**In re Estate Ruto Kimotuet alias Ruto Kimwatek (Deceased) (Miscellaneous Succession Application 303 of 2010) [2024] KEHC 8840 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8840 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**MISCELLANEOUS SUCCESSION APPLICATION 303 OF 2010**

**JRA WANANDA, J**

**JULY 19, 2024**

**IN THE MATTER OF ITEN SENIOR MAGISTRATE'S COURT SUCCESSION CAUSE NO. 28 OF 2009**

**AND**

**IN THE MATTER OF THE ESTATE OF RUTO KIMOTUET ALIAS RUTO KIMWATEK (DECEASED)**

**BETWEEN**

**LUKA CHESIRE RUTO ..... 1ST APPLICANT**

**TIMOTHY K KOIMA ..... 2ND APPLICANT**

**JOHN KIPCHUMBA RUTO ..... 3RD APPLICANT**

**CHRISTOPHER K RUTO ..... 4TH APPLICANT**

**RICHARD KIPKOECH RONO ..... 5TH APPLICANT**

**AND**

**CHEMWOLO RUTO MOTWEK ..... RESPONDENT**

**JUDGMENT**

1. Before Court for determination is the Summons dated 24/11/2010 filed by the Applicants through Messrs Chepkonga & Co. Advocates. It seeks orders as follows:

   i. [.....] Spent

   ii. [.....] Spent

   iii. That the Honourable Court be pleased to remove into this Court and revoke and/or annul the Grant of Letters of Administration made to the Respondent and confirmed on 15/3/2010

in Iten Senior Resident Magistrate's Court, Succession Cause No. 28 of 2010 being Estate of Ruto Kimotuet alias Ruto Kimatek (Deceased) who died intestate on 24/5/1993.

iv. That the costs of this Application be in the cause.

2. The Application is expressed to be brought under the provisions of Section 76 of the *Law of Succession Act* and Rule 44 of the Probate and Administration Rules and is premised on the grounds stated on the face thereof. It is then supported by the Affidavit sworn by the 3rd Applicant, John Kipchumba Ruto.

3. In the Affidavit, the 3rd Applicant deponed that the deceased died intestate on 24/05/1993 and that he was survived by his 2 wives and several children, that the Respondent unlawfully petitioned for Grant of Letters of Administration in respect to the estate in Iten Senior Resident Magistrate's Court Succession Cause No. 28 of 2009 without the written consent of the Applicants in an overt attempt to disinherit the Applicants, that the estate consists of the property known as L.R No. Irong/Iten/258 measuring about 41 acres, that the value of the estate asset is in excess of Kshs.100,000/= and thus the Magistrate Court lacked jurisdiction to admit the Petition. According to the Applicants, the Grant ought to be have taken before High Court in Eldoret, and not before the Magistrate's Court.

4. He contended further that the Respondent excluded the name of one Albert Kiprono Ruto who is a biological son of the deceased and one of the Applicants' brothers and a survivor and that in his place, the Respondent unlawfully included one Julius Kiprotich Toroitich who is not a biological son of the deceased and neither was he a dependent directly or indirectly of the deceased. He deponed further that the Respondent was given a gift by the deceased, namely, the land parcel Irong/Iten/257 measuring about 21 acres and got himself registered as the owner thereof but that has also gone ahead to distribute the estate's other asset, L.R. No. Irong/Iten/258 between himself and the said Julius Kipkorir Koroitich who is a total stranger and in no way related to the deceased in any degree of consanguinity.

**Replying Affidavit**

5. The Application is opposed vide the Replying Affidavit sworn by the Respondent through Messrs R.M. Wafula & Co. Advocates. He deponed that the Application is premised on falsehoods, that the 2nd and 5th Applicants are strangers to the estate as they are not biological sons of the deceased and neither were they dependants at the time of the death of the deceased, that the 1st, 3rd and 4th Applicants have included the 2nd and 5th Applicants to dupe the Court and to paint the Respondent as a bad character. He also contended that the Petition was filed in accordance to the law and disclosure made by advertising the same in the Kenya Gazette, that the Applicants by doing nothing since 1993 when the deceased died, had demonstrated that they no interest in the estate and by law, the Respondent became entitled to apply, and that the Applicant's consent was therefore unnecessary. He denied the Applicants' averments that they will suffer, since, according to the Respondent, the Applicants have not been disinherited. He contended further that the persons who have given authority to the Applicants herein are not all competent since the 2nd and 4th Applicants are strangers as they are not biological sons or adopted sons or dependants of the estate as at 24/5/1994. According to him therefore, the authority is defective and ought to be rejected.

6. The Respondent deponed further that list of survivors exhibited by the Applicants is false and defective and that the correct list is the one furnished by the Assistant Chief. He further denied that the Applicants have been disinherited and stated that the Applicants have been allocated their lawful shares as shown in the Certificate for Confirmation of Grant and that even if the process were to be repeated, the Applicants will still be allotted the same shares. The Respondent then suggested that instead of going through the process all over again, the Court should adopt and confirm the Grant in the same

terms or order an equitable distribution thereof. He also deponed that the elders had deliberated the dispute and reached tentative solution which is what was then merely incorporated in the Grant. Further, the Respondent deponed that the said Albert Kiprono Ruto referred to in the Applicants' Affidavit is deceased and could not be named as a living beneficiary and also that the said Julius Kipkorir Toroitich is the Respondent's grandchild whom the Respondent has given a part of the Respondent's share of the estate.

