



**In re Estate of Chepkurgat Cheptony (Deceased) (Succession Cause 112 of 2015) [2023] KEHC 1078 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1078 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 112 OF 2015  
RN NYAKUNDI, J  
FEBRUARY 16, 2023**

**IN THE MATTER OF THE ESTATE OF CHEPKURGAT  
CHEPTONY ALIAS THOMAS CHEPKURGAT CHEPTONY**

**BETWEEN**

**HILLARY KIMTAI KURGAT ..... OBJECTOR**

**AND**

**CLETI KURGAT ..... 1<sup>ST</sup> PETITIONER**

**AGNES KURGAT ..... 2<sup>ND</sup> PETITIONER**

**JUDGMENT**

1. The Applicant approached this court vide a Chamber summons dated November 23, 2022 seeking the following orders;
  1. That the grant issued in favour of the petitioners/respondents herein be revoked and/ or be amended to reflect the Applicants interest of 40 acres which he has used and occupied since given by deceased.
  2. That the costs of this application be borne by the Respondents.
2. The application is premised on the grounds set out therein and the contents of the supporting affidavit of Hilary Kimtai Kurgat.

**Applicant’s Case**

3. The applicant’s case is that he is a beneficiary of the estate of the deceased as he was his grandfather. Among the properties he left behind, the applicant was gifted 40 acres being part of the land known as LR No 1558/5. He stated that he has been in occupation use and possession of the said 40 acres for over twenty years. Pursuant to family meetings, it was agreed that he retain the 40 acres given to him.



## Respondent's Case

4. The application was opposed by the respondents/petitioners. The 1<sup>st</sup> petitioner deposed that she swore the affidavit annexed to the applicant's supporting affidavit based on the understanding of the family members who attended various meetings that the deceased herein had indeed gifted the applicant the stated 40 acres of land. She acknowledged that her co-petitioner has always been opposed to the allegation that the applicant was entitled to the said 40 acres. Further, that the 1<sup>st</sup> Objector (the applicant's stepmother) and the 2<sup>nd</sup> Objector, Lucy Kemboi who is a widow to her other brother have equally opposed the position that the applicant is entitled to 40 acres.
5. The 1<sup>st</sup> petitioner deposed that this court vide its ruling rendered on July 13, 2022 (paragraph 54) declared that the deceased herein died intestate. To her understanding, this nullified the purported will by the deceased and any entitlement by way of purported gift. Through a series of meetings, it was then agreed that Beneficiaries to the deceased's estate be limited to the deceased's surviving widow and children including Michael and Ambrose who are both deceased and further, that all grandchildren will only be entitled to a share of the deceased's property through their parents. Therefore, the Applicant and Ascah Kurgat are entitled to a share of the estate herein on behalf of Michael Kipkosgei Kurgat (deceased). They are then expected to share it out with all other beneficiaries in a manner consistent with the mode of distribution decreed by the court in Eldoret High Court P/A No 12 of 2011 aforesaid. She maintained that as a matter of fact the portion of land presently occupied by the applicant is the same portion that has been given to his father's estate in the distribution agreed upon by the family.
6. The 2<sup>nd</sup> petitioner submitted that the court rendered a ruling by which at paragraph 54, it was held that Thomas Chepkurgat Cheptiony (deceased) died intestate. That decision has not been set aside or reviewed. Further, that the deceased left no will capable of taking effect. That finding by the court precludes the applicant from raising any claim to the deceased's property on the basis of an alleged gift. The respondents urged that the deceased's father was provided for by the mode of distribution that was agreed upon by the deceased's surviving spouse and children. She indeed signed the annexed consent.
7. The 2<sup>nd</sup> petitioner submitted that the Applicant's rights over the deceased's property herein flow from iris relationship with Michael. He cannot in the absence of a will claim a share of the estate directly unless the primary beneficiaries' consent. Under the broader concept of intergenerational equity, he can only claim from his father's estate. In the instant case his father's estate has been provided for. Counsel further stated that the application is incompetent as it seeks to revoke or amended the grant yet the grant is merely a form of representation. It does not confer ownership to anyone. He urged the court dismiss the application.

## Analysis & determination

8. Upon considering the application, responses thereto and the submissions of the parties, the following issue arises for determination;

Whether the grant issued in favor of the petitioners should be revoked
9. Revocation of grant is governed by section 76 of the [Law of Succession Act](#) which stipulates as follows;

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 has ordered or allowed; 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.”

10. The applicant contends that the grant was issued by making of false statements as he was not disclosed as a beneficiary to the estate. It is not in dispute that the applicant was the grandchild to the deceased. It is also not disputed that the applicant uses the parcel of land which is a portion of LR No 1558/5 and he was indeed gifted 40 acres of the parcel of land.

