



**In re Estate of Wilson Cherop (Deceased) (Succession Cause  
300 of 2007) [2024] KEHC 1336 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1336 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 300 OF 2007  
JRA WANANDA, J  
FEBRUARY 16, 2024**

**IN THE MATTER OF THE ESTATE OF WILSON CHEROP (DECEASED)**

**BETWEEN**

**PERIS JEPKEMBOI KIMUTAI ..... 1<sup>ST</sup> PETITIONER  
ISAAC KIBIWOTT CHEROP ..... 2<sup>ND</sup> PETITIONER  
FRANCIS KIPSANG KIMUTAI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**SOLOMON KIPSANG KIPTARUS ..... OBJECTOR**

**JUDGMENT**

1. The deceased, Wilson Cherop died on 21/10/2007 and left behind 4 widows and a big number of children. The deceased also left several parcels of land. Without wasting any time at all, on 2/11/2007, the 3 Petitioners in their capacities as widow and sons, respectively, of the deceased, applied for Grant of Probate of Written Will allegedly made by the deceased.
2. After some challenges and litigation from some family members, the Grant of Probate was eventually issued on 4/02/2008 to the Petitioners. On 11/08/2008, the Petitioners filed the Summons seeking confirmation of the Grant. However, before the Summons could be heard, the Objector emerged and on 14/11/2021 filed the Objection the subject of this Judgment.
3. The Objection is dated 11/11/2011 and is filed through Messrs J.K. Kiplagat & Co. Advocates. The ground advanced is that the deceased had sold part of the parcel of land L.R. No. Kaptagat/Kongasis/Block 1/122 measuring 1 acre to the Objector, that the Objector had paid a sum of Kshs 100,000/- as the purchase price and that the Objector is therefore an interested party. The Objection is supported by the Affidavit sworn by the Objector.



4. In the Affidavit, the Objector deponed that the deceased was his neighbour with whose family they had lived peacefully for many years at Kongasis within Uasin Gishu County, that on several occasions the deceased requested the Objector to purchase 1 acre from his 2 acres of the said parcel of land L.R. No. Kaptagat/Kongasis/ Block 1/122 to enable the deceased seek medical treatment for a heart ailment, that the land was to be divided into two portions, “A” and “B” each measuring 1 acre, that “A” was to remain as access to the river for the deceased’s family’s other land L.R. No. Kaptagat/Kongasis/ Block 1/185 and “B” to be transferred to the Objector upon payment of a sum of Kshs 100,000/-, that accordingly the two entered into a written Agreement for Sale on a willing buyer/willing seller basis and the Objector paid the sum of Kshs 100,000/- to the deceased through Messrs Birech & Co. Advocates, that to date the land has not been transferred to him nor has an alternative land been given to him, that the issue of refunding the money does not arise as the same was not a loan but money paid as purchase price, that the deceased had personally showed him the parcel of land and the location as indicated in the sketch map, that after the deceased died, he took possession but the sons refused and threatened him, that the area Chief sent a letter to the family about the issue but the family has refused to recognize the Objector’s ownership, that the deceased was the sole registered owner, the 3 Administrators of the deceased’s estate have applied for confirmation of Grant without recognizing the Objector and that the confirmation ought to be done only after his claim has been determined. The Objector exhibited a copy of the Sale Agreement dated 2/08/2004.

#### **Administrators’ Replying Affidavit**

5. In opposing the Application, the Administrators relied on the Replying Affidavit sworn by one Esther Jemutai Cherop and filed on 19/07/2023 through Messrs Tarus & Co. Advocates. She deponed that she is a widow of the deceased, that the deceased had 4 wives including herself and several children, that the matters alleged by the Objector are not true, that the Objector has filed a suit namely Eldoret Chief Magistrate Case No. 329 of 2007 and the same is pending for hearing and the matter is part-heard, that the Objector has never entered or occupied the suit property, that the relationship of the Objector with the deceased’s family has not been good, that she is not aware of the alleged sale of land, that the land was not available for sale since the family has been residing and farming on it, that the Objector and the deceased entered into another Agreement in October 2006 in which it was purported that a portion of the subject property was to be exchanged with a plot at Strawbag Centre and that this is the subject of the said Eldoret Chief Magistrate Case No. 329 of 2007 and that the only option for the Objector is to pursue a refund.

