



In re Estate of Chesang Chelagat Toromoo (Deceased) (Succession Cause 89 of 1997) [2023] KEHC 23354 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 89 OF 1997
JRA WANANDA, J
OCTOBER 13, 2023**

BETWEEN

SALINA JEPKORIR SANG APPLICANT

AND

WILLIAM KIMUTAI SANG 1ST RESPONDENT

BARNABAS CHESANG TOROMOO 2ND RESPONDENT

FREDRICK K. SANG 3RD RESPONDENT

RULING

1. This deceased, Chesang Chelegat Toromoo died on 7/9/1995 leaving behind a widow and 4 children, namely, the Applicant (the only daughter) and the 3 Respondents (sons). The Grant of Letters of Administration over the estate of the deceased was issued on 3/03/1998 to the parties' mother, widow of the deceased, Toiyoi Taptuwei Chesang. To date however, confirmation of the Grant has never been applied for and the said Administrator has since died.
2. Now before Court for are two Applications, both filed by the Applicant, Salina Jepkorir Sang through Messrs Omwenga & Co. Advocates. The 1st Application is dated 29/10/2021 and basically seeks that the Grant issued herein be revoked and the 2nd Application, dated 17/03/2023 basically seeks orders restraining the Respondents from interfering with the Applicant's occupation and/or use of one of the estate properties. In view of the close connection between the two Applications, I directed that the two be heard together and one common Ruling be delivered.
3. In full, the orders sought in the 1st Application dated 29/10/202 brought by way of the Summons, are the following:



- a. That the Grant of Letters of Administration intestate of the estate of Chesang Chelegat Toromoo (deceased) issued to Toiyoi Taptuwei Sang on 3rd March, 1998 who is now deceased be revoked and/or annulled.
 - b. That the grant of letters of administration intestate of the estate of Chesang Chelagat Toromoo be issued to Salina Jepkorir Sang.
 - c. That costs of this Application be provided for.
4. The Application is stated to be brought under Section 76 and 47 of the Law of Succession Act, Cap. 160 Laws of Kenya and rule 49 and 73 of the Probate and Administration Rules. The grounds of the Application are as set out on the face thereof and the Application is supported by the Affidavit sworn by the Applicant, Salina Jepkorir Sang.
 5. The Application is supported by the Affidavit sworn by the Applicant in which she depones that she is a daughter of the deceased, the Grant of Letters of Administration issued herein is yet to be confirmed, the Petitioner, Toiyoi Taptuwei Sang who was also the Administrator died on 18/08/2019, the Grant has become useless and inoperative and the estate has not been administered. She prayed that she be included as the Administrator of the estate.
 6. The 2nd Application, brought vide the Notice of Motion dated 17/03/2023 seeks the following orders:
 - a. [.....] Spent
 - b. That this Honourable Court be pleased to grant an order for temporary injunction restraining the Respondents either by themselves or through their servants, agents, employees or otherwise any person acting under their direction or authority from cultivating, planting or dealing in any way preventing or stopping the Applicant from accessing/entering into the portion of land forming part of Land parcel Uasin Gishu/Elgeyo Border/55 being used by the Applicant pending hearing of this application inter parties.
 - c. That the Respondents be prohibited from entering or trespassing onto the portion of land forming part of the parcel of land Uasin Gishu/ Elgeyo Border/55 or in any manner whatsoever interfering with the same pending the hearing and determination of this cause.
 - d. That costs of this application be provided for.
 7. The Application is stated to be brought under “Sections 1A, 1B & 3A of the Civil Procedure Act, order 40 rules 1 and 2 of the civil procedure rules 2010, order 51 rule 1 of the Civil Procedure Rules, 2010, Section 45 of the Law of Succession and all other enabling provisions of the law”. The grounds of the Application are as set out on the face thereof and it, too, is supported by the Affidavit sworn by the Applicant.
 8. In the Affidavit, the Applicant deponed that the deceased was survived by 4 children, namely 3 sons and 1 daughter and she is one of the beneficiaries. According to her, the assets that the deceased left behind were Uasin Gishu/Elgeyo/55 (20 Acres), Ngobelyani/Block 1560/63, Ngobelyani/Block/1560/127, Elgeyo Border Township (1/8 acre), Tractor Planter 2 Ploughs Trailer (sold by Respondents), Posho Mill (already sold) and herds of cattle (already sold).
 9. The Applicant further submitted that her mother, the said Toiyoi Taptuwei Chesang was appointed the personal representative to the estate, she however died on 18/08/2019 without fully administering the estate, the Applicant has been using a portion of 8 acres of land parcel No. Uasin Gishu/Elgeyo Border/55 for cultivating with her deceased mother and when she died, the Applicant continued tilling



that land and that the remaining portion thereof was used for herding of cows and trees have been planted there.

