



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 313 OF 2006**

**IN THE MATTER OF THE ESTATE OF KIPTUI CHEBOI (DECEASED)**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OF GRANT**

**BETWEEN**

**NICHOLAS KIPNGETICH KIPTUI.....PETITIONER**

**-AND-**

**JOSEPH KIMUTAI KIPTUI.....1<sup>ST</sup> APPLICANT**

**SOPHIA JEBIWOTT KIPTUI.....2<sup>ND</sup> APPLICANT**

**ALICE JEROTICH KIPTUI.....3<sup>RD</sup> APPLICANT**

**JUDGMENT**

[1] The Summons for Revocation of Grant dated **18 February 2008** was filed herein by the three applicants, who are siblings, through the law firm of **M/s Anassi Momanyi & Company Advocates**. It was brought pursuant to **Section 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules** for orders that:

[a] Spent

[b] The Grant of Letters of Administration issued on **8 May 2007** and confirmed on **17 December 2007** be revoked;

[c] Spent

[d] That the costs of the application be provided for.

[2] The application was premised on the grounds that the proceedings to obtain the grant were defective in substance; that the grant was obtained through concealment of material facts; and that there are proceedings pending in **Eldoret P&A Cause No. 319 of 2004** over the same estate of the deceased. In support of the application the applicants relied on their respective affidavits, sworn on **18 February 2008**. Thus, the 1<sup>st</sup> applicant, **Joseph Kimutai Kiptui**, averred that he is a son to the deceased, **Kiptui Cheboi**; and that his late father was also known as **Kiptui Maluei**. He further averred that there are in existence two Succession Causes in respect of the same estate, namely **Eldoret High Court P&A Cause No. 319 of 2004**, which they filed as children of the deceased; and the instant cause, which was subsequently filed by their uncle, **Nicholas Kipngetch Kiptui**, who also is the respondent in the instant application.

[3] It was therefore the assertion of the 1<sup>st</sup> applicant that the instant cause ought not to have been filed; and, therefore, that the grant issued herein ought to be revoked on the ground that it was fraudulently obtained. He denied that the deceased sold a portion of the estate property to **Benjamin K. Kandie** who is listed herein as a beneficiary. The same averments are to be found in the affidavits of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants, which affidavits were word for word replications of the 1<sup>st</sup> applicant's affidavit.

[4] In response to the application, the petitioner/respondent relied on his Replying Affidavit, sworn on **11 March 2008**. He denied that **Kiptui Cheboi**, the deceased herein, was also known as **Kiptui Maluei**. He explained that the late **Kiptui Maluei** was his father; and that he married two wives, namely, **Kabon Kiptui** and **Sote Kiptui**. The respondent further averred that **Kabon Kiptui**, who is now deceased, gave

birth to only one child, namely **Kiptui Cheboi**; and that the said **Kiptui Cheboi** died on **25 September 1973**. He added that **Sote Kiptui**, who is his mother, was still alive when the deposition was made; and that she was blessed with 7 children. He thus denied that **Kiptui Maluei** is the same person as **Kiptui Cheboi**.

[5] Regarding the estate of his deceased father, **Kiptui Maluei**, the respondent averred that as early as **10 October 1993**, the family was in mutual agreement that land parcel number **MOSOP/MOSOP/46** be shared equally between him and his nephew **Michael Kipchirchir Kiptui**; and that it was pursuant to the resolutions of that family meeting that they filed this cause. As for **Benjamin Kandie**, the respondent averred that he had earlier purchased a portion of the estate property from **Joseph Kimutai Kiptui**, (the 1<sup>st</sup> applicant) and therefore that it is hypocritical for the 1<sup>st</sup> applicant to now deny the transaction. Thus, the respondent asserted that this cause is in respect of a totally different estate from the estate in **Eldoret High Court P&A 319 of 2004**; and therefore that the application is misconceived.

