



**In re Estate of the Late Kiptum Arap Naniwet (Deceased) (Succession Cause 182 of 2003) [2024] KEHC 2630 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2630 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
SUCCESSION CAUSE 182 OF 2003  
JK SERGON, J  
MARCH 5, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPTUM ARAP NANIWET (DECEASED)**

**BETWEEN**

**MARY CHEMUTAI TUM ..... 1<sup>ST</sup> APPLICANT  
KIMALIT ARAP TUM ..... 2<sup>ND</sup> APPLICANT  
JOSEPH KIPKEMOI TUM ..... 3<sup>RD</sup> APPLICANT  
ALICE KOE MABWAI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**RHODA CHEPKORIR NANIWET ..... 1<sup>ST</sup> RESPONDENT  
CATHERINE CHEBWOGEN TONU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the instant matter there are several applications coming up for determination by this court, these are the notice of motion dated 3rd November, 2022, 19th September, 2023 and 4th October, 2023.
2. In the application dated 3rd November, 2022 the applicant is seeking the following orders;
  - (i) Spent
  - (ii) That the certificate of confirmation of grant issued on 23rd June, 2022 be revoked and/or annulled.
  - (iii) That pending the hearing and determination of this application therein be stay of execution and implementation of the certificate of grant dated 23rd June, 2022.
  - (iv) That the respondent does bear the cost of this application.



3. The application is supported by grounds on the face of it and the supporting affidavit of Mary Chemutai Tum the applicant herein.
4. The applicant avers that without obtaining the consent nor involving all the rightful beneficiaries of the deceased herein, the Respondent fraudulently went ahead and obtained the certificate of confirmation of grant which was issued on 23rd June, 2022.
5. The applicant avers that the grant of letters of administration was obtained fraudulently. Further to this the respondent concealed material facts from this court by purposely conducting the confirmation process solely and failing to disclose and/or indicate the true, correct and accurate portions of the land to be given to all the rightful beneficiaries.
6. The respondent herein Rhoda Chepkorir Naniwet filed a replying affidavit response to the application, she avers that the certificate of confirmation of grant was issued on 23rd June, 2022 subsequent to her application.
7. The respondent avers that there was neither fraud nor subterfuge in her application for confirmation of grant.
8. The respondent avers that the succession cause herein having been hotly contested, the applicants would have been hostile towards her and would therefore not have signed a consent allowing her specific interest in the estate of the deceased. The respondent further avers that the applicants had not demonstrated that the failure to execute a consent was prejudicial to them in any way.
9. The respondent avers that since the applicants' advocates were duly served with the application for confirmation of grant, the applicants were deemed to have been aware of the proceedings and they therefore had a chance to object.
10. The respondent avers that the instant application lacks merit and is merely intended to deny her the fruits of her judgment. In any event this court having issued a certificate of confirmation of grant upon application with notice, this court was *functus officio*.
11. In the application dated 19th September, 2023 the applicant is seeking the following orders;
  - (i) Spent
  - (ii) That pending the hearing and determination of the present application this Honourable Court be pleased to stop Kericho County Surveyor from visiting, surveying and/or subdividing the land parcel LR. No. Kericho/Sosiot/46 for the purposes of subdivision
  - (iii) That pending the hearing and determination of the present application this Honourable Court be pleased to stop Kericho Land Registrar from implementing the surveyors report in the event that the above said surveyor shall visit the said parcel of land
  - (iv) That this Honourable Court be pleased to give any necessary direction with regards to this application
  - (v) That the costs of this application herein be provided for.
12. The application is supported by grounds on the face of it and the supporting affidavit of Mary Chemutai Tum the applicant herein.
13. The applicant avers that on 23rd June, 2022 this court issued a certificate of confirmation of grant stating that the estate herein shall be distributed equally giving each of the beneficiary, an equal share on the subject estate.