10. The Applicant deponed further that her brothers, the Respondents, have been cultivating the other parcels of land comprised in the estate, the Respondents have now unlawfully leased the land, Uasin Gishu/Elgeyo Border/55 to one Ben Ngetich who by cultivating it, is preventing the Applicant from entering into the property, the Applicant intends to gain entry into the land to prepare it for planting but she is unable to commence the same because the Respondents have prevented her from accessing and entering into the land, the lessee is yet to plant the 8 acres portion of the land, the illegal actions of the Respondents of leasing out the parcel of land are aimed at frustrating the Applicant and intermeddling with the estate, the Applicant stands to suffer irreparable loss and damage should the lessee be allowed to continue tilling the land.

Response

11. In opposition to the 1st Application dated 29/10/2021, the 3rd Respondent filed Grounds of Opposition on 11/05/2023. The same was filed through Messrs Kalya & Co. Advocates.
12. In the Grounds, the 3rd Respondent contended that the Application offends the Section 55 to 66 of the Law of Succession Act, the Applicant did not obtain the consent of all the beneficiaries prior to filing of the consent, every survivor of the deceased ought to be involved in the appointment of Administrators and that the Application is not brought in good faith but with an attempt of advancing personal interests.
13. As aforesaid, in light of the connection between the two Applications, I directed that the same be heard together and one Ruling delivered. However, and although I gave the Respondents time to file their common and/or consolidated responses, apart from the said Grounds of Opposition, no other response was filed.

Hearing of the Applications

14. It was then directed, and agreed, that the Applications were to be canvassed by way of written Submissions. Pursuant thereto, the Applicant filed hers on 20/06/2023 in respect to both Applications. On their part, and despite being given ample time to do so, the Respondents did not file any Submissions

Applicant's Submissions

15. Counsel for the Applicant submitted that the Administrator of the estate having died, the Grant issued to her became useless and inoperative as provided under Section 76(e) of the Law of Succession Act thus there is need for the same to be revoked and issued to another beneficiary as the estate cannot remain unadministered. He cited the case of Goolamhoosain Keshavjee (Deceased) [2017] eKLR and submitted that this matter has been lying in Court since the year 2017, the Respondents have never bothered to take out Letters of Administration for that long for the reason that they had already taken over the estate and are using the same to the exclusion of the Applicant, the 3rd Respondent's Grounds of Opposition claiming that their consent was not obtained prior to filing the Application is malicious as they have never been willing to proceed with this Succession Cause so that they can continue to utilize the estate to the exclusion of the Applicant, it is also worth noting that the Applicant does not see eye to eye with the Respondents as there is already bad blood between them and therefore any attempt to obtain their consent would prove futile, the aim of the Application is to ensure that the estate is administered and all the beneficiaries get their share, as it stands, the Respondents have dispossessed the Applicant of the portion of land that she was carrying on subsistence farming with their deceased



