REBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS APPLICATION NO. 11 OF 2020

IN THE MATTER OF THE ESTATE OF THE LATE CHEPKURUI MATHWEK-DECEASED

SABINA KURUI...1ST OBJECTOR/APPLICANT

ALEXANDER NGETICH..2ND OBJECTOR/APPLICANT

VERSUS

JOSEPH KIPKOSGEI YATICH..1ST PETITIONER/RESPONDENT

WILLIAM CHEMWOLO..2ND PETITIONER/RESPONDENT

KENNETH KIPLIMO KIPOCHUMBA..................................3RD PETITIONER/RESPONDENT

RULING

1. **SABINA KURUI (1ST OBJECTOR/APPLICANT)** and **ALEXANDER NGETICH (2ND OBJECTOR/APPLICANT)** filed this summons seeking revocation or annulment of Grant of Letters of Administration intestate issued to **JOSEPH KIPKOSGEI YATICH, WILLIAM CHEMWOLO and KENNETH KIPLIMO KIPOCHUMBA (the 1st, 2nd and 3rd Petitioners/Respondents)** issued on 14th September 2020 and confirmed on the 21st day of September, 2020 by the SRM, Iten Law Courts. In the summons dated 23rd September, 2020 the objectors/applicants seek the following orders;

a) Spent

b) Spent

c) That an interim injunction do issue restraining the Petitioners/Respondents their servants, agents and or employees from sub-dividing, leasing, disposing of, transferring and or in any other manner dealing with the deceased's properties namely **IRONG/ITEN 138, IRONG/ITEN/34 and IRONG/ITEN/31.**

d) That a permanent injunction do issue restraining the Petitioners/ Respondents, their servants, agents, and or employees from sub-dividing, leasing, disposing of, transferring and or in any other manner dealing with the deceased's properties namely **IRONG/ITEN 138, IRONG/ITEN/34 and IRONG/ITEN/31.**

e) That the Amended Grant of Letters of Administration intestate issued to **JOSEPH KIPKOSGEI YATICH, WILLIAM CHEMWOLO and KENNETH KIPLIMO KIPCHUMBA** issued on the 14th day of September, 2020 and confirmed on the 21st day of September, 2020 be revoked or annulled.

OBJECTORS'/APPLICANTS CASE

2. The applicants' case is premised on the grounds that;

a) The SRM court had no jurisdiction to hear and confirm the Succession proceedings relating to the estate of the deceased as the value exceeds 7 million shillings and or alternatively, Iten Law Courts has no jurisdiction as the value of the estate exceeds Kenya Shillings 15 million.

b) The proceedings to obtain the grant were defective and that the grant was obtained fraudulently by making of false statement or by the concealment from court something material to the case.

c) Some beneficiaries were left out and or never signed or consented to the required forms hence failing to meet the mandatory requirements regarding the Petition as laid out in the Law of Succession Act, Cap 160 Laws of Kenya and the Probate and Administration Rules.

d) The Grant was confirmed without informing and or involving all beneficiaries of the estate.

e) At the time of confirmation of grant, all beneficiaries had not agreed on the mode of distribution of the estate

f) There was discrimination and inequality against the 1st house as to the distribution of the estate.

g) The petitioners/respondents concealed and failed to disclose to the court material facts to the case.

3. The applicants in their written submissions argue that the court lacked pecuniary jurisdiction to issue and confirm the Grant of Letters of Administration Intestate with respect to the estate of the deceased since the total value of the exceeds Kshs. 15 million. The applicants further submit that the initial magistrate who handled the matter was aware of this fact, and did state that he lacked jurisdiction and advised parties to lodge a formal application to have the case transferred to the court at Eldoret. The applicants relied on the case of **Isaac Gathungu Wanjohi v Simon Moloma Nkaru & Another (2019) eKLR** to buttress their argument.

4. The applicants also submitted that the deceased had two wives **KABON CHEPKURUI** (1st wife) and **MOKOCHO CHEPKURUI** (2nd wife) who are both deceased, and listed the beneficiaries surviving each of the said houses. It was the applicants' case that the Chief's letter dated 23rd November, 2005 is full of falsehoods in that some of the persons listed are not the legal sons and or heirs of the deceased and are therefore not dependants within the meaning of **Section 29 of the Law of Succession Act.** The applicants also submit that some of the genuine beneficiaries were also omitted by the petitioners. That the 2nd applicant is one of the children of **MAGRINA KIMOI** (deceased) who is one of the daughters of the deceased. It is their further contention that they never signed the necessary/requisite consents to accompany the Letters of Administration Intestate. The applicants relied on the case of **Monica Adhiambo v Maurice Odero Koko (2016) eKLR** to support this argument. It is their further contention that the grant was confirmed without their consent as to the mode of distribution.