7. The Respondent also denied that he was given the property, Irong/Iten/257 as a gift and stated that the land was given to him by the Government in 1962, just as his brother Kwambai Ruto was also given land by the Government in 1961. In conclusion, he deponed that the process of transmission of the shares is at an advanced stage and that the Survey process should be allowed to proceed.

**Hearing of the Cause**

8. It was then agreed that the matter would be heard by way of viva voce evidence.

**Applicants' evidence**

9. PW 1 was the 3rd Applicant, John Kipchumba Ruto who adopted his Statement. He referred to the said Iten Magistrate's Court Succession Case No. 28 of 2009 and recounted the matters already stated in his Affidavit. He then stated that the deceased had 3 parcels of land, namely, Irong/Iten/258, 257 and 89, that parcel No. 258 was registered in the name of the deceased, parcel No. 257 in the name of the Respondent and his mother and parcel No. 89 in the name of William Koima Ruto. He told the Court that distribution was done in the Iten case but that the same was not proper. He contended that parcel No. 258 should have been distributed to the whole family. He stated that in total they are 7 brothers and 2 sisters and that the Chief's letter that was relied upon by the Respondent referred to 7 of them but left out Christina Ruto and Moret Ruto yet they both have children. According to him, the Respondent, as Administrator, distributed the estate unfairly.

10. He then referred to the copy of the Green card attached to the application in respect to Plot No. 258 and told the Court that the same bears the acreage and names, Chemwolo Ruto, Julius Kiprotich, Charles Taraus, Kwambai arap Setrumo, Luka Chesire Ruto, Timothy Koima, John Kipchumba and Christopher Ruto. He testified that before his death, the deceased Mzee had given plot No. 257 measuring 16 acres to the Respondent, that plot 258 is 42.7 acres, and that in the Green card for plot No. 258, Julius Kipkorir Torotich appears yet he is not even a member of the family. Regarding Charles Tarus Chemwolo, he stated that he is the Respondent's son and Kwambai arap Sertumo is his brother, that Timothy Koima is the son of Koima Ruto who is another of their mothers, that Koima Ruto lived in plot No. 89 which was given to her but that Koima Ruto is now deceased. He also stated that Christopher Ruto is his (PW1's) brother.

11. He further testified that a portion of the plot No. 258 (Water Shamba) was given to the Water Department but that they never agreed thereon and that no compensation was given to them by the Government. He stated that they have 2 sisters but who were not included in the distribution, and that his father (the deceased) got Plot No. 258 after survey during which time, he (PW1). was a young boy. Regarding plot No.257, he stated that the deceased got it from an in-law to the deceased who married a sister to the deceased and that the in-law left the plot for the deceased. He stated further that 5 brothers live on Plot No. 258, that Plot No.89 is occupied by his brother, William Koima and that Plot 257 is occupied by the Respondent.

12. In cross-examination, he stated that he was born on 1/1/1954, that in 1962, he was 8 years old and had not started going to school, that as per the Kalenjin customs, children of tender years would not be involved in land matters and even women were not involved and his work at the time was to herd cattle,

that he could not recall when the survey was done as he was very young but that he saw the surveyors on the ground and that it was around 1962. He stated further that plot No. 257 is in the name of the Respondent and that it was so registered in the name of the Respondent name in 1962 as shown in the Green Card. He reiterated that his father (deceased) got Plot No. 257 from his in-law who was a Maasai by tribe and who was known as Arap Aloros who had married his (PW1's) aunt - his father's sister, Ms. Kabon. He however stated that he does not know Arap Aloro's full name but he knows that he came from Kilgoris, that he knows that Maasais use the phrase "ole", in the same manner and meaning that Kalenjin use the phrase "arap". He told the Court that plot No. 257 is about 16.5 acres, and that it was given to his father as dowry.

13. He then stated that the Respondent is the 2nd born in the 1st house and that the plot No. 257 was not given to the 1st born, Kwambai Seturmo because he (1st born) had not yet built a home. He stated further that the Maasai in-law relocated with his property including livestock around 1959 before Kenya got its independence, that he does not know why the in-law paid his father by land and not cattle. He therefore reiterated that Plot No. 257 was family property and that the Respondent never purchased it on his own. He however conceded that he did not produce any document to show that Plot 257 belonged to his father (deceased). He then stated that Plot 258 was registered in his father's name in the same year.

14. PW1 further stated that his father (deceased) had 2 wives, that Kwambai Seturmo and the Respondent are from the 1st house and that he (PW1) is from the 2nd house. He conceded that he had listed the Respondent in his statement as one of the beneficiaries but stated that the respondent is not entitled to the remainder. He also conceded that Plot 257 has never been registered in the name of the deceased. He also conceded that although the deceased died in 1993, he is not aware whether, before his death, the deceased claimed that plot 257 was his. He also conceded that he himself has no claim over plot 257. He further told the Court that in the homestead of the deceased, the 1st wife resided on the left side while the 2nd wife on the right, and that the land went up to the river and was enough for all of them to cultivate. He told the Court that in Kalenjin tradition, they only "talk of" the sons, that Kwambai from the 1st house cultivated plot No. 258 on the left and the sons from the 2nd House cultivated on the right, that his sister Christina Ruto died before his father and that his other sister, Moret Ruto is still alive, that the Chief should have written the name of Christina Ruto even though she had died and that even Moret should have been listed.

