



**In re Estate of Jonathan Kipruto Chemjor (Succession Cause
2 of 2017) [2024] KEHC 2041 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
SUCCESSION CAUSE 2 OF 2017
RB NGETICH, J
FEBRUARY 29, 2024**

IN THE MATTER OF THE ESTATE OF JONATHAN KIPRUTO CHEMJOR

BETWEEN

NANCY JEPKEMBOI CHEMJOR APPLICANT

AND

SARAH WANJIRU GITICHI 1ST RESPONDENT

RUTH JERONO KIPRUTO 2ND RESPONDENT

RULING

1. The Applicant has moved the court vide an application dated 27th June, 2023 under the provisions of Section 74 of the *law of Succession Act*. Cap 160 Laws of Kenya, seeking for orders:
 - i. That the confirmation of grant made on 11th November 2021 issued on in this matter be rectified in the following respects as provided for by Rule 43 (1) of the *Probate and Administration Rules*:

Provision be made for Nancy Jepkemboi Chemnjor, who is a dependent of the late Jonathan Kipruto Chemnjor.
 - ii. That the costs of this application be provided for.
2. The Application is grounded upon the affidavit of Nancy Jepkemboi Chemjor who avers that she is a beneficiary of the Estate of Jonathan Kipruto Chemnjor as clearly indicated in the application for letters of administration filed in Eldama Ravine court and later Transferred to this court on grounds of jurisdiction; that a grant of letters of administration was confirmed on 11th November 2021 in her absence and was not notified.



3. That she lives on parcel number Baringo/Pekerra101/1125 together with her son Ian Kiprop Chemnjor, 25, having been left in the parcel by the deceased who was his brother and she has constructed a homestead on the parcel.
4. That the parcel was carved out of ancestral land belonging to her late father Japhet Chemnjor and the current administrators were the administrators of her father's estate.
5. That title to Baringo/Pekerra101/1125 was issued 6-months before his demise and the family did not have time nor opportunity to settle all the interests in the parcel as she was completing a homestead in the parcel and was content with being named as a beneficiary to her brothers estate.
6. She avers that she has not been served with nor had knowledge of the proceedings in Kabarnet on the final disposal and allocation of the parcel to Ruth Jerono Kipruto and has not seen nor is she aware of any consent for distribution though she is a party named in the cause as a beneficiary.
7. That on the 12th June 2023, unknown person or persons dropped at the gate leading to her house summons addressed to the Administrators and she realized from the application the parcel she lives on has been fully awarded to Ruth Jerono.
8. That the Administrators have not shared with her the dates and developments in this cause and she is likely to be rendered destitute if the titles are transferred without consideration of her dependency, the developments she has made in the parcel.
9. That she has legal and reasonable expectation on the parcel as the developments she has done on the same with the authority and knowledge of his late brother run to tens of millions and it will be unfair and unjust to transfer the same as if it is vacant undeveloped land.
10. That the Administrators and Ruth Jerono have not disclosed fully to the court the status of the estate, leading to the current obvious error in distribution of the estate.
11. That his late brother left all of them in the estate and it is fair and just that provision be made for her and her son who have never lived outside the estate of Jonathan Kipruto Chemnjor.
12. The Respondents filed a preliminary Objection to the application on the following grounds:
 - a. That the Application as filed is fatally defective and a non-starter.
 - b. That the Application as filed contravenes the provisions of Sections 74 of *Law of Succession Act* and rule 43 of Probate and Administration Rules.
 - c. That the Application filed herein is inept, incompetent, misconceived vexatious a total abuse of this court's process vexatious.
13. The Respondent pray that the Applicant's Summons for Rectification of Grant dated 27th June, 2023 be dismissed with costs to the Respondent.
14. In support of preliminary objection and in opposing prayers for rectification, the respondent filed affidavit sworn by one Sarah Wanjiru Gitichi on the 7th August, 2023 and has filed an application as the Protestor on behalf of the sole beneficiary [Particulars Withheld] who was a minor then to protect her interest as a sole beneficiary in the estate of her late father.
15. That it is true that the Summons for rectification of grant filed herein is fatally defective, misconceived, vexatious and an abuse of the court process and should be struck out.