5. In arguing that that this instant application meets the threshold for granting interlocutory injunction as was established in the case of **Giella v Cassman Brown (1973) EA 361, t**hey also draw from the case **of Re the Estate of the late Agnes Kirio Taiti (Deceased) (2017) eKLR**

<u>THE PETITIONERS'/RESPONDENTS' CASE</u>

6. In opposing the application, the respondents/petitioners rely on the replying affidavit sworn by **JOSEPH KIPKOSGEI** as well their submissions and they insist that they followed the right procedure in obtaining the grant herein and informed all the beneficiaries of the estate to the deceased who agreed and consented to the current succession cause.

The petitioners state that the deceased left the following dependants;

JOSEPH KIPKOSEGEI YATICH

WILLIAM CHEMWOLO

PETER KIPCHUMBA BARSOSIO

SABINA CHEPKURUI

LAWERENCE CHEPKURUI

RICHARD CHEPKURUI

PAUL YATICH.

7. It is their contention that the objectors were rightly acknowledged in the succession cause and that their interests were carted for. They deny disinheriting their sister and nephew the (1st and 2nd objectors) herein despite the fact that the 2nd objector not being a dependant in the estate of **CHEPKURUI MATHWEK**. The repondents state that they shared their late father's estate equally amongst his children, and the issue of the 1st and 2nd house never arose and was never in dispute. That the petitioners the 1st objector herein was allocated a bigger share than a majority of the dependants and that Succession is for the living hence the objector ought not to bring their deceased sister as part of the dependants as they have rightly acknowledged their nephew the (2nd Objector) herein.

8. The respondents argue that the grand children of the deceased whom the objectors are purporting to bring now as beneficiaries, are not direct dependants, and had not born at the time of commencement of this succession cause. Therefore, allowing them to be included as such

will open up an endless avenue for further future objections for children being born by other dependants. They urge this court to note that they have not included their children as beneficiaries.

9. The claims that the respondents uttered any false document before court or perpetrated any fraud against anyone is contested, and draw to this court's attention that the 2nd Objector had filed objection proceedings vide his application dated 14th February 2006 in **Iten PMC Succession Cause No. 43 of 2006** which were dismissed for want of prosecution, and this instant application is an abuse of court process.

10. The petitioners urge this court to find that the supporting affidavit by the 1st objector does not reflect the views of the 2nd objector, as she has not stated having any authority to swear on his behalf, hence it cannot be assumed that the 2nd objector is pursuing the objection herein, having abandoned his earlier own objection which was dismissed in the lower court.

11. It is submitted that the Senior Principal Magistrate Court at Iten had the requisite pecuniary jurisdiction to handle the Succession Cause as the total acreage of land is 61 Acres which was **approximately Kshs. 6,000,000/- (six) million** at the time that of filing the said Succession cause. They rely on the case of **Augustine Johnstone Moi Kirigia v Catherine Muthoni Kirimi (2017) eKLR**

ISSUES FOR DETERMINATION

WHETHER THE GRANT SHOULD BE REVOKED?

12. For such application to succeed, the party applying must prove one or more of the grounds set put in section 76 of the Law of Succession Act which provides 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.***

In the Matter of the Estate of L A K – (Deceased) [2014] eKLR the court held that;

> ***Revocation of grants in governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.***

13. It is the applicants' case that Iten Law Courts lacked pecuniary jurisdiction in issuing and confirming the Grant of Letters of Administration Intestate with respect to the estate of the deceased since the total value of the estate exceeds Kshs. 15 million**.** It is trite law that where the question of jurisdiction is raised then the court must first and foremost investigate and establish whether it has the requisite jurisdiction to hear and determine the matter. This is so because jurisdiction is everything without which a court of law acts in vain. In **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** where the Court of Appeal was clear that:

> ***"It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined."***

14. Initially, the jurisdiction of the Magistrates courts in succession matters was provided by **Section 48(1)** of the **Law of Succession Act,**

Cap. 160 of the Laws of Kenya. The said provision stated as follows: -

> ***'Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as my be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:***
>
> ***Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.' (emphasis added).***

15. In 2015, **Section 48(1)** of **the Act** was amended by the enactment of the **Magistrates' Court Act, Act No. 26 of 2015**. **Section 23** of **the new Act** repealed the said **Section 48(1)** of **the Act** and substituted it with the following new subsection: -

> ***'23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection –***
>
> > ***1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed*** **under section 7** ***(1) of the Magistrates' Courts Act, 2015.'***

Section 7 (1) of the Magistrates Court Act, 2015 has enhanced the pecuniary jurisdiction of magistrate.