15. PW1 stated further that he was employed in the Department of Water, that at some point he was stationed at the same Plot 258 as his employer had stationed him there, that the Department had drilled a borehole on the plot to supply Iten township. He however denied that his employment by the Department was a reward for the land given to the Department. He claimed that the Department had been using 3.7 acres since 1977, that the place is known by all as belonging to the Department and that the Department has a title deed for that portion. He insisted that the Water land still belongs to the family although he conceded that the title is in the name of the Department. He also conceded that he does not have any evidence that the Department is aware that this matter is in Court. He stated that the Respondent has given part of his share to his children in Plot No. 258 but that he should have given them 257 and not 258. He agreed that Plot 258 as shared out is 19 acres for the 1st house and 19 acres for the 2nd house and that it was therefore shared out equally, and that the Water Department has 3.7 acres. Further, he stated that the family has had meetings, one was on 10/9/2009 and that the minutes thereof have been exhibited. Regarding one Makarina Kabon, he stated that she is the Respondent's daughter.

16. PW2 was Ambrose Kirui Ruto, the Respondent's son. He stated that is not aware that his father (Respondent) had filed the Succession Cause at Iten, that he has lived there since they were children

and that he has never lived in Plot No. 258 nor cultivated it and that the people who live there are the 5 sons of the deceased (his grandfather).

17. In cross-examination, he confirmed that Makarina is his sister but stated that he differs with her. He claimed that Plot 257 was acquired in 1962, that he was not already born by then and did not witness any dowry given to the deceased. He however confirmed that he is aware that one arap Aloros, a Maasai, gave land to the deceased as dowry for the marriage of a sister of the deceased, He told the Court that in 1978, arap Aloros came to visit them and he came with Kabon his wife, the sister to the deceased and they later returned to Purko but that he does not know where Purko is. He told the Court that he has no differences with his siblings, Magarina and Charles, but he is opposed to them in this Cause. He told the Court that he is satisfied with Plot 257 and does not want more land. He contended that as a grandson he ought to have known about the Iten Succession because it belonged to his grandfather who died in 1993, and that he is concerned because the land was given to one Julius, who is a stranger. He stated that he did see the house of the 1st wife of the deceased, who was his grandmother, that the wives used to share plot No. 258, but each wife occupied their own separate portion, that the 1st wife occupied the right side as per Kalenjin traditions while the 2nd wife occupied the left side, that the land went up to the river but each wife knew her portion. He then stated that his uncle, the 3rd Applicant, used to work with the Department of Water and that the Department had a borehole on the plot and that it is not correct to now claim the said portion back as it belongs to the Department.

18. PW 3 was Atanas Kwambai, another grandson to the deceased. He told the Court that the deceased had 2 wives and that he is from the 1st house, that the deceased had 2 plots of land, Irong/Iten/257 and 258 and another one in the interior, that plot 257 was in the name of the deceased, and plot 258 was in the name of Kwambai, Luka, Albert, John and Christopher. In cross-examination, he conceded that the matters that he had stated in his statement are what he was informed. He then told the Court that plot No. 257 was given to the deceased but conceded that he had not produced any proof to show that the plot indeed belonged to the deceased grandfather. He also conceded that he did not produce any proof to show that plot No. 257 and 258 were one plot. He further conceded that he was not there during the payment of dowry. He then stated that he has no problem that the deceased having given land to the Respondent, and that one William Ruto is the one currently occupying the land in the interior. He further stated that as a son to the deceased, he occupies the land in Moiben but that he deserves a share of plot No. 258, that the deceased had 10 acres in Moiben which is occupied by the said William Ruto who is a son to the deceased and that although Willaim Ruto is occupying the 10 cares, he, too, deserves a share in Plot 258. He however conceded that he has no documentary evidence to prove that the deceased gave out shares as alleged. He confirmed that the Respondent is from the 1st house, that his father is Kwambai Seturmo and that the Respondent is the 2nd born from the 1st house. He, too, confirmed that the deceased had divided his 2 wives to separately occupy separate plots of land.

19. PW4 was Timothy Koima, yet another grandson of the deceased. He stated that his father was William Koima Ruto. He too confirmed that the deceased had 3 plots of land, namely, plot 257, 258 and 89. He told the Court that plot 257 is occupied by the Respondent, plot 89 by him (PW4) and 258 by Luka Ruto, Albert Ruto, John Kipchumba Ruto, Kwambai Seturmo and Christopher Ruto. In cross-examination, he stated that he had 2 grandmothers; Kabon Ruto and Shakwei Ruto, that Kwambai and the Respondent were from the 1st grandmother, Kabon, and that in Kalenjin customs, the 1st son is given respect and honour. He conceded that he has no evidence that Plot No. 257 belonged to the deceased but he knows that the said plot was given to the deceased (his grandfather) by PW4's aunt. He however conceded that he did not know the aunt as he (PW4) had not been born by that time. He also conceded that he was not there when dowry was being paid as he had also not been born. He then stated that he does not know whether there is a plot owned by the Department of Water. He further

told the Court that he does not live in the homestead as he lives in Moiben in a plot owned by the deceased (his grandfather). He also stated that he does not want any share of plot 257 and that by the time that he was born, the children of the deceased had already divided the plots.

