In re Estate of William Kipseren Serem - Deceased (Probate & Administration 9 of 2017) [2025] KEHC 5305 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5305 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION 9 OF 2017

RN NYAKUNDI, J

APRIL 29, 2025

IN THE ESTATE OF WILLIAM KIPSEREN SEREM - DECEASED

BETWEEN

ELKANA KIPKORIR SEREM .... 1ST PETITIONER

JOHN KIBET SEREM .... 2ND PETITIONER

HOSEA KIPKEMOI SEREM .... 3RD PETITIONER

AND

GLADYS JEBUNGEI .... 1ST OBJECTOR

LENA JEROTICH SEREM .... 2ND OBJECTOR

EMMA JEPCHUMBA SEREM .... 3RD OBJECTOR

ROSE JEPLETING .... 4TH OBJECTOR

JANE JELAGAT SEREM .... 5TH OBJECTOR

RULING

1. The applicant approached this court vide an application dated 26/02/2025 seeking the following orders;

    a. Spent.

    b. That this honourable court be pleased to make an order that the applicants are entitled to a hearing under order 50 of the *Constitution* in this application.

    c. That this honourable court be pleased to make an order that the applicants are entitled to protection under Articles 27 and 40 of the *Constitution* in as far as the proceedings herein are concerned.

d. That this honourable court be pleased to stay transmission of the estate pending hearing of this application interparties and thereafter pending hearing and determination of this application.

e. An order that this honourable court is bound by the decision in the case of *Justus Thiora Kiugi & 4 others versus Joyce Nkatha Kiugi & Another* Civil (2015) eKLR and proceed distribute the developed cost be provided for portions of the estate to the developers beneficiaries.

f. That this honourable court be guided by the principle of equity in distributing the estate user and above the principle of equality.

g. That Kipkaren Salient Police Station to enforce the Order.

h. Costs be provided for.

2. The application is premised on the grounds on the face of it and the deponements of the 2nd Petitioner. He deposed that he entitled by law to a hearing by this court under Article 50 of the *Constitution* and to make the application as herein. Further, that this court is vested with authority under Article 159 and 160 of the *Constitution* and Rule 73 of the *Probate and Administration Rules* to deal with the matter herein and issue appropriate orders.

3. He stated that the court rendered itself in a ruling dated 16th February which Ruling has seriously fuelled a lot of animosity among the beneficiaries. The male beneficiaries who were living and occupying some portions of the land which had been pointed out by the deceased father had developed portion of those properties by erecting permanent buildings. That they developed the portions by planting long term cash crops like coffee, macadamia and blue gum trees. He urged that those developments have not been taken into account such that the portions have been distributed out to others who did not undertake those developments.

4. He additionally stated that there are portions of properties that are undeveloped which ought to have been shared out to those who did not do any development on the properties. That there was need for valuation to be done in order to identify portions which were developed from those which were not. He disputed the distribution model and invited the court to look at the alternative mode of distribution in the affidavit.

Replying Affidavit

5. The application was opposed vide a replying affidavit sworn by the 5th Objector. She deponed that the prayers sought in Application are seeking to 'mislead the court, create confusion and delay the transmission process for the following reasons;-

(a) That the Application lacks substratum and the same is merely an academic exercise and the Applicant has not demonstrated any reasonable or just cause that would warrant the prayers sought;

(b) That the instant Application was brought with unclean hands and out of malice;

c) That the instant Application is full of perjury

(d) That the Petitioners don't want the Estate of the Late William Kiberen Serem to be transmitted to the female beneficiaries i.e. the objectors.

6. She urged that Section 83 (g) and (i) of the *Law of Succession Act* Cap 160 provides for the duties of personal representatives and further, that it is six months since the rectified certificate of confirmation of grant was issued and the Petitioner herein i.e. John Kibet Serem being an administrator has failed to

proceed diligently with the administration of the estate of the deceased. She stated that he has engaged in intermeddling with, and wanton destruction of the estate of the deceased for illegal purposes. Further, that the prayer to have the transmission exercise stayed is fatal since the estate will be subjected to wastage.

7. She pointed out that after a grant is confirmed, and a certificate of confirmation of grant issued, the process that follows is known as transmission of the property from the name of the deceased to that of the beneficiaries named in the certificate of confirmation of grant. She stated that transmission is not provided for under the *Law of Succession Act*, nor under the *Probate and Administration Rules*. It has nothing to do with the probate court, and it is carried out at the lands registry. It is, therefore, a process under land legislation.

8. She cited Article 10 (2) (b) of the *Constitution* of Kenya, 2010 and deposed that the Applicant has failed to disclose to this honourable court that he has on several occasions harassed the female beneficiaries from occupying their respective portions as per the rectified certificate of confirmation of grant. Therefore if at all the Applicant seeks equity he must do equity.