It provides: -

> ***"Civil jurisdiction of a magistrate's court***
>
> > ***(1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —***
> >
> > > ***(a) twenty million shillings, where the court is presided over by a chief magistrate;***
> > >
> > > ***(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;***
> > >
> > > ***(c) ten million shillings, where the court is presided over by a principal magistrate;***
> > >
> > > ***(d) seven million shillings, where the court is presided over by a senior resident magistrate; or***
> > >
> > > ***(e) five million shillings, where the court is presided over by a resident magistrate***

16. On pecuniary jurisdiction, in this instant case, the applicants have submitted that the Senior Resident Magistrate Court, did not have the jurisdiction to issue and confirm the Grant of Letters of Administration with respect to the deceased estate. The applicants have also argued that the Petition for Letters of Administration Intestate does not reveal the estimated value of the assets forming the estate of the deceased and that the value of the estate of the is over Kshs. 15 million.

17. It is a cardinal principle of law that "**he who alleges must prove**". This principle is well captured in sections 107 to 109 of the Evidence Act which reads as follows;

> ***"107 (1) whoever desires any court to give judgment as to the legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> > ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies with that person.***
>
> ***108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on the other side.***
>
> ***109. 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 proof of that fact shall lie on any particular person."***

18 In the case of **Stephen Wasike Wakho & Another V Security Express Limited [2006] eKLR,** the court stated as follows:-

> ***"A party seeking justice must place before the court all material facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum he who alleges must prove."***

In light of the above mentioned statutory provisions, it is clear that a Senior Magistrate Court has pecuniary jurisdiction not exceeding a sum

of seven million shillings.

The petitioners have submitted that the deceased estate comprises of three parcels of land whose value was estimated to have been Kshs. 6 million at the time of filing of the Succession Cause. The applicants have not presented to this court any valuation report or any evidence to the contrary or to suggest otherwise.

19. The applicants have attached a copy of court proceedings marked as exhibit '**SK4'** in support of their case. Upon perusal of the said proceedings, I note that the author indicated that he lacked jurisdiction. At this point am unable to ascertain whether jurisdiction in this sense meant pecuniary jurisdiction or any other form of jurisdiction and therefore cannot conclusively determine the issue.

WHETHER THE GRANT WAS OBTAINED FRAUDULENTY?

20. The court in the case of **Jamleck Maina NJoroge –V- Mary Wanjiru Mwangi (2015) eKLR** at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows;

> ***"11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law." (emphasis added.)***

21. The applicants argue that the **Chief's letter dated 23rd November, 2005** is full of falsehood in that some people listed are not legal sons are or heirs of the deceased are therefore not dependants within the meaning of Section 29 of the Law of Succession. This allegation however, is not supported by any concrete evidence. The applicants herein bear the burden of proof and should have been more vigilant in pursuing this assertion. It is worth noting that Courts of law will never act on impulse or imagination.

22. It is not in dispute that the deceased had two wives, namely **Kabon Chepkurui and Mokocho Chepkurui** who are both deceased. Both wives were blessed with issues. It is the 1st objector's case that in the first house were born two daughters: **MAGRINA KIMOI (DECEASED)** and the **SABINA KURUI (1st objector)**. That the said **Magrina Kimoi** (deceased) was blessed with children who were not included in the list of beneficiaries save for, **ALEXANDER NGETICH** (the 2nd objector/applicant) who was only included in these proceedings at the confirmation stage. The applicants maintain the position that the 2nd objector being one of the children of **Magrina Kimoi** (deceased) is a proper heir for purposes of Succession. Upon perusal of pleadings before this court, I note that it is not in dispute that the 2nd Objector is a grandson to the deceased,

In the case of **Cleopa Amutala Namayi -V- Judith Were (2015*)* eKLR** the court stated that;

> ***"Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents who died intestate after 0.1.07.1981 when the Act came into operation.***
>
> ***The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly though their own parents, the children of their parents.***
>
> ***The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents.***
>
> ***Needless to say such grandchildren must hold appropriate representation on behalf of their parents."***

Also, in **Re- estate of Wambui Ndutu (deceased) (2017 eKLR & In the matter of the Estate of Veronica Njoki Wakago to (Deceased) (2013) eKLR** where a similar holding was made.

