



In re Estate of David Kiprugut Bor (Deceased) (Succession Cause 123 of 2021) [2023] KEHC 17624 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
SUCCESSION CAUSE 123 OF 2021
RN NYAKUNDI, J
MAY 23, 2023**

IN THE MATTER OF THE ESTATE OF DAVID KIPRUGUT BOR (DECEASED)

BETWEEN

BERNEDINE JEBET CHERUTICH PETITIONER

AND

STEPHEN KAPKITONY SITIENEI OBJECTOR

RULING

1. The applicant filed a summons for revocation of grant dated August 4, 2022 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That, the grant of letters of administration issued on the 28th day of February 2022 to the petitioner be revoked and/or annulled.
 4. That, upon grant of prayer (3) above, this honourable court be pleased to appoint the petitioner herein and applicant as joint administrators of the estate of the late David Kiprugut Bor and thereafter be granted time to apply for confirmation of grant.
 5. That, this honourable court be pleased to make such other orders as shall meet the ends of justice.
 6. That, the cost of this application be provided for.
2. The application was premised on the grounds set out therein and the contents of the supporting affidavit sworn by the applicant.



Applicant's Case

3. Learned counsel for the applicant filed written submissions on the application. Counsel contended that the applicant is a beneficiary to the estate by virtue of being a legal guardian to the biological daughter of the deceased. Further, that the applicant was appointed as DJ's guardian through a valid court order which is still in force which the petitioner failed to disclose this important fact to the honourable court and the fact that the minor's mother, Anne Chepkosgei Kipsaina passed away and was legally married to the deceased.
4. He urged that the petitioner failed to disclose a full inventory of the assets of the deceased at the time of his death and therefore he is apprehensive that the grant of representation issued to the petitioner herein will be fraudulently used to disinherit himself together with other beneficiaries of the deceased who stand to suffer damage and/or loss if the grant is not revoked or annulled.
5. Counsel submitted that it has been clearly demonstrated that the applicant is the legal guardian of the minor and therefore this creates a continuing trust as the minor is an orphan and a direct beneficiary of the estate. The respondent was appointed as a sole administrator of the estate which contravenes the provisions of section 58 of the *Law of Succession Act*. He cited section 76 of the *Law of Succession Act* and the case of *In re estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR in support of his submission that the process giving rise to these proceedings were defective in nature and substance since the respondent fraudulently obtained the grant through falsification and concealment of the existence of continuing trust and the existence of a minor under the guardianship of the applicant herein.
6. Counsel urged that these proceedings cannot go on without another administrator who may be appointed in association with the petitioner in accordance with section 66 *LSA* and this means the grant has to be revoked. The respondent's failure to disclose and accentuate the existence of a continuing trust was a critical and essential point of law because grant of letters of administration intestate could not singularly issue to her as a sole administratrix of the estate of the deceased.
7. Counsel urged that the application be allowed with costs in favour of the applicant.

Respondent's Case

8. Learned counsel for the respondent opposed the application and submitted that section 76 in the *Law Of Succession act* provides that an application for revocation of grant of representation may be made by any interested party and any party that makes an application under the said section must demonstrate to the court sufficient interest to challenge and grant of representation. Further, that he has not demonstrated any interest to warrant him to be included as an administrator in the petition and revocation of the grant. He has not demonstrated the lack of competence, character and suitability of the Petitioner/respondent in making the application of grant of letters of administration intestacy.
9. Learned counsel submitted that the objector has not pleaded or being a dependent of the deceased prior to his death as provided under section 26 and 29(b) of the *law of succession act*. Further, that his interest in the estate is completely unknown and he is not competent to make the present objection.
10. Counsel urged that the petitioner was the wife to the deceased and therefore by virtue of section 66 as read together with section 29 of the *Law of Succession Act* priority is given to surviving spouses in administration of the deceased's estate intestate. Further, that rule 7 of the *Probate and administration rules* sets out the procedure for application of grant of representation. Sub-rule 7 addresses situation where the petitioner has a lesser right to representation and requires that he/ she cites or cause citations to issue to persons with a prior right, or get them to renounce probate or to renounce probate or



obtain their consent allowing the petitioner to apply for representation. Counsel submitted that the petitioner, having proved she was a wife to the deceased by producing a marriage certificate, had priority and therefore did not need to perform the aforementioned obligations.

