



In re Estate of William Kipkosgei Kiptum (Deceased) (Succession Cause 59 of 2007) [2023] KEHC 20442 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 59 OF 2007
RN NYAKUNDI, J
JULY 21, 2023**

IN THE MATTER OF THE ESTATE OF WILLIAM KIPKOSGEI KIPTUM (DECEASED)

BETWEEN

EUNICE CHEBICHII KIPKOSGEI 1ST PETITIONER

VIOLAH CHERUTO KIPTUM 2ND PETITIONER

AND

ESTHER JEPTANUI KIPTOO 1ST OBJECTOR

EDNA JESANG KOSGEI 2ND OBJECTOR

RULING

1. The Respondents filed a Notice of Preliminary Objection dated 24th March 2023 to the Chamber Summons dated 30th November 2022 on the following grounds;
 1. The application offends the doctrine of Res Judicata hence this honourable court is divested of the requisite jurisdiction to hear and determine it.
 2. The application is fatally defective having been brought through a wrong instrument and under a wrong procedure.
2. The application has been lodged through a law firm not properly on record in the matter.
3. The petitioners have filed submissions on their objection together with their submissions on the application that they have raised a preliminary objection to. The respondents to the preliminary objection being the applicants in the Chamber summons dated 30th November 2022 filed their submissions dated 12th April 2023.



Petitioners Case

4. Learned counsel for the petitioners submitted that the chamber summons dated 30th November 2022 is *res judicata*. Further, that vide the application dated 1st March 2021 by the objectors commenced contempt of court proceedings against the petitioners. The gist of the contempt was that the petitioners had planted maize on a portion of land title no. Moiben/Moiben Block 5 (Merwet) 228. The application for contempt was dismissed. According to the petitioners, the present application has the effect of portraying them as guilty of contempt. They urged that the application seeks to circumvent the rule on *res judicata* as they both seek to address a similar issue.
5. The respondents/objectors opposed the preliminary objection, pointing out that in the absence of submissions on the 2nd and 3rd limbs of the PO, the applicants have failed to substantiate the same. Further, that the application the respondent/petitioner indicates that renders the current application *res judicata* is the objector/applicant's application dated 1st March 2021 in which the objector's application dated 1st March 2021 in which the objectors brought contempt of court proceedings against the respondent/petitioner was dismissed by the court on the grounds of lack of evidence to sustain it.
6. The applicants submitted that the application is not *res judicata* and the first element as stated in the case of *Independent and Electoral Boundaries Commission, Maina Kiai & 5 others* (Nairobi CA No. 105 of 2017 (2017)(eKLR) was not satisfied. The present application is to have a surveyor visit the land and identify portions of 20 acres to be utilized by the applicants/objectors and 30 acres to be utilized by the respondents/petitioners this application is made to effectuate this court's order dated 3rd February 2021 by Hon. O.A Sewe. The issue of identifying the portions as per the court order cannot be equated to subdividing the land and the respondent's submissions are therefore misleading. They urged the preliminary objection be dismissed with costs.

Analysis & Determination

7. The basics on assessment of this litigation in the matter of the Estate of the late William Kipkosgei Kiptum since it was filed on 5/3/2007 borders on vexation and an abuse of the court process. First and foremost, the jurisdiction of the probate court is clearly spelt out in the law of Succession in terms of Section 29, 35, 36, 37, 38, 39 40, & 41 of the *Law of Succession Act*. As a matter of reiteration of the express provisions in Section 38, 39 & 40 predominantly they provide as follows:

38: Where intestate has left a surviving child or children but no spouse:

Where the intestate has left the surviving child or children but no spouse the net intestate estate shall subject shall subject to the provision of sections 41 and 42 depones upon the survival child if there be only one or be equally divided among the surviving child, if there be only one or equally divided among the surviving child.