**Respondent's Evidence**

20. DW1 was Magarina Kabon Limo, the Respondent's daughter. She testified that plot 257 was not owned by the deceased (her grandfather) but by her father (Respondent). Regarding Plot 258, she stated that the same was owned by the deceased but it has now been distributed by the Respondent (his father) as the Administrator. She told the Court that Julius Kipkorir Toroitich is the son of her aunt and so her father (Respondent) gave him a share in plot 258. She then claimed that the deceased gave out a portion of the plot 258 so that the 3rd Applicant, John Kipchumba could be employed by the Water Department, that the land belonging to the Water Department later became Irong/Iten/2977. She told the Court that Charles Kiptaraus is her brother and that and her father (Respondent) also gave Charles Kiptaraus his (Respondent's) share from plot 258 and not any other person's share. She too testified that the deceased had 2 wives, that the 1st house had 2 children and the 2nd house had 5 children, that the deceased had divided the land between the 2 wives with the 1st wife being on the right side and the 2nd was on the left side as per Keiyo/Kalenjin customs.

21. In cross-examination, she clarified that the 1st house had 2 sons while the 2nd house had 5 sons and 2 daughters, that the 1st house had no daughters, that in the 1st house, the children were Kwambai and Chemwolo (Respondent) while in the 2nd house, the children were Luka, William, Albert, John, Christopher and the daughters were Christina and Moret. Regarding the Succession Cause filed in Iten, she stated that the Chief wrote names of the survivors as Kwamabai arap Seturwo, Chesire Ruto, William Koima Ruto, John Kipchumba Ruto, and Christopher Kiptoo Ruto but left out Chemwolo and the 2 daughters, that after the Succession, she does not know how the distribution was made but she knows that Plot 258 was divided into 2, between the houses of the 2 grandmothers. She then stated that Julius is not a son to the deceased, that Charles Taraus Chemwolo is her (DW1's) younger brother. She then confirmed that in the Certificate of confirmation of Grant dated 15/3/2020 issued in the Iten Succession Court Cause, the beneficiaries were listed as Chemwolo Ruto Motwek (Respondent), Julius Kipkorir Toroitich, Charles Taraus Chemwolo, Kwambai arap Sertumo, Luka Chesire Ruto, Timothy Koima son to William Koima, John Kipchumba Ruto (3rd Applicant), Christopher Ruto and "Water Shamba". She faulted the 3rd Applicant for claiming that he did not have a plot yet he has one plot under the 2nd grandmother. According to her, the Applicant should leave and go where his other siblings are. She conceded that the 2 daughters of the deceased were left out although they had children.

22. DW2 was Wilson Chemitei. In cross-examination, he stated that the deceased was a neighbour but that he lives far. He stated that he knows some of the children of the deceased and also some of his land but not all. He was referred to his statement in which he mentioned a case that they were handling before the Chief over the plot Irong/Iten 258 and he told the Court that during the case before the Chief, all the children of the deceased were present but when shown the minutes of the meeting of 10/9/2009, he conceded that one of the family members was absent. He also conceded that he did not sign the minutes but only wrote his name thereon.

23. DW3 was Barnaba Ruto Chemusoi. In cross-examination, he stated that the deceased had 2 wives, that Kabon was the 1st wife and that her children were 2, namely, Kwambai and Chemwolo, that the 2nd wife was Shakwei and her children were Luka Ruto, William Ruto, Albert Ruto, Jepchirchir, Moret, John Ruto Kipchumba and Chrsitopher Kimwatet. He stated that the deceased had 1 plot of land, plot No. 258, which he divided into 2 for the 2 wives as per the Keiyo customs. He also stated that the deceased had another plot that was given to him by people from where the deceased had married and

that one of his sons, Koima, lives there. He stated that the deceased might have had other plots but he (DW3) was not sure about that. He added that they had meetings even with the Chief and other elders to resolve the dispute herein.

**Submissions**

24. After close of the trial, the parties filed written Submission. The Applicants filed their Submission on 19/9/2023 while the Respondent filed his on 5/10/2023

**Applicants' Submissions**

25. Counsel for the Applicants submitted that the deceased married 2 wives who were respectively blessed with children, namely, 1st wife, Kabon Ruto (Kwambai arap Seturwo, and Chemwolo Ruto), 2nd wife, Shakwei Ruto (Luka Chesire Ruto, William Koima Ruto, Albert Kiprono Ruto, John Kipchumba Ruto, Christopher Ruto, Christina Ruto and Moret Ruto). Counsel further submitted that during the lifetime of the deceased, free property belonging to him was distributed in that Irong/Iten/257 measuring 16 acres was given to the Respondent) and Irong/Iten/258 measuring approximately 43 acres to be shared among Kwambai arap Seturwo, Luka Chesire Ruto, Albert Kiprono Ruto, John Kipchumba Ruto (3rd Applicant) and Christopher Ruto. He submitted further that the late William Koima was allocated 5 acres within Karona Farm which is occupied by his son.