11. Learned counsel intimated to the court that the interests of the minors are well protected by the Petitioner/respondent who lived with them even before the demise of their father, the deceased herein. The Petitioner even recognizes the two children in the Petition and in her Affidavits as beneficiaries of the estate. Counsel submitted that the applicant had failed to meet the threshold set out in section 76 of the [law of succession act](#) and therefore the summons ought to be dismissed with costs.

Analysis & Determination

12. In my view, the following issues arise for determination;

1. Whether the grant of letters of administration issued on February 28, 2022 should be revoked

Whether the grant of letters of administration issued on February 28, 2023 should be revoked

13. Revocation of grant is governed by section 76 of the [Law of Succession Act](#) which provides 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 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.”
14. The applicants’ contention is that the grant should be revoked on the basis that the petitioner concealed material information in obtaining the grant. The material information he claims was concealed is that there are properties and dependants that the petitioner left out of the succession proceedings. In his application he did not mention anything about a continuing trust but he raised the same in his submissions as material information that was concealed.



Whether there was concealment of material information

15. It is trite law that he who alleges must prove. The applicant provided a list of properties and beneficiaries that he alleged were left out of the proceedings but there was no corroborating evidence on the same. He provided a list of names of beneficiaries and dependants as evidence, there is no elaboration on how they were dependants and beneficiaries to the deceased's estate. Similarly, the list of properties he claimed were left out are on the basis of his personal knowledge and no tangible evidence. It is my considered view that the applicant has failed to prove his allegations and as such the same cannot be considered concealed material information.
16. The applicant raised the issue of a continuing trust in his submissions despite never mentioning the same in pleadings and as such, it appears to have been an afterthought. The court takes judicial notice that parties are bound by their pleadings and further, that submissions are not pleadings. If this court was to go outside the pleadings to address the issue of a continuing trust, that would be ultra vires as the court is equally bound by the pleadings before it.
17. This matter has been very contentious and at the center of it is the minor DJ from the chief's letter dated July 17, 2021, it is ascertainable that the minor is 15 years of age or thereabout at this point in time. Further, that, the minor lived with the administrator from May 4, 2011, when her mother passed away and up until the point that the applicant took guardianship of the minor in 2021. The [*law of succession Act*](#) defines who is a dependant or heir to the estate of a deceased person Section 29 of the [*Act*](#) provides as follows:
 - a. The wife of wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death
 - b. Such of deceased's parents step-parents, grandparents 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, and
 - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."
18. I am minded to note that the doctrine of dependency in succession law may be more flexible depending on the direct and circumstantial evidence placed before a probate court for determination. It is a question of degree and evaluative judgement. It is generally not a question of emotional support. In the instant case, the evidence is sketchy as to whether the ongoing guardianship intention is to create a permanent social, economic, moral, and legal obligations for the advancement of the minor. Dependency in the ordinary sense of the word is seen as the giving of financial or material assistance by the deceased over a significant period of time in order to meet the need of an eligible person. The end result is that the dependant relied entirely on that deceased person for survival. It is also true that any person may naturally rely upon another who later passes on but the relationship was not meant to extend to inheritance of estate. In my view the necessities of subsistence ought to be distinguished with the letter and spirit under section 29 (a) & (b) of the [*Succession Act*](#). I am convinced that the non-justiciability of claims resting on dependency embody some of these essential features. For example

"In the case where a daughter comes into her father's house to look after him and with his concurrence, brings her children with her and it seems me that whilst the children are dependent upon the mother and the mother may be dependent upon the father unless



there are some other facts there is insufficient to show that the grandchildren are directly dependent upon their grandfather.” (See *Shaw v Lambert*) 2005 NSWSC 593