Section 29 of the Law of Succession Act defines a dependant

For the purposes of this Part, "dependant" means

> **(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
>
> **(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
>
> **(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

23. This definition includes grandchildren. The definition is given in the order of priority. It depends on who has survived the deceased.

The definition does not exclude grandchildren from the list of dependants. However, the grandchildren are not direct or automatic dependants. They inherit from their parents share who are direct dependants and where they prove that they were being maintained by the deceased.

24. In this case there is no dispute that the 2nd applicant is the son of a (deceased) daughter of the deceased to whom these proceedings relate and note the applicant's part in deceased. A perusal of the Certificate of Confirmation of Grant issued on 21st September, 2020 and annexed as petitioners' exhibit '**JKY**' shows that **ALEXANDER NGETICH**, is listed as one of the beneficiaries of the deceased's estate. I however, note that he has only be awarded 1 Acre of the **IRONG/ITEN/31** parcel of land. I also note he was only included in the said petition at the confirmation stage and was never from onset listed as a dependant of the deceased. The applicants have also submitted that **MAGRINA KIMOI(DECEASED)** had other children whose interests were not catered for in the mode of distribution of the said estate.

25. In the case of **Elizabeth Wairimu Thimba & 2 others v Wilfred Njogu Mbuthia & 2 others [2014] eKLR**, Emukule J held that:

> ***"In Law of Succession (Law Africa Publishers), William Musyoka expounds on the provisions of Section 41 in terms of the rights of grandchildren at page 102 -***
>
> ***"The rule of substitution of a grandchild for his or her parent in all cases of intestacy where the parent dies before the intestate is known as the principle of representation. The law on this is section 41. If a child of the intestate has predeceased the intestate or dies before attaining the age of eighteen years, then that child's issue alive or en ventre sa mere at the date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority, or if female marrying under that age.***
>
> ***The term per stirpes is defined in the Black's Law Dictionary, 9th Ed to mean "proportionately divided between beneficiaries according to their deceased ancestor's share. "Therefore, the grandchildren of the intestate are only entitled to take between them equally the share which their parent would have received had he not predeceased the intestate but on condition that at the time of his death whether before or after the intestate, he had attained eighteen years or if female, married under that age. Therefore, reasonable provision as per the law refers to an equal share of what their parent's portion would have been."***

26. The law demands full disclosure of the estate's assets and beneficiaries and short of that the grant cannot stand. Whereas it would be unfair to warrant a distribution where all beneficiaries have not been provided for, I agree that **MAGRINA'S** children step into her shoes and are entitled to inherit her share. The question of them demonstrating that they had been born during the lifetime of the intestate or were being maintained by the intestate, would in my view only arise if they were claiming separate share and not what would otherwise have been due to their mother.

27. I think the petitioners intended to give the bare minimum to their sister's children by deliberately failing to mention that **MAGARINA** had several other children, and that the share given to **ALEXANDER WOULD BE HIS AND FOR THE BENEFIT OF HIS OTHER SIBLINGS** when they applied for the Grant of Letters of Administration Intestate and the subsequent Confirmation of the same. So that on the face of it, the distribution gave an appearance of being equitable because certain critical material facts were not disclosed, it was not so much as to list each of **MAGARINA's** children and give each a share, rather it was the failure to disclose their existence, and that **ALEXANDER** was not her only survivor. I am persuaded that if this information had been disclosed to the court, the pattern in the mode of distribution would have been queried and probably altered to make it more equitable. It is on account of this that I must therefore find that the Amended Grant of Letters of Administration Intestate issued to **Joseph Kipkosgei Yatich, William Chemwolo and Kenneth Kiplimo Kipchumba** on 14th September 2020 was obtained fraudulently and by concealment from court of material facts, that is the non-disclosure of the existence of the other children of Magrina Kimoi (deceased).

I therefore order that the said grant be and is hereby revoked and annulled. The respondents shall bear the costs of these summons

Delivered and dated this 9th of March 2021 virtually

H. A. OMONDI

JUDGE