9. She stated that the Applicant herein has been accorded fair hearing since the start of this matter. That the Applicants were given a right to be heard in this matter and such an issue cannot be revisited at this point in time. All parties to this cause were given an opportunity to file their respective modes of distribution in support of their respective cases and the court, in distributing the deceased's property equally to its beneficiaries, fully rendered itself on this issue which same stands spent at this moment. She deposed that it is now trite law that litigation must come to end, urging that the Applicants have not preferred any appeal on this matter and therefore should allow the transmission process to commence.

10. She denied the allegations of animosity among the beneficiaries of the deceased and further, that there is no interference with the developments present on the land by the female beneficiaries' i.e. the Objectors. That it is the Petitioners who have denied the Objectors the opportunity to occupy their rightful shares. She urged that the distribution as done equally and the application is intended as a delay tactic and prayed that the same be dismissed with costs.

Applicant's submissions

11. Counsel for the applicant filed brief submissions. Counsel cited the case of the Court of appeal at Kampala in Uganda in *Obiga v Electoral Commission & Another*, Election Petition Appeal No. 4 of 2011 (2012) UGCA and the case of *Steel and Morris v United Kingdom* (2005) ECHR 103. Further, he urged that the applicants are entitled to a hearing on the issues they have raised which this honourable court is well seized with. He cited the case of *Justus Thiora Kiugu & 4 others V Joyce Nkatha & Another* 2015 (eKLR) and urged that it binds this court and the transmission therein should follow the principles in that case. He urged the court to allow the application.

Analysis & Determination

12. This is a protracted succession story if the years the beneficiaries have spent seeking justice before this court is anything to go by. The record is clear that the deceased passed on 3rd January, 1991 and the petition for the making of Grant was lodged on 6th April, 2017. The chief's letter was filed on 6th April, 2017 indicative of the following details:

> "This is to confirm to you that the person here above underlined was a resident of my area of jurisdiction until his demise on the 3rd day of January, 1991. He was the owner of the

parcel of land that is known as Nandi Kipkaren Salient/179, Nandi Kipkaren Salient/182 and Nandi Kipkaren Salient/183.

The late was married to one wife Priscah Jebitok Serem who also died on the 24th October, 2011.

He is survived by the following persons;

1. Gladys Jebungei – daughter – over 50 years – married
2. Japhet Kimeli – son – deceased
3. Elikana Kipkorir – son – over 50 years
4. Rose Jepleting – daughter – over 50 years – married
5. Jane Jelagat – daughter – over 50 years
6. John Kibet – son – over 50 years
7. Lenah Jerotich – daughter – over 50 years
8. Hosea Kipkemboi – son – over 50 years
9. Emma Jepchumba – daughter – over 40 years – married.

13. Thereafter, the beneficiaries spent many years in and out within the court room under the guise of seeking justice on one predominant issue; distribution of the deceased estate within the framework of the law. This matter was heard and determined by this court and the judgment which was handed down and circulated to the parties on 19th May, 2023 within section 35, 36, 37, 38 as read conjunctively with section 40 of the *Law of Succession Act*. I take cognizance that this was one household as known in law and there was no dispute about the heirs to the estate. It was expected that within 6 months of the date of ruling being effectuated with the rectified Certificate of Confirmation of Grant dated 12th July, 2023 6 months thereto, the transmission of the estate could have been completed by the administrators and a probate account filed under section 83(g) of the same *Act* so as to liquidate the estate and discharge the beneficiaries. To this court's surprise, new complaints have emerged as drawn in the chamber summons dated 24th February, 2025. There are various remedies being agitated in the said summons. First and foremost, they are at odds with the timeline set by the *Law of Succession Act* for the administrators to administer the estate faithfully and diligently on behalf of the deceased. That has not taken place. The material evidence required at the time was sufficient for the court to prepare a decision giving a roadmap to the administrators in the distribution of the estate.

14. As a starting point, without cherry-picking the grievances in the applicant's summons, there is a complaint on the right to a fair hearing under Art. 50 as having been violated by the court in handing down the final judgment and therefore asking for a new trial on the same subject matter. In order to do justice in this matter, it is plausible for this court to reiterate the provisions of what constitutes fair trial rights be either in criminal law or civil law or succession law for that matter. the *Constitution* in Art. 50 provides and gives every person who presents a dispute to forums created under Art. 50(1) a right to a fair trial which includes the right to adduce and challenge evidence. The right to a fair trial is both applicable in all spheres of adjudication of dispute and it embraces the concept of substantive fairness which is not to be equated with the interpretation of the law which is vested in our hierarchy of courts. In this sense, its broader and more context based, the adjudication of succession disputes from the very beginning, it is insulated to give effect to the values and principles of governance in Art. 10 of the *Constitution* just to mention but a few: inclusivity, participation of the beneficiaries,