- mother before her demise, the Applicant is eligible to be appointed as the Administratrix since she meets all the requirements under Section 66(b) of the Law of Succession Act being the daughter to the deceased, the Court should exercise its discretion and invoke its inherent powers under Section 73 of the Law of Section Act and issue the Grant so that the estate can be administered.
16. Counsel cited order 40 rule 1(a) and (b) of the Civil Procedure Rules and submitted that the Applicant is a single parent who has been living at their home which forms part of the estate, the Applicant has been cultivating 8 acres portion of the land forming part of the parcel of land No. Uasin Gishu/Elgeyo Border/55 together with her deceased mother for their subsistence until after her mother's demise, the Respondents have been cultivating the rest of the parcels comprised in the estate, after the demise of their mother, the Respondents took over all the parcels of land, including the 8 acres part of the said Uasin Gishu/Elgeyo/Border/55 which the Respondents leased out leaving the Applicant with nothing for her subsistence farming, the leasing out of the said land amounts to intermeddling with the estate against the provisions of Section 45 of the Law of Succession Act, unless the orders of injunction are issued, the said parcel of land will be wasted and/or sold to third parties, the Applicant will also continue to suffer as she does not have any land for her subsistence farming. He cited the case of *Giella v. Cassman Brown* (1973) EA 358 and order 40 rule 1 (a) &(b) of the Civil Procedure Rules.
 17. On whether the Applicant has a prima facie case, the Applicant's Counsel cited the case of *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] eKLR and submitted that it is not disputed that the Applicant is a daughter of the deceased, she therefore has an interest in the estate, the Respondents have leased out the 8 acres part of the parcel of land No. Uasin Gishu/Elgeyo Border/55 as indicated in the Chief's letter exhibited leaving the Applicant with nowhere to plough, the Respondents have become greedy, they are illegally benefitting at the expense of the Applicant, the Respondents have not filed any response to the Application dated 17/03/2023 and therefore the evidence has not been controverted and that the act of leasing the land amounts to intermeddling. He cited the case of *In re Estate of Gideon Kibitok Tarus (Deceased)* [2021] eKLR where, he submitted, the Court relied on the case of *In the Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR and *In Re Estate of John Gakunga Njoroge* [2015] eKLR and submitted that the Applicant has a prima facie case with probability of success as clearly her rights as a beneficiary have been infringed and also the Respondents are intermeddling with the estate.
 18. On whether the Applicant will suffer irreparable injury which cannot be compensated by an award of damages, Counsel reiterated that the Respondents have leased the portion of land cultivated by her leaving her with no land for her subsistence farming and therefore she will have to buy food which she could have planted and that such loss and damage cannot be compensated by way of costs.
 19. On whether the balance of convenience is in favour of the Applicant, Counsel submitted that Counsel cited the case of *Paul Gitonga Wanjau v. Gathuthis Tea Factor Company & others* 2016 eKLR and submitted that the Applicant will suffer irreparable loss, harm and damage in the event the order of injunction is not granted and that no prejudice will be suffered by the Respondents.

Analysis and Determination

20. Upon examination of the record and the pleadings filed, including the Affidavits and Submissions, I find that the issues that arise for determination to be as follows:
 - i. Whether the Applicant has demonstrated sufficient grounds for revocation of the Grant of Letters of Administration and her appointment as the new Administratrix, the initial Administratrix having died.



- ii. Whether the Applicant has demonstrated sufficient grounds for the Respondents to be restrained from dispossessing her of the use of a portion of the 8-acre parcel of land known as Uasin Gishu/Elgeyo Border/55

21. I now proceed to analyze and answer the said Issues.

i. Whether the Applicant has demonstrated sufficient grounds for revocation of the Grant of Letters of Administration and her appointment as the substitute Administratrix, the initial Administratrix having died

22. Section 76 of the *Law of Succession Act* provides as follows:

“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.”

23. For the orders sought to be granted, the Applicant must therefore demonstrate that the stipulated grounds for revocation as set above have been satisfied. It is evident that Section 76(e) above is the most applicable herein. This is because the appointed Administratrix, the mother to the Applicant and the Respondents, Toyoi Taptuwei Sang, died on 18/08/2019 before distributing the estate. The Applicant has exhibited a copy of the death certificate. The death of the Administratrix is therefore not contested.

24. The Respondents contend that the Application should not be granted because the Applicant has not obtained their consent. While this may be true, the omission has been cured by the fact that the Respondents were served with the Application. The requirement for consent is to ensure that all interested parties are made aware of the institution or continuance of Succession proceedings and that such beneficiaries have been given a hearing before the Court proceeds to issue orders. Since the



Respondents were duly served and as a result, they fully participated in these proceedings, the excuse that their consents were not obtained cannot be a serious one and cannot bar this Court from revoking the Grant and/or appointing a new Administrator.

25. Having reached the above findings, it follows that the grant has indeed become “useless and inoperative” within the meaning of Section 76(e) of the *Law of Succession Act*. Should the Court now simply substitute the deceased Administratrix with a new one or should it proceed to revoke the Grant altogether?
26. In respect to this question, I cite the case of *In re Estate of Keziab Wanjiru Chege (Deceased)*[2014] eKLR, in which Hon. Justice Musyoka pronounced himself as follows:

“ 4. Secondly, the person named in the revocation application as sole administrator cannot be substituted as his demise would result in the grant made to him becoming useless and inoperative. In any event, even if he were to be substituted in the revocation application, which is not feasible, he can only be substituted with persons who have themselves been appointed administrators of the estate. He cannot be replaced with heirs who are yet to be named by the court as administrators.

