



**In re Estate of Magete Tesot (Deceased) (Succession Cause
49 of 2017) [2024] KEHC 4153 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
SUCCESSION CAUSE 49 OF 2017**

**RL KORIR, J
APRIL 30, 2024**

BETWEEN

PAUL KIPKEMOI SITIENEI PETITIONER

AND

SARAH CHELANGAT TESOT RESPONDENT

RULING

1. The Petitioner and the Respondent are joint administrators in the estate of the late Magete Tesot, through the Grant of Letters of Administration dated 29th February 2016. The parties in this case have filed numerous Applications leading to the convoluted nature of this matter. It is therefore important to state the chronology of events leading to this point.
2. This succession cause was in respect of the estate of the late Magete Tesot who died on 5th September 2011. His late widow, Tapsabei Cheptonui Tesot petitioned for Letters of Administration on 7th April 2014 seeking to administer her late husband's estate being KERICHO/KONGOTIK/528 and a half share of KERICHO/KYOGONG/525.
3. Sarah Chelangat Tesot being the deceased's niece filed an Objection dated 22nd January 2014 objecting the Grant being issued in the name of Tapsabei Cheptonui Tesot. This Application was withdrawn by consent on 22nd January 2015 and the court ordered that a Grant be issued in the joint names of Tapsabei Cheptonui Tesot and Sarah Chelangat Tesot. The said Grant was issued on 29th February 2016.
4. Tapsabei Cheptonui Tesot filed Summons for confirmation of the Grant dated 22nd September 2016. This Application remains unprosecuted.
5. Sarah Chelangat Tesot filed Summons for revocation of Grant dated 31st January 2017. This Application equally remains unprosecuted.



6. Tapsabei Cheptonui Tesot died on 23rd June 2017. Her son Paul Kipkemoi Sitienei filed an Application dated 14th September 2017 seeking to substitute and replace his mother as the Petitioner. The same was granted on 14th November 2017.
7. Paul Kipkemoi Sitienei filed an Application dated 24th April 2018 seeking eviction orders against Sarah Chelangat Tesot and other objectors from the suit land being KERICHO/KONGOTIK 528. He also sought injunctive orders against any interference in the said subject land by the Objectors. This Application was withdrawn on 11th June 2018.
8. However, this court (differently constituted) erroneously delivered Judgement in the aforementioned Application (dated 24th April 2018) on 6th August 2020. The Judgement held among others that Sarah Chelangat Tesot was not a beneficiary of the estate. Sarah Chelangat Tesot through her advocate filed an Application dated 17th August 2020 pointing out the error. In a Ruling dated 2nd October 2020 the court acknowledged the error and set aside the Judgement dated 6th August 2020.
9. Paul Kipkemoi Sitienei (Petitioner) filed a Notice of Motion Application dated 11th February 2021 and Sarah Chelangat Tesot (Respondent) filed another Notice of Motion Application dated 14th January 2021. Both Applications are the subject of this Ruling.
10. On 4th March 2021, I gave directions as to how the two Applications would be heard and I directed that the Notice of Motion Application dated 11th February 2021 be dispensed with first.

Notice of Motion Application dated 11th February 2021.

11. The Applicant (Paul Kipkemoi Sitienei) filed the referenced Application and sought the following orders:-
 - I. Spent.
 - ii. That the letters of administration issued to the joint names of the 1st Petitioner/Applicant and the 2nd Petitioner/Respondent by the strength of a default consent recorded in court on 22nd January 2015 and issued on 29th February 2016 be revoked and a fresh Grant in the names of the Petitioner/Applicant herein be issued to him.
 - iii. That the Petitioner/Respondent be restrained from intermeddling in the estate of the deceased namely Kericho/Kongotik/528 by herself, employees, agents, relatives, servants and/or those acting through her from selling, leasing and/or in any way dealing with the said estate land pending the determination of this succession cause.
 - iv. That the honourable court do issue such other or further orders as necessary for the preservation of the estate and the inheritance of the Petitioner/Applicant and his co-beneficiaries.
 - v. That interim orders be issued in terms of prayer (II) above.
 - vi. That the cost of this Application be provided for.
12. The Application was brought under sections 45, 47 and 76 of the *Law of Succession Act* and Rules 44 and 73 of the *Probate and Administration Rules*. The Application was based on the grounds on its face and further by the supporting affidavit sworn by Paul Kipkemoi Sitienei on 11th February 2021.