equality, equity, etc. The fairness of succession law is that every beneficiary or anybody with a stake in the share of the intestate estate to make a case for determination by the Probate court. In emphasizing substantive fairness, this is not to say that all procedural irregularities like administrators not calling for expertise from the surveyor before full implementation of the decree of the court, the administrators not taking into account certain legitimate expectations by beneficiaries, for example where they had established matrimonial homes or residences or areas of occupation, or certain land use improvement during the survivorship or after the demise of the deceased should be sufficiently serious as to constitute an infringement of the *Constitution* right to a fair trial. The law of succession requires courts to receive and admit such material evidence for purposes of interpreting and applying the facts to the applicable law on distribution of the intestate estate. Determining what is fair, the context of the prevailing circumstances are of primary importance. There is no such a thing as fairness in a vacuum. It is salutary to bear in mind that the problem on distribution of this estate cannot be resolved in the abstract but must be confronted in the context of conditions and resources survived of the deceased and the legitimate beneficiaries as required by law.

15. The question is whether the irregularity complained of by the applicant is so serious as to undermine the basic structure of the Certificate of Confirmation of Grant and the notions of trial fairness and justice during the pendency of this cause of action. Based on the record, and the prevailing jurisprudence, the irregularity is alleged by the applicants in this matter appear to be of a nature in a constitutionally definition of fair trial rights to be impermissible. When one reads in and reads out the substratum of the chamber summons, the objective is to engage this court's jurisdiction to reopen the proceedings on distribution denovo. With regard to the annexed photographic impressions, it is not the jurisdiction of this court to deal with unique intricacies and topographic outline of the estate while giving effect to the formulae in the Certificate of Confirmation of Grant. The question of what constitutes initial settlements of some beneficiaries including development of houses, buildings, some commonly referred to as matrimonial homes, is generally a matter for the appointed administrators. There is no decree of a court in the form of a Certificate of Confirmation of Grant which renders home owners as refugees or asylum seekers or stateless under the guise of distributing the intestate estate. The notion that the shares indicated in the Certificate of Confirmation of Grant constituted some kind of penal treatment to some of the beneficiaries is neither here nor there in so far as the letter and spirit of Succession Law is concerned. For me then, it is a question of alignment of the total acreage of the estate in question, the number of legitimate beneficiaries to be allocated the shares of the estate while factoring in the already developed household without necessarily speaking generally on certain temporary on rights of land use on cultivation before distribution. Well, the law demands that the gut-wrenching truth is that those beneficiaries in the first degree of consanguinity and affinity must not be denied those rights which belong to them under the rubric of inheritance. There is simply no reason from the affidavit evidence from both the applicants and the respondents why the scale should not tilt without violating the provision of section 38 of the Act which formed the basis of the primary ruling of this court in distributing the estate to deal with those mundane issues on some crop, trees or any such other improvement which has not acquired the measure of permanence to achieve a fair and proportionate sharing of the estate. Whether there has been an irregularity or illegality in the distribution of this estate that is a departure from the formalities, rules principles of procedure and substantiveness of the decision according to our *law of succession Act* that evidential threshold is yet to be met by the applicants.

16. In the scheme of the *Law of Succession Act*, the time prescribed from initiating the petition for the making of the Grant of representation to the final Certificate of confirmation is on or about 12 months altogether which I regard as constituting a reasonable and fair opportunity for the beneficiaries to transmit the estate, deliver a final probate account and liquidate the estate before the various forums

in which the adjudication was undertaken in earnest. I consider the vital time limits in the succession Act play in bringing certainty and stability to social and legal affairs in the administration of justice and maintaining the quality of adjudication. As things stand now, no litigant or court follows the prescription periods in probate matters. The disputes are drawn for long periods of time and the pendency of the case docket across the country is a sad story, for the indefinite periods of time spent in court brings about prolonged uncertainty to the beneficiaries of the estate. There is no doubt in my mind that the quality of adjudication of cases before the various forums constitutionally constituted is central to the rule of law. For the law to be respected and for the courts to live to their oath of office and application Art. 10 of the *Constitution* on National values and principles of governance, time has come for a complete paradigm shift on the events and processes being superintended by the courts ad infinitum. The hallmark of a system of constitutional justice such as ours is to ensure that we are not guilty of the provisions of Art. 159(2)(b) which provides that justice shall not be delayed for such a delay consists of justice denied. The parties to the dispute are not fence sitters but must labour by fulfilling their obligations to contribute on an equal footing with the courts in ensuring the integrity of their fairness of the trial. To that extent, the many cries of adjournments from the performance management systems of our courts should start on a weighted measure to accord more on contributory liability on the part of the litigants who approach courts on various claims to shoulder a higher burden of adjournment ratio. One has just to carry out an empirical research in the succession case dockets to see the level of indolence, laxity and don't care attitude on the part of administrators in the fair administration of justice of our legal system. There is need for legislative intervention as to an avalanche of applications filed by administrators or beneficiaries post final judgment of the dispute. This is the best example of such an abuse of the court process. That the chamber summons in question was filed on 27th February, 2025 to impeach a final decision of the court dated 12th July, 2023.