[6] The respondent also relied on the affidavit of **Benjamin K. Kandie**, sworn on **11 March 2008**. **Benjamin K. Kandie** averred that he purchased a portion of land parcel number **MOSOP/MOSOP/46** from one **John Barmao Chebii** who had purchased the same from **Joseph Kimutai Kiptui**; **Nicholas Kipngetich Kiptui** and **Michael Kipchirchir Kiptui**; and that he has been residing on the said parcel of land ever since. He therefore prayed that the instant application be disallowed.

[7] Granted the nature of the dispute and the Court Order calling for investigations by the CID of the allegations of fraud, this matter proceeded by way of *viva voce* evidence. Directions were accordingly given on **9 February 2015** for the filing of witness statements and documents with a view of expediting the hearing of the 10 or so witnesses that the parties had lined up. Thus, when hearing commenced in earnest on **15 June 2015**, the 1<sup>st</sup> applicant, **Joseph Kimutai Kiptui**, testified as **PW1** and adopted his witness statement filed on **15 June 2015**. He stated that he is the son of the deceased, **Kiptui Cheboi**; who was also known as **Kiptui Maluei**; and that the deceased died intestate in **1973**. He asserted that, since there was already in existence **High Court P&A Cause No. 319 of 2004**, this particular cause, **High Court P&A Cause No. 313 of 2006**, ought not to have been filed; let alone by the petitioner, **Nicholas Kipngetich Kiptui**, who is his uncle. It was further the testimony of **PW1** that the deceased owned two properties, namely, **Kaptagat/Kaptagat Block 2 (Mosop) 46** and **Mosop/Chepkorio/75**; and that he was survived by the following sons and daughters:

[a] **Joram Kipkoech Kiptui**

[b] **Joseph Kimutai Kiptui**

[c] **Michael Kipchirchir Kiptui**

[d] **Sophia Jebiwott Kiptui**

[e] **Alice Jerotich Kiptui**

[8] **PW1** was categorical that the deceased died intestate, and therefore that his estate ought to be distributed amongst his sons and daughters. He added that if anybody bought land from the sons of the deceased then they should claim their respective interests from those particular individuals. Regarding the inheritance of the respondent, **PW1** testified that a family meeting was held in **1993** in which it was agreed that since their grandfather left no property, he be accommodated by the family of his step-brother, the deceased. They accordingly agreed to give him a portion of the deceased's land to live on. Hence, **PW1** acknowledged that the respondent ought to be given a share of the estate of his father; but contends that he had no right to file this cause for that purpose. In his view, the distribution of the estate of the deceased herein can still be tackled in **Eldoret High Court P&A Cause No. 319 of 2004**. He also complained that the respondent included the names of strangers to this cause and yet excluded the rightful beneficiaries of the deceased. It was on that account that he prayed for the revocation of the grant issued herein to the respondent.

[9] The evidence of **PW1** was echoed by his sister, **Sophia Jebiwott Kiptui (PW3)**; namely, that their father died in **1973** and was survived by 5 children. She also confirmed that the respondent is their uncle. The applicants also called **CI Mutiso Kioko (PW2)** as a witness in connection with the investigations conducted by him while he was serving as the **DCIO, Keiyo**. **PW2** confirmed that he was required, by an order of the Court (**Hon. Ibrahim, J.**, as he then was), to conduct investigations to establish the true position in respect of two deceased persons, namely, **Kiptui Maluei** and **Kiptui Cheboi**. He testified that, having conducted his investigations, he established that **Kiptui Cheboi Arap Maluei** died on **25 September 1973**; while **Cheboi Kiptui** died on **28 September 1998**; and that the two were father and son. He therefore denied that the two names belong to one and the same person. He prepared a report which he produced herein as **Exhibit 1**.

[10] On his part, the respondent testified on **15 July 2019** as **DW1**. He adopted his witness statement dated **2 June 2015**. He confirmed that the deceased herein, **Kiptui Cheboi**, was his step brother, and that they are the sons of **Kiptui Maluei** who was the owner of **Land Parcel No. 75**. The respondent further conceded that **Land Parcel No. 46**, belongs to the estate of **Kiptui Cheboi**. He confirmed that **Kiptui Cheboi** died on **25 September 1973**; and added that his father, **Kiptui Maluei**, died of old age on **23 September 1988** at his son's home in **Beliamo Farm**. He told the Court that his father was survived by two widows, namely: **Kabon Kobot Kiptui** who was the 1<sup>st</sup> wife and mother of the deceased herein; and the 2<sup>nd</sup> wife, **Soti Kiptui**, who was his mother. Both widows are since deceased.

