



In re Estate of Chumo Arap Chabas alias Chumo Chabas (Deceased) (Succession Cause 157 of 2003) [2024] KEHC 9483 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 157 OF 2003**

JK SERGON, J

JULY 25, 2024

**IN THE MATTER OF THE ESTATE OF CHUMO ARAP
CHABAS ALIAS CHUMO CHABAS (DECEASED)**

BETWEEN

**WILLIAM KIPTERER BII 1ST PETITIONER
PAUL KIPTONUI NGENO 2ND PETITIONER
WILLY KIPKIRUI RONO 3RD PETITIONER
JOHN KIPKEMOI CHABAS 4TH PETITIONER**

AND

**JAMES CHEPKWONY KIBIEGON 1ST OBJECTOR
JAMES KIPYEGON CHEPKWONY 2ND OBJECTOR**

RULING

1. There are two applications coming up for determination: a summons for revocation and/or annulment of grant dated August 29, 2023 and a summons for rectification of grant dated 18th October, 2023.
2. In the summons for revocation of grant dated August 29, 2023 the applicants are seeking the following orders;
 - (i) Spent.
 - (ii) Spent.
 - (iii) Spent.



- (iv) That the grant of letters of administration intestate issued on November 21, 2012 to the petitioners/respondents herein and confirmed then rectified on 8th May, 2023 be revoked on the following grounds;
 - (a) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of a material fact.
 - (b) That the proceedings to obtain the grant were defective in substance.
 - c. That the grant was obtained by an untrue allegation of a fact essential in a point of law to justify the grant.
 - (v) That the costs of this application be provided for
3. The application is supported by grounds on the face of it and the supporting affidavit of James Chepkwony Kibiegon the 1st applicant herein.
 4. The 1st applicant avers that he is the son of Kiplutan a brother of the deceased herein.
 5. The 1st applicant avers that the said Kiplutan established his home on the parcel of land known as Plot No. 1 Chepsir where he lived until his death, having had an interest in the said parcel by virtue of contribution towards the same. The 1st applicant avers that the said parcel of land was bought by Kiplutan (now deceased) and his siblings Tapsagaa and the deceased herein, however, during registration the parcel was registered in the name of the deceased herein to hold in trust for his siblings.
 6. The 1st applicant avers that sometime in 1993 the family of the deceased herein wanted to evict the families of Kiplutan and Tapsagaa from their respective portions on PLOT No. 1 Chepsir on grounds that the land was registered in the name of the deceased herein. The matter was resolved by the area chief and the families of Kiplutan and Tapsagaa were given two portions measuring 25 acres each.
 7. The 1st applicant avers that they learnt that the family of the deceased herein had filed a succession cause in respect of the estate of the deceased and that upon further inquiry, he learnt that the properties listed as the deceased properties included Plot No. 1 Chepsir under the rectified certificate of confirmation of grant dated 8th May, 2023 and that the same was only distributed to the family of the deceased herein, to the exclusion of his family and that of his aunt, the late Tapsagaa.
 8. The 1st applicant avers that he was at risk of being rendered destitute and homeless.
 9. The 1st applicant reiterated that PLOT No. 1 Chepsir as a whole did not constitute part of the deceased's free properties and that the 1st applicant was entitled to a share of the said property and further that the said property was held by the deceased for himself, his late brother and their sister Tapsagaa.
 10. The application is supported by grounds on the face of it and the supporting affidavit of James Kipyegon Chepkwony the 2nd applicant herein.
 11. The 2nd applicant avers that he is the son of Benjamin (deceased), who was a son to one Tapsagaa, a sister of the deceased herein.
 12. The 2nd applicant avers that the parcel of land known as Plot No. 1 Chepsir was bought by Kiplutan, Tapsagaa and the deceased herein, however, during registration the parcel was registered in the name of the deceased herein to hold in trust for his siblings.
 13. The 2nd applicant avers that sometime in 1993 the family of the deceased herein wanted to evict the families of Kiplutan and Tapsagaa from their respective portions on PLOT No. 1 Chepsir on grounds



