



REPUBLIC OF KENYA



In re Estate of the Late Chepkilot Chepkosom (Deceased) (Succession Cause 272 of 1992) [2023] KEHC 20183 (KLR) (10 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 272 OF 1992**

TA ODERA, J

JULY 10, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE CHEPKILOOT
CHEPKOSOM (DECEASED)**

IN THE MATTER OF

REBECCA KIPTOO CHERUTICH 1ST APPLICANT

SOTI KIPRONO ALIAS PAULINA CHEPKILOOT 2ND APPLICANT

SUSAN JEPKOSGEI KETON 3RD APPLICANT

AND

THOMAS KIPTOO CHERUTICH INTERESTED PARTY

**SUSAN CHEPKEMOI KULEI (REPRESENTATIVE OF THE ESTATE OF THE
LATE JOHN KIPKOECH) INTERESTED PARTY**

WILSON KIPKENY TALLAM INTERESTED PARTY

ANDREW KIBII INTERESTED PARTY

JOSEPH KETER INTERESTED PARTY

HARON KOMEN INTERESTED PARTY

JAMES CHEBII INTERESTED PARTY

RULING

1. This is a ruling on a preliminary objection dated 2.8.22 filed by the 1st to 7th interested parties on the grounds that:
 - a. The application dated 27.10.2020 is incompetent, frivolous ,vexatious and an abuse of the process of the court .



- b. The estate of deceased administratrix and Tamirsebei Takai Chepkilot and her son Josephat Kipkori Chepkilot (deceased) are unrepresented.
 - c. The applicants lack *locus standi* to bring the application against the estate of the deceased who died in the year 1978 before the law of succession came into force.
 - d. That the applicants cannot claim to have been left out or discriminated against as the customs existing then could not recognize daughters as beneficiaries.
 - e. The application lacks merit and should be dismissed with cost *ex debito justiae*.
2. The interested parties submitted that deceased died in the year 1978 and Tamirsebei Takai Chepkilot and Josephat Kipkorir Chepkilot (both now deceased)petitioned for letters of administration which was issued and confirmed in the year 1992 and the estate herein was equally distributed between them . Further that both beneficiaries sold their shares of the inheritance and have since died. It was submitted that the summons for revocation of grant dated 27.10.2020 is based on the allegation that the applicants believe that t6her5e was a concealment of the fact that they are children of the deceased and therefore entitled to a share of the estate of deceased.
 3. They framed issues for determination as follows ;
 - i. Whether the application for revocation of grant is proper without representation of both the deceased administratrix and her son.
 - ii. Whether the applicants have right to bring the application for revocation of grant over estate of deceased who died in the year 1978 before the law of succession came into force .
 - iii. Whether the application is frivolous and vexatious.
 4. On whether the summons for revocation of grant is properly before this court, it was submitted that he beneficiaries of the estate of the deceased herein are both deceased after selling their shares to the interested parties herein. Further that no administrator had been appointed to take up their roles under Section 81 of the [Law of Succession Act](#) and respond to the application herein and especially whether the applicants are children of the deceased herein since they obtained birth certificates after the death of their parents. Also that such questions can only be answered by family members not interested parties. It was submitted that without representation of the said two deceased administrators/beneficiaries the application cannot succeed.
 5. On whether applicants have right to file the application in view of the fact that deceased passed on in the year 1978, it was submitted that applicants had no capacity to file the same as by virtue of section 2 of the4 [Law of succession Act](#), the law applicable to the estate of deceased is customary law which deceased subscribed to.
 6. Counsel cited section 2 (2) of the [Law of Succession Act](#) which provides that;
 - (2) “The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

Counsel also cited *Re Nduati Mbutia (deceased)* (2015) eKLR where Section 2(2) of the [law of Succession Act](#) where it was held that administration of estates of deceased who died before 1.7.81 is under Customary Law to which deceased subscribed before his death.”