[11] The respondent further testified that, since the death of **Kiptui Cheboi** in **1973**, the family had to contend with friction between his mother and her co-wife, particularly over the occupation and use of **Land Parce No. 75**; and that the disagreements degenerated into outright hatred that forced members of the 2<sup>nd</sup> house to move away from the property to settle on a piece of purchased property, which he referred to as **Plot No. 54**. The respondent further stated that no less than 30 dispute resolution meetings were called by the family with the help of the local administrators; which meetings were attended by neighbours as well, with a view of resolving the impasse over the estate of **Kiptui Maluei**, to no avail. He singled out the family meeting of **20 October 1993** in which it was resolved that **Land Parcel No. 75** be shared equally between the 1<sup>st</sup> applicant herein and **Joram Kipkoech Kiptui**; while **Plot No. 46** would be shared between him and **Michael Kipchirchir Kiptui**. He concluded his evidence by stating that, it was on the basis of this family understanding that he sold his portion of **Land Parcel No. 46** to **John Barmao Chebii**; and that, thereafter, **Michael Kipchirchir Kiptui** also sold a portion his share to the same

**John Barmao Chebii.**

[12] Regarding the filing of this Cause, the respondent explained that, since the family was in agreement on distribution, he obtained a letter from the area chief authorizing him to institute the cause with a view of having his share transmitted to the purchaser. He pointed out that the children of **Kiptui Cheboi** were all aware of the institution of these proceedings, and therefore have no basis for objecting thereto. He accordingly asked for the dismissal of the instant application for Revocation of Grant. The respondent produced Minutes of the family meeting of **20 October 1993** as **Exhibit No. 1** as well as a copy of the chief's letter, whose original is on the file.

[13] The respondent called his nephew, **Michael Kipchirchir Kiptui** as **DW2**. **DW2** confirmed that the deceased was his father and that the applicants are his siblings. He adopted, as his evidence in chief, his witness statement dated **12 June 2015**; wherein he stated that **Kiptui Maluei** was his grandfather; and that the deceased was the only son of **Kiptui Maluei** by his first wife, **Kobot Kangogo**. He therefore conceded that his deceased father was a step-brother to the respondent herein; and therefore that the respondent is his uncle.

[14] **DW2** reiterated the evidence of the respondent that a family meeting was held in **1993** in which it was agreed that **Land Parcel No. 75** be shared amongst **Joseph, Joram** and **Sophia**; and that **Land Parcel No.46** be shared equally between himself and the respondent. According to him, his sister, **Alice**, was to receive **Plot No. 30** at **Chepkorio Centre** along with shares at **Chepkorio House**. He further testified that when they decided to sell their shares in **Land Parcel No. 46**, they again consulted the family members; and it was with their consent and approval that a sale agreement was drawn in favour of **Mr. Chebii**. Thus, it was the evidence of **DW2** that he supported the respondent's version and opposed the application filed by his siblings because the estate property had been distributed with the approval of all the family members; and therefore that there is no cause for complaint by any family member.

[15] The third witness for the petitioner was **Helena Malakwen Kiptui**, the sister of the respondent and daughter of **Kiptui Maluei**. She confirmed that **Land Parcel No. 46** is registered in the name of her brother, **Kiptui Cheboi**. She was categorical that the respondent is not the son of **Kiptui Cheboi**, the deceased herein, but a brother to the deceased. She confirmed, in cross-examination that the deceased was survived by his 5 children, **Joram, Joseph, Chebiwot, Cherotich** and **Michael**. **DW3** also confirmed that there was a family meeting in which the entire family of **Kiptui Maluei** agreed on how the estate of the two deceased persons would be shared.