#### **Hearing of the Objection**

6. Directions were then given that the Objection would be heard vide viva voce evidence and the parties were directed to file Witness Statements and bundles of documents. Pursuant thereto, the Administrators filed theirs on 19/07/2021 while the Objector filed on 3/11/2021. The Objector also filed a Supplementary Affidavit.

#### **Administrators’ Statements**

7. 2 Widows of the deceased – Esther Jeruto Cherop and Esther Jemutai Cherop – filed separate but similar Statements. Basically, they both stated that the Objector is a stranger to them, that he has never resided in the subject property, that they are not aware of any transaction between the Objector and the deceased, and that as a family they reside on the property together with their children since when the deceased was still alive. As already deponed in the Replying Affidavit, they reiterated that they have learnt that the Objector and the deceased entered into another Agreement in October 2006 in which



it was purported that a portion of the subject property was to be exchanged with a plot elsewhere, and that the family is also opposed to this other Agreement.

### **Objector's Supplementary Affidavit**

8. In his Supplementary Affidavit, the Objector denied that there is any suit pending in respect of the estate of the deceased and himself, that all along he has been waiting in vain for the 1 acre of the subject property which he legally purchased to be transferred to him thus necessitating the filing of this Objection, that he had earlier been allowed to take possession of the portion after full payment but some family members of the deceased prevented him from doing so, that the Petitioners have been harassing and intimidating him whenever he demands the land, that he paid Kshs 100,000/- to the deceased which was equivalent to 1 acre to obtain the land and not to be refunded the money, that he took a loan in good faith as a neighbour so as to assist the deceased who was ailing by then and in need of medication, that he declined to take an alternative plot that the family offered him at a place known as Strawbag shopping centre because the same is not registered in the name of the deceased, that it is only just and fair that he be given the subject property as per the Sale Agreement dated 2/08/2004 drawn by Messrs Birech & Co. Advocates and that the deceased had enough land which is over 35 acres out and he only sold 1 acre to the Objector.

### **Objectors' Witness Statements**

9. In his Statement, the Objector reiterated the matters already set out above and added that pursuant to the letter dated 20/03/2006 from the law firm of Birech & Co. Advocates, the area Chief summoned the parties on 28/03/2006 for a discussion on the issue, that the family of the deceased requested for time to settle the matter amicably, that on 9/10/2006 the deceased who was still alive by then presented an offer to the Chief proposing to give the Objector land at Strawbag Centre, and that the Objector rejected the offer upon discovering that the land was not registered in the deceased's name.
10. In support of the Objector's case, one Gabriel Kipyakwai Kipkurui also filed a Statement. He stated that he is a retired Chief of Kipsinende location, that the deceased sold the said 1 acre portion of the subject property, that pursuant to the letter dated 20/03/2006 that he received from Messrs Birech & Co. Advocates, he summoned the parties to his office, that the deceased was still alive by then and together with his family requested to be allowed to settle the matter amicably at home, and that on 9/10/2006 the deceased came to him and presented an offer to give the Objector a plot located a Strawbag Centre.

### **Objector's Viva Voce Evidence**

11. PW 1 was the Objector. He basically reiterated the matters already set out in his Objection, Supporting Affidavit, Supplementary Affidavit and Witness Statement. He reiterated that he is not interested in a refund but wanted to be given the 1 acre that he purchased out of the property. In cross-examination, he stated that the deceased was his neighbour and told him that he had consulted his wives on the sale. He however conceded that neither the wives nor the children witnessed the sale Agreement. He stated that he conducted a search and confirmed that the land belonged to the deceased. He insisted that he wanted specific performance of the contract or refund of the money at current market value of the land.
12. PW2 was Gabriel Kipyakwai Kipkurui, the said retired Chief Kipsinende Location. He too reiterated the matters already set out in his Witness Statement. He stated that after summoning the deceased and his 2 wives and after discussions, the deceased and his wives agreed to settle the matter, and that he later heard that the deceased had died. In conclusion, he stated that the Objector should be given his land because it was a legitimate sale. In cross-examination, he stated that he was the area Chief for 24 years.



He agreed that he was not present when the Sale Agreement was entered into. In conclusion, he stated that the deceased later agreed to give the Objector another piece of land.

