate decreed that there was no fraud or concealment of material facts on the part of the Petitioner in making the application for confirmation of grant and as such the Objector's application was dismissed.
4. Aggrieved with the said decision, the Appellant has approached this court on the following grounds of appeal as captured in the Memorandum of Appeal dated 24<sup>th</sup> May, 2022:
  - a. That the learned magistrate erred in law and fact in failing to take into account the fact that the appellant is a dependant of the deceased estate.
  - b. That the learned magistrate erred in law and fact by not taking into account the fraud and concealment of material facts with regards to the dependants of the deceased estate.
  - c. That the learned magistrate erred in law and fact by failing to recognize that the appellant and his siblings were entitled to the property of the deceased.
  - d. That the learned magistrate erred in law and fact by misinterpreting the principles applicable in the Law of Succession and more particularly section 26, 29, 39 and 76 of the Law of Succession.
  - e. That the Learned Magistrate erred in law and fact by finding the Respondent as the sole beneficiary of the estate.
  - f. That the learned magistrate erred in law and in fact by finding that there was no fraud or concealment of material facts on the part of the Respondent in making the application for confirmation of grant.
  - g. That the learned magistrate erred in fact and law by finding that the appellant presented to court information that is not factual.
  - h. That the learned magistrate erred in law and fact by failing to weigh the evidence on record which tilted in favour of the appellant.
  - i. That the learned magistrate erred in law and fact in failing to take into account the collective interest of the appellant's siblings who are orphaned and in occupation of the suit property in question.
  - j. That the learned magistrate erred in law and fact in failing to take into consideration that all dependants are equal for the purpose of succession and a right to inherit.
  - k. That the learned magistrate erred in law and fact by ruling in favour of the Respondent despite overwhelming evidence justifying revocation and annulment of Grant of Letters of Administration.
5. The parties took directions to canvass the appeal through written submissions. However, at the time of preparing this judgment, only the Respondent's submissions were available on record.

### **Respondent's submissions**

6. Learned Counsel Mr. Wafula submitted on behalf of the Respondent that the instant appeal is devoid of merit and deserves a dismissal. Counsel started by submitting that this being a first appeal, the court is under a duty to re-evaluate and assess the evidence on record and make its own conclusions, but as the court does that it should keep in mind that the trial court, unlike the appellate court had the



advantage of observing the demeanor of the witnesses and hearing their evidence first hand. On this, Learned Counsel cited the decisions in Mbogo and another v. Shah (1968) EA 96 and Peters v. Sunday Post Limited (1958) EA 424.

7. Mr. Wafula maintained that the appellant's claim as a dependant was fundamentally flawed from its inception. The temporal impossibility of this claim was highlighted by the fact that the appellant, born in Nandi in 1997, could not have been a dependant of Chelombet Arap Chemisto who passed away in 1985.
8. In developing this position, Learned Counsel drew the Court's attention to the critical distinction in tribal lineage, noting that while the appellant hails from the Nandi tribe, the respondent belongs to the Keiyo tribe. This distinction, Counsel argued, served to further undermine the appellant's claims of familial connection to the deceased.
9. Counsel detailed the appellant's misrepresentations to the Registrar of Persons and Death. These included falsely claiming to be the deceased's son, providing incorrect information about the year of death (stating 1980 when it was actually 1985), and misrepresenting the deceased's age at death (claiming 98 years when the deceased was 48 years old at the time of passing).
10. In fortifying the submissions regarding succession rights, Counsel relied on the authority of *In re Estate o Mungiria M'Runguchi (deceased)* (succession Cause 507 of 2015) [2022] KEHC 2222 (KLR).
11. Learned Counsel further submitted on the oral will made by the deceased two weeks before his death. In this disposition, Joseph Chemisto alias Makerere received 4 cows while the respondent was given a cow and the disputed land. Significantly, Counsel emphasized that Makerere, who died in 2009, never contested this distribution during his lifetime, having been satisfied with his portion.
12. Counsel presented evidence that the appellant had sold land for Kshs. 1,300,000/-, arguing this demonstrated a pattern of compulsive gambling behaviour that required judicial intervention to curtail.
13. In his conclusory submissions, Mr. Wafula passionately urged the Court to dismiss the appeal with costs on the higher scale. This plea was particularly poignant as Counsel emphasized that such dismissal would enable the octogenarian respondent, characterized as a vulnerable member of society, to enjoy the fruits of her judgment in her sunset years.