[16] **John Barmao Chebii** testified as **DW4**. He, likewise, adopted his witness statement dated **12 June 2015**. His evidence was basically that, on **15 August 1995**, he bought a portion of the piece of land known as **Kaptagat/Kaptagat Block 2 (Mosop) 046**. He added that the transaction was between him and the respondent, **Nicholas Kipngetich Kiptui** and was made with the consent of the sons of the deceased herein, namely: **Joseph Kimutai Kiptui, Michael Kipchirchir Kiptui** and **Joram Kipkoech Kiptui**. He produced the land sale agreement as an exhibit and added that the portion he bought, measuring 5 acres, was the share of the respondent, **Nicholas Kipngetich Kiptui**. He further asserted that he later bought another piece of the same property from **Michael Kipchirchir Kiptui**, measuring one acre; and thereafter proceeded to fence off the consolidated portion he purchased, which he later sold to **Benjamin Kiplimo Reuben Kandie** on **9 February 2004**. **DW4** further told the Court that he experienced no challenges over his ownership of the property; save that the process of succession had not been done. He conceded that he bought the 6 acres while fully aware that the registered owner had died way back in **1973**.

[17] The respondent also called **Dr. Benjamin Kiplimo Kandie (DW5)** as his witness. **DW5** adopted his witness statement dated **12 June 2016** and confirmed that he bought a portion of the suit property, **Parcel No. Kaptagat/Kaptagat (Mosop) Block II/046**, measuring 6 acres, from **John Barmao Chebii (DW4)** at **Kshs. 734,000/=** in two portions of 5 acres and 1 acre, respectively. He produced a copy of their sale agreements as **Defence Exhibits 2 and 3**. He added that he has developed the property and has been staying there since the year **2005** without any problem; and that **Michael Kipchirchir Kiptui**, one of the sons of the deceased is residing on the other portion of the property with his sister **Alice Cherotich Kiptui**. He also mentioned that he was aware that the property was registered in the name of the deceased, **Kiptui Cheboi**; and that the only challenge he has was the issue of succession.

[18] The respondent's last witness was **Nelson Kipsabit**, a retired chief of Machar Location in Keiyo South of Elgeyo Marakwet County. He testified about the meeting of the deceased's family that he chaired on **18 July 2012**. He identified the Minutes of that meeting which he signed in his capacity as chairman; and produced the same as an exhibit herein (marked **Defence Exhibit 4**). He pointed out that the main issue for discussion was the distribution of the estate of the late **Kiptui Maluei** as there was a dispute over **Land Parcel No. 75, Mosop**, between the family of **Kiptui Cheboi** and **Nicholas Kiptui**, the two sons of **Kiptui Maluei**. He pointed out that, since **Joseph Kiptui** and **Joram Kiptui**, the sons of **Kiptui Cheboi** had already settled on **Land Parcel No. 75**, the meeting resolved that **Kiptui Cheboi's** land, being **Land Parcel No. 46**, be shared equally between **Nicholas Kiptui** and **Michael Kiptui**. **DW6** also produced a letter dated **18 October 2006**, which he wrote in respect of the estate, as **Defence Exhibit 5** herein.

[19] In his written submissions dated **23 June 2020**, **Mr. Momanyi** for the applicants urged the Court to find that the respondent, **Nicholas Kipngetich Kiptui**, obtained grant herein by fraudulent means in so far as he posed as the son of **Kiptui Cheboi**, the deceased, yet the deceased was in fact his step-brother, who was survived by his own children. He further took issue with the fact that there was concealment of material facts from the Court, in that the respondent left out the children of the deceased from the petition; and instead fronted for strangers as beneficiaries of **Kiptui Cheboi**.

[20] Counsel impugned the letter produced by **DW6** as being of no consequence, since that there was already a succession cause in existence at the time it was written, being **Eldoret High Court P&A Cause No. 319 of 2004**. Accordingly, **Mr. Momanyi** urged the Court to allow the application and issue the orders sought by the applicants, including an order for the dismissal of this Cause to enable the parties pursue their interests in **Eldoret High Court P&A Cause No. 319 of 2004**.

