In re Estate of John Kiptoo Kipserem (Deceased) (Succession Cause 426 of 2014) [2025] KEHC 5925 (KLR) (7 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5925 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 426 OF 2014

E OMINDE, J

MAY 7, 2025

BETWEEN

NELLY JEPKORIR ..... 1ST APPLICANT

DENNIS KIPKOGEI KIBET ..... 2ND APPLICANT

AND

ABIGAEL KIPTOO ..... RESPONDENT

RULING

1. This Ruling is with respect to a Summons for Revocation of Grant dated 17/09/2024 seeking the following orders;

   i. Spent

   ii. That the grant of letters of administration made to ABIGAEL KIPTOO by Honourable Court on the 29th day of February 2015 and confirmed on 29th June 2016 be revoked/annulled.

   iii. Spent.

   iv. That the costs of this application be awarded to the applicants.

2. The application is premised on the grounds on the face of it and the contents of the affidavits sworn by the Applicants.

3. In the affidavit, the 1st Applicant deponed that she is a wife to the deceased and further, that the Petitioner excluded the following beneficiaries to the estate; Sennis Kipkogei Kibet, Viola Jepngetich, Fredrick Kimaiyo and Nelly Jepkorir. She additionally stated that the deceased was the registered owner of Eldoret Municipality Block 2/2X9 measuring 0.0278 Ha., Uasin Gishu/ Ainabkoi West/1X1 measuring 22.5 Ha and Shares at KCB Bank. Additionally, that the deceased had also bought a parcel of land measuring 0.50 acres at Outspan Eldoret being Pioneer Ngeria Block 1 (EATEC)/7XX5.

4. The deponent stated that the deceased was a son of Kipserem Kotut who passed away in 1994 whereas the deceased passed away in 1992. Further, that Kipserem Kotut owned property which was to be shared and used for the benefit of all his children and their families. She urged that following the death of Joseph Kibet Serem in 1992 and Kipserem Kotut in 1994, the responsibility of caring for the family was bestowed upon John Kiptoo Kipserem. He was also in charge of the joint family assets and income, which income he used to purchase the land parcel number Eldoret Municipality Block 2/XX9, Pioneer/Ngeria Block 1 (EATEC/7XX5, a plot at Kipkaren Estate in Eldoret. Additionally, that land parcel number Uasin Gishu/ Ainabkoi West/1X1 belonged to Kipserem Kotut though later registered in the name of the deceased. She urged that it ought to be shared by all his children and widows but the petitioner's mother took it.

5. The deponent stated that land parcel number Eldoret Municipality Block 2/2X9 being land that was acquired through proceeds of the family assets, it ought to be shared by the children of Kipserem Kotut as the deceased was only registered as a trustee for his siblings. She urged that the petitioner secretly filed the petition and proceed to distribute the estate to her mother solely while knowing very well that the deceased was polygamous and had left other beneficiaries surviving him who were not named in the petition. Further, that they tried to convene a family meeting on 12/12/2023 to settle the matter but it was fruitless. It escalated to the area chief where it became known that the petitioner is the sole administrator and no agreement was reached. She urged that as a result of the petitioner's actions an injustice has been done to the applicants as they have been completely disinherited from the estate of the deceased.

Replying Affidavit.

6. The Respondent opposed the application vide a Replying Affidavit dated 25/10/2024. She averred that the application is an afterthought and has been brought after an inordinately long delay. Further, that the application is misconceived, lacks merit and is otherwise an abuse of this honourable court process.

7. The deponent stated that the allegations in paragraph 5, 12, 13 and 14 of the affidavit are untrue since no evidence has been presented before this court to substantiate the same. Further, that the birth certificate of the 2nd Applicant indicate his father is Joseph Kibet Serem who raised him. Further, that prior to his demise, he had acquired properties of his own and at no single time did the 2nd applicant depend on the deceased in any way. She urged that the 2nd applicant has not established any sufficient link between him and the deceased during the deceased lifetime to persuade the court to grant the orders sought.