### **Analysis and determination**

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
15. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”



16. The established legal principle holds that appellate courts exercise significant restraint when reviewing factual determinations made by trial courts. When a trial court has thoroughly evaluated evidence and assessed facts, appellate courts should not substitute their own interpretation for that of the trial court. This principle stems from the fundamental understanding that determining primary facts falls squarely within the trial court's domain. The law presumes that a trial court or tribunal's factual findings are accurate and will remain so unless successfully challenged by the contesting party. The Court, in *Archibong v. State* (2022) 1 NWLR (Pt. 1811) 239 @ P. 254-255, paras. H-F puts it aptly:
- “Findings on primary facts are matters within the province of a trial court and there is a rebuttable presumption that a trial court's findings and conclusions on facts are correct. Therefore, such findings of fact are accorded due respect in appellate courts. An appellate court will very rarely, if at all, interfere with the findings of fact made by the trial court. This is because such findings of fact enjoy the privilege of passing through the furnace of acrimonious cross-examination, the toothcomb scrutiny of the observation of the witnesses' reactions and assessment of the veracity of their testimonies. In effect, such findings of fact made by a trial court are accorded due respect in appellate courts that did not have the advantage of the trial court.
17. In this matter, the primary issue for determination revolves around whether the trial court erred in dismissing the objection to the grant of letters of administration. After careful consideration of the evidence on record and submissions made, several crucial facts emerge that require this court's attention.
18. Firstly, there exists an insurmountable temporal impossibility in the Appellant's claim of being a dependant of the deceased. The deceased passed away in 1985, while the Appellant was born in 1997, twelve years after the death of the deceased. This fact alone fundamentally undermines the Appellant's claim of dependency.
19. Secondly, the evidence reveals significant discrepancies in the Appellant's representations to various authorities. The court notes with concern the following misrepresentations: False declaration of being the deceased's son, Incorrect reporting of the year of death (1980 instead of 1985), Misstatement of the deceased's age at death (98 years instead of the actual 48 years).
20. Thirdly, the court takes judicial notice of the oral will made by the deceased two weeks prior to his death, which was properly evidenced before the trial court. This disposition clearly delineated the distribution of his estate, allocating four cows to Joseph Chemisto (alias Makerere) and both a cow and the disputed land to the Respondent. It is significant that Makerere, who passed away in 2009, never contested this distribution during his lifetime.
21. Thirdly, the court takes judicial notice of the oral will made by the deceased two weeks prior to his death, which was properly evidenced before the trial court. This disposition clearly delineated the distribution of his estate, allocating four cows to Joseph Chemisto (alias Makerere) and both a cow and the disputed land to the Respondent. It is significant that Makerere, who passed away in 2009, never contested this distribution during his lifetime.
22. The Appellant's grounds of appeal largely center on alleged errors in interpreting the *Law of Succession Act*, particularly sections 26, 29, 39, and 76. However, these provisions must be read in light of the factual matrix established above. The law cannot create rights where none existed at the time of the deceased's death.



23. This Court finds that the learned magistrate exercised sound judicial discretion in evaluating the evidence presented. The finding that there was no fraud or concealment of material facts on the part of the Respondent was not only well-founded but supported by both documentary evidence and consistent witness testimonies. The trial court's detailed analysis of the temporal impossibility of the Appellant's claims demonstrates the careful consideration given to all material facts.
24. In conclusion, this Court finds the appeal to be both legally untenable and factually unsustainable. The Appellant's claims are fundamentally undermined by the irreconcilable chronological contradiction of asserting dependency on a deceased person who passed away twelve years before the Appellant's birth. Furthermore, the documented misrepresentations to various authorities regarding the deceased's details suggest a pattern of conduct that this Court cannot sanction.
25. Having carefully considered the grounds of appeal, submissions, and evidence on record, this Court finds no merit in the appeal. Accordingly, the following orders are made:
- a. The appeal is hereby dismissed in its entirety.
  - b. The ruling and orders of the Senior Principal Magistrate's Court at Iten delivered on April 28, 2022, are hereby upheld.
  - c. The costs of the appeal shall be borne by the Appellant.
26. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11<sup>TH</sup> DAY OF MARCH 2025**

.....

**R. NYAKUNDI**  
**JUDGE**