26. He submitted that the initial Petitioner for the Letters of Administration over the estate of the deceased was Chemwolo Ruto Motwek (Respondent) but who has since passed on and was subsequently substituted by Magarina Kabon Limot. He alleged that the Respondent concealed material facts crucial in respect to the proper and fair distribution of the estate, that the Respondent presided over inclusion of strangers to the estate such as one Julius Kipkorir Toroitich and "Water Shamba" as beneficiaries yet they are not beneficiaries of the deceased, inclusion of the Respondent's own son, one Charles Tarus Chemwolo, yet the law is clear that a grand-child can only inherit directly from his grandparents after the demise of their parents, and that the said son was given 4.5 Acres of Irong/Iten/258. Counsel submitted further that bona fide beneficiaries of the estate, namely, John Kipchumba Ruto and Christopher K. Ruto were indicated under the category of "others" and that the Respondent got a disproportionately larger portion of the estate land apart from other parcels of land which he had been gifted.

27. Counsel cited Section 76 of the *Law of Succession Act* and also Rule 26 of the Probate & Administration Rules which, he submitted, requires issuance of notice to interested parties during the process of obtaining Letters of Administration. He also cited the case of In re Estate of Thomas Tatwa Sakwa (Deceased) [2021] eKLR. He contended further that the Chief's letter dated 4/10/2010 relied on by the Respondent in his Petition for the Letters of Administration omitted other own siblings, namely, Christina Ruto (who, although deceased, has children) and Moret Ruto. According to Counsel, the omission was unjustified and amounted to concealment of material facts.

**Respondent's Submissions**

28. On his part, Counsel for the Respondent submitted that the deceased had 2 wives, that before his death, the deceased had divided his parcel of land, Irong/Iten/258, between the houses equally as per Keiyo customary law, that the 1st house occupied the right side while the 2nd house occupied the left, that the Respondent, in the Grant obtained in the Iten Magistrate's Court Succession Cause in the same terms as it had already been distributed by the deceased among the beneficiaries, that each house received 19 acres while 3.7 acres was given to the County Government of Elgeyo Marakwet (Department of Water, Agriculture, Livestock and Fisheries) which had purchased the same directly from the deceased. He

submitted further that the Applicants have not been disinherited as they currently live in the said estate and their portions and boundaries have never been interfered with.

29. On whether the Grant issued by the Iten Magistrate's Court was obtained pursuant to the making of false statement and/or concealment of anything material to this case, Counsel the case of Jamleck Maina Njoroge Vs Mary Wanjiru Mwangi [2015] eKLR, and submitted that the Applicants were supposed to prove their allegations as required under Sections 107, 108, 109 and 110 of the *Evidence Act*, that the Applicants have not proved that the Respondent applied for the Grant without their consent in an overt attempt to disinherit them, that by the Petition being advertised in the Kenya gazette the requirement for disclosure was made, that from the Certificate of Confirmation of Grant, it is clear that the Applicants have not been disinherited as the distribution of the estate included both houses with each house getting an equal share of the deceased's estate that of 19 acres each and that there was therefore nothing wrong at all with the late distribution. He cited the treatise of Dr. Patricia Kameri-Mbote, entitled: The Law of Succession in Kenya, Gender perspective in property management and control, published by Nairobi: Women & Law in East Africa, 1995 and also Madan, J (as he then was) in the case of Kingunu Vs Gathangi [1976] Kenya CR 253.

30. As regards William Koima Ruto, (who belonged to the 2nd family), Counsel submitted that his name was not included in the list of beneficiaries as he had already been bequeathed his inheritance in land parcel Irong/Iten/89 in Karona farm measuring 5 acres. He argued that was admitted to by his son, Timothy K. Koima (PW4), both in his statement and also in his testimony during the hearing. As for Christina Ruto and Moret Ruto, Counsel submitted that their whereabouts at the time of Petition for the Grant was unknown, that even currently, the family is still unaware of their whereabouts, that they have never made any claim to the estate and that in the Objectors/Applicants' pleadings, that in any case, the Applicants have made no mention of the 2 as not being included in the list of beneficiaries, that their purported issue is not properly placed before this Court for determination because it never formed part of the Applicants' pleadings. He cited the case of Independent Electoral and Boundaries Commission & Another. Vs Stephen Mutinda Mule & 3 Others (2014) eKLR and also the case of Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR .

31. Regarding inclusion of the 2 persons termed as strangers to the estate, namely, Charles Tarus Chemwolo and Julius Kipkorir Toroitich, whom Counsel submitted, are close relatives to the deceased, and the "Water Shamba" whose inclusion the Applicants deem to be fraudulent, he submitted that "Water Shamba" refers to the 2.2 Hectares registered in the name of the County Government of Elgeyo Marakwet (Department of Water, Agriculture, Livestock and Fisheries) being land parcel number Irong/Iten/2977 and curved out of land parcel number Irong/Iten/258. He submitted that the Respondent included the said Charles Tarus Chemwolo and Julius Kipkorir Toroitich) in the Respondent's share and also included the "Water Shamba" because the County Government Department of Water was a purchaser of that portion carved out of the larger parcel of land. Counsel therefore argued that the said Charles Tarus Chemwolo and Julius Kipkorir Toroitich had not taken up any more land than that was supposed to belong to the Respondent since the Respondent only relinquished part of his share to them.