- that the land was registered in the name of the deceased herein. The matter was resolved by the area chief and the families of Kiplutan and Tapsagaa were given two portions measuring 25 acres each.
14. The 2nd applicant avers that they learnt that the family of the deceased herein had filed a succession cause in respect of the estate of the deceased and that upon further inquiry, he learnt that the properties listed as the deceased properties included Plot No. 1 Chepsir under the rectified certificate of confirmation of grant dated 8th May, 2023 and that the same was only distributed to the family of the deceased herein, to the exclusion of his family and that of Kiplutan.
 15. The 2nd applicant avers that he was at risk of being rendered destitute and homeless.
 16. The 2nd applicant reiterated that Plot No. 1 Chepsir as a whole did not constitute part of the deceased's free properties and that the 2nd applicant and his siblings were entitled to a share of the said property and further that the said property was held by the deceased for himself, his late brother and their sister Tapsagaa and that their families were currently in occupation of their respective portions on the subject parcel of land.
 17. The respondents filed a replying affidavit in response to the application, the replying affidavit was sworn by Paul Kiptonui Ngeno on behalf of the other petitioners/respondents.
 18. The respondents aver that the estate of the deceased was confirmed on 16th July, 2013 and later rectified on 8th May, 2023 upon the court ascertaining and being satisfied that the identities of and the shares of the beneficiaries had been ascertained.
 19. The respondents aver that this Court lacks the jurisdiction to determine the existence or non-existence of a trust in respect to the subject parcel of land and that such jurisdiction lies within the purview of the Environment and Land Court.
 20. The respondents aver that the applicants were not dependents of the deceased within the meaning of section 29 of the *Law of Succession Act* and therefore it was not necessary for them to be included in the confirmed grant.
 21. The respondents aver that a person seeking revocation and/or annulment of grant must establish the grounds stated in section 76 of the *Law of Succession Act* and that the applicants had not demonstrated any of the grounds warranting the revocation and/or annulment of grant.
 22. The respondents filed a summons for rectification of grant dated 18th October, 2018 seeking the following orders;
 - (i) That leave be and is hereby granted to the surviving administrators of the estate of the deceased John Kipkemoi Chabas, Paul Kiptonui Ngeno, Willy Kipkirui A. Rono to effect the final distribution of the estate of the deceased.
 - (ii) That the grant of letters of administration issued to Willy Kipkurui Rono, John Kipkemoi Chabas, William Kipterer Bii and Paul Kiptonui Ngeno on 16th July, 2013, rectified on 11th March, 2014 and further rectified on 28th June, 2021 and further rectified on 8th May, 2023 be further rectified as per the attached schedule as provided for by rule 43 (1) of the *Probate and Administration Rules*.
 23. The application is supported by grounds on the face of it and the supporting affidavit of Paul Kiptonui Ngeno on behalf of his co-administrators.



24. The administrator avers that they were issued grant of letters of administration intestate with respect to the estate of the deceased on 16th July, 2023 and that the said letters have been amended severally on diverse dates 11th March, 2014, 28th June, 2021 and 8th May, 2023 by this Court.
25. The administrator avers that among the listed properties of the deceased herein is the subject land parcel known as Plot No. 1 Chepsir measuring 450 acres. The administrators aver that pursuant to court annexed mediation and the resultant mediation agreement adopted by this court on 8th May, 2023, a portion of the said parcel measuring 12.5 acres was hived off and the same devolved to one Grace Cherotich Maina whereas the remaining 437.5 acres devolved to the administrators to hold in trust for themselves and other beneficiaries of the deceased listed in the certificate of confirmation of grant.
26. The administrator avers that the operation of the said trust has become onerous and untenable and consequently all the beneficiaries of the estate of the deceased were desirous and had consented to have the subject parcel divided into equal portions for each of the five houses and therefore the rectified certificate of confirmation of grant dated 8th May, 2023 should be further amended in this respect.
27. The administrator further avers that one of the administrators William Kipterer Bill recently passed away and that this Court should allow the surviving administrator to effect the final distribution of the estate of the deceased.
28. The parties were directed to file written submissions in respect to the applications.
29. The 1st, 2nd and 4th petitioners/respondent filed written submissions opposing the summons for revocation. They contended that the summons for revocation of grant is unmerited as it does not meet the threshold required for grant of the orders sought as stipulated in section 76 of the *Law of Succession Act*. They further submitted that the provisions of section 76 were construed by the court in the case of *Matheka and Another v Matheka* [2005] 2 KLR 455 where the court of appeal laid down the following guiding principles.
 - 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.”
30. The 1st, 2nd and 4th petitioners/respondents contended that the applicants had neither demonstrated or adduced evidence to the effect 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 a point of law.
31. The 1st, 2nd and 4th petitioners/respondents contended that whereas the gist of the summons for revocation of grant was that the subject parcel Plot No. 1 Chepsir, was registered in the name of the deceased to hold in trust for his two siblings since he was the eldest among them, these claims were unsubstantiated and aimed at misleading this Court. They contended that the applicants’ claim was not based on a beneficial interest but based on a trust yet this Court is not vested with jurisdiction to determine the existence or the non-existence of a trust over the subject parcel. They further asserted