14. The applicant avers that through an application dated 3rd November, 2022, they filed summons for revocation of grant which application was still pending hearing and determination of this court. Furthermore, without taking into consideration the pendency of the summons for revocation of grant and without their consent the respondent instructed the county surveyor from Kericho to visit the estate.
15. The applicant was therefore apprehensive that the surveyor will visit the estate and subdivide the same without the summons for revocation being heard and determined and that the applicants would suffer irreparably, which damages might not be adequately compensated in monetary terms.
16. The respondent herein Rhoda Chepkorir Naniwet filed a replying affidavit response to the application, she avers that the application was overtaken by events and that pursuant to court orders the County Surveyor visited L.R. No. Kericho/Sosiot/46 on 19th September, 2023 and 22nd September, 2023 and the survey was undertaken in compliance with the court order. The surveyor took the measurements and dimensions of the land and thereafter demarcated the estate property into four equal portions.
17. In the application dated 4th October, 2023 the applicant is seeking the following orders;
  - (i) That pending hearing and determination of this application there be a stay of execution of all consequential orders arising from the certificate of confirmation of grant issued on 23rd June, 2022.
  - (ii) That pending the hearing and determination of this application, the court be pleased to issue temporary orders of inhibition restricting and/or prohibiting registration and/or further dealings whatsoever against the registers of the estate property herein comprised in land parcel registered as Kericho/Sosiot/46
  - (iii) That this Honourable Court be pleased to vary and/or review orders issued herein on the 23rd June, 2022
  - (iv) That upon grant of prayer (iii) above a rectifies and/or amended certificate of confirmation of grant be issued accordingly as hereby prayed
18. The application is supported by grounds on the face of it and the supporting affidavit of Alice Koe Mabwai the applicant herein.
19. The applicant avers that she has a beneficial interest in the estate of the deceased and further that despite having been listed amongst beneficiaries of the estate no provision was made for her or any of her three (3) sisters who are now deceased but survived by children.
20. The applicant avers that the deceased's four (4) daughters would be disinherited unless orders staying execution of the certificate of confirmation of grant issued on 23rd June, 2022 are granted.
21. The applicant avers that is in the interest of justice that the Court be pleased to vary and/or review the orders issued on 23rd June, 2022 in order to pave way for the redistribution of the estate amongst the heirs as follows;
  - a. Kimalit Arap Tum.....3 Acres
  - b. Mary Chemutai Tum.....3 Acres
  - c. Joseph Kipkemoi Tum.....3 Acres
  - d. Rhoda Chepkorir Naniwe & Catherine Chebwogen  
Tonui.....3 Acres



- e. Mary Chemutai Tum & Alice Koe Mabawai (to hold in trust for the estate of Rebecca Chebii Chepkwony, Annah Chepkurui Kirui & Chepkorir Taplelei Too).....9 Acres
22. The respondent herein Rhoda Chepkorir Naniwet filed a replying affidavit response to the application, she avers that the vide a letter dated 17th March, 2004, the Chief Waldai Location listed the known dependants of the deceased at the time and none of the daughters were deemed as dependants as they had long been married in accordance to Kipsigis customary law. The daughters did not exhibit any interest in the estate of the deceased who was their father.
23. The respondent avers that there is no cogent reason advanced by the applicants for the estate to be redistributed, and that the application was mala fidei and calculated to defeat and/or deny her the fruits of judgment.
24. The parties were directed to file written submissions. The respondent complied and filed submissions which were duly considered.
25. The respondent contended that the summons for revocation is not merited as it does not meet the threshold required for revocation as set out in section 76 of the *Law of Succession Act*. The respondent cited the Court of Appeal case of *Matbeka & Another v Matbeka* [2005] 2 KLR 455 in which the court held as follows;
- “i. A grant may be revoked either by application by an interested party or by the court on its own motion.
- ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”
26. The respondent faulted the applicants for failing to demonstrate or adduce evidence that the proceedings to obtain the grant were defective, the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law.
27. The respondent contended that the applicants were not deserving of an order staying the execution of the certificate of confirmation of grant since they had not satisfied all the conditions required for grant of the same as set out in order 42 rule 6 (2) of the *Civil Procedure Rules*, 2010.
28. The respondent contended that the applicants were not entitled to a grant for orders setting aside and/or reviewing the orders made on 23rd June, 2022 as the applicants had not demonstrated an error apparent of the face of record, discovery of new evidence or other sufficient grounds as set out in order 45 (1) (b) of the *Civil Procedure Rules*, 2010.
29. The respondent submitted that the applicants were not entitled to inhibition orders restricting and/or prohibiting registration and/or further dealings in respect to the estate property. The respondent relied on the case of *Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria* [2012] eKLR In an application for



