



REPUBLIC OF KENYA



**In re Estate of Tuptubor Arap Chirchir (Deceased) (Miscellaneous Succession Cause 754 of 2008) [2024] KEHC 3505 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3505 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS SUCCESSION CAUSE 754 OF 2008  
JRA WANANDA, J  
APRIL 12, 2024  
IN THE ESTATE OF TUPTUBOR ARAP CHIRCHIR**

**BETWEEN**

**JEPSONGOK CHERUIYOT ..... 1<sup>ST</sup> PETITIONER**

**KIRWA TARUS ..... 2<sup>ND</sup> PETITIONER**

**AND**

**DAVID MARITIM ROTUK ..... 1<sup>ST</sup> OBJECTOR**

**PETRONILA CHEPKURGAT KEBENEI ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. The deceased was a polygamous man with 3 wives and who died in the year 1983. The initial parties herein were siblings (sons of the deceased) but from different mothers. From the record, I gather that the initial parties, save perhaps for one, have themselves also since died and that the persons now litigating in their names are their survivors.
2. The Application now before the Court for determination is the Objectors' Notice of Motion dated 20/09/2023 which seeks the following orders:
  - i. [.....] Spent
  - ii. [.....] Spent
  - iii. That the Honourable Court be pleased to set aside its orders issued on 9<sup>th</sup> February, 2015 and in its place, there be an order that the status quo be maintained pending the hearing and determination of this Application on merit.
  - iv. That the costs of this Application be provided.



3. The Application is filed through Messrs Chebii & Co. Advocates and is expressed to be brought under Rule 49 of the Law of Succession Act and “all other enabling provisions of the law”. It is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the 2<sup>nd</sup> Objector, Petronila Chepkurgat Kebenei.
4. In the Affidavit, the 2<sup>nd</sup> Objector deponed that she has authority from the family of the 2<sup>nd</sup> Objector’s family to swear the Affidavit, that she is the widow to the late Thomas Kebenei who is a son of the deceased, the proprietor of the land parcel previously known as Nandi/Ndalat/260 (hereinafter referred to as “the property”), that it came to her attention that the Petitioners wanted to have the said property sub-divided into 5 portions on the ratio of 45:15:15:75 and 7.5 which is against the law of Succession and natural justice for lack of equity, that the property ought to have been sub-divided into equal shares and that is the reason why the Objectors challenged it, that the Objectors are bona fide heirs and beneficiaries of the estate and were entitled to notice that the same was coming up for confirmation of the Grant and that they were supposed to tender their consent on the mode of distribution, that the 1<sup>st</sup> Objector was deceased at the time of the confirmation and therefore, it is not clear how he was represented when it is clear from the record that there was no application for substitution, that it is suspicious how the Petitioners arrived at the Objector’s consent to the mode of distribution, that the forgeries are under investigations, that had they been given an opportunity, they would have opposed the distribution since the Objectors are in actual occupation of 30:15:15:15 and 15 acres thereof hence the effect of the order is to have the Objectors partially evicted from the premises after their houses being demolished, that there is therefore material error apparent on the face of the record as the order was issued without any formal Application thereby condemning the Objectors unheard, that unless the orders are granted, the Objectors will be greatly prejudiced as their right to a fair hearing will have been violated.

## Response

5. In opposing the Application, the Petitioners through Messrs Songok & Co. Advocates, on 4/10/2023 filed a Preliminary Objection. In the same, it is stated that the Application being premised on a consent order given on 17/03/2009 prior to the Judgment delivered on 9/2/2015 is *res judicata, sub-judice* and this Court has become functus officio since the Objector filed Eldoret Court of Appeal No. 61 of 2015 which was dismissed, that the Application is fatally defective having been received in Court on 21/08/2023 yet it was dated 20/09/2023, that this is not a technical error nor an oversight but impractical and that factually, there is no Application before the Court, that this Court issued Judgment on 9/02/2015 and 8 years since then, no application to annul or revoke the Grant and no application to amend the Certificate of Confirmation of Grant has been filed, that the Confirmation of Grant has been extracted, a decree extracted and registered at the Lands Registry, that the Decree has since been executed and that the Objector is guilty of laches.
6. There is also the Replying Affidavit filed on the same 4/10/2023 and sworn by one Silver Cheruiyot who described herself as the daughter and only child to the late 1<sup>st</sup> Petitioner and whom she has since substituted in these proceedings. Shen recited the matters already captured in the Preliminary Objection and added that the Court distributed the property to the beneficiaries at the rate of 45:15:15:7.5:7.5 and the Objector purports to seek Review thereof without adducing any evidence, that the said changes would require a trial which was done and determined in 2015, that the allegation that the consent entered earlier prior to Judgment bears a forged signature and that one of the parties was deceased is a repetition of the same issues upon which this Court is functus officio since the same have been addressed in Appeal, that the party who was purportedly included in the consent has not been disclosed by the Objector and this Court, being a Court of record, cannot imagine or infer that