39: Where intestate has left no surviving spouse or children:

Where the intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:

- (a) father or if dead
- (b) mother or if dead



- (c) Brothers and sisters and any child or any children or deceased brothers and sisters in equal shares or if none
 - (d) Half brothers and sisters and half-sisters and any child or children of deceased half-brothers or half-sisters, in equal share or none.
 - (e) the relative who are in the nearest consanguinity up to and including the sixth degree in equal share
2. Failing survival by any of the persons mentioned in par a-e of (1), the net intestate estate shall devolve upon the state and be paid into the Consolidated Fund
 40. Where Intestate was polygamous
 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number OF children in each house, but also adding any wife surviving him as an addition unit to the number of children
 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Section 35- 38
 8. It is now appropriate to turn to Section 3(2) of the Act which defines child and children as follows: “References in this Act to “child” or children shall include a child conceived but not yet born (as long as tht child is subsequently born alive) and in relation to a female person, a child born on her out of wedlock, and in relation to a male person, a child whom he has expressly recognised or in fact accepted as a child of the own or for whom he has voluntarily assumed permanent responsibility.”
 9. Section 17 of the children’s act describes the nature and extent of the judicial power vested in the probate court for interpretation and application on rights to inheritance of children. The analysis of the issue shall take the following model: (1) Every child shall have the right to inherit property in accordance with the law of Succession Act.
 - (2) subject to the Law of Succession Act
 - (a) every child shall be entitled to equal treatment and protection, and to the benefit of the law: and to the benefit of the law and
 - (b) no person shall disinherit or cause a child to disinherited on any ground, including age, origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, health status, pregnancy, social, political, economic or other status, race disability, tribe, residence or local connection.
 10. The other tangent used to encompass intestate distribution is one influenced by the provisions in Section 93 of the Act which deals with purchaser’s interest. That brings me to the subject matter of this protracted probate cause of action which has been litigated and handled by various justices of the high court making determinative decisions between the petitioners and objectors but prima facie the estate remains far from being distributed within the dictate of the law
 11. It is significant to make reference to the judgement of the high court indexed as Probate & Administration Cause No 59 of 2007 where the court in discussing issues relevant to the probate dispute ruled as follows:



27. In the premises I am satisfied that both the 1st objector and her daughter, the 2nd objector are dependent of the deceased and are therefore entitled to apply for appointment as administrators of his estate alongside the two petitioners and to benefit therefrom in the manner set out in Section 40 of the Law of Succession Act, namely, according to the number of the children in each house and treating the 1st petitioner and the 1st objector as additional units to the number of the deceased's children.
28. Accordingly, I would allow the objection application dated 28 May 2007 and issue orders as herein under, taking into account the petition, cross-petition herein and the petition filed in Eldoret High Court P&A Cause No 67 of 2007
- (a) That the petitioners, Eunice Chebichii Kipkosgeu and Vioka Cheruto Kiptum, and the objector Esther Jeptanui Kiptoo and Edna Jesang Kosgei, be and ae hereby appointed to act jointly as the personal representative of the deceased Wiliam Kipkosgei Kiptum. And that a Grant of Letters of Administration intestate in respect of the estate of the deceased be Accordingly issued forthwith in their joint names
 - (b) That an application for confirmation of Grant be filed herein to determine the question of distribution not later than 3 months from the date hereof.
12. Although this may not have exhausted the legal issues which may have arisen under the Succession Act the findings of the greater part of the issues on identifying the beneficiaries and the estate due for sharing were significantly categorised for the administrators. The other question was a command in clause (b) that the question of distribution through an application for confirmation of grant was to be settled not later than 3 months from 8th day of November 2019. When therefore it becomes necessary to interpret and consider any remedies in subsequent applications this decision inevitably should not escape the mind of the court. I see no evidence of a decision of the court of appeal affirming or setting aside the orders by Sewe J save for a ruling delivered on 19th February 2021 with the following orders in place.
- a. That there be a stay of execution of the judgement delivered on 8th November, 2019 and any further proceedings in this matter pending hearing and determination of the intended appeal.
 - b. The Respondents shall continue utilizing the portion of Land Parcel No. Moiben/Moiben Block 5 (Merewet) 228 measuring 20 acres without let or hindrance pending the hearing and determination of the appeal
 - c. Costs of the application be borne by the estate.
13. General statutory law on Succession emphasizes that the probate court shall determine the beneficiaries under Section 29 and the free estate of the deceased under Section 3 of the Act. This litigation was at a stage of confirmation of grant. In ascribing to the provision of Succession Act one must remember that it is underpinned in Article 27 (1) & (4) of Constitution. That the devolution of the estate of the deceased person shall be governed by this one uniform law of inheritance regardless of such person's age race, colour, sex, religion, political or other opinion, national or social origin, place of origin, property, birth, tribe, custom, tradition, disability, health status, station in life or other status. To the extent that any existing customary, Islamic or statutory laws are inconsistent with provisions of Constitution 2010 they are not applicable hereby repealed.