8. The deponent urged that the 1st applicant has failed to demonstrate that she was a wife to the deceased for the purposes of succession or that she has an interest in the estate of the deceased as a wife. Further, that the letter dated 7th May 2024 from assistant chief for Kapsengwet Sub Location is misleading given that the applicants are not beneficiaries from the estate of the deceased. She stated that in any event, the assistant chiefs' letter is not conclusive evidence that the 1st applicant is a wife of the deceased. Further, that the letter from the area chief dated 6th December 2013 states clearly that the deceased left behind his only wife Eunice Wamboi Kiptoo and the said chief is more than ready to attest to that.

9. The petitioner stated that following the demise of the deceased, the applicants did not show up or attend the funeral to identify themselves as either wife or dependants to the deceased. Further, that after burial of the deceased, 'makumbusho' in commemoration and honour of deceased was held and again the applicants never attended it and never raised the issue of them being a wife to the deceased or being dependants to the deceased.

10. The petitioner disputed the contents of paragraph 15 and 17 of the affidavit in support of the application, urging that the deceased bought land parcel No. Eldoret Municipality Block 2/2X9 in the 1990s using his own money and, further, that the deceased acquired land parcel No. UASIN G1SHU / Ainabkoi West/1X1 from Chebet Ego and the same was transferred into his name during the lifetime of the late Chebet Ego now deceased.

11. The petitioner urged that the minutes relied upon by the applicants are of 2nd May 2024 long after the grant issued hereto had already been confirmed and properties transferred to the beneficiary of the deceased and the legal wife of the deceased namely Eunice Wamboi Kiptoo, which properties have already been transferred into her name. She further deponed that it is questionable for the applicants waited from the year 2003 to 2024 to claim the estate of the deceased. She additionally deponed that the 1st applicant has failed to demonstrate that her existence or the existence of 2nd applicant was within her knowledge at the time of applying for grant herein to warrant the revocation of the grant.

12. The petitioner stated that she applied for the grant as the legal daughter to the deceased as per the Provisions of Section 66 of the *Law of Succession Act* which fact is not disputed and further, that there is no breach of Section 76 of the *Law of Succession Act* on her part. She urged that the applicants do not deserve the orders sought given that they are strangers to the estate of the deceased. Additionally, she stated that she did not conceal any material information as at the time of applying for letters of administration and that the applicants have failed to demonstrate the conditions to be satisfied for the Revocation or Annulment of Grant under Section 76 of the *Law of Succession Act*.

Applicants' Supplementary Affidavit.

13. The applicants filed a supplementary affidavit, sworn by the 2nd Applicant, in response to the petitioners' Replying Affidavit. He urged that since his childhood, he lived with the deceased who had taken him as his son and he was fully dependent on him. Further, that the deceased allowed him to put up a home in a section of the property UASIN GISHU/AINABKOI WEST/1X1 and to also plant trees. He stated that the deceased had shown him a portion of the property which he desired would be given to him and the family of the deceased including the petitioner and her mother were all aware of his status. He stated that he always participated in family meetings where he was recognized as a child of the deceased.

14. The deponent averred that he has been left desolate without any provision from his estate even though he depended on him from the age of six. He prayed that the court revokes the grant so that he may be provided for.

Hearing of the application.

15. The parties filed submissions on the application. The applicant filed submissions dated 28/01/2025 through the firm of Messrs. Keter Nyolei & Co Advocates whereas the respondent filed submissions dated 17/02/2025 through the firm of Mukabane Kagunza & Co. Advocates.

Applicant's submissions.

16. Learned counsel for the applicant submitted that the 2nd applicant has demonstrated that though he is not a biological son of the deceased, he is a dependant in terms of the provisions of Section 29 of the *Law of Succession Act*. According to him, he was brought up and raised by the deceased as his own son from the time he was six years until adulthood, he knew no other home and was regarded by the deceased and his family as the son of the deceased. He participated in family meetings where in all those occasions he was being recognized as a son of the deceased. Indeed, the deceased had allowed him to

put up a home in a section of his property namely Uasin Gishu/Ainabkoi West/1X1 and also to plant trees. He was solely dependent on the deceased and by being left without and provision from his estate, a grave injustice has been meted against him.

17. In addition, it is contended that the property being Uasin Gishu/Ainabkoi West/111 belonged to the father of the deceased but upon his death was registered in the name of his son, the deceased the subject of these proceedings. The registration was done as he was the eldest son of the late Kipserem Kotut as a trustee for his siblings. Similarly parcel number Eldoret Municipality Block 2/2X9 was acquired through proceeds of family assets and ought to be shared by all the children of the late Kipserem Kotut, the lather of the deceased in these proceedings. Counsel submitted that the sisters of the deceased though entitled to a share of the estate by virtue of the above, were also left out and disinherited.

