



**In re Estate of William Kiberen Serem (Deceased) (Succession Cause  
9 of 2017) [2023] KEHC 17614 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17614 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 9 OF 2017  
RN NYAKUNDI, J  
MAY 19, 2023  
IN THE MATTER OF THE ESTATE OF WILLIAM KIBEREN SEREM**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED ..... APPLICANT**

**AND**

**ELKANA KIPKORIR SEREM ..... 1<sup>ST</sup> PETITIONER**

**JOHN KIBET SEREM ..... 2<sup>ND</sup> PETITIONER**

**HOSEA KIPKEMOI SEREM ..... 3<sup>RD</sup> PETITIONER**

**AND**

**GLADYS JEBUNGEI ..... OBJECTOR**

**LENA JEROTICH SEREM ..... OBJECTOR**

**EMMA JEPCHUMBA SEREM ..... OBJECTOR**

**ROSE JEPLETING ..... OBJECTOR**

**JANE JELAGAT SEREM ..... OBJECTOR**

**RULING**

1. The applicant approached this court vide a Chamber Summons dated April 11, 2023 seeking the following orders;
  1. That the honourable court do declare that all that parcel of land known as Nandi/Kipkaren Salient/974 measuring approximately 2.19 Ha does not form part of the free properties forming part of the estate of the deceased herein.



2. That in the alternative, and without prejudice to the foregoing, the honourable court do find that the Interested Party is entitled to the Property Nandi/Kipkaren Salient/974 as innocent purchasers for value
  3. That the honourable court be pleased to vacate and set aside Clause No. 3 of its orders issued in this matter on January 27, 2023.
  4. That the honourable court be pleased to order the Nandi County Land Registrar to reinstate and re-issue to West Kenya Sugar Company Limited the title deed for Nandi/Kipkaren Salient/974.
  5. That the honourable court be pleased to issue any orders it deems fit in order to meet the ends of justice to the parties herein.
  6. That the costs of this application be provided for.
2. The application is premised on the grounds set put therein and the contents of the affidavit of Sohan Sharma annexed thereto.

### **Applicant's Case**

3. The applicant's case is that it is the registered owner of Nandi/Kipkaren Salient/974. The applicant stated that on June 20, 2022 it received an offer letter for purchase of the said property and conducted a search on the same day. It was then issued with a Certificate of Official Search No. 961 /22 which duly certified that the proprietor of the said property at the said time was one John Kibet Serem. The applicant then entered into a sale agreement dated July 18, 2022 between the applicant and the Proprietor of the land and in which agreement, the parties agreed to purchase and sell, respectively, the said piece of land at a consideration of Kshs 8,212,500/-. pursuant to the agreement, the interested party paid to the proprietor the agreed purchase price and accordingly, on August 4, 2022, the interested party was duly issued with a Title Deed in respect of the Property.
4. The applicant was served with orders dated January 27, 2023 on February 9, 2023 limiting it from encroaching on the property pending the confirmation of grant. The applicant stated that there was a Notice of Motion Application dated December 13, 2022 which culminated in the said orders and that the same was tainted with misrepresentation of facts that hoodwinked the court into issuing the order. The applicant maintained that the properties Nandi/Kipkaren Salient/974 and Nandi/Kipkaren Salient/179 have never been, and do not form part of the estate of the deceased.

### **Respondent's Case**

5. The respondents opposed the application vide replying affidavits and further affidavits filed on various dates.
6. The 1<sup>st</sup> Objector, Lena Jerotich Serem, filed a replying affidavit dated April 14, 2023. She deposed that the property known as Nandi/Kipkaren/974 forms part of the Estate of the deceased contrary to the allegations by the applicant/interested party because it was a result of Subdivision of Nandi/Kipkaren Salient/178 which was jointly registered in the names of;

Hillary Kibii A. Too 17/40 share

Kipkoske A. Koros 8/40 Share

Malakwen A. Leley 7/40 share

William K. Serem 5/40 share (deceased herein)