14. The parties to this estate not yet done with the litigation on 4th November, 2021 a notice of motion under certificate of urgency was considered by Hon. Justice E. Ogola in which he ordered as follows:
 1. That the application dated 4/11/2021 be and is hereby certified agent
 2. That an interim a conservatory order be and is hereby issued for seven (7) days restraining the petitioners, their agents and/or any other persons acting under their instructions from trespassing and/or harvesting maize crop on a portion of 20 acres comprised in land parcel No. Moiben/Moiben Block 5 (Merewet) 228 being occupied by the Applicant/Objectors pending hearing of the application interparties
 3. That a conservatory order be and is hereby issued for seven (7) days restraining the petitioners, their agents and/or any other persons acting under their instructions from trespassing and/or harvesting maize crop on a portion of 20 aces comprised in land parcel No. Moiben/Moiben Bloc 5 (Merewett) 228 being occupied by the Applicant /Objector
 4. That the application shall be served for hearing interparties on 10th November, 2021.
15. Similarly among the issues raised in respect of the contempt proceedings were determined by Sewe J on 14th day of June 2021 as follows: “ that my finding then is that the application dated 1st March 2021 lacks merit and is hereby dismissed with an order that the costs thereof be in the cause. Nevertheless, it is hereby reiterated, for the avoidance of doubt, that the subject Court, orders still stands and is enforceable against the two respondents.
16. Last but not the least is a certificate of urgency dated 10th November 2021 seeking the following substantive orders:
 1. There be stay of the orders given and issued on 5th November, 2021 and any further proceedings in the matter pending interparty hearing and determination of this Application.
 2. The orders given and issued on 5th November, 2021 are hereby set aside.
17. Based on the above in view of this clear provisions of the law this estate should have been shared years ago within the framework provided in the law of Succession. It may be either party or heirs has beef with the judgement of Sewe J and the proper forum of convenience would be the court of appeal unless the issues can be cured in terms of Section 80 of the *Civil Procedure Act*, Rule 73(1) of the *Probate & Administration Rules* and Order 45 (1) of the *Civil Procedure Rules* on review jurisdiction. The avalanche of subsequent applications on contempt in breach of an order to plough part of the estate hinges on a likelihood risk occasioning prejudice or injustice to those other beneficiaries whose rights to utilize the estate in terms of Section 35, 36, 37, 38, & 40 of the *Law Succession Act*. Essentially their rights are in limbo until this court or the Court of Appeal unlocks the impasse. It’s unfortunate that an estate which is not complex in nature as proceeded to hold the courts hostage and the survivors economic and social rights in Article 43(1) of *Constitution* remain a mirage. I therefore consider whether the words stay pending an Appeal for purposes of this succession from the orders of the court dated 8th November 2019 is a foregone shut case for the beneficiaries to this estate as the other beneficiaries are not pursuit to continue enjoying partial land use rights. It is instructive to note that the 3 months order in the judgement of the court dated 8th November, 2019 presumably seems to be have been ignored by the administrators hence mutating the litigation into a forum of interlocutory applications with no



substantive relief on the petition as framed by the petitioners. The subject matter of the petition by dint of these applications after the judgement is now muddled up and the roadmap to its final conclusion lost. It is also apparent that delivering expeditious & substantive justice under Article 159 (2) (a) (b) & (d) of *Constitution* is not within the horizon of predictability. The usual words expressing the purpose for which grant of letters of presentation is issued that is to say to administer the estate and doing such things as to render probate account within six (6) months with effect is not maintainable given the litigation history of this estate. This court reading the four corners of the record is of the view that time has come for the beneficiaries to recognize the dichotomy between law and morality to determine the specific areas of a relationship and to determine the effect of this relationship as necessitated by the dignities and needs of each person to secure the rights on inheritance as defined in the Succession Act. That is the attainment of the end for which families exist and the goal to which all laws aim is the common good of humanity.

