



In re Estate of Josiah Kipkurui Arap Rono (Deceased) (Succession Cause 457 of 2006) [2024] KEHC 11615 (KLR) (1 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 457 OF 2006
SM MOHOCHI, J
OCTOBER 1, 2024**

BETWEEN

CHARLES KIPKOECH ARAP KIRUI APPLICANT

AND

JOYCE CHEPKORIR RONO 1ST RESPONDENT

SUSAN CHERON RONO 2ND RESPONDENT

DENIS KIMUTAI KIRUI 3RD RESPONDENT

RULING

Background

1. The deceased passed away on 7th December, 2005 and left behind a vast estate and dependents. Grant of Letters of Administration were issued to Susan Cheron Rono, Joyce Chepkorir Rono, Charles Kipkoech Kirui and Denis Kimutai Kirui on 8th December, 2008 in Nairobi Succession Cause No. 3030 of 2006. The 1st, 3rd and 4th Administrators are members of the first house being widow and sons of the deceased. The 2nd Administrator is the widow of the deceased and represents the 2nd house.
2. By Consent recorded on 13th June, 2018 the grant dated 17th November, 2018 was partially confirmed save for items numbers, 22, 26, 29, 30, 31, 35 and 43. By Judgement dated 14th January, 2021 and delivered on 8th February, 2021 the Court distributed items numbers, 22, 26, 29, 30, 31, 35 and 43. The 2nd Administrator being dissatisfied with the said decision, filed Nakuru Civil Appeal Number 034 of 2021.



Summons for Revocation of Grant

3. Before Court determination is the Application by the Applicant dated 11th January, 2024 seeking to revoke the Grant of Letters of Administration made to the Respondents on the 8th December, 2008 partially confirmed on 8th February, 2021. The application seeks orders that:
 - i. Spent
 - ii. That the firm of Mutai Kirui & Associates advocates be granted leave to come on record on behalf of the Applicant herein Charles KipKoech arap Kirui
 - iii. That an order does issue restraining the administrators of the Estate of Josiah Kipkirui arap Rono; Sunan Cheron Rono, Joyce Chepkorir Rono, Charles Kipkoech Kirui and Denis Kimutai Kirui from effecting transfer and distribution of any of the deceased's movable and immovable assets, monies and other property in his name pending the hearing and determination of the Summons for Revocation of Grant.
 - iv. That the Summons for Confirmation of Grant that was partially confirmed by consent on 13th June, 2018, save for items no. 22, 26, 29, 30, 31, 35 and 43 be revoked.
 - v. That the Judgement delivered on 8th February 2021 distributing items no. 22, 26, 29, 30, 31, 35 and 43 be set side
 - vi. That costs hereof be provided for.
4. The Application was Supported by the Affidavit sworn on even date by the Applicant and the further Affidavit of Cynthia Muthoni alias Cynthia Rono sworn on 11th January, 2021. The Applicant stated that his father introduced to him one Cynthia Muthoni as his sister in 1998 and 2002. She is the sixth born of the deceased's children and therefore a beneficiary of the estate, she was recognized during the deceased burial but was left out in the distribution of the estate. It was his argument that the grant was defective and there was no disclosure of material facts to benefit the second house to the detriment of the first house. That Joyce Chepkorir suggested Cynthia be left out in the succession proceedings.
5. Cynthia deponed that she was the biological child of the deceased. Was maintained by the deceased and was well known to the deceased family. She deponed that she was left out of the succession proceedings despite being a child of the deceased.
6. The Petitioner in opposition filed Grounds of Opposition dated 29th January, 2024 on the grounds that the Court is functus officio in the matter as judgement has been entered and appeal lodged. The Applicant ought to have relinquished his position as an Administrator before filing the Application. The Applicant's advocates are not properly on record. the Applicant's actions are an afterthought and in bad faith since the Applicant failed to disclose those facts at the material time. The grounds relied on are unconstitutional and not anchored in law. The Application is frivolous, vexatious and an abuse of the Court process.
7. Also, in opposition, the 1st and 4th Administrators filed Grounds of Opposition dated 5th February, 2024 on the grounds that the Court is functus officio by the fact that it is pending at the Court of Appeal. That a Certificate of Confirmation of Grant is different from a Grant of Representation and therefore not available for revocation under Section 76 of the *Law of Succession Act*. The Certificate of Confirmation of Grant was issued by Consent Orders executed by the Applicant and the grounds for setting aside the consent have not been advanced. The Application is bad in law and an abuse of the Court process.