Nicholas Koske Kipkoske 33/40 share

7. She urged that the interested parties failed to conduct due diligence, therefore the court issued the orders in order to preserve the estate of the deceased after establishing that there was fraud. Further, that the green card marked B speaks for itself and shows the chronology of events with respect to the allegations of her and her co-objectors having misrepresented facts or hoodwinked the court.
8. She deposed that the succession is at an advanced stage and that her and her co objectors have filed a proposed mode of distribution where they have categorically stated that Nandi/Kipkaren Salient/974 should be allocated to John Kibet Serem, the person who is now confirmed to have illegally sold land which forms part of the Estate of the deceased to the interested party.
9. She maintained that Nandi/Kipkaren Salient/178 forms part of the Estate of the deceased, contrary to allegations in the supporting affidavit sworn by Sohan Sharma. She produced a copy of the search marked E in support of this point. Further, that they apportioned Nandi/Kipkaren Salient/974 to the 2<sup>nd</sup> respondent on the basis that he owns up the illegal sale to West Kenya Company Limited and as he alluded in his Supporting Affidavit sworn on 23/2/2023. She stated that the objectors would suffer as John Kibet Serem wants to allocate himself more land if Nandi/Kipkaren Salient/974 is not factored to form his share.
10. She deposed that the title should revert to the estate and that the applicant avail the letters of Administration that they relied on in consenting to purchase the property from John Kibet Serem.
11. The 2<sup>nd</sup> objector, Jane Jelagat Serem, opposed the application and stated that it was brought in bad faith. This was the position adopted by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> objectors.
12. The 2<sup>nd</sup> petitioner, John Serem, swore a Replying Affidavit dated April 14, 2023 and a further affidavit dated April 13, 2023. He stated that he concurred with the sentiments in the affidavit of the applicant. Further, that the land in dispute was given to him as a gift inter-vivos by the deceased and does not form part of the estate. He did not oppose the application and urged that the status quo be maintained.
13. In his further affidavit, he stated that the applicant purchased the property from him legally. He urged that it is not disputed that parcel number Nandi/Kipkaren Salient/974 which was initially Nandi / Kipkaren Salient /178 was commonly owned by
  - a) Hillary Kibii A. too 17/40
  - b) Kipkokei A.koros 8/40 (Deceased)
  - c) Malakwen A.leleY 7/40 (Deceased)
  - d) William A.serem 5/40 (Deceased)
  - e) Nicholas Koskei Kipkoskei 33/40(Deceased)
14. He stated that his father's share (William A. Serem) had been given to him inter -vivos. Further, that there is clear evidence that the parcel of land was given to him back in 1988 and he settled on it with his family and built a homestead. He deposed that it is out of his own volition that if the objectors want to deny him the parcel of land Nandi/Kiparren /Salient /974 formerly 178 which was given by the deceased way back in 1988 inter - vivos then he will accept the same to form part of his share and the rest he will leave it to God. He maintained that the applicant obtained the property legally.



## Analysis & Determination

15. Upon considering the application and the responses thereto, the following issues emerge for determination;
1. Whether the parcel of land known as Nandi/Kipkaren Salient 974 forms part of the estate of the deceased
  2. Distribution of the estate

### **Whether the parcel of land known as Nandi/Kipkaren Salient 974 forms part of the estate of the deceased**

16. Section 3 of the *Law of Succession Act* defines the free property of the estate as;
- “free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;
17. The deceased passed away on January 3, 1991. Therefore, if the property was still registered in his name at the time of his death, it would form the free property of the estate and be considered available for distribution. In the affidavit in support of the petition for letters of grant of administration intestate, the following properties were listed as part of the estate;
1. Nandi/Kipkaren Salient/179
  2. Nandi/Kipkaren Salient/182
  3. Nandi/Kipkaren Salient/183
18. It is not in dispute that Nandi/Kipkaren Salient/974 was formerly known as Nandi/Kipkaren Salient/178 and neither is it in dispute that it was jointly registered in the name of other proprietors with the deceased owning 5/40 share of said property. As per the green card, the property was registered in the name of the deceased alongside the other owners on August 9, 1978. It was then closed for partition and new numbers were issued being 970-975 resulting in the disputed property. However, as per the certificate of official search annexed to the affidavit of the 1<sup>st</sup> objector, the same is currently registered in the name of the interested party. The next issue that needs to be determined is how the portion of land was registered in the name of the interested party. It is not in dispute that the 2<sup>nd</sup> petitioner sold it to the interested party. He urged that he illegally sold the parcel as he was given the property by the deceased as a gift *inter vivos*. It follows that to determine if he had proprietary interests in the land the court must first determine whether the property was a gift *inter vivos*.

