



In re Estate of Joseph Kiprono Situk (Deceased) (Succession Cause 822 of 2013) [2023] KEHC 17410 (KLR) (16 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 822 OF 2013
HM NYAGA, J
MAY 16, 2023**

IN THE MATTER OF THE ESTATE OF JOSEPH KIPRONO SITUK (DECEASED)

BETWEEN

MOSES KIMUTAI KIPTARUS APPLICANT

AND

ALEXANDER KIPKOECH SITUK 1ST RESPONDENT

DOMINIC KIPNGETICH SITUK 2ND RESPONDENT

RULING

1. This Succession Cause relates to the estate of Joseph Kiprono Sittuk (hereinafter ‘the Deceased’) who died intestate in Metiso on October 28, 1999.
2. Following the demise of the Deceased his sons Dominic Kipngetch & Alexander Kipkoech Sittuk Petitioned the court for Grant of letters of Administration Intestate.
3. In the Affidavit in support of the Petition dated November 18, 2018
 - i. Sandi Kimutai Sittuk- Son (Deceased)
 - ii. Dominic Kipngetch Sittuk- Son 48 years Old
 - iii. Kipchirchir Setuk- Son 46 years Old
 - iv. Winsum J Sittuk Daughter 34 years Old
 - v. Lucy J Sittuk – Daughter 32 years Old
 - vi. Moses K Sittuk Son (Deceased)
 - vii. Timothy Kibet Sittuk Son 29 years Old



- viii. Alexander Kipkoech Sittuk Son 28 years Old.
4. The estate of the Deceased was said to comprise of only one asset being Title No. Lembus/Sinonin/134 valued at Kshs 2 million and the estate was indicated to have NIL liabilities.
 5. Following the petition filed Grant of Letters of Administration Intestate were issued to Dominic Kipngetch Sittuk & Alexander Kipkoech Sittuk as the Administrators of the deceased's estate on 4th of March, 2014. The said Grant was thereafter confirmed on October 4, 2018 with the sole asset of the estate devolving to the Administrators herein, their two brothers namely; Kipchirchir Situk, & Timothy Kibet Sittuk, and also to the estate of Saudi Kimutai Sittuk.
 6. Subsequently, an amended Consent to Confirmation of Grant containing every beneficiary's signature was filed and a rectified Grant issued on December 3, 2019. According to the said consent, the deceased's estate was to devolve to his beneficiaries in the following manner: -

Name	Description of the Property	Share of Heirs
Susan Jepkemboi Kandie	Parcel No. Lembus/ Sinonin/134	3.84 Acres
Dominic Kipngetch Sittuk	Parcel No. Lembus/ Sinonin/134	3.84 Acres
Kipchirchir Setuk	Parcel No. Lembus/ Sinonin/134	1.95 Acres
Alexander Kipkoech Sittuk	Parcel No. Lembus/ Sinonin/134	9.05 Acres
Alexander Kipkoech Sittuk	Parcel No. Lembus/ Sinonin/134	5.05 Acres

7. The Applicant Moses Kimutai Kiptarus then filed the instant summons dated March 31, 2022 brought pursuant to Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules seeking for Orders:
 1. Spent
 2. That the Court grants a temporary injunction against the administrators or persons claiming under them from evicting the Applicant alienating or transferring or dealing or in any way interfering with the Applicant's possession of a portion of two (2) acres within all that piece of Land Reference Number Lembus/Sinonin/134 pending hearing and determination of these summons for revocation of grant.
 3. That the Grant of letters of Administration issued to Alexander Kipkoech Sittuk and Dominic Kipngetch Sittuk made on March 4, 2014 which were confirmed on October 4, 2018 and rectified on December 3, 2019 be revoked and/or annulled.
 4. That Costs of these proceedings be borne by the Respondents.