### **Administrators' Viva Voce Evidence**

13. DW 1 was Esther Jemutai Cherop. She adopted her Witness Statement. In cross-examination, she stated that they were 4 wives. She conceded that the Objector is known to her as a neighbour but denied knowledge of any Agreement between the deceased and the Objector for sale of the subject land. She also denied that the deceased sold the land to enable him cater for medical treatment and stated that it is only after the deceased died that she heard about the alleged sale from the Chief, that they had been to the Chief's office on two occasions but never agreed to resolve the matter, that the deceased never informed her of any alleged sale, that she has always lived on the land and she has never seen the Agreement.
14. DW2 was Esther Jeruto Cherop the other widow and she, too, adopted her Witness Statement. In cross-examination, she stated that they are 4 wives, herself and DW1 live on the property, that she knows the Objector as a neighbour, that he lives elsewhere but has a plot and a house in the area (Kongasis), that she has lived on the property since 1993 with DW1 although in separate plots, that the property is occupied by DW1, that she has never heard of any sale of the property by the deceased to the Objector, she heard it for the first time at the Chief's office after the death of the deceased, that the deceased never informed her of any such sale and she is not aware of any agreement made before the Chief, that the family occupies the land so there is nothing to give to the Objector, that they never agreed on anything with the Chief and she is not aware of the Agreement allegedly signed before Birech & Co. Advocates or the map allegedly drawn for the Objector, and that the Objector could have drawn it by himself. She however agreed that they can refund the Objector. In Re-examination, she reiterated that the subject property is occupied by her co-wife - DW1 - and claimed that the Chief was forcing them to concede that the sale was genuine.

### **Submissions**

15. Upon close of the trial, the parties filed written Submissions. The Objector's Counsel filed his on 10/07/2023 while the Administrators' Counsel filed on 29/09/2023.

### **Objectors' Submissions**

16. In his Submissions, Counsel for the Objector submitted that the Objector is a Creditor to the estate having purchased 1 acre of the subject property for a consideration of Kshs 100,000/-, that the Sale Agreement proves the same, that the subject property was disposed of by the deceased during his lifetime and what was left incomplete was only transfer thereof to the Objector. On the issue of the rights of such purchaser, he cited the case of Johnson Muinde Ngunza & Another vs Michael Gitau Kiarie & 12 Others [2017] eKLR and added that even though the deceased is the registered owner, he was just a mere trustee of the property and was under liability to transfer the 1 acre to the Objector who is now a creditor to the estate. He also cited the case of Mpatinga ole Kamuye vs Meliyo Tipango & 2 Others [2017] eKLR.
17. Counsel submitted further that the remaining part is the responsibility of the Administrators to transfer the land to the Objector once the Grant is issued, that it is the duty of the Administrators to disclose all material facts to the Court including existence of creditors, that the Chief's letter dated 28/03/2006 illustrates that the family of the deceased was aware of the existence of the Objector's claim even before filing of this Succession Cause but nonetheless disregarded it. He also cited the case of In Re Estate of Joseph Mutua Munguti (Deceased) [2018] eKLR. He further submitted that under the



Law of Succession Act only “free property” of the deceased is available for distribution. He cited Section 3 of the Act and also the case of *In Re Estate of Geoffrey Kamau (Deceased)* [2022] eKLR.

### Administrators’ Submissions

18. On his part, Counsel for the Administrators submitted that the Administrators’ witnesses, being wives of the deceased stated that the subject property is “matrimonial property” and that they were not aware nor were they involved in the alleged transaction, that the Objector was very much aware that the deceased was married at the time of the transaction but the spouses were not involved nor were their consents sought. He referred to Section 93 of the Land Registration Act, No. 3 of 2012 and submitted that where property is obtained during the subsistence of a marriage, it is to be dealt with under the Matrimonial Property Act, No. 49 of 2013, that the latter Act defines in Section 2 thereof what a “matrimonial home” is and “matrimonial property” is defined in Section 6 and that Section 12 addresses the situation such as the one in this case. He also cited the case of *Gissing v Gissing* (1970) 2 ALL ER 780 where, he submitted, the Court held that the Appellant’s interest in the matrimonial home was an overriding and unregistered interest which entitled her to remain in the property. He also cited the case of *Mugo Muiro Investments Ltd v EWB & 2 Others* [2017] eKLR.