16. That she is surprised that the Applicant purports not to have knowledge of the existence of this matter when in fact she used to attend court always to give her brothers (the Petitioners) moral support in their pursuit to frustrate proceedings herein.
17. That at no time did she file an application to be enjoined as an interested party and/or beneficiary of the estate of Jonathan Kipruto Chemnjor (deceased) and the instant application is misplaced and an afterthought and the application filed herein does not in any way demonstrate that the Applicant was a dependant of the deceased and it is clear she moved into the deceased's house to take advantage of the property which the deceased and herself were constructing with a view of grabbing the same, for selfish gain.
18. That her daughter Ruth Jerono Kipruto was named the sole beneficiary of the estate of Jonathan Kipruto Chemnjor (deceased) vide judgment delivered on 11th November, 2021 on record and it is not in dispute that land parcel known as Baringo/Pekerra 101/1125 forms part of the deceased's estate.
19. That her late husband Jonathan Kipruto Chemnjor and herself began constructing the house on the subject property meant to be their matrimonial home sometime in the year 2004 and sometime in 2006 they stopped the said construction which had reached the lintel of the house due to financial difficulties.
20. That they equally planted trees and Orange trees on the farm which are still there to date and sometime in year 2013 after the death of the deceased herein, the Applicant continued the construction of the house on the subject property and forcefully moved in sometime in December, 2015 without her consent and/or in the absence of letters of administration and has since been intermeddling with the estate of the deceased.
21. That the issue of her moving into the property unlawfully was mentioned in their previous affidavits on record.
22. That the property wherein the subject property was carved out of what was divided among the siblings of the deceased including the Applicant herein from their father's estate Japheth Kipkorir Chemnjor (deceased) in Nairobi High Court Succession Cause No 1626 OF 1993 and the Applicant got a share from the estate of her father same as the deceased herein and the administrators in this cause and can therefore not lay any claim on the property of Jonathan Kipruto Chemnjor (deceased) in the guise of ancestral land.
23. She avers that if the Applicant had an issue with the way her father's estate was distributed then she should raise the issue in the succession cause in respect to her father's estate and not in the instant succession cause and in any event, the Petitioners in her father's estate are the same Petitioners herein.
24. That the averments at paragraph 6 of the summons are false as the Applicant has always been aware of these proceedings from the inception in Eldama Ravine being PMCC Succession Cause number 32 of 2014 wherein she signed the consent form allowing her brothers to be Petitioners and further the said matter was gazetted as per law and the Applicant cannot now feign ignorance nor purport not to know of the existence of this Succession Cause.
25. That the filing of the instant application is an afterthought coming one year and nine months after judgment was delivered, clearly with a view of delaying justice considering this matter commenced in 2014 nine years down the line and the beneficiary who is now an adult must be allowed to manage the estate of her father as the many applications are not made in the interest of justice.



26. Directions were given for the application to proceed by way of written submissions but only the respondent filed written submissions.

Respondent's Submissions

27. By submissions dated 26th October, 2023, the respondent submit that they filed Preliminary Objection dated 25th July, 2023 and argue that the Summons filed herein is fatally defective as it does not comply with the provisions of Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules. That Section 74 provides that errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a /inviter/ grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly. And shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued.
28. The respondent argue that the Summons for rectification of grant herein essentially seeks to redistribute the estate of the deceased and include the Applicant as a beneficiary in the confirmation with regards to property known as Baringo/Pekerra 101/1125 the subject matter herein ;that the same constitutes a fundamental change and goes to the root of the orders issued by this honourable court thus cannot be altered by way of summons for rectification of grant and cited High Court At Nairobi Succession Cause No. 1010 Of 2011 In The Matter Of The Estate Of Geoffrey Kinuthia Nyamwinga (deceased) [2013] Eklr And Civil Application No. 7 Of 2014 Zacharia Okoth Obado v Edward Akong'o Oyugi & Others [2014] eKLR where the Supreme Court stated that the essence of Article 159(2) (d) of the constitution is that the court should not allow the prescriptions of procedure and form to overshadow the primacy object of dispensing substantive justice to the parties. That the proposed amendment is a substantive issue that goes to the root of the matter and as such cannot be cured by the provision of Article 159(2)(d) of the Constitution of Kenya, 2010 and the application herein is fatally defective and should be struck out.
29. Further that the issue of beneficiaries cannot be raised at this point when the court dealt with the matter after the Petitioners were served with hearing notices and they failed and or neglected to show up; that affidavit of service proved that indeed they were served and the issue of distribution of the properties of the deceased were conclusively dealt with culminating in the judgment delivered on 11th November, 2021 and the Applicant herein, has been part of this succession cause from the onset; that the consent form (Form 38) on record clearly shows that the Applicant signed the same allowing the Petitioners (brothers of the deceased) to be administrators of the estate. That in paragraph 30 of her Replying Affidavit, the respondent has stated and listed the instances in the cause whereupon the Applicant's unlawful trespass onto the subject property has been addressed and concluded vide the judgment delivered by this court.
30. The respondent drew court's attention to Section 7 of the Civil Procedure Act which provides as follows: -
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the snit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
31. And it is not in dispute that the subject property forms part of the deceased's estate. The parties in the instant application are similar to the ones in the main cause. The Applicant being fully aware



of this cause and having participated from the inception of it and being included in the Petition or Letters of administration on record as a proposed beneficiary; and this court's decision on the issue of beneficiaries having been dealt with and addressed in the judgment on record, the application filed herein is fatally defective, vexatious, scandalous and an abuse of the court process; that the instant Application is a non-starter as it is res judicata and the same must be struck out.