8. The Application is premised on grounds on its face and supported by an Affidavit of the Applicant sworn on the even date. He deposed that he is a beneficiary of the estate of the deceased herein by virtue of purchase and that his interest had been confirmed and noted in the Amended Affidavit in support of confirmation of grant that was filed on May 19, 2016.
9. He averred that the administrators herein did not inform him of the hearing date of this matter despite being a beneficiary and living on the estate.
10. It was his deposition that the rectified grant issued on December 3, 2019 failed to consider the Memorandum of decision that had been passed on December 30, 2015 and that the administrators failed to disclose to the court that they had not included all the beneficiaries as listed in the consent to confirmation of grant.
11. He further deposed that he learned about the above when the administrators went to his property and purported to evict him and vary the boundaries. He states that it is only fair and just to annul the grant issued to the administrators and a proper distribution of the estate done wherein his interests are noted.
12. The Application is opposed. The First respondent Alexander Kipkoech Sittuk swore a replying Affidavit on March 13, 2023. He deposed that the deceased herein sold one acre from the Parcel known as Lambus/Sinonin to one Joseph Cheruiyot at Ksh. 40,000/= and he paid Ksh. 30,000/= leaving an outstanding balance of Ksh. 10,000/= which is unpaid to date.
13. He averred that the Applicant herein did not have any dealings with their father and that the second transaction between the deceased and Joseph Cheruiyot did not take place and the annexed agreement is a forgery.
14. He contended that the amended affidavit in support of summons for confirmation as well as the copy of the consent to confirmation annexed by the Applicant are fraudulent and that the issues raised by the Applicant can only be handled by the Environment and Land Court.
15. The court directed parties to file their respective submissions. Only the Applicant filed his submissions on March 10, 2023.
16. The Applicant reiterated the averments contained in his supporting affidavit in his submissions and relied on the case of *In re Estate of the Late Epharus Nyambura Nduati (Deceased)* [2021] eKLR where the Court revoked the letters of grant of administration on grounds that the same was obtained fraudulently by making of false statement or by the concealment from court of something material to the case particularly that the deceased had sold 2 acre portion of land to the Applicant's husband.

Issues for determination

17. Having perused the Application, supporting affidavit and the Applicant's submissions, it is my considered view that the following issues crystalize for determination: -
 1. Whether the applicant has made out a case for grant of the injunctive order sought.
 2. Whether the Applicant's application meets the threshold for the revocation of a grant within the meaning of Section 76 of the *Law of Succession Act*
18. Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* cloth this Court with wide discretion to do what is necessary to ensure that the ends of justice are met.



19. Section 47 of the *Law of Succession Act* provides:
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders as may be expedient.”
20. Rule 73 of Probate and Administration Rules of the *Law of Succession Act* provides:
- “Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the Court.”
21. The Court of Appeal in *Floris Piezzo & Another vs Giancarlo Falasconi* (2014) eKLR while considering whether an injunction can issue in a Succession Cause expressed itself inter alia as follows: -
- “Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”
22. With the above background, I will now analyse the first issue.
23. The celebrated case of *Giella vs Cassman Brown* (1973) EA 358 sets out the conditions for the grant of interlocutory injunction as follows: -
- “The conditions for the grant of an interlocutory injunction re now, I think, well settled in East African. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
24. In *Nguruman Limited vs Jane Bonde Nielsen and 2 Others* NRB Ca Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella vs Cassman Brown* (Supra) and further clarified that the conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. Consequently, if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.