18. Counsel reiterated that the petitioner secretly filed the petition and proceeded to distribute the entire estate to her mother while knowing very well that the deceased was polygamous and left out other beneficiaries. He urged that the grant and certificate of confirmation made to the respondent ought to be revoked or annulled to give the parties an opportunity to ventilate in fresh proceedings over the issue of the grant and distribution of the estate of the deceased.

Respondent/Petitioners' Submissions.

19. Learned counsel for the respondent submitted that the 2nd applicant did not seek prayers on the issue of dependency within the ambit of Section 26 and 29 of the *Law of Succession Act* but instead brought the current application under section 47 and 76 of the *Law of Succession Act* that deals with revocation of grant alone. He submitted that there is no substantive prayer for dependency in the application thus the court cannot issue orders for prayers that have not been pleaded. To support this contention, counsel relied on the case of Fertilizer Corporation of India Ltd vs Sarat Chandra Rath AIR 1996 SC 2744 and the case of Galaxy Paints Co. Ltd vs. Falcon Guards Ltd EALR (2000)2 EA 385.

20. Om whether the applicant has proved dependency, counsel cited the case of Njoki vs Mothara and Others Civil Appeal No 71 of 1989 (UR) and submitted that the burden of proof in proving dependency is on the party who claims it. Further, that if the 2nd applicant was a dependant of the deceased as alleged, he would have featured as being part of the deceased's family and even in the time of eulogy reading, the 2nd applicant would have protested his exclusion from the same. He urged that he was not involved in any burial arrangements and was therefore not known to have any relationship with the deceased.

21. Counsel urged that the 2nd applicant never produced any fee structures, receipts of purchase of basic necessities made by the deceased in respect of maintenance to the 2nd applicant. Further, that the 2nd applicant has not provided any photographs to prove recognition of the applicant by the deceased. He stated that the deceased died in 2003 while on record, there is a request for bursary by the 2nd applicant filled in the year 2002, which confirms that deceased never paid for the 2nd applicant's fees in any way.

22. Counsel submitted that the allegations by the 2nd applicant that there is a house which was built for him on the deceased land and, that he was also allowed to plant trees are false. That the Respondent clarified that the house that the 2nd applicant was referring to was built by the deceased for male visitors, workers and grandchildren and the trees on the land were planted by Eunice Wamboi Kiptoo the lawful wife to the deceased, which trees are barely three years old as of now. Counsel reiterated that there was no evidence produced with regards to dependency.

23. Counsel submitted that Section 107 of the *Evidence Act* places the burden of proof on the party that alleges. He cited the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others (2014) eKLR on burden of proof.

24. On whether the 1st applicant proved that she is a wife to the deceased, counsel urged that the 1st applicant has not tendered any evidence as proof of marriage between the deceased and herself. Further, that the 1st applicant has not provided any photographs to prove recognition of the applicant by the deceased and/or recognition by the deceased family. He stated that the letter dated 7th May 2024 from assistant chief for Kapsengwet sub location is misleading given that the 1st applicant is not a beneficiary to the estate of the deceased. He reiterated that the letter is not conclusive evidence that the 1st applicant is a wife of the deceased. Further, that the letter from area chief Ainabkoi Kapsengwet location dated 6th December 2013 states clearly that the deceased left behind his only wife Eunice Wamboi Kiptoo.

25. Counsel cited the case of Helen Turn vs. Jepkoech Tapkili Metto & another [2018] eKLR and reiterated that the applicant never produced any exhibit to prove that there was a customary marriage in existence between her and the deceased and instead chose to forge a purported dowry agreement which is a subject of investigation by the police. Further, that the 1st applicant did not establish that there was marriage conducted in accordance with the tenets of Keiyo Customary law. In this regard, counsel placed reliance on the decision in Eva Naima Kaaka & Anor v Tabitha Waithera Mararo [2018] eKLR which referenced the essentials of a marriage under Kikuyu Customary Law as set out in Cotran's 'Casebook on Kenya Customary Law'. He additionally cited the case of Mary Njoki vs John Kinyanjui Muthru [1985] eKLR where the elements that must exist for a customary marriage to be deemed as a marriage was reiterated.