8. Cynthia Muthoni alias Cynthia Rono in her Witness Statement dated and filed on 19th February 2024 stated that the deceased was her biological father who visited her and her mother during his lifetime. That he took care of her financial and educational needs. She also stated that she was introduced by the deceased to his family and together with her mother attended family functions as his daughter and was known as a daughter to his family. That she spent nights in the home of the deceased and some of her siblings spent time in her mother's home.
9. She added that she was informed when the deceased passed away, attended the funeral, was acknowledged in the obituary published in the newspaper and the eulogy. She noted that she was not included as a member of the family despite being his daughter. She learnt that the partial grant had been confirmed from her brother Charles Kipkoech arap Rono and believes that her relationship with the deceased was not disclosed to Court during the proceedings.
10. The 4th Administrator in his Witness Statement dated 9th April, 2024 stated that the first house acknowledges Cythia Muthoni as a child of the deceased. That there were consultations and concessions prior to lodging the succession proceedings to transfer assets to her mother as she was a minor. She has never been disowned and was factored in the distribution by those concessions and she ought to join the appeal as an interested party to ventilate her issues.

1st and 4th Administrators First Household's Submissions

11. Through Written Submissions dated 9th March 2024, it was submitted that there is no dispute that Cynthia Muthoni is a child of the deceased however prior to the passing and lodging of the succession cause, some assets were transferred to Cynthia's mother to hold in trust and the Applicant was part of those arrangements.
12. They maintain that the Court is functus officio by the fact that there is a pending appeal. They relied on *Telkom Kenya Limited v John Ochanda (Suing on his Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR to submit that despite the Court having powers under Rule 73 of the Probate and Administration Rules the Court of Appeal has superiority due the fact that a judgement has already been rendered and a Certificate of Confirmation of Grant issued. The Court of Appeal is the one clothed with jurisdiction to rehear and re-evaluate the proceedings.
13. They also brought to the Court's attention the decision in the case of *Estate of Kiberenge Mukwa (Deceased)* [2021] eKLR where the Court held that a Certificate of Confirmation of Grant is akin to an order or a decree and therefore not a grant of representation culpable of being revoked. They contended that the Court ought to down its tools in these proceedings.

2nd Administrator/ Second Household's Submissions

14. In the submissions dated 5th June, 2024, the 2nd administrator submitted on three issues. Firstly, whether the Court was functus Officio. It was argued that the High Court has already expressed itself in the matter and the Applicant is seeking to ask the Court to set aside the judgement and render it on which is the role of a Court with a higher jurisdiction. Reliance was placed in the Supreme Court's decision in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR where the Court elaborated on the doctrine of functus officio and the principle of finality.
15. Secondly as to whether a party can take summons against himself, it was submitted that the Applicant by virtue of being an administrator and the grant being in his favour he is playing the role of both the Plaintiff and the Defendant in his own case. Reliance was placed in re estate of Gurdial Kaur Sihra



(Deceased) [2018] eKLR. It was also argued that he was aware all along that Cynthia was his sister and now seeking to include her despite proceeding without her in the first instant brings to question the motive of the Applicant.

16. Thirdly, it was submitted the firm of Mbatia Kirui and Associates is owned by the Applicant and therefore there is conflict of interest by virtue of paragraph 96 and 97 (d) of the LSK Code of Standards.

Analysis

17. Upon considering the Pleadings for and against the Application and considering the submissions by the parties, I am unable to find in favor of this Application in that the Applicant who has all along participated in the proceedings seeks to review judgment and set aside elements thereon after judgment which judgment he never appeals.
18. The Applicant was all aware of the situation of Cynthia and was obliged as a petitioner and ultimately as an administrator to make the said disclosure during pendency of the proceedings and not post facto judgment.
19. That the decision whether or not to set aside ex parte judgment is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah vs. Mbogo & Another* [1967] EA 116.
20. In *Pindoria Construction Ltd vs. Ironmongers Sanytaryware* Civil Appeal No. 16 of 1976 it was held that:
- “It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the *Civil Procedure Rules*. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge’s exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions.”
21. The Applicant has equally not complied with Order 9 of the *Civil Procedure Rules* relating to change of advocates post-judgment.
22. The Applicant cannot seek an order of injunction against himself as an administrator unless he relinquishes the position to move in against his Co-Administrators.
23. This Court cannot revoke a summons for confirmation of grant but rather can revoke a grant of probate of letter of administration or with written will and as such the prayer that, Summons for Confirmation of Grant that was partially confirmed by consent on 13th June, 2018, save for items no. 22, 26, 29, 30, 31, 35 and 43 be revoked, cannot be granted.
24. I thus in exercise of my discretion find the Application to be without merit and accordingly dismiss the Applicant dated 11th January, 2024.



25. I am constrained to award costs of this Application to the Respondents.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 1ST DAY OF OCTOBER 2024

MOHOCHI S.M

JUDGE