### Analysis & Determination

19. Upon examination of the Pleadings, Affidavits, Submissions and the entire Record, I find the one broad issue that arises for determination in this matter to be as follows:

“Whether the deceased had, before his death, sold off 1-acre portion of the parcel of land known as Kaptagat/Kongasis Block/122 to the Objector and therefore whether such 1-acre portion comprises part of the deceased’s “free property” available for distribution as part of the deceased’s estate”

20. The first item that I have to grapple with here, although neither of the parties raised it, is whether the Objection is properly before this Court. This is because the Objector’s claim is in the nature of a creditor claiming to have purchased a portion of a parcel of land from the deceased during the lifetime of the deceased. The claim may therefore be deemed to be for determination by the Environment & Land Court (ELC) which is the Court clothed with the jurisdiction to hear and determine land disputes or to be heard as a civil suit under the law of trusts.

21. On this view, I cite, for instance, the case of *In re estate of Solomon Mwangi Waweru (deceased)* (2018) eKLR in which A.K. Ndungu J had the following to say:

“Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”

.....

“It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the



administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.

22. Similarly, in the case of *In Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, Musyoka J held as follows:

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *law of succession Act* is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land court. Consequently, and for the reasons above stated, I wish to find and hold that this court has no mandate to resolve the proprietary interest on land based on the alleged trust”.

23. However, upon carefully studying the matter and considering all relevant factors, I have come to the decision that the claim, though truly bearing aspects of a land dispute, can still be properly dealt with by this Court under the *Law of Succession Act*. I have considered that neither of the parties raised any challenge on jurisdiction and in fact, from the manner in which they have forcefully articulated their cases before this Court, both parties are in unanimity that the dispute is before the correct forum. This matter has also been in Court for the last 17 years having been filed in the year 2007. I do not believe it will be in the interest of justice to refer the Objection to another forum at this late stage and thereby further delay the conclusion of this matter. In my view, that would amount to dereliction and/or abdication of the duty of this Court. The parties have spent much time and resources in litigating over the Objection and “chasing” them away from this Court will be the height of insensitivity. Of course, I would have ruled otherwise if the issue of jurisdiction were crystal clear that this Court has no jurisdiction. However, I find this to be one of those borderline cases in which jurisdiction may be deemed to transcend or overlap two fora and it cannot be easily concluded that jurisdiction lies elsewhere. I may also add that although general rules of law and procedure apply to cases, it must also always be remembered that each case must be determined on its own facts. I will therefore proceed to entertain and determine the Objection.
24. Although in arguing the Objector’s case, Counsel for the Objector did not cite any provision of the law to support his submissions, in my finding above, I am fortified by the provisions of Rule 41(3) of the Probate and Administration Rules which stipulates as follows:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.”

25. I appreciate that under Rule 41(3) above, where a claim by a party claiming beneficial interest has been identified and recognized, the Probate Court’s recourse is then to set aside the share in question and let the issue of that share be determined by a civil Court and only proceed with distribution of such share



after the civil Court has made its determination. In this case however, for the reasons stated above, I see no need to refer that issue to another forum.

26. In view of the above, I am confident that the Objection can properly be determined before this Court under the *Law of Succession Act*. I also cite the case of *In re Estate of Joseph Mutua Munguti (Deceased)* [2018] eKLR where Odunga J (as he then was) remarked as follows:

“43. In this case the interests of the Objector and the Creditors were those of persons who had entered into sale agreements with the Deceased for the sale of portions of the lands forming part of the Deceased’s estate. If there were such agreements then their interests can be legitimately taken into account in distributing the estate of the deceased.”

27. There is also the holding of Gikonyo J in the case of *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR in which he stated as follows:

“(17) But before I close, the facts of this case bring me to the point where I feel I should state, albeit in passing, that, where the deceased had entered into some binding transactions, or where liability had attached against him or a right had accrued upon him, the death of the deceased does not discharge him from the obligations or liability, or obliterate his right under those transactions. The personal representative comes in to fulfil those obligation or liabilities, or to realize any right or benefit thereof for the estate of the deceased. That is why the law requires the personal representative to bring in all the estate property, to pay out all liabilities and discharge all obligations of the deceased. In my experience as a judge, I have seen dishonest parties seeking to defraud bona fide claimants especially in land transactions which the deceased did not complete due to his death, in the pretext of preserving the estate-and what they mostly cite is section 45 of the *Law of Succession Act* even where it is inapplicable. Circumstances of this case should be distinguished from a situation where the sale of land is done after the death of the deceased and before confirmation of grant.”