26. On whether the grant should be revoked, counsel submitted that the grounds upon which a grant may be revoked are stipulated in Section 76 of the *Law of Succession Act* and further, that the Court of Appeal laid down the principles set out in statute in the case of Matheka and Another vs Matheka (2005) 2 KLR 455. He submitted that the Grant of Letters of Administration intestate was issued on 29th February 2015 and confirmed on 29th June 2016 and from that time, until 2024 being 8 years down the line, is the time when the applicants decided to institute this instant application which is very suspicious.

27. That the applicants have not explained the considerable delay in challenging the grant having waited many years after its issuance and confirmation to raise these allegations. He urged that the grant cannot be revoked on the said grounds since the applicants have led evidence to persuade this court to revoke the grant for the reason that the applicants are strangers to the estate of the deceased. He urged the court to dismiss the application.

Analysis & Determination.

28. Having considered and addressed my mind to the pleadings as well as the submissions by both parties, it is my considered opinion that the only issue for determination is

> whether the Applicants have met the conditions and/or threshold for the revocation/ annulment of the grant herein issued as set out in Section 76 of the *Law of Succession Act*.

29. Section 76 of the *Law of Succession Act* provides as follows:

> "
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> "76. Revocation or annulment of grant

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."

30. The relevant provisions of Section 76 that set out the circumstances in which a grant can be revoked are paragraphs *(a)*, *(b)*, and *(c)* as herein above underlined by way of emphasis. In the instant case, from my consideration of the pleadings, it is evident that the Applicants want the grant annulled under the provisions of Section 76 (b) and (c) which is to the effect that the Petitioner in filing the Petition for Grant of Letters of Administration, failed to disclose that the deceased had another wife being the 1st Applicant and a dependant being the 2nd Applicant who states that he was a dependant in the circumstances herein summarised. The burden of proving that which the Applicant allege then lay with them as provided under the provisions of Section 109 of the *Evidence Act*, CAP 80 of the Laws of Kenya which states that: -

'The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.'

31. On whether the 1st Applicant was a wife to the deceased, the Court notes that it is her case that she got married to the deceased under African Customary Law. She deposed that a traditional marriage ceremony was held on 10th October 1999 under Keiyo Customary Law in the presence of the deceased family and clan members where bride price was discussed and agreed as is customary under that customary law. She annexed a copy of the agreement which was signed by the deceased, herself and other witnesses as NJ1. The same is on a quarter page of paper and is in a language that the Court is unable to decipher. It should be noted that much as the Applicant was represented, Counsel did not consider availing an interpreted equivalent to Court.

32. The Court also noted that it was not deposed whether the pride price discussed was subsequently paid. On the basis of this evidence, the 1st Applicant seeks that the Court presumes that there existed a marriage between her and the deceased which entitles her to a share of the Estate. She went further

to state that out of this union, a child was born and she annexed the relevant Birth Certificate of the said child as NJ2. The Court shall proceed on this averment against the backdrop of the fact that the 1st Applicant's assertion that she is a wife to the deceased is vehemently opposed by the Petitioner herein for the reasons already herein summarized.

33. The principles that form the basis of a Presumption of Marriage were set out by the Court of Appeal for East Africa decision (Wambuzi P, Mustafa VP and Musoke JA) and were outlined in Mary Njoki v John Kinyanjui Mutheru & 3 Others, (Mary Njoki) [1985] EKLR by Kneller JA as follows:

    a. The onus of proving customary law marriage is generally on the party who claims it;

    b. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;

    c. Evidence as to the formalities required for a customary law marriage must be proved to that standard; (Mwagiru v Mumbi, [1967] EA 639, 642)

    d. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;

    e. Only cogent evidence to the contrary can rebut the presumption (Toplin Watson v Tate [1937] 3 All ER 105)

    f. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (Sastry Veliader Aronegary v Sembecutty Vaigalie (1880-1) 6 AC 364; Shepherd George v Thye, [1904] 1 Ch 456)

34. In considering these principles as against the evidence upon which the 1st Applicant seeks to rely, I am of the finding that apart from the assertion made by the Applicant and the NJ1, there is basically no evidence at all to support the assertion. There is no evidence adduced to show that there were formalities that were performed to lead to the Court to presume that a marriage existed between her and the deceased. There is also nothing to show that she cohabited with the deceased if at all and if so where and here I do agree with the Petitioner that her allegation that she lived with the deceased with her co wife in the same house until his demise is not practical. There is also no evidence availed to show that within the vicinity where they cohabited (if at all) they were held out as husband and wife. There is also no evidence that she participated in the burial arrangements of the deceased and/or all other ceremonies thereafter.