### **Whether the 2<sup>nd</sup> Petitioner acquired Nandi/Kipkaren Salient/974 as a gift inter-vivos**

19. A gift *inter vivos* is a gift between the living. It is a gift of or relating to property conveyed not by will or in contemplation of an imminent death but during the conveyor's lifetime.
20. *In Re Estate of the Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR Nyamweya J expounded on the requirements for valid gifts *inter vivos* as follows;

For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered



transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.

21. It is essential to note the requirement that the gifts *inter-vivos* must be complete for the same to be valid. It will otherwise be deemed an incomplete gift. The court in the case of *In re Estate of The Late Gedion Mantbi Nzioka (Deceased)*<sup>[supra]</sup> cited Halsbury's Laws of England as follows;

In *Halsbury's Laws of England* 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

22. Therefore, the essentials of a gift *inter-vivos* are;
- a. It may be granted by deed, an instrument in writing, by delivery, by declaration of trust by the donor or by way of resulting trusts or presumption of.
  - b. If it is a gift of land it must be by way of registered transfer, or declaration of trust in writing if the land is unregistered.
  - c. It must be complete.
  - d. It is not necessary for express acceptance from the donee.
23. The 2<sup>nd</sup> petitioner has not produced a registered transfer which would be evidence of the gift *inter vivos*. This is a mandatory requirement to prove whether one received a gift *inter vivos*. He merely mentioned that it was a gift *inter vivos* and did not make any effort whatsoever to prove the same. It follows that the property was not a gift *inter vivos*.
24. Having determined that he did not have title to the property, it follows that the same forms part of the estate of the deceased and is available for distribution. The allegations by the interested party that it was an innocent purchaser for value implies that there is a causal connection between its contributions and acquisition, preservation, maintenance, or improvement of the disputed property and if allowed not to pass as a share proportionate to the purchase price it will occasion unjust enrichment. The interested party has demonstrated sufficiently with substantial evidence that there is a direct link between the contract of sale entered with John Serem a co-administrator to the estate of the deceased. From the sale agreement the interested party's money or sweat had gone into a venture to acquire a share of the estate in the property of the deceased, though no title has been processed the averment on vacant possession remains unchallenged. It is also crystal clear that resources have been expended on improvement of the purchased property predating back at the time of sale. The inference to be drawn from the facts of this case is that the parties had an understanding that they would make no claims from each other at the time of confirmation of grant save for transmission of title to authenticate the sale.



25. Nevertheless, on the other side of the arguments, the court is alive to the unnecessarily long process that would be having the title revert to the estate, distribute the same to the 2<sup>nd</sup> Petitioner only for the same to be registered in the name of the interested party by virtue of the fact that he had already sold it to them. The objectors have proposed that the property revert to the estate and at the same time that the property be distributed to the 2<sup>nd</sup> petitioner. In my view that would be an unnecessarily long route that would lead to the same destination, with the end result being that the interested party would have the property registered in its name.
26. Under the powers granted to this court by section 47 of the [Law of Succession Act](#), I find that it would be in the interests of justice and expediency to find that whereas the property forms part of the estate of the deceased, and in consideration of the positions of both parties on the same, it shall be considered as the portion to be distributed to the 2<sup>nd</sup> petitioner and therefore making the interests of the interested party in the property legitimate. This is not an approval of the mode in which the 2<sup>nd</sup> petitioner and the interested party conducted the transfer, but more so an exercise of Solomonic wisdom in an effort to expedite the distribution of the estate. It also addresses the apprehension of the objectors that the 2<sup>nd</sup> petitioner would demand another portion of the estate.