27. In view of the foregoing, it is clear that where a sole Administrator dies, the only recourse is for the Court to revoke the Grant and issue a fresh one, where necessary. In the circumstances, I hereby revoke the Grant and issue a fresh Grant appointing two new joint co-Administrators. Pursuant thereto, I appoint the Applicant and one co-Administrator to be nominated by the Respondents.

ii. Whether the Applicant has demonstrated sufficient grounds for the Respondents to be restrained from dispossessing her of the use of a portion of the 8-acre parcel of land known as Uasin Gishu/Elgeyo Border/55

28. In her Affidavit, the Applicant deponed that she has been using a portion of the 8 acres of land parcel No. Uasin Gishu/Elgeyo Border/55 for cultivating and that she had always been doing so with her deceased mother when the mother was still alive. She added that even after the mother died, the Applicant continued tilling that portion of the land for her subsistence and that her brothers, the Respondents, have been cultivating the other parcels of land comprising the estate. According to the Applicant, sometime in January 2019, the Respondents leased the entire parcel of land, Uasin Gishu/Elgeyo Border/55 to one Ben Ngetich who is now cultivating it and thus preventing the Applicant from entering into it. She exhibited a copy of a letter from their local Chief confirming the said state of affairs. The Applicant then submitted that she is unable to gain entry into the land to prepare it for planting because the Respondents have prevented her from accessing and entering thereto.
29. None of the 3 Respondents filed a response to the Application despite being given ample time by this Court. In the circumstances, the matters deponed by the Applicant remain uncontroverted and presumed to be true.
30. In the circumstances, I have no choice but to find that the Applicant has proved her allegations that she is indeed a beneficiary of the estate, that she is dependent on the said parcel of land having cultivated it for a long time for her subsistence farming even before the demise of their mother. I therefore find that the Applicant has proved that she shall suffer prejudice since according to her, the land has been leased out by the Respondents to a third party.



31. Regarding the leasing out of the property, the same clearly offends the provisions of Section 45 of the *Law of Succession Act* which prohibits “intermeddling”. *In Re Estate of M’Ngarithi M’Miriti* [2017] eKLR, Hon. Justice Gikonyo held as follows:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

32. In light of the above statement, which I wholly embrace, I am satisfied that the act of leasing out the land by the Respondents before distribution of the estate, if true, amounts to the criminal act of intermeddling and therefore unlawful. I also agree with the Applicant that the act of leasing out the land appears to be aimed at frustrating her and that she stands to suffer irreparable loss and damage should the purported Lessee continue occupying the land. I therefore find that the circumstances that justify the grant of an injunction have been met by the Applicant.

Final Orders

33. In light of the above findings, I make the following orders:
- i. Both the Summons dated 29/10/2021 and the Notice of Motion dated 17/03/2023 filed by the Applicant are allowed in the terms set out hereinbelow:
 - ii. The Grant of Letters of Administration intestate given herein on 3/03/1998 to one Chesang Chelagat Toromoo, who has since died, is hereby revoked and in its place, a fresh Grant is issued appointing two joint co-Administrators as follows:
 - a) The Applicant, Salina Jepkorir Sang; and
 - b) One other co-Administrator to be nominated by and among the 3 Respondents.
 - iii. The Respondents are given thirty (30) days within which to agree on and present to the Court the name of the co-Administrator nominated by them, for adoption by the Court.
 - iv. Pursuant to the above, this matter shall be mentioned after lapse of such thirty (30) days for purposes of formal appointment of the co-Administrators.
 - v. Pending distribution of the estate or as shall be directed by the Court, an order of injunction is hereby issued restraining the Respondents either by themselves or through their servants, agents, employees or otherwise any person acting under their direction or authority from cultivating, planting or dealing in any way or preventing or stopping the Applicant from



accessing/entering into the portion of land forming part of the land parcel Uasin Gishu/Elgeyo Border 55 which portion the Applicant has been utilizing.

- vi. Pending distribution of the estate or as shall be directed by the Court, an order of injunction is hereby issued restraining the Respondents and/or prohibiting them from entering or trespassing onto the portion of land forming part of the parcel of land Uasin Gishu/ Elgeyo Border/55 which portion the Applicant has been utilizing, or in any manner whatsoever interfering with the same.
- vii. The Applicant is therefore hereby allowed and/or returned into possession and permitted use of the portion of land forming part of the parcel of land Uasin Gishu/ Elgeyo Border/55 which portion she has been utilizing.
- viii. It is directed that any lease, or conveyance of similar nature, given out in respect of any property comprised in the estate herein to any third party amounts to intermeddling with the estate, is null and void and such lease or leases or conveyance, if any, is or are hereby declared unlawful and are accordingly, revoked.
- ix. This being a family matter, each party shall bear his/her own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 13TH DAY OF OCTOBER 2023

WANANDA J. R. ANURO

JUDGE