7. Applicant submitted that the issues for determination are;
 - a. Whether the estates of deceased, Josephat Kipkorir Chepilot (deceased) and that of Tamirtei Talai are unrepresented.
 - b. Whether the applicant's being daughters of deceased are precluded from distribution of their father's estate on account of repugnant customary law.
8. On whether the estates of deceased is unrepresented, the applicants submitted that they could not act for the estate of deceased whereas they were never included in the succession cause and that they are challenging the procedure of succession and not estates of deceased. Also that the late Josephat Kipkorir Chepilot died on 19/7/2005 and was not married but he sired child Kipkoech Kipkorir who is still a minor and his estate is yet to be administered. It was also submitted that the issue of unrepresentation of the estates of the said two deceased and can be cured under Article 159 (2) of the constitution which provides that the court should be guided by the substance rather than form.
9. On whether the applicants should be precluded from the distribution of their fathers estate, it was submitted that the preliminary objection cannot purport to argue that the Succession Act does not apply to this cause whereas the grant was obtained unprocedurally. Further that the applicants being daughters of deceased are entitled to inherit his estate and that Section 51 of the Law of Succession Act provides that the names of all survivors of deceased including the children must be supplied. It was submitted that the petitioner herein is guilty of not disclosing the existence of applicants herein. Counsel went further to submit that Article 27 of the constitution provides for Equality before the law and equal protection by the law and that Article 27 (5) provides for non-discrimination.
10. It was also submitted that Kenya signed the Convention for Elimination of all form of Discrimination Against Women (CEDAW) in 1984 and this was domesticated under Article 2 of the constitution of Kenya. Applicants also submitted that Article 2 (4) of the constitution outlaws any customary law which is consistent with the constitution. Further that the widow and son of deceased herein are the only ones who participated in the succession cause and thus the grant was illegal abinitio as it discriminated against the daughters of deceased.
11. Finally it was submitted that the preliminary objection did not meet the threshold set in the case of *Mukbisa Biscuits Manufacturing Company v West End Distributors*.
12. I have carefully considered the preliminary objection the submissions in support of it and the submissions by the applicants. It is not disputed that deceased died on 14.6.78 and the applicants claim to be his daughters. Further that the petitioner and the beneficiaries to the estate of deceased are now deceased and before their demise, they sold their inheritance to the interested parties herein.
13. The issues for determination are:-
 - a. Whether the estate of deceased herein, Josephat Kipkorir Chepilot (deceased) and that of Tamirtei Talai (deceased) are unadministered.
 - b. Whether the estate of deceased was to be administered under Customary Law or Law of Succession Act.
14. On whether the estate of deceased herein, and those of the beneficiaries herein are unrepresented, this was the contention of the interested parties and it was not denied. The interested parties submitted that applicants thus have no capacity to file the instant application as there is no one to represent the estate of deceased herein and the deceased beneficiaries. The applicants submitted that that the administrator and the beneficiaries died upon selling their shares to interested parties and that Josephat had a son



out of wedlock who is still a minor staying with a relative thus there was no one to enjoin in these proceedings . This court was urged to overlook the gap under Article 159 of the constitution as it was an omission of form and not substance.

15. It is true that Article 159 of the constitution enjoins the courts to administer justice without undue regard to procedure.
16. Article 159 (2) (d) of the Constitution provides ; “in exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (d) Justice shall be administered without undue regard to procedural technicalities;”
17. It is trite law that estates of deceased cannot be dealt with in any manner unless letters of administration have been taken out. Section 45(1) of the law of Succession Act provides
 45. No intermeddling with property of deceased person
 - (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
18. The issue of administration of estates of deceased persons is a matter of substance and not form. It is thus clear that the estates of Chepkilot Chepkosom, Josephat Kipkorir Chepilot (deceased) and that of Tamirtei Talai (deceased) are unadministered. Article 159 (2) (d) of the constitution cannot cure non-compliance with law but procedure. In the circumstances I find that no action can be brought against the said estates in the circumstances.
19. In the foregoing I need not determine the 2nd issue. The preliminary objection is upheld. Application dated 27.10. 20 is struck out. Each party to bear its own costs.

T. A. ODERA - JUDGE

10/7/2023

RULING DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

No appearance for the Applicants.

Matoke h/b for Nyagaka for the interested party.

Court Assistant; Bor.

T. A. ODERA - JUDGE

10/7/2023