The Applicant's case

13. It was the Applicant's case that the present succession proceedings were instituted by his mother, Tapsabei Cheptonui Tesot (deceased) who was appointed as the administrator of the estate of his father, the late Magete Tesot after all the beneficiaries consented.
14. The Applicant stated that on 22nd January 2015 his former advocate, J.K. Kirui and J.K Koech for the Respondent illegally recorded a default consent whereby his deceased mother and the Respondent were made joint administrators of the estate of the deceased. That on 29th February 2016, a Grant was issued in his name and that of the Respondent. He further stated that his former advocate did not consult him or any beneficiary of the deceased's estate before recording the defective consent.
15. It was the Applicant's case that the Respondent was not a beneficiary to the deceased's estate. That the lands known as KERICHO/KONGOTIK/528 and half of KERICHO/KYOGONG/525 were registered in the names of the deceased and that together with his co-beneficiaries, they were entitled to inherit the lands.
16. The Applicant stated that the Respondent's father (Kiprono arap Tesot) was his uncle and that together with his deceased father, were the joint owners of KERICHO/KYOGONG/525 and they each held equal undivided shares. That the Respondent's father who was also deceased had his own distinct land called KERICHO/TEGAT/566.
17. It was the Applicant's case that the Respondent and her mother (Loise Chepkirui Tesot) had been over the years intermeddling with KERICHO/KONGOTIK/528 by subdividing the said land into plots and have sold them to various purchasers.
18. The Applicant stated that the default consent recorded on 22nd January 2015 should be expunged from the court record and the Grant be revoked as a result.

The Respondent's case

19. Through her Replying Affidavit dated 22nd July 2021, the Respondent (Sarah Chelangat Tesot) stated that the Applicant's Application was an attempt by the Applicant to side-line her in the administration of the estate of the deceased.
20. It was the Respondent's case that the impugned consent was filed more than six years ago and they had attended court more than ten times and the Applicant never raised this issue. That the same was an afterthought and a gamble. It was her further case that equity aids the vigilant and not those who slumber on their rights.
21. The Respondent stated that the impugned consent was entered into by the Applicant's former advocate J.K Kirui who acted under the firm instructions of the late Tapsabei Cheptonui Tesot who was the Petitioner and the Applicant's mother. That the Applicant could not purport to revoke the consent done with the express consent of his mother as he had no authority or locus to represent his deceased's mother as no letters of administration had been taken out.
22. It was the Respondent's case that the land parcel known as KERICHO/KONGOTIK/528 was initially registered under the name of the deceased since her father was away at the time of the registration. That it was agreed that the deceased and her father (Kiprono arap Tesot) would equally share KERICHO/KONGOTIK/528 although the same was not reflected in the land register entries.



23. The Respondent stated that the Applicant consented to the sale and subdivision of KERICHO/KONGOTIK/528 by appending his signature. That he did this based on the knowledge that the said land had been shared equally between their families.
24. It was the Respondent's case that the succession proceedings could not proceed without her involvement as she was the representative of her late father who had an equal share in the estate.