35. The letter from the Area Chief stating that she too was a wife to the deceased was written on 7th May 2024 for a deceased who died in the year 2003. The Petitioner contends that the said letter is a forgery and she has made the relevant report to the Police. But that aside, the fact that this later has come so late in time, coupled with the fact that the Applicant who states that she was a legally recognised wife of the deceased is coming to Court 24 years after the fact of the death of her husband to claim her share of the inheritance beats logic and only goes to lend credence to the deposition by the Petitioner that this Application has been brought as an afterthought. In light of all the above, on a balance of probabilities, it is my finding that the 1st Petitioner has failed to satisfy the Court that she was indeed married to the deceased under Keiyo Customary Law to warrant the Court making a presumption of marriage in her favour and therefore entitling her to a share of the deceased estate.

36. On whether the 2nd Applicant has sufficiently proved that he was a dependant of the deceased. Section 29(a) of the *Law of Succession Act* is relevant. It defines a 'dependant' to mean; -

    " For the purposes of this Part, "dependant" means—

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;"

37. In Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others (2016) eKLR, the court observed that:

> " A dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts."

38. In the instant case, having addressed my mind to the evidence as adduced by the 2nd Applicant in his assertion that he was a dependant of the deceased from the age of six (6) years as herein summarized, I note that there is largely no evidence proffered to support this claim. Emphasis has been placed by this Applicant on the documents annexed to his Supplementary Affidavit and marked as DKK3 and DKK4. These are minutes of family meetings where he is marked as present as part of the family. The Court however notes that the said documents has persons marked as present as part of the family and who are not exclusively members of the family of the deceased herein. They would therefore qualify as gatherings of the larger family. In this regard, the court takes into account the explanation of the 1st Applicant in her Supporting Affidavit that the 2nd Applicant is a dependant by dint of the fact that he was a son of the deceased late brother. As such, it would not be untoward for the 2nd Applicant to be present in the larger family meetings because he is in fact family.

39. Given the above context therefore, the said documents cannot be taken to be conclusive proof that the 1st Applicant was present in those gatherings solely as a son of the deceased. Further to the above, the Petitioner availed a bursary application form made by the 2nd Applicant in the year 2002 when the deceased was still alive as proof that the Applicant was not dependent on the deceased at all because if he was he would not have been looking for a bursary during the deceased lifetime. She also clarified the use of the house claimed by the 2nd Applicant to be his, as well as an explanation on who planted the trees the said Applicant claims he planted as already herein summarized. These facts were not at all rebutted and/or controverted. All considered, on a balance of probabilities, I find that the 2nd Applicant too has failed to prove that he was a dependant of the deceased within the meaning Section 29(a) of the Succession Act to qualify as a beneficiary to the deceased estate.

40. Lastly on the issue of Viola Jepngetich Kiptoo whose Birth Certificate was produced by the 1st Applicant indicating that she was born of the 1st Applicant and the Deceased, the Court notes that the said Birth Certificate indicates that Viola was born on 30th May 2000. This places her at 25 years of age. In this regard, she is an adult, presumably of sound mind and is therefore capable of suing and being sued in her own name and on her on behalf. Because she is an adult, the court shall not address itself on her issue, even as the same has been highlighted by the 1st Applicant in her various affidavits because she is not a party to the suit

41. The upshot of all the above then is that it is my finding that the Application by the two Applicants has not met the conditions and/or threshold for the revocation/annulment of a grant as set out in Section 76 of the *Law of Succession Act*. The same therefore lacks merit and is dismissed in its entirety with costs to the Petitioner.

READ DATED AND SIGNED AT ELDORET ON 7TH MAY 2025

E. OMINDE

JUDGE.