party, that the Objector should have attached the consent, that if the Objector is referring to the late Thomas Kebenei then that is her husband and who was not a party to the consent order given on 17/03/2009 but the 2<sup>nd</sup> Objector was actually made an Administrator, that the issues being raised by the Objector should have been raised during the hearing as ordered in the consent order and if not addressed, the Objector could have appealed but has not done so to date, that whoever comes to equity must come with clean hands, that the Objector is a litigious party and since equity does not aid the indolent, the instant Application should be dismissed and bring these proceedings to an overdue closure.

### **Hearing of the Application**

7. When the matter came up in Court on 22/11/2023, I asked the Counsels whether they wished to file written Submissions. Mr. A. Songok, Counsel for the Petitioners-Respondents stated that he would not be filing any Submissions. On his part, Dr. J.K. Chebii, Counsel for the Objector-Applicant accepted that he would file such Submissions. However, up to the time of finalizing this Ruling, I had not come across any Submissions filed. I therefore conclude this Ruling on the belief that no written Submissions were filed by either party.

### **Determination**

8. Before I delve further into this matter, I observe that the Petitioners have averred that the instant Application, though dated 20/09/2023, was received by the Court much earlier on 21/08/2023 and that therefore the same is fatally defective. I am unable to comprehend this submission since the copy of the Application placed in the Court file bears the Court stamp of 21/09/2023. The Court Receipt confirming the filing is also dated 21/09/2023. I will therefore not belabour this point any further.
9. On a different point, as aforesaid, this matter has been in Court since 2008, initially as Kapsabet Principal Magistrate's Court Succession Cause No. 35 of 2008. I also note that Messrs J.K. Chebii & Co. Advocates came on record for the Objectors vide the Notice of Appointment filed on 21/08/2023, the same date when the Application was filed.
10. The more I read the Application, the more I get persuaded that Messrs Chebii & Co. may have rushed to file the Application before fully appreciating the status, history and background of, or to the litigation herein. I say so because, for instance, the Application seeks the setting aside of orders said to have been issued on 9/02/2015 and whereof the property Nandi/Ndalat/260 was distributed. The Application also alludes to a consent order recorded earlier on the same 9/02/2015 which the Objector alleges was a forgery.
11. However, from the record, the correct position is that the Judgment whereof the property was distributed was delivered by Kanyi Kimondo J on 22/01/2015 after a full viva voce trial. It is the Certificate of Confirmation of Grant that was then issued subsequently on 9/02/2015 pursuant to the Judgment. I have not come across any consent in respect to the mode of distribution and note that, in fact, the mode of distribution was a strenuously contested issue. The only consent I have come across in the file is the one recorded before Mohammed Ibrahim J (as he then was) much earlier on 17/03/2009 whereof the Grant confirmed in the said Kapsabet Principal Magistrate's Court Succession Cause No. 35 of 2008 was mutually revoked and all the initial 4 parties appointed as joint or co-Administrators.
12. Be that as it may, and despite the above obvious factual inaccuracies made in the Application, I understand the Objector to be seeking the setting aside of the mode of distribution made herein. In



light of the above scenario and upon examination of the Pleadings and Affidavits, I find the issue that arises for determination in this matter to be

“whether this Court should set aside the mode of distribution made herein and embodied in the Certificate of Confirmation given on 9/02/2015”.