28. Although I have found that I shall entertain the Objector’s claim as a Creditor to the estate, I must caution that under the *Law of Succession Act*, recognition of such creditor’s claim can only be entertained by a Probate Court where it is demonstrated that the same crystallized during the lifetime of the deceased. Indeed, this was the holding of A.K. Ndungu J in the case of *In re Estate of Solomon Mwangi Waweru (Deceased)* [2018] eKLR in which he stated as follows:

“There is no doubt that the duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries and that its Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. Where it demonstrated that such claim has crystallized, a Probate Court is entitled to determine the claim.



29. Similarly, Mabeya J in the case of Alexander Mbaka vs. Royford Muriuki Rauni & 7 Others [2016] eKLR also stated as follows:

“It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.”

30. In this case, I am convinced that the Objector’s claim had crystallized during the lifetime of the deceased and is properly before this Court for determination.

31. Now, regarding the substantive issue - the alleged sale of the 1-acre portion of the subject property by the deceased to the Objector while the deceased was still alive - the Objector has produced a copy of the Agreement for Sale dated 2/08/2004. The Agreement is stated to have been prepared by Messrs Birech & Co. Advocates. The same is signed and witnessed and Clause 2 thereof indicates that the deceased acknowledged receipt of the full purchase price of Kshs 100,000/-. According to Clause 4 of the Agreement, the deceased is stated to have also confirmed that he had the blessings of his family to transact the sale and that he would attend before the Land Control Board for purposes of obtaining the Board’s consent to the transaction and facilitate sub-division and transfer.

32. The Administrators called two witnesses, both being widows of the deceased. Although they denied any knowledge of the Agreement, they had nothing to challenge the authenticity or genuineness of the Agreement. They did not allege that the Agreement is a forgery or that the signatures thereon were not genuine and neither was there any demand by the Administrators for the summoning of the Advocates who drew the Agreement or witnessed the signatures to come to Court for cross-examination. In the circumstances, the Court has no material or basis to doubt the Agreement and its contents.

33. I may also state that the mere fact that the deceased may not have informed the widows about the sale is of no assistance to the Administrators since the property was registered in the sole name of the deceased and he therefore had all the legal right to sell it. I agree it is indeed curious that the Objector never found it necessary to involve the widows or confirm that they were aware of or consented to the sale. It is also strange that the Objector paid the purchase price of Kshs 100,000/- to the deceased in cash without involving any witness. Be that as it may, in our deeply patriarchal society, it is not uncommon and, although it ought to be discouraged, it is in fact deemed an acceptable practice, particularly in the rural setting, for men to feel that they can dispose of their parcels of land without involving or informing their spouses or family. Further, under the law prevailing at that time, the deceased did not by law require the consent of the spouses to dispose of his property. The *Land Registration Act* which made it a requirement for a Vendor of an immovable property to obtain and supply the consent of the spouse only came into existence in the year 2012. The *Matrimonial Property Act* which brought in similar provisions also came in the year 2013. Both statutes were therefore enacted long after the sale herein was concluded in the year 2004. The explanation given by the deceased that the deceased sold him the land because he was ailing and needed money for medical treatment is also a plausible one.

34. Another factor which points to the sale as being genuine is the evidence that even before the deceased died, the local Chief, whose assistance was sought by the Objector through the said law firm of Birech & Co. Advocates, to help in compelling the deceased to complete the transfer, made a follow-up on the matter. The Chief gave evidence as PW2 and clearly stated that he summoned the parties to his office, that the deceased attended together with his two wives – DW1 and DW2. According to the Chief, the deceased and his wives sought for time to settle the matter amicably, that later on they came back



with an offer proposing to give to the Objector a different parcel of land at a place known as Strawbag Centre in exchange for the subject property. The Chief stated further that however before the matter could be resolved, he heard that the deceased had died. This same consistent account was also given by the Objector.

