



REPUBLIC OF KENYA



In re Estate of James Chelanga Tuitoek (Deceased) (Succession Cause 5 of 2019) [2024] KEHC 8877 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 5 OF 2019
HI ONG'UDI, J
JULY 24, 2024**

IN THE MATTER OF THE ESTATE OF JAMES CHELANGA TUITOEK (DECEASED)

IN THE MATTER OF

**PAULINE CHEPKORIR MAIYO 1ST PETITIONER
DANIEL CHESUM KIMARUN 2ND PETITIONER
PHILIP KENDAGOR BETT 3RD PETITIONER**

RULING

1. In the Application dated 31st July, 2023 the 1st Petitioner/applicant herein prays for the following orders;
 - i. Spent.
 - ii. That this Honourable court be pleased to vacate and/or set aside the directions/orders issued on the 25th July, 2023 on the disposal of the summons for confirmation of grant.
 - iii. That the issue of distribution of the estate of the deceased James Chelanga Tuitoek be determined by way of viva voce evidence.
 - iv. That this honourable court be pleased to give directions as to the filing of witness statements and list of documents before the summons for confirmation is set down for hearing by way of viva voce evidence.
 - v. That costs be in the cause.
2. The application is based on the grounds on its face and the affidavit of the applicant sworn on even date. She deposed that the 2nd Petitioner filed summons for confirmation of grant dated 29th March, 2022, proposing that the deceased's estate be shared equally.



3. She deposed that she filed an affidavit of protest and an affidavit on the preferred mode of distribution of the estate. She added that she personally acquired the bulk of the assets constituting the deceased's estate but in keeping with Kalenjin traditions she registered them in the deceased's name.
4. She went on to depose that the evidence as to how and when the bulk of the assets comprising the estate were acquired is crucial to enable the court determine her claim to 50% of the net estate. Further, that the 2nd Petitioner and Faustine Jemutai Chesum were given certain properties by the deceased during his lifetime which should also be taken into consideration in determining the distribution of the estate.
5. She added that some of the assets listed in the summons for confirmation are not available for distribution as the same were disposed of by the deceased which transactions are evidenced by various agreements that need to be tendered in evidence as exhibits.
6. It is her averment that no one will be prejudiced if the instant application is allowed and orders sought granted.
7. In response the 2nd Petitioner filed a replying affidavit dated 18th September, 2023. He averred that in the petition, the deceased had left a Will in which all the listed assets were indicated to belong to him. He added that if the applicant's claim to 50% of the assets were true, she ought to have contested the Will rather than seeking its enforcement. He further stated that together with her sister Faustine, they are the biological children of the deceased.
8. In response to paragraphs 6, 7 and 8 of the applicant's supporting affidavit, he deposed that the same are not relevant to the proceedings as they do not relate to the deceased's estate. Further, that the court has no jurisdiction to hear and determine issues relating to rights to acquisition and ownership of land. He denied that they were given any land by the deceased prior to his demise.
9. He averred that the applicant misled the court in alleging that some of the properties were sold by the deceased during his lifetime. He added that the applicant who is in possession of all records regarding the assets in the estate and is capable of manipulating facts to suit her agenda.
10. He urged the court to order that searches be done on all assets of the deceased as well as an order to the banks listed in the petition to avail bank statements from 10th July, 2017 when the deceased died to date. It is his averment that nothing would be gained by conducting confirmation of grant by way of oral evidence as the pending issue is distribution of the assets which could be done via submissions.
11. He urged the court to dismiss the application with exemplary costs.
12. The application was disposed of by way of written submissions.

Applicant's submissions

13. The applicant's submissions were filed by Mirugi Kariuki & Co. Advocates and are dated 20th February 2024. Counsel relied on Rule 41 (1) and Section 47 of the [Law of Succession Act](#) and submitted that the application was properly before the court.
14. He submitted that review of probate is governed by rule 63 of the Probate and Administration Rules which provide for the applicable civil procedure rules. He further relied on Order 45 of the [Civil Procedure Rules](#) and submitted that there is sufficient reason to warrant the setting aside of the orders as the applicant seeks for a chance to file witness statements and documents to enable the court reach a fair judgment on the distribution of the estate.



15. Counsel relied on the case of *In re estate of Livingstone M'mungania* (deceased) [2018] eKLR where the court allowed review on the ground of any other sufficient reason. He submitted that the evidence already before court was not sufficient to present the applicant's case.
16. He further submitted that the instant application was filed without delay. Counsel cited the case of *Gerald Macharia Njogu V Samuel Macharia Murimi* [2016] eKLR where the court in the interest of justice allowed the application for determination of the case by way of oral evidence. He thus urged the court to allow the application as prayed.

2nd Petitioner's submissions

17. The 2nd Petitioner's submissions were filed by Omwenyo & Company Advocates and are dated 17th January, 2024. Counsel argued that the applicant had no intention of having the 2nd Petitioner and Faustine Jemutai Chesum benefit from the estate. He added that they filed summons for confirmation of grant after the applicant failed to do so. He further submitted that on 25th July, 2023 the court directed that parties file written submissions regarding distribution of the assets in the estate. It was counsel's submission that they filed and served the applicant who in turn failed to file hers and insisted that she be orally heard regarding her protest to the mode of distribution. He submitted further that the applicant's stand against the 2nd Petitioner and Faustine amounts to discrimination. In support of this position he relied on Article 27 of the *Constitution* of Kenya.
18. He submitted that the applicant made allegations on the bulk of the assets in the estate having been acquired by herself but failed to prove the same. Further, that the allegation by the applicant that that she be given 50% of the assets does not stand since the court does not have jurisdiction to entertain claims rights to land. Counsel cited Section 2(1) of the *Law of Succession Act* and the case in Succession Cause 312 of 2008 *In the matter of the Estate of Atibu Oronje Asioma*. (High Court, Kakamega).
19. Counsel went on to submit that the instant suit is limited to the issue regarding distribution of the deceased's assets and not how he acquired them. He urged the court to dismiss the applicant's application and proceed to distribute the assets in the estate as per the 2nd Petitioner's submissions dated 18th September, 2023.
20. The 3rd Petitioner, Philip Kandagor Bett did not file any response or submissions to the application.

