



In re Estate of the Late Chepngok arap Chepkwony (Deceased) (Miscellaneous Application Probate & Administration 02 of 2021) [2024] KEHC 12702 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION 02 OF 2021
JR KARANJA, J
OCTOBER 23, 2024
IN THE MATTER OF THE ESTATE OF THE
LATE CHEPNGOK ARAP**

BETWEEN

SOSTEN KIMAIYO CHEPSIRO APPLICANT

AND

ESTHER JELAGAT CHEPKWONY 1ST RESPONDENT

BENJAMIN KIPRONO KUTTOH 2ND RESPONDENT

**KIPKOSGEI CHOGE T/A KIPKOSGEI CHOGE & COMPANY
ADVOCATES 3RD RESPONDENT**

EMILY CHIRCHIR 4TH RESPONDENT

RULING

1. The application dated 18th December 2023 is made by the interested party, Sosten Kimaiyo Chepsiror, for orders that the order of this court made on 21st November 2023 that the summons for annulment of grant be heard by “viva-voce” evidence be reviewed and set aside and also that the order for the payment of costs in the sum of Kshs. 18,000/- to the Respondents be set aside.

The grounds in support of the application are set out in the Applicant’s lengthy affidavit dated 18th December 2023, framed in a manner suggesting that it was constituted of factual and legal arguments relating to the application.

The First, Second and Fourth Respondents opposed the application by filing grounds of apposition dated 8th February 2024 and a replying affidavit dated 8th February 2024 deponed by the Second Respondent. The Third Respondent would appear not to have filed any response but is on record



stating that he was a victim of circumstances emanating from the dispute between the Applicant and the Respondent.

2. Pursuant to the directions given by the court on 14th February 2024, the application was canvassed by way of written submissions which were herein filed by the Applicant through K.K. Arap Sego & Company Advcoates as part of his supporting affidavit.

The submissions by the First, Second and Fourth Respondents were filed on their behalf by Rotich Lagat and Partners Advocates.

The Third Respondent did not file any submissions and left the matter to the court.

Having considered the application as against the supporting grounds and the rival submissions it could not escape the mind of this court that the application is by itself overtaken by events in as much as it seeks a review of the order of this court made on 21st November 2023 directing that the summons for annulment of the grant dated 29th August 2019 be heard “viva-voce” on the 24th February 2024.

The Applicant seeks to have the directive reviewed to the effect that the summons be heard by way of written submissions rather than by way of “viva –voce” evidence.

3. However, the order or directive to proceed by way of viva-voce evidence was actually made on 8th May 2023 and not on the 21st November 2023 when the matter was due for hearing of the summons for annulment of grant but was adjourned to 13th February 2024 and not to 24th February 2024, due to the unavailability of the Applicant’s Counsel, Mr. Sego, who was said to be out of the country at the time, but Mr. Kipkorir Chumba, held his brief and sought for an adjournment on his behalf. Mr. Chumba also made a request for the matter to be heard by way of written submissions.

The court allowed the application for adjournment and reconfirmed the order to have the summons heard by “viva-voce” evidence with further orders that the Applicant meets the day’s costs for the Respondent’s in the sum of Kshs. 12,000/- respecting the First, Second and Fourth Respondents and Kshs. 6000/- respecting the Third Respondent.

4. It is therefore clear from the foregoing factors that prayer (2) of the present application is not only misconceived by also overtaken by events considering that the order sought to be reviewed was made on 8th May 2023 and the matter was adjourned to 13th February 2024, but was wrongly listed for hearing on 14th February 2024 when all the parties appeared in court, but Learned Counsel for the Applicant, Mr. Sego, was not ready to proceed because in his mind the matter was not in court on that day for hearing of the main application for annulment of grant.

5. The court noted that what was slated for hearing that day by “viva-voce” evidence was the application for annulment of grant dated 29th August 2019, and that the application in the mind of Mr. Sego was the present application dated 18th December 2023 for review of the orders made on 21st November 2023 inclusive of the order for the application dated 29th August 2023 to be heard by “viva-voce” evidence. In view of the present application, the court on that 14th February 2024 ordered that the application be heard on 24th February 2024 in priority to the main application for annulment of grant dated 29th August 2019.

Accordingly, the present application was fixed for hearing on 20th March 2024 by way of affidavit evidence and written submissions but was adjourned to 13th May 2024 and thereafter on several other occasions for one reason or the other.

6. Finally, the application came up for hearing on 14th October 2024 when all the parties appeared and confirmed having filed their respective submissions save for the third Respondent. This ruling is in



respect of the application and as noted hereinabove prayer (2) of the same is overtaken by events and misconceived. In any event, the threshold for grant of the prayer was not met in terms of Order 45 Rule 1 of the Civil Procedure Rules.

The Applicant did not demonstrate by relevant evidence that there has been discovery of new and important matter or evidence or that there is an error apparent on the face of the record in relation to the impugned order and/or any other sufficient reason for which the court may exercise discretion in his favour.

7. As regards prayer (3) of the application, the Applicant has also failed to demonstrate sufficient and satisfactory grounds for setting aside the order of costs made in favour of the Respondents on 21st November 2023, when the court rendered itself as follows: -

“Costs normally follow the event. The event of adjourning this matter was caused by the Applicant oblivious to the fact that the Respondents incurred expenses in their appearing in court today.

Therefore the costs proposed by the Respondents are fairly reasonable but would be slashed to Kshs. 12,000/- for the 1st, 2nd and 4th Respondents and to Kshs. 6,000/- for the 3rd Respondent. Those are the amounts payable by the Applicant”

8. It is notable that the court did not set a time frame for the payment of the costs or impose any condition in respect thereto. Therefore, the Respondents were left at liberty to realize the costs from the Applicant either before or after the conclusion of this cause.
9. In sum, the present application is devoid of merit and is hereby dismissed in its entirety with costs to the Respondents thereby paving way for the hearing and disposal of the application for annulment of grant dated 29th August 2019. However, this court must divest itself of the jurisdiction to hear the application for reasons that the grant sought to be annulled and/or revoked was issued and confirmed by the Magistrate’s Court which is possessed of the necessary jurisdiction to deal with the application by dint of the amendment to the Law of Succession Act on the 2nd January 2016, which brought into force the Magistrate’s Court Act No. 26 of 2015, which amended and repeated Section 48(1) of the Law of Succession Act, by providing under Section 23 that: -

“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of Section 49 a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under Section 7(1) of the Magistrate’s Court Act 2015.”

10. Section 48[1] of the Law of Succession Act had previously granted exclusive jurisdiction to the High Court to revoke grants made by the magistrate court. Such jurisdiction was however, extended to the Magistrate’s Court in the year 2016 by the amendment aforementioned.

In this case, the grant in question was issued on 31st July 2018 and confirmed on 19th February 2019. Thereafter, on the 29th August 2019 the impugned application for annulment of the grant was filed by the Applicant against the four Respondents even though the grant was issued to the First Respondent only.

Rather than moving the Magistrate’s Court which issued and confirmed the grant, the Applicant moved the High Court at Eldoret in Miscellaneous Case No. 17 of 2019 which was ultimately



transferred to this court to become Kapsabet Probate & Administration Miscellaneous Cause No. 02 of 2021.

In the circumstances and for reasons stated herein above this court now downs its tools in this matter for lack of jurisdiction with orders that the application dated 29th August 2019 be and is hereby struck out without prejudice to the Applicant filing a fresh application before the Magistrate's Court. The Respondents shall have the costs of the application.

DELIVERED AND DATED THIS 23RD DAY OF OCTOBER, 2024

J. R. KARANJAH,

JUDGE