19. A similar view is stated from the same comparative jurisdiction in *Morrison v Carruthers*, (2010) NSWSC 430 it is moreover essential to remember the nature and subject matter of section 29 (a) & (b) and to interpret it subjectae materies. Applying the criteria the court in *Morrison* (supra) distinguishing between expectation and dependence had this to say

“it is important in this regard to draw the distinction between expectation and dependence. If an adult receives payment on a regular basis from the deceased and chooses not to obtain money from another available source because of the expectation of regular payment from the deceased that does amount to dependence within the meaning of that term in the Act. Financial dependency in the case of a healthy adult who is able to work means a necessity to rely on the deceased because there is no other source of finance available”

20. In my view the context in which those two cases arose are analogous to the situation which exist in Kenya as a consequence of the power given to the court pursuant to section 29 of the [Law of Succession Act](#). In my judgment, the principal purpose of section 29 in inheritance matters is to construe closely the conceptual framework and application of affinity and consanguinity.

21. It is my view from the conduct of the parties and litigation in this succession matter, that the applicant is attempting all means to be included as a beneficiary of the estate. The applicant has used guise of guardianship of the minor and I have considered the application for guardianship which is riddled with material non-disclosure leading up to its issuance. I also note that the administrator included the minor as a beneficiary to the estate and therefore it cannot be said that she failed to disclose that she was a minor.

22. The applicant, on his part, has not proved that he was dependent on the deceased immediately before his death as is required under sections 26 and 29(b) of the [Law of Succession Act](#). Whereas there is only a sole surviving administrator, the conduct of the applicant does not instil confidence in the court that he will administer the estate with her interests in mind. Section 84 of the [Law of Succession Act](#) states;

84. Personal representatives to act as trustees in certain cases

Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall, unless other trustees have been appointed by a will for the purpose of the trust, be the trustees thereof:

Provided that, where valid polygamous marriages of the deceased person have resulted in the creation of more than one house, the court may at the time of confirmation of the grant appoint separate trustees of the property passing to each or any of those houses as provided by section 40.

23. It is my considered view that the administrator act as a trustee for the minor as there are no alternative trustees who have been proposed and the applicant herein, in my view, would not be an appropriate order to make in the specific facts of this case. In consonant with rule 73 (1) of the [Probate & Administration Rules](#) the ends of justice would be met if the application on revocation is disallowed. For avoidance of doubt section 66 of the [Law of Succession Act](#) affirms as follows:

“When a deceased has died intestate the court shall save or otherwise expressly provided have a final discretion as to the persons to whom a grant or letters of administration shall in the



best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the following orders of preference

- a. Surviving spouse or spouses with or without association of other beneficiaries.
- b. Other beneficiaries entitled on the intestacy, with priority according to their respective beneficial interests as provided by part V
- c. The Public Trustee and
- d. Creditors"

24. It will be of course completely out of order to revoke a grant of representation duly issued to the senior ranking heir to the deceased intestate estate. Issues of revocation is a matter to be exercised sparingly and not at whim. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* Succession Case No 158 of 2000 where Mwita J stated:

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound ground. It is not discretion to be exercised whimsically or capriciously. There must be evidence of a 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 interest of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

25. The judicial discretion permits me not to revoke or annul the grant of representation issued to the spouse of the deceased. She is better placed to deal with all matters arising on both movables and immovable of the deceased estate. In every sense it is not tenable for this court to distribute any assets of the deceased which do not fall within the rubric of section 3 of the *Law of Succession Act*. The Applicant should stop being anxious with regard to the adequacy or inadequacy of the registration instruments of the particularised estate of the deceased in the petition filed by the Administrator.

26. In the premises, the application for revocation is unmerited and is hereby dismissed. Each party shall bear its own costs.

DELIVERED, VIA MAIL DATED AND SIGNED AT ELDORET ON THIS 23RD DAY OF MAY 2023

R. NYAKUNDI

JUDGE

