



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 333 OF 2009**

**IN THE MATTER OF THE ESTATE OF KIPROP CHEPSAIGUT (DECEASED)**

**JULIUS KIPTUM ROP.....APPLICANT**

**VERSUS**

**PAULINE RABUTANY KIPROP .....1ST RESPONDENT**

**MIRIAM CHEPKORIR TERIK .....2ND RESPONDENT**

**RULING**

1. By way of a summons dated 20/7/2016, Julius Kiptum Rop (Applicant) seeks orders;

**1. Spent**

**2. Spent**

**3. THAT the letters of administration issued to the respondents in this cause be revoked and/or annulled.**

**4. THAT the honourable court do declare that all that parcel of land known as LR No. 9856 measuring approximately 100 acres does not form part of the free properties forming part of the estate of the deceased herein.**

**5. THAT the costs of this application be provided for.**

2. The application is pegged on grounds;

**a. That the respondents obtained letters of administration in this cause fraudulently by the making of a false statement and by concealment from the court of material facts.**

**b. That the grant in this cause has become useless and inoperative through the respondents' conduct.**

**c. That all that property known as LR No. 9856 measuring 100 acres does not form part of the free properties forming part of the deceased estate.**

3. In addition the applicant has sworn an affidavit in support of the application.

4. It is the Applicant's case that the grant herein was obtained fraudulently by the making of a false statement and by concealment from the court of material facts. It is urged that the grant has become useless and inoperative through the Respondent's conduct. The property LR No. 9856 does not form part of the free property of the deceased.

5. The Applicant depones that he acquired use and possession of 100 acres of land excised from LR. No. 9856 after purchasing the same from Samwel Chebii (deceased). A sale agreement executed on 19/2/1986 is annexed.

6. Since the property is not registered in the deceased's name, it is urged, the same does not form part of the deceased's estate.

7. The application is opposed and a replying affidavit sworn by Pauline Tabutany Kiprop is on record.
8. Pauline depones that the suit land belonged to her father Kiprop Chepsaigut (deceased). A petition for grant of letters of administration was made, issued and confirmed. Pauline and her sisters inherited 15 acres of land and their brother 40 acres.
9. It is admitted that the deceased had brought the land from one Samwel Kiptum Chebii but the same had not been transferred at the time of the death of the deceased herein. A chief's letter is annexed. The matter was heard before a tribunal and resolved in favour of the Respondents.
10. It is urged that an application for judicial review by the applicant to challenge the decision of the tribunal came a cropper and was dismissed on 10/4/2008.
11. Directions were given on the 15/2/2017 that the application be disposed off by way of written submissions. Both parties duly complied.
12. I have carefully considered the summons, the supporting grounds and affidavits on record. I have had regard to the learned submissions by counsel.
13. Of determination is whether the applicant has made a case to the required threshold for the revocation and/or annulment of the grant issued herein. Secondly, whether the Court should declare that all that parcel of land known as LR. No. 9856 measuring approximately 100 acres does not form part of the estate of the deceased. Lastly, is the question of who bears the costs of this application.
14. The relevant law making provision for revocation/annulment of grants is found at **Section 76** of the **Law of Succession Act**. That section provides;-

**“S 76. 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 has ordered or allowed; 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.”**

15. In our instant suit, the Applicant claims that he acquired use and possession of 100 acres of land excised from LR. No. 9856 after purchasing the same from one Samwel Chebii (deceased). He annexes a sale agreement. It is his case that this asset should not be included as an asset of the deceased herein.

16. It follows therefore that the only discernable alleged defect in the confirmed grant is that it includes property that is subject of a dispute between the Applicant and the estate. This defect can easily be remedied by, on satisfaction of the Court, having such property being removed from the list of assets and allowing the grant to remain operational for purposes of administration of the rest of the estate.

17. To that extent therefore, the threshold for revocation and/or annulment of grant has not been achieved by the Applicant.

18. Which leads me to the next issue for determination. Has the Applicant laid sufficient evidence to the satisfaction of the Court for a declaration that LR No. 9856 measuring approximately 100 acres does not form part of the estate herein?

19. The Applicant has not tendered any tangible evidence of ownership of the land. To the contrary, the respondents have shown that the Applicant litigated over the land before a Lands Dispute Tribunal and the matter was resolved in favour of the Respondents as seen in annexure “PTK 5” to the affidavit of Pauline Tabutany Kiprop.

20 The Applicant's challenge to this finding vide a judicial review application in Miscellaneous Civil Application Number 740 of 2005 was dismissed as seen from the orders of Court dated 10/4/2008 and issued on the 15/4/2008 as can be seen from annexure “PTK 6”.

21. From the foregoing, it is clear that the applicant lays a proprietary claim to the subject property. The core of the dispute is thus ownership of the property.

22. As held in ALEXANDER MBAKA Vs. ROYFORD MURIUKI RAUNI AND 7 OTHERS [2016] eKLR;

**“It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.”**

23. The Applicant's claim ought to be litigated in separate proceedings in the Court with the requisite jurisdiction being the Environment and Land Court in a suit pitting the Applicant against the estate.

24. To reaffirm the above position, the decision in **High Court Succession Cause Number 864 of 1996 [2015] eKLR** by *Musyoka J* is apt. In that case the Judge stated;

**“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.**

**Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.**

**In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”**

25. In any event on the material before Court, the Applicant fails miserably in demonstrating his legal claim over the property. In any event the jurisdiction to determine the rights over ownership of land is a preserve of the Environment and Land Court. I am thus unable to make the declaration sought.

26. With the result that the application before Court dated 20/7/2016 must fail and is dismissed. The Respondents shall have costs of the application.

**Dated and Signed at Nakuru this 12th day of June, 2018.**

**A. K. NDUNG’U**

**JUDGE**