Analysis and Determination

21. I have considered the application, affidavits together with the submissions filed by the parties herein. I find the main issue for determination to be whether the application herein is merited.
22. It is not in dispute that the alleged deceased's will dated 9th November, 2016 was rendered invalid by virtue of not providing for all the beneficiaries. Further, the Petitioners by consent agreed to the present administrators of the deceased's estate on 22nd September, 2021. The court then directed the 1st Petitioner to file her proposal for the mode of distribution but she failed to do so. Subsequently, on 25th July, 2023, the court ordered that both parties file submissions on the mode of distribution but the 1st Petitioner/applicant filed the instant application. She argued that she is entitled to 50% of the net estate having contributed in acquiring the same.
23. It is her contention that the same Application be heard so that she can adduce evidence of how she acquired part of the deceased's assets. The 2nd Petitioner on his part argues that this court lacks the requisite jurisdiction to hear and determine matters ownership of land. It is his contention that this



- court is only limited to the issue regarding distribution of the deceased's assets and not how the assets were acquired.
24. Section 47 of the *Law of Succession Act* provides
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”
25. Further, Rule 73 of the *Probate and Administration Rules* provides that:
- “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.” [Emphasis mine]
26. The main issue pending before this court in this matter is the distribution of the deceased's estate. It is also clear that there is no agreement on the mode of distribution. The estate has three (3) administrators namely Pauline Chepkorir Maiyo, Daniel Chesum Kimarun and Philip Kandagor Bett. They were appointed on 22nd September, 2021 after a consent was entered into by the parties.
27. The next step was to be the confirmation of the grant which is yet to be done.
- 28.
- (a) On record is a summons for confirmation of grant dated 29th March, 2022 filed by the 2nd petitioner Daniel Chesum Kimarun. Annexed to it is a proposed mode of distribution of the deceased's estate. The same were filed on 31st March, 2022.
- (b) An affidavit of protest dated 5th July, 2022 was then filed by the 1st petitioner Pauline Chepkorir Maiyo on 27th July, 2022.
- (c) The 2nd petitioner then filed a reply to the Affidavit of protest. The same is dated 4th August, 2022.
29. The summons for confirmation of grant was on 21st March, 2023 fixed for hearing on 15th June, 2023. On the said hearing date, the court granted the 1st petitioner 30 days to file her proposed mode of distribution. This was not complied with and on 25th July, 2023 Chemitei J directed parties to file submissions on the mode of distribution within 30 days from the said date.
30. The Application dated 31st July, 2023 was thereafter filed. In it the 1st petitioner wants the direction issued on 25th July, 2023 to be reviewed. In the Affidavit of protest the 1st Petitioner claims for a 50% share of the estate on grounds of equal contribution to the purchase of the same. The 2nd petitioner has denied the claim and states that the court lacks jurisdiction to handle issues to do with rights in land.
31. What the 1st petitioner has raised is a weighty issue which would impact on the ultimate mode of distribution of the estate and cannot just be wished away. What is before this court now would be referred to as a confirmation – cum – protest hearing where there is a dispute relating to the identity and share of the assets, in the deceased's estate. Pursuant to section 41(3) of the *Probate and Administration Rules* the court will before confirming the grant set aside and/or remove the share, property which should not form part of the estate for hearing before another court. See below the following cases which dealt with a similar issue:



- i. *In the Matter of the Estate of Laban Gikonyo Kamau* Nrb High Court Succession Cause No. 84 of 1999.
 - ii. *In the Matter of the Estate of Mary Gachuru Kabigo* Nrb High Court Succession Cause No. 2830 of 2001.
 - iii. *In the Matter of the Estate of Patrick Mungai Kugega* Nrb High Court Succession Cause No. 1374 of 2000.
32. Considering all the above I find that having the contest here tested through oral evidence would also give the 2nd petitioner an opportunity to address the issues raised in his replying affidavit of 18th September, 2023 touching on the land searches and bank statements which he wishes to have availed in court.
33. The upshot is that the application dated 31st July, 2023 has merit and is hereby allowed. Costs shall be in cause.
34. The directions issued on 25th July, 2023 are hereby set aside and substituted with the following:
- (i) The confirmation cum protest hearing will proceed by way of *viva voce* evidence.
 - (ii) Parties to file and exchange witness statements together with the list of documents within 50 days. The 1st petitioner to have the first 25 days from today.
 - (iii) The 1st petitioner to file and serve her proposed mode of distribution within 45 days from today.
 - (iv) The 1st petitioner to file and serve within 60 days the following documents:
 - a. Current Land searches of all the parcels and/or plots of land forming part of the assets in the deceased's estate as per the summons for confirmation.
 - b. Bank statements from 2017 – to date in following accounts within 45 days
 - i. First Community Bank Account No. 950034xxxx
 - ii. KCB Limited Account No. 117924xxxx
 - iii. KCB Limited Account No. 110273xxxx
 - iv. Standard Chartered Bank Account No. 5018116xxx
 - (v) Mention before the Deputy Registrar on 24th September, 2024 to confirm compliance before the file is placed before this court for fixing a hearing date.

34. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 24TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

