



In re Estate of Herman Kimego Sirma - Deceased (Succession Cause 247 of 2003) [2024] KEHC 14249 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 247 OF 2003
RN NYAKUNDI, J
NOVEMBER 15, 2024**

IN THE MATTER OF THE ESTATE OF HERMAN KIMEGO SIRMA – DECEASED

IN THE MATTER OF

**ELPHAS KIMEGO SIRMA 1ST PETITIONER
PERIS JEPKORIR SIRMA 2ND PETITIONER
ROSE JERUTO STANLEY 3RD PETITIONER**

AND

HENRY KISORIO CHERUIYOT APPLICANT

RULING

1. Before me for determination are summons for rectification/amendment of grant dated 18th November, 2022 expressed to be brought under the provisions of sections 35,37,47 and 74 of the [Law of Succession Act](#), and Rules 43 and 73 of the Probate and Administration Rules. The applicant seeks orders as follows:
 - a. Spent
 - b. That pending the hearing and determination of this application inter-parties or until further orders, a temporary injunction and/or prohibition be issued restraining the Petitioners either by herself or agents/servants from laying claim to, offering for sale, transferring or otherwise in any manner, alienating that parcel of land known as Kuinet Farm (Previously known LR. No. 9148) and Kipsanguo Farm (Previously known as LR. No 10969) and all the resultants parcels Namely Kiplombe/Kuinet Block 7 (Kuinet)/ 1-162 And Soy/kipsangui Block 5(kipsangui) 1-199.
 - c. That the certificates of confirmation of grant issued on the 30th of June, 2022 in respect of the estate of the late Herman Kimego Sirma by this Honourable Court be amended by deleting



therefrom the property known as Kuinet Farm Ltd (Previously known I.R No. 19388) and in lieu thereof insert the property known as Soy/Kipsangui Block 5(Kipsangui)35.

- d. That a declaration be made that the Estate is only entitled to the parcel of land known as Soy/Kipsangui Block 5(Kipsangui)/35 and not Kuinet Farm Ltd (Previously known LR. No. 9148) and Kipsangui Farm Ltd (Previously known as LR. No 10969 I.R NO. 19388).
 - e. That the grant of letters of administration intestate to Elphas Kimego Sirma, Kipkoech Kimego, Peris Jepkorir Sirma and Rose Jeruto Stanley made on 7th July, 2004 and confirmed on the 5th of July, 2021 be revoked;
 - f. That costs of this application be provided for.
 - g. The amended certificate of confirmation of grant issued to John Sirma Koech on 31st March 2023 be revoked or annulled.
 - h. The Uasin Gishu County Land Surveyor is hereby compelled to stop the implementation of grant issued on 31st March 2023 and cancel titles emanating from sub division of the parcel known as Turbo East/Leseru Block 3 (Tugoin)51
 - i. Costs be borne by the respondent.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn in support of the same. The grounds have been captured as follows:
- a. That the Petitioners have made attempts to evict the Applicant from his parcel of land at Kipsangui area on the basis of a certificate of confirmation of grant issued by this court.
 - b. That the Petitioners are seeking vacant possession of Kuinet Farm Limited (Previously known LR. NO 9148 and Kipsangui Farm Ltd (Previously known as LR. NO 10969) under the mistaken belief/fraudulent scheme that the deceased, Herman Kimego Sirma, was the owner of the two parcels of land.
 - c. That Petitioners fraudulently misdirected the court in their application for confirmation of grant by listing the properties known as Kuinet Farm Ltd (Previously Known LR. No. 9148) and Kipsangui Farm Ltd (Previously known LR. NO 10969) as being available and was wholly owned by the deceased and thereby available for distribution as part of the estate of Herman Kimego Sirma.
 - d. That the Petitioner fraudulently did not disclose to the court that the said Kuinet Farm Ltd (previously known LR. NO 9148) and Kipsangui Farm Ltd (Previously known as LR. NO 10969) and been closed on sub-division and conversion resulting in creation of new RLA titles namely Kiplombe/Kuinet Block 7 (Kuinnet)/ 1-162 and Soy/Kipsangui Block 5(Kipsangui) 1-199 respectively.
 - e. That the Petitioner further failed to disclose to the court the fact that the deceased was only entitled to a portion measuring 23.34 acres being the parcel of land known as Soy/Kipsangui Block 5(Kipsangui)/35.
 - f. That unless the orders sought herein are granted, there is a real danger that the petitioners herein shall continue to misuse the certificate of confirmation of grant so issued to deprive the Applicant of its immovable properties.