32. Regarding the "Water shamba", parcel number Irong/Iten/2977, registered in the name of the County Government of Elgeyo Marakwet (Department of Water, Agriculture, Livestock and Fisheries), Counsel submitted that that the same was rightfully transferred to the Department, that the deceased sold the same in 1985 to the Department and which has been in occupation thereof since then, that the Department drilled a borehole thereon and has been using the same to supply water to the Iten Township to date, that the land was sold by the deceased so that he could secure employment for the

3rd Applicant, that it is therefore dishonest for the 3rd Applicant to later try and misrepresent facts and allege that the Department is an intruder.

33. Regarding filing of the Iten Magistrate's Court Succession Cause, Counsel argued that the Applicants have no basis for their claims since the deceased died in 1993 and yet none of the Applicants had shown any interest and/or bothered to institute Succession proceedings over the estate, that had the Applicants been concerned with propriety of the Succession proceedings, then, they ought to have properly moved the Court, that in the alternative, the Applicants should have filed their protest at the Iten Magistrate's Court Succession Cause before conclusion thereof rather than let the Respondent go through the whole trouble of moving the Court to distribute the estate only for the Applicants to later try and negate all those efforts and return the family to square one. According to Counsel, the Applicants action is unreasonable, unfair and made with ulterior motives. Counsel further argued that the Applicants never contested the Grant when the Gazette Notice was published but only later instituted these proceedings at the High Court as an afterthought. He added that furthermore, the claim that the value of the estate exceeded the pecuniary jurisdiction of the Iten Magistrate's Court has not been backed by any evidence, that the Applicants have not produced any Valuation Report to that effect.

34. In respect to the property, Irong/Iten/257 and the Applicants' allegation that the same was gifted to the Respondent by the deceased thus disentitling the Respondent to a further share of the estate, Counsel submitted that the Applicants did not present any tangible evidence to prove the allegation. He submitted that the property was registered in the name of Respondent even at the time that the deceased died and that the same was registered in the name of the Respondent way back on 11/09/1962 as shown by the exhibits produced. He observed that the 3rd Applicant, PW1, in his testimony, admitted that the property had never been registered in the name of the deceased and that the deceased, during his lifetime, never claimed the land between 1962 when it was registered in the name of the Respondent and his death in 1993 (a period of over 30 years). Counsel also submitted the 3rd Applicant admitted that the Respondent was a grown man in the 1960s, and that, PW3, Atanas Kwambai testified that the Respondent was an army officer during the colonial times. According to Counsel, this would mean that the Respondent was more than capable of purchasing the land by himself. It was therefore his contention that the Respondent acquired the said land on his own and that it does not form part of the estate of the deceased.

35. In conclusion, Counsel urged the Court not to interfere with the Grant issued and confirmed by the Iten Magistrate Court and the distribution of the estate pursuant thereto. He reiterated that each of the 2 houses has received 19 acres out of the estate while the County Government of Elgeyo Marakwet (Department of Water, Agriculture, Livestock and Fisheries received 3.7 acres, and that a computation of the acreage amounts to the entire parcel of land with a very minimal margin error.

**Determination**

36. The issue for determination herein is "whether the Applicants have established sufficient basis for revocation of the impugned Grant issued by the Iten Magistrate's Court".

37. Section 76 of the *Law of Succession Act* states as follows:

> "76. Revocation or annulment of grant
>
> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any Interested Party or of its own motion—
>
> (a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

38. Evidently, the grounds relied upon by the Applicants are those falling within sub-Sections (a), (b) and (c) above.

39. On the issue of revocation of Grants, Section 76 was expounded upon by Hon. Justice W. Musyoka in the case of Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR where he stated as follows:

> " Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust."

40. In this case, the Applicants have claimed that the Respondent unlawfully petitioned for Grant of Letters of Administration in Iten Senior Resident Magistrate's Court Succession Cause No. 28 of 2009 in respect to the estate herein without the written consent of the Applicants. The Applicants have also claimed that the value of the estate assets is in excess of Kshs.100,000/- and thus the Magistrate Court, at the material time, lacked jurisdiction to admit the Petition. I however note that the Applicants have not seriously argued or submitted on this allegation. I got the feeling that this ground was only raised half-heartedly and without any demonstrated conviction to seriously agitate it. For this reason, I will not belabour it.

41. In any event, in regard to that ground, the Respondent has submitted that the claim that the value of the estate exceeded the pecuniary jurisdiction of the Iten Magistrate's Court has not been backed by any evidence and that the Applicants have not presented any Valuation Reports to that effect. I agree. In the absence of any material placed before it, the Court cannot make a factual determination on what the value of the estate was as at the relevant time. The ground of lack of jurisdiction therefore remains unproven.