11. It is my considered view that the applicant has misconceived the principles of the law of succession gravely. As there is no will by virtue of the deceased’s will having been revoked by this court vide a ruling dated July 13, 2022, the property of the deceased was subject to intestate succession. The applicant’s father, Michael Kipkosgei Kurgat, who is deceased, was to receive a portion of the deceased’s estate, including the portion occupied by the applicant.

12. Upon the allocation of his portion of the estate, the applicant and his family were to receive a share of the estate from the estate of Michael Kipkosgei Kurgat pursuant to the mode of distribution decreed by the court in Eldoret High Court P/a No 12 of 2011.

13. It is settled law tht Section 29 of the [Law of Succession Act](#) provides for different categories for dependants: Thus

Section provides that a dependants means wife (s), former wife(s) and children whether or not they  
29(a) were being maintained by the deceased prior to death.

Section further provides that dependants include, deceased’s parents, step parents, grandparents,  
29(b) grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters as were being maintained by the deceased immediately, prior to his death

Section provides that where the deceased was a woman, the husband if he was being maintained by  
(c) her prior to her death



Section illustrates that only the wife/wives and children of the deceased are out rightly entitled to the deceased's estate. All other relations (Section 29b and C) need to prove that they were being maintained by the deceased. Upon proving that you are dependant, you are required to apply to court for provision out of the net estate.

*In re-Estate of MMuthania Mwendwa (Deceased)* (2016) eKLR the petitioner (son of the deceased) sought to include his children as dependants of the deceased estate. However, he did not provide any evidence that his children, the deceased's grandchildren was being maintained by him prior to his death. Consequently, the court held that it is not the mere relationship that matters but proof of dependency”.

14. Given these express provisions the Applicant has not demonstrated that he is a dependant as strictly envisaged and construed that he is entitled to the passing of the property under the laws of inheritance by way of intestate estate administration. The problem arising is that the Law of Succession Act under section 29 comprises of a rubric intertwined relationship ranging from 1<sup>st</sup> degree to 3<sup>rd</sup> degree of consanguinity and affinity. What happens traditionally in the event of death of the deceased more specifically the head of the family or man of family members agitate to lay a claim to the estate. The known primary ranking of the family of the deceased is well captured in the Law of Succession. The mistake interpretation of the Law which weighs in by way of multiple litigations is structured around the question of in-laws and grand-children not indirect lineage with the deceased. As per the law any such class of persons under Section 29(B) of the Act must discharge the burden of inheritance of the deceased estate which goes beyond the principles of financial provisions. Pedigrees with complex consanguinity and affinity loops arising from successive generations are in certain instances invoked in a petition for heirship. Customary law infused with culture within our multiple ethnic society provided a regular pattern of social behaviour accepted by a given society/tribe as binding upon itself. For the sake of clarity “There are two fundamentals relationships of the highest generality, namely child and parent, the one relationship being the reciprocal of the other. These can be combined so as to express any of the complex relationship, thus grandchild is expressed by child of child. Grand parent by parent of parent, brother or sister by child of parent, and consort by parent of child. The two latter expressions are taken subject to a certain condition (see pg 48) . In the same way great grandchildren is expressed by child of child of child, nephew or niece by child of child of parent, and so on” (See Macfarlane-Analysis of Relationships- galton.or [https:// galton.org](https://galton.org), essays, galton-1983-jaigi.con)
15. The welfare test is not sufficient as a matter to justify inheritance for those outside the first degree of consanguinity and affinity. The court must never lose sight of the fact that the nuclear family rank first as an ideal immediate beneficiaries to the estate of the deceased. What those options might be in the class of persons named under 29(B) of the Act will depend upon the individual circumstances of the case but at their widest interpretation they can range from making no order of inheritance to making an order for financial provisions. If the thresholds criteria under section 29(B) of the Act cannot be satisfied then dependency for purpose of inheritance fails. Crossing the threshold of consanguinity and affinity pursuant to section 29 (B) of the Act is not a reason for making an inheritance order but merely opens the way to the possibility that such an order may be made.
16. The upshot of the foregoing is that the applicant has failed to prove that the grant was obtained by making of false statements. As he is a grandchild of the deceased he is not a primary beneficiary or a dependant as envisioned by the Law of Succession Act. Further, the portion of land he claims is subject to the distribution of his fathers' estate and not his grandfathers' estate. The petitioner's and the administrator's tabled a mode of distribution which factored in the applicant as a beneficiary of his father's estate and included the disputed parcel of land. The model of distribution was approved in court on December 13, 2022 in the presence of Ascah Kurgat, the mother to the applicant. It follows



that there was no concealment of material facts and the application is unmerited. It is hereby dismissed with no orders as to costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023**

In the Presence of:

Dr. Chebii for the Appellant

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**R. NYAKUNDI**

**JUDGE**