- g. That unless the Petitioners are restrained forthwith and the orders sought herein granted, the applicant shall be exposed to irreparable loss and damage and this motion shall be rendered nugatory.
- h. That the law has clothed this court with inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
3. In response to the summons for amendment, Peris Jepkorir Sirma swore a replying affidavit in which she deponed as follows: -
- i. That its true the depositions of the deponent at paragraph 2. He is the only occupant of the 1283 acres where he has built a small hat and uses the entire land for farming and leasing to individuals whom he is calling shareholders.
- ii. That further, the said letter did not advise the chief to assist any of the administrator to evict the applicant, but resolve a dispute that is ever standing to date.
- iii. That in reply to paragraph 3, the same are false. It is true the deceased Herman Kimego Sirma is the sole owner of the two (2) parcels of land which he solely bought using his farm proceeds as demonstrated by the documents filed in court in support of the summons for confirmation dated 13th April, 2021 sworn by Co-Administrator, Rose Jeruto Stanley.
- iv. That exhibits numbered from 1-24 complete a documented history of how the deceased acquired the two companies. He raised funds from his other farms including Kipsangui Ltd to purchase Kuinet Ltd and the founding members and subscribers to the memorandum is also clear from the record.
- v. That the information has not been challenged by the Applicant, further the applicant has not filed any share certificate for himself or the people he alleges to be members and no copies of the certificates of title for himself or any of the alleged members has been shown to court.
- vi. That I am informed by my Advocates which information I believe to be true that only the Registrar of companies and the Land Registrar can give credible evidence that a company has been wound up through Kenya Gazette Notice and Certified Copy of the closed Title respectively. The Applicant has not shown to court such information.
- vii. That further to the above, because of the Applicant's failure to avail information regarding winding up of the companies and certified copies of closed certificates of mother titles at Nairobi makes his claims false.
- viii. That the Certificate of Titles and the companies are intact. The original certificate of titles has been ordered by the civil court to be deposited in this court.
- ix. That the applicant is a fraudster. He was the deceased's farm manager and, in a position, to access documents after the death of our father. That he has been trying to steal the land comprised in the companies. He is the sole person on the land.
- x. That the whole of LR No. 9148 belongs to the estate.
4. In further response, the applicant filed a further affidavit sworn on 28th September, 2023 in which the applicant deponed: -
- a. That I am a director of Kuinet Limited competent and duly authorized to depose hereto.



- b. That we learned of the existence of Eldoret E&L No. 96 of 2015 Kuinet Limited, Elphas Kimego Sirma, Peris Jepkorir Sirma, Rose Jeruto Stanley versus Agricultural finance co-operation through the proceedings herein.
- c. That subsequently the company engaged the services of M/s Tororei & Co. Advocates to cause the withdrawal of the said suit on the basis that it was filed without authority of the directors of the M/s Kuinet Limited, by the 2nd, 3rd, and 4th Plaintiffs who were neither shareholders nor directors of the company.
- d. That the court (Hon E. Obaga J) considered our application and thereafter proceeded to mark the matter as withdrawn and the matter closed.

Analysis and Determination

5. I have considered all the evidence adduced by the parties herein. I have also considered the background of this matter and various directions issued by this court. The cardinal issue that I ought to determine is whether parcel of land known as Kuinet Farm (Previously known LR. No. 9148) and Kipsanguo Farm (Previously known as LR. No 10969) forms part of the estate of the deceased.
6. The “estate” is defined under Section 3 of the *Law of Succession Act* as follows:-

“Means the free property of a deceased person.”

On the other hand, “free property, is defined as follows-

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.”
7. The Court of Appeal in the case of Maxwell Ombogo-v- Standard Chartered Bank & Another the court held that “Free estate” in the *Law of Succession Act* is property which a person was legally competent freely to dispose off, it connotes not only the personal property of a deceased person but also all the property which was in his possession or control or under his power and the disposal of which would legally have required his authority but for his death.
8. In the case of Re-Estate of Alice Mumbua Mutua (2017) eKLR Justice Musyoka stated that-

“The *Law of Succession Act* and Rules made thereunder are designed in such a way that they confer jurisdiction to the Probate Court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest and finally distribution of assets amongst the survivors of the deceased and the persons with beneficiary interest. The function of the Probate Court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the assets.”
9. The jurisdiction of the Probate Court in determining estate assets must be exercised judiciously, particularly where questions of corporate ownership arise. The distinct legal personality of a company, as established in *Salomon v Salomon & Co Ltd* [1897] AC 22, means that ownership of shares in a company does not equate to ownership of the company's assets. This principle is critical when determining whether corporate property can properly be characterized as part of a deceased shareholder's free estate.



10. From the decision in *Re-Estate of Alice Mumbua Mutua* (supra), one of this court's duty is to determine the assets of the deceased. The properties forming part of the estate of the deceased must be identified and duly distributed to the rightful beneficiaries. Where the issues of ownership arise, they ought to be determined before distribution.
11. The applicant's major argument is that the two properties in question do not form part of the estate as they do not solely belong to the deceased person. The applicant argued that the deceased person did not solely own the two companies namely; Kipsangui farm limited and Kuinet farm limited with which the two properties are affiliated. He further stated that he was the secretary of Kipsangui farm Limited and he is well aware that the deceased was not the owner of the entire Kuinet farm (previously known LR. NO. 9148) or the entire of Kipsangui Farm Ltd (previously known as LR. NO. 10969). The Applicant in support attached a list of members who form part of the two establishments.
12. Given such assertions I sought to peruse through the record and establish the exact ownership of the said properties. It is important to note that in terms of ownership of Kipsangui Limited, the Petitioners initially in their summons for confirmation dated 15th April, of 2021 attached a share certificate of the said company and the deceased together with one Kirwa Baren are indicated to have a share of two hundred and fifteen shillings out of the capital of Kshs. 400,000/=. It therefore clears the fact that the deceased was not the sole owner of the said property.
13. In support of the fact that the establishment known as Kuinet Farm Limited the applicant attached a list of members of the said company. Unlike Kipsangui Limited, I have not had sight of any share certificate to establish the fact the deceased did not own the establishment wholesomely. Can this court then rectify or amend the letter of grant of administration?
14. The law on rectification or alteration of grants is Section 74 of the *Law of Succession Act* and Rule 43 of the Probate and Administration Rules. Section 74 provides:

‘Errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court...’