42. Regarding the Applicants' claim that the Petition in Iten Senior Resident Magistrate's Court Succession Cause No. 28 of 2009 was filed without the Applicants' written consent, the Applicants are no doubt right. The requirement for disclosure of the existence of all survivors of a deceased person, filing of consents signed by such survivors and involvement, generally, of such survivors when petitioning for Letters of Administration in Succession proceedings is stipulated in Section 51 of the *Law of Succession Act* and Rules 26(1) and (2), Rules 7(1)(e)(i) and Rule 7(7) of the Probate and Administration Rules.

43. The above provisions, read together, make it clear that where representation is applied for by a person with equal or lesser right to others, the Petitioner is expected to notify these other persons of the filing of the Petition. These other persons would then be at liberty to participate in the proceedings or renounce their rights to administration or sign consents in Forms 38 or 39 acceding to the filing of the Petition. Where such consent or renunciation has not been filed, the Petitioner is required to file an Affidavit confirming that he/she duly notified these other persons. The Respondent's contention that the Petition was published in the Kenya Gazette and that therefore all necessary persons were deemed notified cannot suffice. That has never been accepted as a conclusive defence in Applications of the nature herein. In the absence of any denial by the Respondent of the allegations attributed to him, I can only make the finding that indeed the Respondent, as the Petitioner in the Iten Magistrates Court Succession Cause, breached or violated the above provisions of law.

44. Having made the above findings, the question now is whether the said breaches or omissions committed by the Respondent should by themselves justify revocation of the Grant. This question arises because Section 76 of the *Law of Succession Act* is discretionary in that it gives the Court discretion whether to revoke or annul a grant. It is not therefore the position that any breach or violation must always or automatically lead to revocation of a Grant.

45. Regarding the rest of the factual allegations made by the Applicants against the Respondent, it is a cardinal rule of evidence under Section 107 of the *Evidence Act* that whoever alleges must prove. The Applicants are the persons who have made allegations of facts and as such they carry the burden of proof. In civil cases, the standard is on a balance of probability.

46. One allegation raised by the Applicants is that the property, Irong/Iten/257 belonged to the deceased and that the deceased then gifted it to the Respondent. For this reason, the Applicants argue that the Respondent already received his share of the estate of the deceased and should not again claim a share of the remainder of the estate. From the record, evidence in the nature of a copy of a Green Card has

been tendered before this Court demonstrating that the said property was registered in the name of the Respondent way back in the year 1962, long before the deceased died 31 years later in the year 1993. Apart from mere verbal allegations, the Applicants' witnesses failed to substantiate the claim that the property belonged to the deceased having been allegedly gifted earlier to the deceased by one arap Aloros, allegedly a brother-in-law to the deceased. In view thereof, my finding is that the Applicants have failed to demonstrate that the property, Irong/Iten/257, forms part of the estate of the deceased. Consequently, there is no basis for this Court to find that the same was gifted as a part of the estate.

47. Further from the evidence tendered, the parties agree that the deceased also owned a parcel of land known as Irong/Iten/89 which they all seem to agree was given to one William Koima Ruto, a son to the deceased and which is currently occupied by his son, PW4, Timothy Koima. As such, that parcel of land is no longer part of the estate herein.

48. Regarding the property, Irong/Iten/258, measuring approximately 42.7 acres, it is not disputed that it belonged to the deceased up to the time of his death. It is also not disputed that the deceased was a polygamous man having married 2 wives, namely, Kabon Ruto and Shakwei Ruto. It is also agreed that Kabon Ruto was blessed with 2 children, namely; Kwambai Arap Seturwo and Chemwolo Ruto Motwek, whereas Shakwei Ruto got 7 children, namely, Luka Chesire Ruto, William Koima Ruto, Albert Kiprono Ruto, John Kipchumba Ruto, Christopher Ruto, Christina Ruto and Moret Ruto.

49. The Applicants are aggrieved by the inclusion of one Julius Kipkorir Toroitich and the entity described as "Water Shamba" as beneficiaries of the estate. The Applicants allege that the two are strangers to the estate. The Applicants are also aggrieved by the inclusion one Charles Tarus Chemwolo a son to the Respondent, as a beneficiary. According to the Applicants, being a grandson of the deceased, Charles Tarus Chemwolo can only inherit directly from his grandparents after the demise of his parents. The Applicants also contend that the Respondent allocated to himself a disproportionately larger portion of the estate land than the rest.

50. The Respondent, on his part, has denied the said allegations, insisting that the property, Irong/Iten/258 was divided equally between the two households and that the portion that the Respondent allocated to Julius Kipkorir Toroitich and Charles Tarus Chemwolo was part of the Respondent's own share of the property.

51. On my part, I note from the testimonies of the witnesses, that the deceased lived with both his 2 wives on the property, Irong/Iten/258 and that as per Keiyo/Kalenjin customs, the deceased had settled the 2 wives in a manner that the 1st wife occupied the left side whereas the 2nd wife occupied the right side. The Applicants cannot therefore claim that the property was only left for the 2nd house. There is ample evidence that both wives lived, occupied and cultivated their respective portions of the property and as such, each house is entitled to a share thereof.