18. The length of this succession cause brings to the fore one of the profound statement ever made that the human soul or the nature of humanity was not invested with a natural immortality. The kind of inherent nature a man possesses on either mortal or immortal is one of the greatest basic question to worry the human family in their conduct here on earth.
19. So what is the substratum? Of my jurisdiction as of now it is about the latest applications dated 4/11/2021 and 10/11/2021 and the preliminary objection dated 9/11/2021 seeking to pierce the whole integrity of the court process as ordered by Sewe J on 8th November, 2019. The consequential applications by Sewe J and Ogola J substantively dealt with the cosmetic issues raised in the aforementioned applications. As has been discussed by the Applicant in the motion dated 10th November, 2021 there is alive practical question which are open to doubt and which require to be resolved by this court. It is often a delicate question as to how far a court is entitled to interfere with its own decision which guaranteed and protected rights to an aggrieved party having taken into account all the relevant factors and material evidence. A distinction may require to be observed between matters which are properly concerned with inherent jurisdiction and power of the court to issue orders for purposes of preserving the subject matter in rem or one which is likely to render the merits of the dispute nugatory. The application at hand does question the discretion of powers on whether or not the cause taken in the context of the application was to that extent an error or mistake on the face of the record. The affidavit in support in substance alludes to the breach on the procedure at the hearing of that application. It has been pointed out in Section 80 of the *Civil Procedure Act* the Order 45 Rule 1 that the defect in form and substance of an order of the court is reviewable in considering the procedural fairness and the significance of the test on the right to a fair hearing. The grounds under Order 45(1) of the *Civil Procedure Act* are sacrosanct. It provides as follows:

1. Any person considering himself aggrieved
 - a. By a decree or order from which an appeal is allowed but from which no appeal has been preferred
 - b. Or by a decree or order from which no appeal is hereby allowed

And who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a



review of the degree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.

20. The demands of justice in both civil and criminal law incorporates the right to a fair trial which involves fulfilment of certain objective criteria including the right to equal treatment and the obligation to conform to the standards guaranteed in *Constitution* on fair trial rights. The ex -parte orders are recognisable where the circumstances dictate that for the interest of justice a court can exercise discretion to protect the integrity of the proceedings. It on a case to case specifics, only that a timely opportunity must be accorded to the adverse party to file a rejoinder to the pending application in an interparties forum. In *Esther Muthoni Passaris V Charles Kanyuga & 2 Others* (2015) eKLR citing with approval the case of *Rex V Kensington Income Commissioners ex parte Princes Edmond De Polignac* (1917) 1KB 486 and stated as follows:

“ There is no controversy that there exists a court made rule that if a party moves the court for restraining or injunctive orders ex parte (without notice, the party is obligated to disclose the fact which the court thinks are most material to enable the court to fairly form its judgement. Where a party does not observe this rule, he disentitles himself form the relief which he asks the court to grant and such relief will not even be visited by the court at the interparties stage.”

“ It is perfectly well established that a person who makes an ex parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.”(See *Princes Edmond De Polignac* 1917 1KB 48 Washington L.J)

21. Notwithstanding anything else the ex parte remedy suffices to say that where the circumstances call for such orders a time limit within which its t to be employed must be observed by the court. The fundamentals of this application does raise the extent at which an ex parte order can be allowed to subsist and the likely prejudice of the adverse party who had no opportunity to be heard in compliance with the basic right of a fair hearing. In a nutshell given the other observations made elsewhere in this ruling I am persuaded that there is merit to set aside the ex parte orders issued on 14th December, 2022
22. Upon considering the preliminary objection and the submissions thereto, the following issue arises for determination
1. Whether the preliminary objection is merited

Whether the preliminary objection is merited

23. The principles on preliminary objections are well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...

24. The impugned application is the objector’s chamber summons dated 30th November 2022. The points of law raised by the applicant present the following issues for determination.
- a. Whether the application is res judicata
 - b. Whether the application is defective for being brought under a wrong instrument and procedure.
 - c. Whether the application has been filed through a law firm that is not properly on record

Whether the application is res judicata

25. The principles on res judicata are set out in section 7 of the *Civil Procedure Act* as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

26. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

27. The principle was well explained in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) in which the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.



- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

28. The Chamber Summons dated 30th November 2022 sought the following orders;

1. Spent
2. That pending the hearing and determination of this application inter partes an order do issue directing the parties herein to have land parcel no. Moiben/Moiben Block 5 (merwet) 228 a portion of 20 acres thereof as per the court order herein be marked and identified by a surveyor same as the remaining 30 acres.
3. That costs of this application be in the cause.