The Applicant's written submissions

25. Through his submissions dated 25th July 2022, the Applicant submitted that the Respondent was not a beneficiary of the deceased's estate as per section 29 of the *Law of Succession Act*. That she was the daughter of Kiprono Tesot (deceased) and not Magete Tesot (deceased). The Applicant further submitted that the Respondent was not maintained by the deceased in his lifetime. That the Applicant was the son of the deceased and fell within the meaning of a dependant as contemplated by section 29 of the *Law of Succession Act*.
26. It was the Applicant's submission that advocates Koech and Kirui recorded a Consent where a joint Grant was issued in the names of the Applicant and the Respondent. That when the Grant was printed out, the name of the Applicant's mother was erroneously registered instead of the Applicant and the same was rectified when the court through a formal application, substituted the deceased with the Applicant.
27. The Applicant submitted that it was not in dispute that the subject land KERICHO/KONGOTIK/528 was registered in the name of Magete Tesot (deceased). That the Respondent's allegations that this land was shared equally between his father and the Respondent's father were false. He further submitted that the only parcel of land that was equally shared between their fathers was KERICHO/KONGOTIK/525. That the Respondent had no inheritance rights over KERICHO/KONGOTIK/528.
28. It was the Applicant's submission that the Respondent could not purport to survey land which she had no beneficial interest in. That together with his siblings, they had been utilizing the subject land and the Respondent and her mother begun intermeddling by forcefully disposing portions of the subject land.
29. The Applicant prayed that the court allows the Application in the interest of justice and further to preserve the estate of the deceased.

The Respondent's written submissions.

30. Through her submissions dated 26th July 2021 the Respondent submitted that the issue of the consent order was being raised approximately six years after its recording. That the Applicant did not dispute that his advocate was not properly on record and had not tendered evidence to show that the said advocate acted without instructions or acted fraudulently.
31. The Respondent submitted that the law on variation of a consent Judgment was well settled as they would be the same grounds that would allow a contract to be vitiated. That the grounds included fraud, collusion, illegality, mistake, an agreement contrary to public policy et.al. She relied on *Paul Kiplangat Keter v John Koech* (2021) eKLR and *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (1982) KLR. The Respondent submitted that the Applicant's statements were mere hearsay as he had not tendered any evidence to suggest that his advocate acted fraudulently or in collusion with another.
32. It was the Respondent's submission that the Applicant sought to set aside the consent done expressly with his mother. That the Applicant had no authority to act on issues dealt with by the then Petitioner



without taking out letters of administration. He relied on *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* (2014) eKLR. It was her further submission that the Application was therefore incompetent.

33. The Respondent submitted that the consent was therefore binding and that the Application should be dismissed.

34. I have gone through the Notice of Motion Application dated 11th February 2021, the Replying Affidavit dated 22nd July 2021, the Applicant's written submissions dated 25th July 2022 and the Respondent's written submissions dated 26th July 2021. The two issues for my determination are:-

i. Whether the Applicant has met the threshold for setting aside of the impugned consent order entered on 22nd January 2015.

ii. Whether the Grant should be revoked.

35. I have gone through the court record and I have noted that a consent was entered in this court on 22nd January 2015 between Mr. Kirui, advocate for the Applicant and Mr. Koech, advocate for the Respondent to the effect that a Grant be issued in the joint names of the then Petitioner (Tapsabei Cheptonui Tesot (deceased) and the Objector (Sarah Chelangat Tesot). In the case of *Simon Ayiemba v Kenya Industrial Estates Ltd* Busia Civil Appeal No. 5 of 2001, Serگون J. held:-

“There are only two ways in which a Consent can be legally accepted by the Court; the first instance is when the parties file in Court a fully executed written contract which becomes a Court Order the moment it is domesticated and approved by Court and the second instance is when one of the parties orally addresses the Court on the contents of the proposed Consent thereafter the adversary as called upon to confirm the contents. The names of the parties orally addressing the Court must be recorded and the Court receiving the Consent must then approve and subsequently adopt the terms of the Consent as an Order ...”

36. For a consent to be enforced, it has to be adopted as an order of the court. The Supreme Court of Kenya in *Geoffrey M. Asanyo & Others v The Attorney General* (2018)eKLR held:-

“.....Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court.....”