- that the issues of ownership of property and declaration of trust are within the exclusive province of the Environment and Land Court and not the Probate Court as the mandate of the Probate Court under the *Law of Succession Act* is limited. They cited the case of *In Re Estate of Solomon Mwangi Waweru (Deceased)* (2018) eKLR where the court found that a succession court has no jurisdiction to hear and determine issues related to trust in land as that is the jurisdiction of the Environment and Land Court.
32. The 1st, 2nd and 4th petitioners/respondents therefore urged this Court to dismiss the applicants' summons for revocation of grant dated 29th August, 2023 with costs and conversely allow the summons for revocation of grant dated 18th October, 2023.
 33. The 4th petitioner/respondent filed additional submissions opposing the summons for revocation of grant dated 29th August, 2023 he contended that once a probate court has confirmed a grant it becomes functus officio with respect to the property in question, particularly in disputes arising between third parties and the estate, especially those claims related to land use and occupation and cited the case of *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR where the court stated as follows; "Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court."
 34. I find that this Court has been called upon to determine two applications contemporaneously, an application for summons of revocation of grant and a summons for rectification in respect to the same certificate of confirmation of grant dated 8th May, 2023. I have considered the application for revocation and/or annulment of grant, the replying affidavit opposing revocation and/or annulment by the respondents, the application for rectification of grant by the respondents and the submissions filed by parties. I find that the issues for determination by this court is whether to revoke and/or annul the rectified certificate of confirmation of grant issued by this Court on 8th May, 2023 and whether to rectify the rectified certificate of confirmation of grant issued by this Court on 8th May, 2023 as per the attached schedule as provided for by rule 43 (1) of the Probate and Administration Rules.
 35. On the issue of revocation and/or annulment of grant. I find that the gist of the summons for revocation of grant is that the subject parcel Plot No. 1 Chepsir, was registered in the name of the deceased to hold in trust for his two siblings Kiplutan and Tapsagaa now deceased and therefore the said parcel did not constitute free property of the deceased. I am in concurrence with the respondents that the applicants' claim was not based on a beneficial interest rather it was based on a trust yet this Court is not vested with jurisdiction to determine the existence or the non-existence of a trust over the subject parcel. The probate court lacks the jurisdiction to determine the existence or non-existence of a trust in respect to the subject parcel of land and that such jurisdiction lies within the purview of the Environment and Land Court. I also find that the applicants have not demonstrated any of the grounds in section 76 of the Law of Succession Act warranting the revocation and/or annulment of the said grant.
 36. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed: "The circumstances that can lead to



the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's 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 making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law." (emphasis added.)

37. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 OF 2000, Mwita J. made remarks on the guiding principles for the revocation of a grant. He stated; "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 the interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice." In light of the foregoing I find that the summons seeking revocation and/or annulment of grant dated 29th August, 2023 lack in merit.
38. On the issue of rectification of grant, the respondents are urging this Court to rectify the rectified certificate of confirmation of grant issued by this Court on 8th May, 2023 as per the attached schedule as provided for by rule 43 (1) of the *Probate and Administration Rules*.
39. The petitioners/respondents stated that that among the listed properties of the deceased herein is the subject land parcel known as Plot No. 1 Chepsir measuring 450 acres and that pursuant to court annexed mediation and the resultant mediation agreement adopted by this court on 8th May, 2023, a portion of the said parcel measuring 12.5 acres was hived off and the same devolved to one Grace Cherotich Maina whereas the remaining 437.5 acres devolved to them being the duly administrators of the estate to hold in trust for themselves and other beneficiaries of the deceased listed in the certificate of confirmation of grant.
40. The petitioners/respondents stated that the operation of the said trust had become onerous and untenable and consequently all the beneficiaries of the estate of the deceased were desirous and had consented to have the subject parcel divided into equal portions for each of the five houses and therefore the rectified certificate of confirmation of grant dated 8th May, 2023 should be further amended to reflect parties agreement. I have considered the proposed amendments, they are beyond the scope of section 74 of the *Law of Succession Act* and rule 43 of the *Probate and Administration Rules*. *In re estate of Charles Kibe Karanja (deceased)* [2015] eKLR, Musyoka J. observed as follows; "If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the *Law of Succession Act* and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules..." I therefore find that the summons for rectification of grant dated 18th October 2023 is not meritorious.



41. The upshot being that summons seeking revocation and/or annulment of grant dated August 29, 2023 and the summons for rectification of grant dated October 18, 2023 are hereby dismissed. Each party to bear its own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 25TH DAY OF JULY, 2024.

.....

J.K. SERGON

JUDGE

In the presence of:-

C/Assistant – Rutoh

Miss Sang for 1st, 2nd & 4th Petitioner

No Appearance for the Objector