[21] On his part, **Mr. Kiboi**, counsel for the respondent, traced the history of the dispute and pointed out that the family of the late **Kiptui Maluei**, who was the father of both the respondent and the deceased herein, had agreed on how to share the two properties the subject of this cause and **Eldoret High Court P&A Cause No. 319 of 2004**. According to him, the 1<sup>st</sup> applicant herein, **Joseph Kiptui**, was to inherit a portion of **Land Parcel No. 75**, belonging to his grandfather, **Kiptui Maluei** while his uncle **Nicholas**, the respondent herein, was to inherit the deceased's property, **Land Parcel No. 46**, alongside **Michael Kiptui**, one of the sons of the deceased herein. He explained that this arrangement was preferred because both **Joseph** and **Joram** had already settled on **Land Parcel No. 75**.

[22] **Mr. Kiboi** consequently urged the Court to dismiss, as selfish, the contention by the applicants that both properties belong to the estate of the deceased herein. He consequently urged for the rejection of the assertion that **Kiptui Maluei** is one and the same person as **Kiptui Cheboi**. In his submission, to allow the application would mean that the entire family of the respondent, a son to **Kiptui Maluei**, would be completely disinherited. He cited the case of **Ibrahim vs. Hassan & Charles Kimenyi Macharia** [2019] eKLR in urging the Court to uphold the provisions of **Rule 73** of the **Law of Succession Act**, namely, that:

**“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the end of justice or to prevent abuse of the Court process.”**

[23] A perusal of the record herein shows that this cause was filed on **20 November 2006** by the respondent, **Nicholas Kipngetch Kiptui (DW1)** herein). It relates to the estate of **Kiptui Cheboi** (deceased) who died intestate at Eldoret District Hospital on **25 September 1973**. Thus, vide his petition herein, the respondent sought to be issued with a Grant of Letters of Administration Intestate in respect of the estate of **Kiptui Cheboi**. The record further shows that the petition was duly processed and a Grant issued on **8 May 2007** to the respondent. The said Grant was confirmed on **8 February 2008**, thereby provoking the instant application. Thus, although the application dated **19 February 2008** has been referred to as an objection application and the applicants as objectors, it was filed, not in objection to the issuance of grant, but for revocation of the Grant already issued to the respondent herein.

[24] The application was, thus, brought pursuant to **Section 76** of the **Law of Succession Act**, which provides that:

**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 assist 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.**

[25] In **Re Estate of Wahome Mwenje Ngonoro (Deceased)** [2016] eKLR, **Hon. Mativo, J.** while discussing the above provision, took the following view with which I agree:

**“...A close look at Section 76 shows that the grounds can be divided into the following categories:- the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances...”**

[26] The grounds set out on the face of the application dated **18 February 2008** are explicit enough. They are:

**[a]** That the proceedings to obtain grant herein were defective in substance;

**[b]** That the Grant was obtained through concealment of material facts;

**[c]** That there are proceedings pending in **Eldoret P&A Cause No. 319 of 2004** over the estate of the same deceased person.

[27] Thus, the issues that arise for determination herein, based on the grounds aforesated, are:

**[a]** Whether the proceedings to obtain the Grant of Letters of Administration Intestate by the respondent herein are defective in substance;

**[b]** Whether the Grant was obtained through fraud or concealment of material facts; and,

[c] Whether the proceedings herein relate to the same person as the deceased in **Eldoret High Court P&A No. 319 of 2004.**

[28] In respect of the first issue, namely, whether the proceedings that led to the issuance of the Grant of Letters of Administration Intestate to the respondent are defective in substance, **the Simplified Resource Tool on Inheritance and Related Family Practice in Kenya**, published by the Judiciary, offers guidance, at **Paragraph 7.3** thereof, as to the documents that must accompany a petition for Grant of Letters of Administration Intestate. They include:

[a] Form P&A 5, (Affidavit in Support of Petition)

[b] Form P&A 11, (Affidavit of Justification of Proposed Sureties)

[c] Form P&A 12 (Affidavit of Means)

[d] Form P&A 57 (Guarantee of Personal Sureties)