35. Although the widows – DW1 and DW2 – denied any knowledge of the said meetings before the Chief or the alleged offer made to the Objector, with due respect, I did not find them to be truthful witnesses. I do not believe that they were not aware of the intervention by the Chief. From their demeanour, I formed the opinion that they were fully aware of the sale but were simply feigning ignorance. I am also persuaded that they did attend the meetings before the Chief prior to the death of the deceased. The deceased may not have informed the wives about the sale at the beginning but at some point the wives must have learnt about it and opposed it hence the explanation for the deceased developing “cold feet” and failing to complete the transaction. It is therefore clear to my mind that the Administrators were fully aware of the Objector’s claims even as they filed this Succession Cause and the Summons for Confirmation of the Grant. The fact that they did not disclose this fact to the Court is evidence of dishonesty. Unlike the widows, I found the Chief’s evidence to be credible, truthful and honest and I do believe him.
36. I also take cognisance of the Summons for Confirmation filed by the Administrators, which although still pending for hearing, shows that there are about 8 other purchasers listed in the Schedule of distribution of assets. This therefore indicates that indeed the deceased had been selling some of his properties prior to his death.
37. In dealing with a similar matter, Makhandia, J (as he then was) in *Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002* held as follows:

“In the instant case the applicants are purchasers for value of a portion of the deceased’s estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises ... Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant.



In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

38. I note that the Administrators have alleged that the Objector filed a suit, namely Eldoret Chief Magistrate Case No. 329 of 2007. They have claimed that they learnt that the Objector and the deceased entered into another Agreement in October 2006 in which it was purported that a portion of the subject property was to be exchanged with a plot at Strawbag Centre and that this is the subject of the said Eldoret Chief Magistrate Case No. 329 of 2007. Strangely however, despite making these allegations in their Affidavit, they never exhibited copies of the Pleadings from that alleged suit nor did they produce the same during the trial. On his part, the Objector denied any knowledge of the alleged suit. In the circumstances, I have no material before me to enable me make any findings on the alleged suit or even confirm its existence.
39. The upshot of the above findings is that I am satisfied that indeed before his death, the deceased had sold off 1 acre out of the property Kaptagat/Plateau/Kongasis Block 1/22 - the portion marked “B” as appears in the sketch map exhibited in the Objector’s Supporting Affidavit and produced in evidence. As such the said portion “B” no longer comprised the deceased’s “free property” and is thus not available for distribution as part of his estate.
40. This being a probate Court whose role is limited to only identifying and distributing property comprising the estate of a deceased person, I cannot go beyond my above findings. Accordingly, I cannot purport to also determine whether the Objector should accept a refund from the family of the deceased or be given alternative parcel of land. That is a clear province of the Environment & Land Court (ELC) and straying into that area will be acting without jurisdiction. I leave it to the parties to negotiate on that issue should they deem it necessary.

### Final Orders

41. In the end, the I rule and order as follows:
- i. I make a declaration that before his death, the deceased had sold to the Objector 1-acre portion out of the 2-acre (0.80 Hectares) parcel of land known as **L.R. No. Kaptagat/Kongasis Block 1/122** being the area marked “**B**” in the sketch map produced in evidence herein (**hereinafter referred to as “portion B”**) and that the deceased received the agreed full purchase price of Kshs 100,000/- from the Objector.
  - ii. Accordingly, the said portion “**B**” is not part of the deceased’s “free property” and thus not available for distribution among the family members as beneficiaries.
  - iii. During distribution and/or confirmation of the Grant therefore, the said portion “**B**” shall vest in the Objector as the sole beneficiary.
  - iv. The Administrators’/Petitioners’ Summons for Confirmation pending for hearing, shall now be fixed for hearing save that in light of the declarations or orders made hereinabove in respect to the said portion “**B**”, the Schedule of distribution of assets shall need to be amended to reflect the said declarations or orders.



- v. Needless to state, the above orders do not in any way bar the parties from initiating and entering into negotiations geared towards reaching an agreement with the Objector for refund to the Objector of the value of the said portion.
- vi. Costs shall be in the Cause.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024**

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**WANANDA J.R. ANURO**

**JUDGE**

**Eldoret High Court Succession Cause No. 300 of 2007**