25. What constitutes a prima facie case? The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it is,
- “...a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”
26. In the instant application, the Applicant contends that he is a beneficiary of the deceased’s estate by virtue of purchase which position has been disputed by the Respondents. According to the Respondents, the Applicant did not have any dealings with the deceased.
27. It is trite law that he who alleges must prove. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person. It was incumbent therefore upon the Applicant to prove that he did purchase 2 acres out of Parcel No. Lembus/sinonin/134 from the deceased. The Applicant did not attach any sale agreement in proof thereof and as such there is no evidence that he purchased the said portion.
28. The Applicant further contended that his interest had been confirmed in the amended affidavit in support of confirmation of grant that was filed on May 19, 2016. He annexed the said affidavit and Marked it as “MKK 1.”
29. It is noted from the court record that;
- I. The Administrators allegedly filed an application dated February 23, 2015 seeking confirmation of the grant herein. In this application the applicant herein was listed as a beneficiary to the estate by virtue of purchase and was to be apportioned 2 acres in land parcel No. Lembus/Sinonin/134. There is no record of this application ever being dealt with by the court.
 - II. The Administrators/ Respondents filed an application dated January 14, 2016 seeking confirmation of the grant. In this application the applicant was not mentioned. This application was prosecuted and the grant was confirmed as proposed.
 - III. The Administrators then filed another application dated November 16, 2019 (though erroneously cited by the court as being dated November 20, 2019). The applicants sought to rectify the grant as earlier issued. The same was allowed by the court. Again, there was no mention of the applicant herein of this material fact to the court before it issued a rectified certificate of confirmation of grant on December 3, 2019.
30. According to the Respondents the purported summons dated February 23, 2015 and the annexure are a forgery and they have annexed the genuine affidavit which does not contain the name of the Applicant herein. It is the same as that supporting the application dated January 14, 2016.
31. I have perused the entire record and I note that the summons for confirmation dated February 23, 2015 and the accompanying consent which were referred to by the Applicant do not bear the stamp of this court and it is thus unclear whether the same was duly filed before this court. There is no receipt of payment on the court record. Consequently, these documents cannot be deemed as duly filed.
32. The summons filed by the Respondents bears the stamp of this court showing that it was filed on May 19, 2016 and it was the one relied on by this court to confirm the grant herein, on October 4, 2018. The grant was rectified on December 3, 2019 and it does not bear the applicant’s name.



33. I am in agreement with the respondents that the applicant is actually trying to hoodwink the court by relying on documents that were not properly filed in court. Nothing would have been easier than for the applicant to annex any sale agreement that he may have entered into with the deceased over the land in question. What I see is a mere allegation that is not backed by any cogent evidence.
34. Since the documents referred to by the applicant were not properly filed, I direct that the same, namely the purported summons for confirmation dated 23rd February 2015 and the attached consent be expunged from the court record as they were irregularly inserted herein. However, for reasons that I shall give at the end of this ruling, they will remain in the court file.
35. Having considered the matter I am of the opinion that the Applicant has not proved, even on a balance of probability that he has any valid interest in respect to the estate.
36. Further he did not adduce any cogent evidence to demonstrate that he has been living on the said parcel and the administrators/respondents have attempted to evict him and vary the boundaries.
37. It is for this reason that I find that the applicant has failed to surmount the 1st hurdle as set out Giella's case(supra). Therefore the prayer for injunctive orders sought herein cannot be sustained.
38. I will now deal with the 2nd issue, on whether the court ought to revoke the grant herein or not.
39. Section 76 of the *Law of Succession Act* states as follows:

“76. Revocation or annulment of grant

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.”

40. The Applicant invited the court to revoke the grant of letters of administration on grounds that the Respondents obtained the confirmed grant by concealment of a material fact, namely that he was entitled to the suit land having bought it from the deceased. He also argued that the Amended affidavit in support of confirmation of grant filed in court on May 19, 2016 identifies him as the beneficiary of 2 acres.
41. I am fully aware of the precedent of *In Re Mwaniki Gichina (Deceased)* [2016] eKLR where Musyoka J pronounced himself as follows: -
- “...However, the power given to the court in section 76, to revoke grants, is discretionary. The court may or may not revoke a grant where it is demonstrated that there were problems with the process of obtaining the grant or with the administration of the estate. Given the age of the matter, I am persuaded not to revoke the grant, but rather to direct that the applicant be listed as a beneficiary of the estate...”
42. In the matter before me, I have already found that the documents referred to by the applicant were not properly filed in court. The respondent has demonstrated that the documents that they filed in court, though almost similar to the ones referred to by the applicant, do not bear the applicant’s name. The allegations by the respondents of forgery have a sound basis.
43. For the reasons advanced while addressing the first issue, I opine that the Applicant has not tendered any credible evidence or material before court to demonstrate that he is entitled to any share of the deceased’s property. As such there are no justifiable grounds to revoke the grant.
44. In conclusion, I find that the Application is devoid of merit and the same is dismissed with costs.
45. Further, I order that the Respondents, if they wish to, ought to report the alleged forgeries to the police for their appropriate action. They will be given access to the documents by the court.

DATED, SIGNED & DELIVERED AT NAKURU THIS 16TH DAY OF MAY, 2023.

H.M. NYAGA

JUDGE

In the presence of:

C/A Jeniffer

Mr. Ombati for Respondent

N/A for Applicant