[e] Original Death Certificate or certified copy, or an order of presumption of death;

[f] Full inventory of assets and liabilities of the deceased at the time of death, including estimated value,

[g] List of heirs

[h] Letter from the Area Chief introducing the petitioner and heirs

[i] Consents, where applicable

[29] There is no dispute that the respondent complied with the requirements of the law in this regard; and therefore that he cannot be faulted on that account. He also availed a Certificate of Search in respect of the property known as **Kaptagat/Kaptagat/Block 2 (Mosop) 46**, dated **8 October 2003**. That document confirms that the property is registered in the name of **Kiptui Cheboi**, the deceased herein. I therefore find no discernible defect in the process adopted by the respondent.

[30] It was, nevertheless, the contention of the applicants that the respondent was not the most qualified to petition in respect of the estate of his deceased step-brother. They pointed out that the deceased was survived by his own children who ranked higher in the order of preference. To this end, evidence was adduced by the 1<sup>st</sup> applicant as **PW1** and his sister **Sophia (PW2)**; which evidence was entirely uncontroverted, to demonstrate that the deceased, **Kiptui Cheboi**, had the following children with his deceased wife, **Taprandich Kiptui**:

[a] **Joram Kipkoech Kiptui**

[b] **Joseph Kimutai Kiptui**

[c] **Sophia Chebiwot Kiptui**

[d] **Michael Kipchirchir Kiptui, and**

[e] **Alice Cheronon Kiptui.**

[31] That the respondent is a step-brother to the deceased was confirmed by, not only the respondent himself, but also by the applicants' brother **Michael Kipchirchir Kiptui (DW2)** and the respondent's own sister, **Helena Malakwen Kiptui (DW3)**. The evidence of **Helena** is particularly straightforward and to the point. In cross-examination, she stated that:

**"...Kiptui Cheboi is not my father. My father was Cheboi Maluei. Land No. 46 is in the name of my brother, Kiptui Cheboi. Nicholas is not the son of Kiptui Cheboi. Nicholas is my brother and a brother to Kiptui Cheboi. I do not know that this case was filed by Nicholas in respect of Land No. 46. Kiptui Cheboi did not say that his property be inherited by Nicholas. I know the deceased's children...Nicholas is not one of the children of Kiptui Cheboi..."**

[32] In view of the indubitable evidence that the respondent is not one of the children of the deceased, **Kiptui Cheboi**, it is plain that, in posing as the son of the deceased as he did in the Petition for Letters of Administration Intestate, Form P&A 80, filed herein on **20 November 2006**, the respondent made an untrue allegation of a fact essential in point of law to the making of Grant. This is because **Section 66** of the **Law of Succession** is explicit as to the order of preference in such situations. It provides that:

**"When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-**

(a) **surviving spouse or spouses, with or without association of other beneficiaries;**

(b) **other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by**

Part V;

(c) the Public Trustee; and

(d) creditors”

[33] In Part V of the Act, it is explicit that a spouse and children of a deceased person have precedence over the deceased’s brothers and step-brothers. And, where the deceased is survived by his children and no spouse, Section 38 of the Law of Succession Act provides that:

“...the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

[34] In addition to falsely describing himself in the petition as the son of the deceased, the respondent also concealed the fact that, other than **Michael Kipchirchir Kiptui**, the deceased was survived by two other sons, **Joseph Kiptui** and **Joram Kiptui** as well as two daughters, **Alice** and **Sophia**. Additionally, he made another false representation that **Benjamin Kiplimo R. Kandie** is one of the beneficiaries of the deceased. **Benjamin Kiplimo Kandie** testified herein and made it clear that his interest is that of a purchaser, having bought, not the whole of **Parcel No. 46**, but only 6 acres thereof for a consideration of **Kshs. 734,000/=**. He further conceded that he bought his portion of the property from **John Barmao Chebii (DW4)** and not the respondent or the children of the deceased who are well-known to him. It is instructive too that the transaction was entered into long after the death of the deceased.