orders of inhibition, in which the Learned Judge stated that an applicant has to satisfy the following conditions;

- “(a) That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.
- (b) That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.
- (c) That the applicant has an arguable case.”

30. The respondent contended that the applicants had not met the threshold for an order of inhibition.
31. I have considered the various applications and I find that the application dated 19th September, 2023 seeking to stop the County Surveyor from visiting, surveying and/or subdividing the land parcel LR. No. Kericho/Sosiot/46 has been overtaken by events. I have taken note that pursuant to court orders arising on 23rd June, 2022, the County Surveyor visited the estate property, surveyed, took measurements and dimensions of the land and thereafter demarcated the estate property into four equal portions.
32. I find that the application dated 4th October, 2023 seeking, firstly, a stay of execution of all consequential orders arising from the certificate of confirmation of grant issued on 23rd June, 2022 and secondly, temporary orders of inhibition restricting and/or prohibiting registration and/or further dealings whatsoever against the registers of the estate property herein comprised in land parcel registered as Kericho/Sosiot/46 has also been overtaken by events. Pursuant to court orders arising from the confirmation of grant on 23rd June, 2023, the estate property was surveyed and subdivided into four equal portions.
33. In the circumstances, the only viable application for determination by this court is the application dated 3rd November, 2022 for revocation and/or annulment of grant. I have considered the application for revocation of grant, the replying affidavit in response to the said application and the submissions filed by the parties and the sole issue for determination is whether this court should revoke and/or annul the certificate of confirmation of grant issued on 23rd June, 2022.
34. On one part, the applicant faulted the respondent for having purposely conducted the proceedings culminating in the confirmation of grant solely without obtaining the consent nor involving all the rightful beneficiaries of the deceased herein. On the other part, the respondent was adamant that since the applicants’ advocates were duly served with the application for confirmation of grant, the applicants were deemed to have been aware of the proceedings and they therefore had a chance to object. The respondent reiterated that there was neither fraud nor subterfuge in her application for confirmation of grant.
35. I have considered the application for revocation of grant and I find that the applicants have not furnished this court sufficient cause to revoke and/or annul the grant as set out in section 76 of the *Law of Succession Act*. In the case of *Albert Imbuga Kisigwa v Recho Kavai Kisigwa*, Succession Cause No.158 of 2000, Mwita J. noted as follows;

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take



into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”

36. I have considered the applicant's assertion that the respondent had purposely conducted the proceedings culminating in the confirmation of grant solely without obtaining the consent nor involving all the rightful beneficiaries of the deceased. I find this assertion to be false, the application for confirmation of grant dated 22nd March, 2022 and hearing notice was duly served upon the applicants and an affidavit of service filed in court. The applicants were therefore aware of the instant succession proceedings and they had a chance to object to the confirmation of grant.

37. In any event this court having issued a certificate of confirmation of grant dated 23rd June, 2022, this probate court is now *functus officio*. *In re Estate of Kiberenge Mukwa (Deceased)* [2021] eKLR the court observed as follows;

“ The court confirming a grant largely becomes *functus officio* so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review. ”

38. Consequently, the notice of motion dated 3rd November, 2022 is dismissed with no order as to costs.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 5<sup>TH</sup> DAY OF MARCH, 2024.**

**J.K. SERGON**

**JUDGE**

**In the Presence of:-**

C/Assistant – Rutoh

Miss Sang for Respondent

No Appearance for Applicant