17. In a nutshell, in so far as the adjudication of this succession cause is concerned, tested within the scope of the chamber summons by the applicants none of their grievances falls within the following elements to persuade this court to admit them as disputants to a non-existent dispute which has been determined on the merits by this court way back in 2023. What could have vitiated these proceedings fall within the well prescribed constitutional imperatives in our legal regime:

> "a. Equality of arms between the parties to a proceeding, whether they be administrative, civil, criminal, or military;
>
> b. Equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;
>
> c. Equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;
>
> d. Respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused.
>
> e. Adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
>
> f. An entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

g. An entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body.

h. An entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body;

i. An entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions."

18. The application does not disclose any orders that this court is capable of issuing at this juncture. The subject matter of the cause was the distribution of the estate, which issue was conclusively determined vide the ruling of the court delivered on 16th February 2025. It follows that the application is incompetent and violates the provisions of Order 2 Rule 15 of the *Civil Procedure Rules* which provides as follows;

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

19. From the pleadings, it is evident that the applicant is dissatisfied with the mode of distribution and wishes to have the court distribute the estate in the mode proposed. However, this court cannot distribute the property afresh as it had already rendered a ruling on the same and cannot sit on appeal on its own decision. Section 66 of the *Civil Procedure Act* provides as follows;

> Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.

20. The courts of law have inherent powers to regulate the administration of justice and the empowerment comes from many statutory provisions like section 1(a), 1(b), 3(a) of the *Civil Procedure Act* and Rule 73(1) of the *Probate and Administration Rules* to stop any frivolous vexatious proceedings which are unsustainable and merely brought to delay the execution of a decision arrived at by the court on the merits. I verily believe that the work of a probate court indeed is to give a legal roadmap in the form of a judgment or ruling which is infused with a decision extractable as a decree of the court with certainty laying down the rights and remedies of the parties to the dispute. To this matter, the court has spoken. The rest of who owns a particular cash crop, plantation of any other farm improvement is a matter for the administrators working with an expert like a surveyor to undertake proper alignment without violating the judgment in its entirety. I do not in any way want to be understood as anticipating the outcome of whatever submissions that may be in the pipeline as canvassed by the applicants in their respective affidavits. It is noteworthy that the previous proceedings shed some light on the propositions both factual and legal which may be generated in so far as this is concerned. More significantly, all those pleaded facts do not constitute new compelling evidence or discovered new factual matrix which was not available all along in the litigation of this succession cause.

21. I am unable to resist the spirit of rendering this application res judicata within the provisions of section 7 of the *Civil Procedure Act*. I also remind myself of the words of the learned scholars in *Halsbury Laws of England* 4th Edition Vol. 16 in which they ordained as follows:

> "In order for the defence of res judicata to succeed, it is necessary to show that not only that the cause of action was the same, but also that the Plaintiff or claimant has had an opportunity of recovery and but for his own fault might have recovered in the first cause of action that which he seeks to recover in the second cause of action. It is not enough that the matter alleged to be concluded might have been put in issue or that the relief sought is abit different. The law contemplates to show that the parties are the same, the cause of action is the same and matters being raised constitute the prior claim in terms of the law."

22. In addition, *Henderson v. Henderson* (1843) 3 Hare Pg. 100 the court stated on the principle of Res Judicata as follows:

> "In trying this question, I believe and state that the rule of the court correctly, when I say that where a given matter becomes the subject of litigation in, and off adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not except under special circumstances permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward from the very beginning as part of the subject in context but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The defence of Res judicata can be invoked and that plea applies to bring in estoppel of litigation. The plea of res judicata only in special cases not only points upon to which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belong to the subject of litigation and which the parties exercising reasonable diligence were required or might have been expected to be brought forward at the time."

23. Essentially, any re-litigation on the same cause of action, same parties but with a new motion or application but at a glance and even reading it in detail, it is just a cosmetic pleading which is an abuse of the court process with no new remedies and claims worthy to comprise an infringement or a violation of a right worthy the court's jurisdiction. This motion is lost with costs to the Respondents.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 29TH DAY OF APRIL 2025

....

R. NYAKUNDI

JUDGE