[35] On account of the aforementioned untrue allegations of fact, the respondent found it unnecessary to comply with the requirement as to consent as envisaged by **Section 66** of the **Law of Succession Act** as read with **Rule 26** of the Probate and Administration Rules. Indeed, **Rule 26(2)** of the **Probate and Administration Rules** is explicit that:

**An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.**

[36] In this instance, the respondent did not rank in *pari passu* with the children of the deceased. In the premises, the consents he obtained from **Michael Kipchirchir Kiptui** and **Benjamin Kiplimo R. Kandie** vide P&A Form 38, filed with the petition on **20 November 2006**, are to no avail, granted that **Michael** ranked in priority to the respondent. Moreover, he did not seek the consent of the other 4 siblings of **Michael**, even though it was his evidence that they consented to the sale. Clearly therefore, the consent on the file would have been rejected by the Court had the true facts been brought to the Court’s attention when the Grant was issued; for it is clear that it was filed in abuse of the court process. Thus, I am convinced that the applicants have succeeded in demonstrating that the Grant of Letters of Administration Intestate that was issued herein to the respondent was obtained through fraud and concealment of material facts from the Court.

[37] The second issue for determination is whether the proceedings herein relate to the same deceased person as in **Eldoret P&A No. 319 of 2004**. Granted the primacy of the proceedings in **Eldoret High Court P&A No. 319 of 2004** to these proceedings, the Court called for the Court File for perusal. Having carefully perused the same, it is evident that the petition was filed on **16 November 2004** by **Joram Koech Kiptui** in respect of the estate of **Kiptui Maluei** (deceased). He presented the petition in his capacity as a son and heir of the deceased; and in **Form P&A 5**, he disclosed that the deceased was survived by himself as well as **Joseph Kimutai Kiptui** and **Samuel Kiptum Chelal**. The only property mentioned in the Assets section of the Affidavit in Support of Petition was **Land Parcel No. Mosop/Chepkorio/75**.

[38] The court record, per **Eldoret High Court P&A 319 of 2004**, further shows that a Grant of Letters of Administration Intestate was issued to the petitioner therein on **4 October 2005**; which Grant was confirmed on **28 June 2006**. Thereafter, an application for Revocation of Grant was filed by **Nicholas K. Kiptui**, **Michael K. Kiptui** and **Joseph K. Kiptui** dated **3 October 2006** which is still pending hearing and determination. The three applicants aforementioned also filed a separate application for a temporary injunction to preserve the estate property, which was allowed. The revocation application is still pending hearing and determination.

[39] Perhaps what is noteworthy in **Eldoret High Court P&A 319 of 2004** is that, in the course of his *viva voce* evidence therein, **Joseph Kiptui** made reference to this Cause in connection with **Land Parcel No. 46**. His evidence in that case, as in this Cause, was that the two parcels of land belong to his father, **Kiptui Cheboi**; and that **Kiptui Cheboi** was also known as **Kiptui Maluei**. Accordingly, the Court (**Hon. Ibrahim, J.**, as he then was) made an order on **18 February 2008** thus:

“This court has come to learn that the Objector is claiming that his father also owned another piece of land Mosop/Mosop/46 measuring about 10 acres. Mrs. Kittony brought this court’s attention that the said land is the subject matter in P&A Cause No. 313 of 2006 – Estate of late Kiptui Cheboi. The Objectors now claim that the said deceased is one and the same as Kiptui Maluei.

**In view of the foregoing, this court orders that the hearing of this Objection proceedings be stayed pending an inquiry as to whether the late Kiptui Cheboi is one and the same person as late Kiptui Maluei...**”

[40] In the same vein, the Court made an order for the DCIO, Keiyo, to investigate the two Certificates of Death; No. 103049 in respect of **Kiptui Cheboi** and No. 717958 in respect of **Kiptui Maluei**. The DCIO’s Report however was of little help as it befuddled the matter even further by confusing the names and identities of the two individuals. Hence, in this matter, **High Court P&A No. 313 of 2006**, the applicants called **CI Mutiso Kioko (PW2)** to shed more light on the outcome of his investigations into matter. His evidence was that he took over the investigations in respect of the identities of the two deceased persons, **Kiptui Maluei** and **Kiptui Cheboi**; and that he confirmed that **Kiptui Cheboi arap Maluei** died on **25 September 1973** while **Cheboi Kiptui** died on **28 September 1998**. It was therefore the evidence of **PW2** that **Kiptui Maluei** is not the same person as **Kiptui Cheboi**; and that the two were father and son, respectively. He produced his report as

applicants' **Exhibit 1**.