29. The applicants have intimated that the application dated 1st March 2021 determined the issues herein. I have perused the record of the court and the said application was for contempt of court orders. The applicants' sought the following orders in the application;

1. This honourable court be pleased to cite Eunice Chebichii Kipkosgei and Violah Cheruto Kiptum to be in contempt of the orders made on 3rd February 2021.
2. An order of committal to prison be made against Eunice Chebichii Kipkosgei and Violah Cheruto Kiptum for such period not exceeding six (6) months as this court may deem fit or order that the contemnors pay a substantial amount of money within a specific period until they purge the contempt and obey the courts orders of 3rd February 2021
3. The OCS Moiben Police station be ordered to provide security in enforcement of the court orders herein.
4. The costs of this application be provided for.

30. It is thus clear in recognizing the discretion exercisable by the court in making the determination as to the various issues applicable to this estate in the above context of the preliminary objection, it is necessary for the ends of justice to be met for this court not to entertain any interlocutory applications which impairs the fair determination of the cause of action. The effect of subsequent rulings when primarily mapped with prior final judgements/rulings the whole practicability of providing perfect justice as of necessity may suffer miscarriage of justice. Jurisdiction to hear and determine any of the questions and claims in this intestate estate as much as possible must be calmed within the orders issued by Sewe & Ogola J in their respective judgement and rulings. It is imperative that the jurisdiction of the court on the subject be invoked within the tenets of Section 7 of the Procedure Act. The general principles on the doctrine of res judicata and estoppel, cannot be entirely be divorced from the instant applications visa viz the concurrent courts decisions in the previous judgements and rulings. In examining the circumstances of the case, it is my view that the court in its power is not contemplated to only look at the bare facts of the latest application and ignore the patent in the rulings made earlier on involving the same parties and expressed subject matter. In the case at bar invoking the preliminary objection would not be considered a matter not relevant to the protection of the rights of the parties to this litigation. The expectation and the detriment to determine the extent of the remedy of the beneficiaries to this estate is real. Therefore, it should be accepted that jurisdiction in its various forms can be considered in the varied nature and circumstances of each case.

31. Which is the subject matter of the dispute the applicant in the application dated 30/11/2022 admits to be chasing against the other beneficiaries given that the distribution of the estate remains in limbo is a question for this court to take judicial notice. In the text law of succession 6th Ed. P. 249 Sir David



Hughes view is of relevance to this protracted succession cause on the right of a beneficiary thus: “ The title of beneficiaries claiming the property of a deceased person, whether as devisees, legatees, or statutory next-of- kin is not complete without some act on the part of the deceased’s personal representative for giving effects to the gift or succession. Until such an act, which generally takes the form of an assent of a conveyance, occurs, a beneficiary has merely an inchoate, but transmissible right.....A residuary legatee or devisee, however, has no claim to any of the deceased estate in specie nor to any part of that estate until the residue is ascertained. His right is to have the estate administered and then applied for his benefit. The right of a beneficiary claiming on a total intestacy is similar, except that he takes under a statutory trust for sale and conversion.