52. Under the Certificate of Confirmation of Grant dated 15/3/2010 issued by the Iten Magistrate's Court, the property, Irong/Iten/258 measuring approximately 14.0 acres was distributed between the 2 houses as follows:

| | |
|---|---|
| 1st House | |
| Chemwolo Ruto Matwek | 5.0 acres |
| Kwambai arap Seturwo | 9. 5 acres |
| Julius Kipkorir Toroitich | 4. 5 acres |
| Charles Tarus Chemwolo | |
| Sub-Total | 19. 0 acres |
| 2nd House | |
| Chemwolo Ruto Matwek, Kwambai arap Seturwo, Julius Kipkorir Toroitich and Charles Tarus Chemwolo | 19.0 acres |
| Water Shamba | 3.7 acres |
| Grand Total | 41.7 acres |

53. In view of the above, the Respondent is therefore right that each house received 19 acres. I cannot find any inequity in this distribution. If the 1st house decided to cede a portion of its share to strangers, then that is their own internal matter within the 1st house and in respect to which members of the 2nd house have no business meddling into.

54. The Respondent has maintained that the shares that he ceded to Julius Kipkorir Toroitich and Charles Tarus came from his own share of the 1st house portion. While therefore it is true that the said Julius Kipkorir Toroitich is not a direct beneficiary in the estate, the allocation to him has been satisfactorily explained by the Respondent. Each beneficiary is free to dispose of his respective share as he pleases. Regarding Charles Tarus, the Respondent's son, while it is true that a grandchild does not rank in priority in regard to inheritance where his parents are still alive, it is equally true that at the distribution stage, beneficiaries are at liberty to determine how their respective shares in the estate should devolve and as such, I cannot find any injustice occasioned by the Respondent when he allocated a part of his share within the 1st house to his son, Charles Tarus and the other relative, Julius Kiprotich Toroitich.

55. I am therefore satisfied that the distribution adopted was informed by the fact that the deceased had already divided the property Irong/Iten/258 between the two household with each household occupying its respective share.

56. Regarding the allegation that there are other family members who were not included in the distribution, my take is that the Applicants cannot purport to litigate for or on behalf these other family members who have themselves not come out to agitate their own cases. In any case, the Respondent has explained that some of the family members are deceased and for some, their whereabouts are unknown. These explanations have not been challenged. Further, in any event, those "omitted" family members, even if they were to successfully make claims, their shares would still have to be claimed within the 19 acres shares already allocated to their respective houses. I therefore do not agree with the Applicants that the Respondent intentionally and or knowingly disinherited them from the estate.

57. I have also perused the minutes of a family meeting convened and attended by the area Assistant Chief on 10/09/2009. The same was also attended by community elders and most of the Applicants were also in attendance. From the minutes, it is evident that the proposal adopted, in the presence of the Applicants who were in attendance, was that the estate be divided as per the wishes of the deceased in terms that the two households equally share the estate. I am satisfied that the distribution adopted was within and in line with the said proposal.

58. As for the 3.7 acres indicated as "Water Shamba", from the witness' testimonies, it is evident that the same was given out by the deceased during his lifetime to a government entity (Department of Water of the Local Authority), was carved out and is now registered as Irong/Iten/2977. It is not clear whether the deceased sold the portion or whether it was a gift. What is not disputed is that the 3rd Applicant was later employed by the same government entity. There are suggestion that the employment of the 3rd Applicant is what was given back by the government entity in exchange or as consideration for the deceased giving out the land. Be that as it may, there is nothing on record to indicate that the giving out or transfer of the said portion to the government entity involved any impropriety or was illegal. That portion is therefore no longer part of the estate and cannot be available for distribution among the beneficiaries. In any case, since the property is said to be registered in the name of the said government entity, if the Applicants have any reason to suspect that the transfer was unlawful, then their recourse is to institute an action at the Environment and Land Court.

59. As aforesaid, the question is whether, in light of my findings hereinabove, the transgressions committed by the Respondent in the process leading to issuance of the Grant (omitting to involve the Applicants in the Iten Magistrate's Court Cause or to obtain their consents) are by themselves sufficient to justify revocation of the Grant and order for re-distribution of the estate. As also stated, this question arises because Section 76 of the *Law of Succession Act* gives the Court an option whether to revoke or annul a grant. It is not therefore the position that any breach or violation must always or automatically lead to revocation of a Grant.

60. In the case of Albert Imbuga Kisigwa v Recho Kavai Kisigwa, Succession Cause No.158 OF 2000, Mwita J. warned of the need by the Courts to exercise caution before allowing a prayer for revocation of a Grant. He remarked as follows:

> (13) 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 wrong doing 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."

61. In this case, in light of my findings on the other matters as set out hereinabove, I find that despite the Respondent's sins of omission committed during the conduct of the Succession Cause before the Iten Magistrate's Court, in the end, the estate was fairly and equitably distributed and it will not therefore serve any meaningful purpose to revoke the Grant and order for re-distribution. I therefore find that there are "exceptional and/or unique circumstances" in this matter, and which when considered, lead me to the conclusion that it will not serve the interest of justice to revoke or annul the Grant.

**Final Orders**

62. In the end, I order as follows

i. The Summons for Revocation or Annulment of Grant, dated 24/11/2010 and filed by the Applicants/Objectors is hereby dismissed.

ii. This being a family dispute, each party shall bear his own respective costs.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JULY 2024**

**.....**

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Mr Kigen for Objectors/Applicants

R.M. Wafula for Respondent

Court Assistant: Brian Kimathi