32. On whether the Applicant is entitled to the orders sought, they submit that this succession Cause commenced in the year 2014 and the cause having been gazette it was incumbent on any party who had an interest in the estate of the deceased to declare such interest for determination by the Court.
33. That the Applicant has been fully aware of this matter having participated in it from the onset and cannot file the instant application almost 10 years down the line claiming any interest.
34. That it is evident from the proceedings and at paragraph 5 of the Applicant's Affidavit that the subject property forms part of the deceased's estate. The Applicant participated in these proceedings from the onset having signed the consent for the Petitioners to act as administrators in Succession Cause filed in Eldama Ravine in Succession Cause No. 32 of 2014 in which an objection was later filed in this court by one Sarah Wanjiru Gitichi the mother to the Sole beneficiary as she was a minor at the time hence the instant case.
35. They place reliance in the court in High Court At Kakamega Succession Cause No. 689 Of 2013 *In Re Estate Of Gaitano Atsianzale Alias Atsianzale Shikomongoma (Deceased)* [2021] eKLR

“In probate proceedings, a party who wishes to advance a case, such as that the applicant is urging here, brings an affidavit of protest at confirmation of the grant. Under *Rule 15* a party who wishes to participate in confirmation proceedings files a caveat, so that the court can notify him of the same once a confirmation application is mounted ”

36. On Whether the Applicant is a beneficiary of the Deceased's estate, the respondent submit that the Applicant alleges that she is a beneficiary of the deceased and argue that she is a sister of the deceased whereas Ruth Jerono Kipruto is the only child of the deceased and was declared the sole beneficiary of her late father's estate.
37. That Section 38 of the *Law of Succession Act* the Act provides that:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
38. Further, Section 29(b) define dependants as: -

“Such of the deceased's parents, step parents, grandparents, 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.”

39. They submit that it follows that the Applicant can only be deemed a beneficiary of the estate if she falls within the definition of dependant as provided by section 29 of the *Law of Succession Act* but the Applicant has not claimed that she was a 'dependant' of the deceased prior to his death and has not adduced evidence to prove that and urged court to dismiss the application forthwith and allow the beneficiary to enjoy the fruits of the judgement.



Analysis And Determination

40. The Applicant herein seeks rectification so as to be included as beneficiary of the Estate of her brother Jonathan Ktrpruto Chemnjor the deceased herein. She alleges that a grant of letters of administration was confirmed on 11th November 2021 without her knowledge and that she has constructed a home and she lives in the parcel herein together with her son.
41. The applicant however confirm that the parcel was curved out of ancestral land that belonged to her father Japhet Chemnjor and the current administrators were the administrators of her father's estate.
42. She argues that title to Baringo/Pekerra101/1125 was issued 6-months before his demise and the family did not have time nor opportunity to settle all the interests in the parcel as she was completing a homestead in the parcel and was content with being named as a beneficiary to her brother's estate.
43. She avers that that she never participated in the proceedings which finally allocated the parcel to Ruth Jerono Kipruto and is not aware of any consent for distribution and seeks rectification of confirmed grant. The Respondents' argument is that the application offends Sections 74 of *Law of Succession Act* and rule 43 of *Probate and Administration Rules*; that it is inept, incompetent, misconceived vexatious a total abuse of this court's process and urged this court to uphold preliminary objection.
44. Justice Prof JB Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro v Mbaja* [2005] eKLR:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I agree that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

45. The Applicant herein seeks rectification of grant on ground that she resides with her son in land parcel Baringo/Pekerra101/1125 which was left to her by her brother the deceased herein. There is no doubt that the application does not merely seek to amend errors but seeks substantial orders of distribution of the estate. In the case of *the estate of Charles Kibe Karanja (deceased)* [2015] eKLR the court stated as follows:-

“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by *Rule 63 of Probate and Administration Rules*, which has adopted a number of procedures from the Civil Procedure Rules.....



Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

46. I do agree with the above decision that urging the court to rectify the grant to include a party who had not been listed as a beneficiary and allocate property to her is fundamental change and not superficial. In my view application for rectification is meant to correct “errors in names, description or in setting out the time and place of deceased’s death or the purpose of limited grant ... as provided under Section 74 of the *Law of Succession Act*.
47. From averments, the applicant is opposed to allocation of property to the respondent. In my view, this cannot be resolved through rectification. The applicant should have either approached court by filing protest or summons for revocation of Grant if she alleges that she is entitled to deceased’s estate but was left out through concealment of material facts. In view of the above, I see no merit in the application.

Final Orders: -

48. ...

1. Application dated 27th June, 2023 is hereby dismissed.
2. Each party to bear its own costs.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET* THIS 29TH DAY OF FEBRUARY 2024.

.....
RACHEL NGETICH

JUDGE

In the presence of:

Ms Muturi holding brief for Ms Nyongesa for Applicant.

No appearance for Applicant.

Elvis/Sitienei – Court Assistants.