32. It will seem that the parties have forgotten that in probate matters non has superior rights to insist on transfer, sale, land use, before final orders factored in the certificate of confirmation of grant. Other beneficiaries have to be considered and it is the basic principle in Succession Matters that the administrators first among equals would be obliged to determine the formula of distribution in consonance with the laid down model under the Succession Act. Which property is otherwise free and clear in contemplation of confirmation of proceedings is relevant to the issue.
33. The sum total the applications remodelled by the objector seems to be in conflict with the law of succession and the basis of an expectation that certain rights to that estate should formerly be recognized and permitted to be enjoyed by a section of the beneficiaries pending certificate of confirmation is a question the court should be estopped from exercising jurisdiction. There are constant reminders on intestate distribution where the principle of equality of the heirs is often neglected nor by passed and therefore stripping the other beneficiaries the benefit which accrues properly by their legal standing under section 29 of the *Law of Succession Act* as much as possible it’s appropriate to consider a concept known as unjust enrichment.
33. As a consequence of this analysis parties to this estate should resolve any ambiguity as to the distribution of the estate in its context of the law of Succession and proper measures be undertaken to avoid piecemeal litigation which has occasioned prejudice and a discourage for the other beneficiaries under the doctrine of legitimate expectation. I do not think it is within the spirit of the law of succession for the probate court to exercise its jurisdiction of granting inheritance rights to any heir within a scheme not factored in the certificate of confirmation of grant. The indivisibility of rights even in the context of the doctrine of necessity before confirmation of grant proceedings in the letter of the law is frowned upon looking at the dictates of express timelines for the administrators to initiate the succession cause and having it concluded within thirteen months. How is this computed?. The petition for gazettment permits countdown for any objection to be raised by any aggrieved party to the estate within 30 days. Thereafter the objection if any has to be considered against the administrators to the estate precisely on or before expiry of the six months period leading to confirmation of grant. It is presumed that prior to the demise of the deceased there is no contest as to the survivorship estate and dependants under Section 29 of the *Law of Succession Act*. Forthwith under Section 83 (e) and (g) of the Act the law commands personal representatives of the deceased to undertake the following duties:
 - (e) Within six months from the date of this grant to produce to the court a full a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account
 - (g) within six month from the date of confirmation of the grant or such longer period as the court may allow to complete the administration of the estate in respect of all matters other than continuing trust and to produce to the court a full and accurate account of the completed administration



34. The legislature objective underlying the provisions of the Succession Act remains in limbo for non-compliance by the litigants and as already seen from this petition both the petitioners and objectors propound their rights outside the framework of this statute. Difficulties in this area of the law devolves around one major catchy words in the preamble of Section 76 of the Act which principally states as follows: “ A grant of presentation whether or not confirmed may at any time revoked or annulled if the court decides either on application by any interested party or of its own motion.
35. The legal phraseology employed by the legislature as absorbed and understood in the litigation of succession causes of action is that parties are at liberty to litigate ad infinitum. This legislative purpose while broad is not without limits, in particular looking at the spirit of the law in safeguarding the property rights of the beneficiaries to an estate. The confusion state of law in this area more specifically applying the logic of revocation and annulment of a confirmed grant already endorsed by the probate court with instructions to the administrators to transmit the shares appropriately defined to the beneficiaries as captured under Section 29 of the Act. I do not agree that Section 76 is to be given an over-breadth interpretation intended to make the consequences of certificate of confirmed grant voidable. For instance, in a traditional African family what injustice is likely to arise if nothing is done for 10-30 years or more if nothing is done to address the distribution of the deceased estate to the heirs within a reasonable time. Put in another way what happens to the economic, social & cultural rights which are indispensable for the dignity and the free development of the heirs survived of their deceased. The long protracted probate causes in action, in our legal system does subject the heirs or beneficiaries to an estate to such limitations of basic rights as earlier determined and secured by Constitution.
36. In contrast to the preamble of Section 76 of the Act truly in the spirit of the law is found the governance structure on Succession disputes which facilitates the just, expeditious and proportionate resolution of intestate or estate administration. As a result, probate courts will never be able to determine the scope on fair administrative of justice in coherent fashion if the conceptual authority of Section 76 of the Act is to be given supremacy to delineate a certificate of confirmed grant instrumental in distribution of the estate with some assets having been conveyed to third parties. The certificate of grant ensures that the delegated authority under the seal of the court mandates administrators to act as legitimates of the deceased to transmit the estate to the next generation under section 29 of the Act. It would be undoubtedly paradoxical for the rights intended to be addressed by the certificate of confirmed grant be put on abeyance with an aggregate effect of complete denial of the rights.
37. It follows from the following discussion that the obiter in this ruling is deemed considered as the expression of the legislative Will that a legal restraint on adjudication of succession cases. The courts of justice are to apply the law to redress the injustice of the citizens. Petitioning the courts by the administrators for succession of property to devolve to the beneficiaries means empowering them to protect these rights entitlement to enforce Law of Succession Act.
38. Finally, the application by the objectors as drawn and canvassed fails the critical threshold to be allowed to subsist as a remedy insitu in the light of the circumferences of this cause. It ought and is hereby dismissed with no orders as to costs

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 21ST DAY OF JULY 2023

In the Presence of:

Mr. Cherogoi for the Petitioners

M/s Chepkurui for the Objectors



.....

R. NYAKUNDI

JUDGE