Rule 43(1) of the Probate and Administration Rules:

‘Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased, or in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons...’
15. The court's power to rectify grants under Section 74 must be interpreted purposively to prevent injustice. While the section specifically mentions correction of errors in names, descriptions and dates, the court retains inherent jurisdiction to prevent abuse of its process where a grant has been obtained on the basis of incorrect information about the estate's assets. This approach is consistent with the court's duty to ensure proper administration of estates and protect the interests of all affected parties.
16. The aforementioned provisions essentially mean that errors may be rectified by the court where they relate to names or descriptions, or setting out of the time or place of the deceased's death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general.
17. The rule of evidence is clear that “He who alleges must prove.” The doctrine has been grounded in law under Section 107 of the Law of Evidence. The doctrine was enunciated in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR when the court stated that: “...As a general proposition the



legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

“ 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

18. There was documentary evidence produced to establish the claim advanced by the Applicants. To start with, through the County Land Registrar’s report dated 24th February, 2023, he confirmed that LR No. 9148 Kuinet as per the records was converted to Kiplombe/Kuinet Block 7 (Kuinet) running from entry No. 1 to 162. The letter further confirmed that the parcel registers were created on 17th November, 1994 all under the Government of Kenya and the subsequent transfers were registered in accordance to the members’ register. Such information is reliable for reasons that the lands office and registrar are the custodians of land documents and all instruments of transfer, and any records thereof must have been duly entered in the register. It then implies that such information as adduced by the Land Registrar is reasonably reliable and on which ground this court can make a decision as to whether the property formed part of the estate.
19. I take note of the fact that the Land registrar’s report was challenged by the Petitioners through their submissions dated 11th April, 2023 for reasons that the reports filed by the Land Registrar lack the history of the land. That there are no original title documents to show the registered owners. That there is no information on how the land was acquired by Kipsangui Limited and Kuinet Limited. It was the submission of counsel that the report alleges that parcel registers were created under the Government of Kenya however there are no attached resolutions of the two companies (Kipsangui Ltd and Kuinet Ltd) shareholders to surrender the land to the government of Kenya. Hence there is no confirmation on how the land allegedly changed hands from private to government of Kenya; they are fictitious names to pass off as the two companies of the deceased.
20. Let me point out that the Land Registrar’s report carries significant probative value for three reasons: First, it emanates from the official custodian of land records charged with maintaining accurate records of title. Second, it is based on contemporaneous records rather than oral testimony. Third, it provides objective evidence of the subdivision and registration history that contradicts the petitioners’ claims of absolute ownership. While the petitioners have challenged the report, they have not produced competing documentary evidence of sufficient weight to displace its findings.
21. Reasonably so, having considered the said report, I see no sufficient reason to ignore the report given that it forms the basis of the applicant’s averments. I have no reason to doubt the said reports given that they have been given by the Land Registrar who to my mind has no reason to give this court wrong information. The logical conclusion I have arrived is that the deceased person was only entitled to a portion of the said properties and not as indicated in the Certificate of Grant dated 25th November, 2022. As pointed out by the applicants, the deceased was entitled to a portion measuring 23.24 acres being the parcel of land known as Soy/Kipsangui Block 5 (Kipsangui)/35 and not Kuinet farm Limited. The Petitioners concluded that there are no companies known as Kipsangui Farm Limited and Kuinet farm limited.
22. Therefore, in sum total of the above legal provisions and the pieces of evidence filed by the applicant, the application dated 18th November, 2022 is allowed and the following orders abide:



- a. That the Certificate of confirmation of grant issued on the 30th of June, 2022 in respect of the estate of the late Herman Kimego Sirma by this Honorable Court be rectified by deleting therefrom the property known as Kuinet Farm Limited (Previously known L.R. NO 9148) and Kipsangui Farm Limited (previously known as LR. NO 10969 I.R NO. 19388) and in lieu thereof insert the property known as Soy/Kipsangui Block 5 (Kipsangui)/35.
- b. A declaration be and is hereby issued that the Estate is only entitled to the parcel of land known as Soy/Kipsangui Block 5(Kipsangui)/35 and not Kuinet Farm Ltd (previously known as LR. NO. 9148) and Kipsangui Farm Limited (previously known as LR. NO 10969 I.R NO. 19388).
- c. There shall be no orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15TH DAY OF NOVEMBER 2024

R. NYAKUNDI

JUDGE