13. In answering this question, I note that the Objectors did appeal against the said Judgment delivered herein by Kanyi Kimondo J on 22/01/2015 whereof the property was distributed amongst the beneficiaries. The same was Eldoret Court of Appeal No. 61 of 2015. In the Appeal, the Objectors, being dissatisfied with the mode of distribution ordered by Kanyi Kimondo J challenged the same on merits. The Appeal was then determined vide the Judgment delivered on 17/10/2019 whereof the Court of Appeal declined to interfere and dismissed the Appeal. In dismissing the Appeal, the Court of Appeal held as follows:

“24. Evidence of the gifts inter vivos was given by the 1st respondent in her testimony where she stated that the deceased had bought the 1<sup>st</sup> appellant property measuring 30 acres in Kormaet area using 12 cows, and that the deceased had bought the 2<sup>nd</sup> appellant’s deceased husband, Thomas Kebenei a property measuring 24 acres in Sugoi using 100 cows. While the 1<sup>st</sup> respondent did not have any documentary evidence in support of her claims, her evidence was not controverted by the appellants, and neither did the appellants shed light on how they had acquired this property. In submissions before this Court, the appellants merely stated that they had bought the property using their own resources. Our view after analyzing this evidence is that the 1<sup>st</sup> respondent’s evidence was more believable; she stated how and where the property gifted to David Rotuk and Thomas Kebenei were purchased. If this was not the true version of events, and the appellant’s bought this property out of their own funds, then the evidential burden rightly shifted to them to state how and when they purchased the property. These were facts within the special knowledge of those appellants and as section 112 of the *Evidence Act* provides,

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The appellants failed to discharge this burden and for this reason, we find no fault with the learned Judge’s finding that the property in Sugoi and Kormaet were gifts given by the deceased during his lifetime to Thomas Kebenei and the 1<sup>st</sup> appellant herein.

25. In the circumstances, of this case, we find that the trial court did not err in holding that the parcels of land that were given to the appellants as gifts inter vivos would be taken into account in the distribution of the deceased’s estate in compliance with section 42 of the *Law of Succession Act* (see: *Johannes Mbugua Muchuku v. Loise Wangui Muchuku & 6 others* [2016] eKLR.)
26. The upshot of the foregoing is that we are satisfied that the learned Judge properly considered and analyzed the evidence and applied the law appropriately. We see no reason to interfere with the findings of the High



Court. Accordingly, we uphold the judgment and dismiss this appeal. This being a family succession dispute we find it prudent to order that each party bears their own costs.”

14. It is therefore clear that the matters now raised by the Objectors have already been heard and fully determined by the Court of Appeal, a higher Court whose decisions bind this Court. As aforesaid, I suspect that the Objectors current Advocates may have not fully familiarized themselves with the matter before drafting and filing the instant Application. This Court is therefore evidently functus officio and has no jurisdiction to re-consider the issue. The issues raised are also *res judicata*. In connection thereto, the Court of Appeal in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, pronounced itself as follows:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

15. From the foregoing, it is clear that the doctrine of *res judicata* exists to protect parties from being endlessly dragged into litigation over the same issue or subject matter that has already been conclusively determined by another Court. As aforesaid, this dispute has been in the Courts since 2008, 16 years now, initially before the Magistrate’s Court, then to the High Court and finally to the Court of Appeal. The estate having long been distributed, it is time that the Objectors now accept that this litigation has come to end and move on with their lives. The Objectors must now realize that litigation cannot continue endlessly or persist in perpetuity.
16. I therefore decline the Application
17. Even assuming that the matters canvassed before the Court of Appeal were not entirely the same as those raised vide the instant Application, still the Objectors were required to place before that Court all issues in the High Court Judgment that they were dissatisfied with at once. There is no room in our judicial system for piecemeal appeals and/or appealing in instalments. Whatever was therefore not raised before the Court of Appeal is presumed to have been waived and cannot be re-opened before this Court after this Court’s Judgment had already been challenged before the Court of Appeal and fully determined in that Court.
18. Further, even assuming that the matters raised were still available for determination by this Court, considering that the orders impugned were made on 22/01/2015, the Objectors have not even bothered to explain why it is only much later, in the year 2023, 8 years later, that they have decided to challenge the same. Since “equity aids the vigilant and not the indolent”, on that ground alone - failure to explain the inordinate delay - I would still have declined the Application.
19. In any event, and as aforesaid, the allegation that a consent was recorded herein on 9/02/2015 whereof the property was distributed, is not borne or supported by the Record. There is no evidence of such consent. The allegation that such consent should be set aside because purportedly, it was a forgery, cannot therefore arise.



**Final Orders**

20. In the end, the Objector's Notice of Motion dated 20/09/2023 fails both on the ground that the issues raised therein have already been finally and conclusively determined by the Court of Appeal and also on the ground of unexplained inordinate delay.
21. The Motion is accordingly dismissed with costs to the Petitioners.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 12<sup>TH</sup> DAY OF APRIL 2024**

**WANANDA J.R. ANURO**

**JUDGE**