[41] Thus, in the report presented by **PW2** dated **12 June 2014**, the conclusion reached was that:

**“...Maluei was found to be the family name thus commonly used by any family member. A carefully crafted confusion by some family members alleging that both names belonged to one person was found to exist and was smartly insinuated to suit their interest in the inheritance case...The culmination of the investigations by this office established that KIPTUI CHEBOI also known as KIPTUI MALUEI was actually a son to CHEBOI KIPTUI ARAP MALUEI...”**

[42] What emerges from the totality of the evidence presented herein is that, aside from the somewhat confusing similarity in the names of the two deceased persons, it is a fact that the disputants are family members; and that the respondent, **Nicholas Kipngetch Kiptui**, is a step-brother to the deceased herein, **Kiptui Cheboi**. There is further no dispute that the two were the sons of the late **Kiptui Maluei**. There is credible evidence that **Kiptui Cheboi** predeceased his father, having died on **25 September 1973** as per the Certificate of Death No. 103049. That is why, in her evidence, **Sophia Chebiwot Kiptui** plainly told the Court, in cross-examination, that:

**“My father’s name is Kiptui Cheboi. Nicholas is the brother of my father. He is my uncle. The father of Nicholas is deceased. His name is Cheboi Maluei arap Kiptui or Kiptui Maluei. My father died in 1973. I was still young...”**

[43] Both **Michael Kiptui (DW2)** and **Helena Malakwen Kiptui (DW3)** were also fairly explicit that **Kiptui Cheboi** and **Kiptui Maluei** were two distinct individuals; and that **Kiptui Cheboi** was the son of **Kiptui Maluei**. **Michael** is the brother of the applicants; while **Helena** is the sister of **Nicholas**, the respondent, and therefore the aunt to the applicants. I must mention that I formed the impression that **Michael Kiptui (DW2)**, **Sophia Kiptui (PW3)** and **Helena Malakwen Kiptui (DW3)** were more reliable as witnesses; and that they were more objective than their siblings who testified herein. Accordingly, on the basis of their evidence, and on the evidence of the DCIO, **CI Mutiso Kioko (PW2)**, I find as a matter of fact that **Kiptui Cheboi** and **Kiptui Maluei** were two different individuals; and that they were in fact father and son. This explains why in the Certificate of Death filed herein, the name of the deceased is clearly stated as **Kiptui Cheboi** as opposed to **Kiptui Maluei**. The same is the case with the chief’s letter dated **18 October 2006**.

[44] The foregoing being my view of the matter, it follows that it would be inappropriate to strike out or dismiss this cause in favour of **High Court P&A No. 319 of 2004**. The deceased herein owned the subject property in his own right, and therefore these proceedings must be pursued to conclusion to enable appropriate transmission to the beneficiaries of the deceased; including **Michael** who has been living on the property. It is further my considered view that, at this point in time, it would be premature to pronounce myself as to the interest, if any, of the purchasers. That is an issue which will fall for determination at the Confirmation stage.

[45] In the result, having found that the respondent herein fraudulently obtained Grant of Letters of Administration Intestate to the estate of **Kiptui Cheboi** (deceased) and concealed material facts from the Court, the application dated **18 February 2008** succeeds and is hereby allowed. It is accordingly ordered that;

[a] The Grant of Letters of Administration issued on **8 May 2007** to the petitioner/respondent, **Nicholas Kipngetch Kiptui**, and confirmed on **17 December 2007**, be and is hereby revoked.

[2] That the costs of the application be costs in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 3<sup>RD</sup> DAY OF MAY 2021

OLGA SEWE

JUDGE