### **Distribution of the estate**

27. The interested parties filed a mode of distribution where they proposed the acreage to be distributed to the beneficiaries. In my view the scheme of the transactions between the grant holder and the interested party can be construed within the provisions of section 93 of the [Law of Succession Act](#). The only fallacy is that the beneficiary one John Kibet Serem conveyed the itemised share on consideration from the interested party before the final decree in the intestate proceedings.
28. It is trite that under the notion of fairness and justice any sale, conveyance, or transmission of an intestate estate awaits the decree of the court commonly referred to as a certificate of confirmation of grant. In the instant case, it is undisputed that the interested party albeit the parcel of land was yet to be transmitted to the beneficiaries there was a reasonable believe that one John Kibet Serem having been gazetted on 7<sup>th</sup> July 2017 as one of the administrators to the estate of William Kabereni Serem had the legal capacity to deal with the transactions on the immovable estate of the deceased.
29. The classical theory of contract characterises it as a bargain resulting from agreement between two equal parties. In this respect applying reasonableness test the petitioner cannot get out of this contract notwithstanding the finding by this court that they give it *inter vivos* is not in his favour. As such to determine whether the beneficiary John Kibet Serem acted with reasonable care or the care of a reasonable person towards the interested party in initiating the sale there is a legitimate expectation of the contract being above board. This concept was construed by Peter Western who observed as follows:
- “ That reasonableness” it is not an empirical measure of how average members of the public think, feel, or behave. Average is not the same as right or appropriate. Regrettably average persons have been known to think, feel and behave very differently from the way that the policy to which they are duty bound believes they should, and when they do., they are answerable to the polity for their failings. Rather reasonableness is a normative measure of ways in which it is right for persons to think, fee or behave- or at the very least, ways in which it is not wrong for them to do so. (see individualizing criminal persons *2CR Role view 2008* “
30. The reasonable test is implicit that injustice to the third party who will suffer the loss may not be remedied outside the symmetry of this succession cause. The privity of contract between John Kibet Serem and the interested party do take cognisance and enforceability within the scheme of Nandi /



Kipkaren/974 totalling 2.19 HA. be excised from the share of the beneficiary for onward transmission to the purchaser. In essence, the share entitlement of John Kibet Serem shall be discounted by the same acreage.

31. The petitioners provided a more detailed proposal on the distribution with the acreages and the properties listed. Upon consideration of the modes of distribution, and in line with the provisions of section 40 of the Law of Succession Act, I order that the property shall be distributed as follows;

Description Of Property	Beneficiary	Shares Of Heirs
Nandi/Kipkaren Salient/178 This Share Be Transmitted To Western Kenya Sugar Co. Ltd	John Kibet Serem	Whole (2.19Ha)
Nandi/Kipkaren Salient/179	John Kibet Serem Jane Jelagat Serem Lena Jerotich Serem	4.387 Ha. 6.5767 Ha. 6.5767 Ha.
Nandi/Kipkaren Salient/182	Hoseah Kipkemboi Serem Gladys Jebungei Rop Estate Of Japheth Kimeli Serem	6.5767 Ha. 6.5767 Ha. 6.5767 Ha.
Nandi/Kipkaren Salient/183	Elkana Kipkorir Serem Rose Jepleting Serem Emma Chepchumba Serem	6.5767 Ha. 6.5767 Ha. 6.5767 Ha.

32. It follows that a certificate of confirmed grant in favour of the estate of William Kiberen Serem and the distribution capture the particulars in this ruling.

Orders accordingly

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 19<sup>TH</sup> DAY OF MAY 2023**

In the Presence

Mr. Ombego Advocates

Mr. J.K Birir Advocate

Chepseba Lagat Advocate

Mr. Andiwo Advocate

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**R. NYAKUNDI**

**JUDGE**