37. The consent was adopted by the court as its order on 22nd January 2015. It is my finding that the said consent was valid as it was properly recorded as the advocates for both parties addressed the court orally and confirmed the terms of their consent to the court and their terms accepted by the court.

38. The Applicant prayed that the consent be set aside because he claimed that his advocate acted without his instructions and that the consent was obtained fraudulently. I have noted that at the time the consent was recorded, the Petitioner was Tapsabei Cheptonui Tesot who was the Applicant's mother and that the Applicant was substituted in as the Petitioner/Administrator once his mother (Tapsabei Cheptonui Tesot) died on 23rd June 2017. The Applicant did not have conduct of the succession proceedings from the inception and it was deceitful for him to claim that the advocate on record then, acted without his instructions.



39. The Applicant has also claimed that the consent was obtained fraudulently. The Court of Appeal in *Ransa Company Ltd v Manca Francesco & 2 others* (2015) eKLR, stated that:-

“.....The law on proving fraud is clear. Particulars of the fraud would need to be pleaded and proved.....”

40. The Applicant has offered no proof of fraud and as such his claims remain mere allegations.

41. A Consent entered into between parties is deemed to be tantamount to a contract between said parties and will have the same binding force as a contract. As such the Court cannot interfere with the terms of a consent unless circumstances are shown to exist that would amount to grounds for rescinding a contract. In *Hirani v Kassam* (1952) 19 EACA 131 the former Court of Appeal of East Africa held:-

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

42. In *Brooke Bond Liebig v Mallya* (1975) EA 266 the court held:-

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

43. More recently, the Court of Appeal in *Board of Trustees National Social Security Fund v Micheal Mwalo* (2015) eKLR held that:-

“The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

44. As earlier stated, the Applicant did not prove fraud on the part of his advocate. The Applicant has also not demonstrated to this court that Mr. Kirui who was their former advocate acted under duress, coercion, misrepresentation, mistake, fraud and undue influence. It is my finding that Mr. Kirui was properly on record and he acted on the instructions of the Applicant’s late mother and that his actions



were binding on them. I am guided by *Kenya Commercial Bank Limited v Specialised Engineering Co. Limited* (1982) KLR 485 where the court held that:-

“A duly instructed advocate has an implied authority to compromise and settle the action and the client cannot avail himself any limitation by him of the implied authority to his Advocate unless such limitation as brought to the notice of the other side.”

45. It is salient to note that even after the Applicant was substituted in as the Petitioner in November 2017, he did not raise the issue of the consent immediately. He waited for four years before raising it. It is my finding that this Application is a mere afterthought and a way of frustrating the succession proceedings.
46. In the final analysis, the Applicant has failed to prove any of the grounds that would make this court set aside the consent entered on 22nd January 2015.
47. In the end, I decline to set aside the consent entered on 22nd January 2015.
48. Having found that the consent entered was legal and binding, I shall address the issue of the revocation of the Grant at the end of this Ruling.

The Notice of Motion dated 14th January 2021.

49. The Applicant (Sarah Chelangat Tesot) filed the referenced Application seeking the following orders:-
SUBPARA I.

That this Honourable Court be pleased to order the Land Registrar-Bomet and the County Surveyor-Bomet to visit the parcel of land registered as KERICHO/KONGOTIK/528 belonging to the estate of the late Magete Tesot (deceased) and file a Report on its status and those occupying the same and their respective acreages and also confirm the acreage of the entire parcel of land.

- II. That upon granting prayer I above, this Honourable Court be pleased to order the officer in charge, Bomet police Station to provide security for compliance of the aforementioned orders.
- III. That the cost of the entire survey process to be met by all the beneficiaries to the estate of the late Magete Tesot (deceased).
- IV. That the court do make any other or further orders in the interest of justice.
- V. That the costs of this Application be provided for.

50. The Application was brought under order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules*, sections 1, 1A, 3, 3A and 63(e) of the *Civil Procedure Act*, sections 45, 47, 71, 76, 86 and 94 of the *Law of Succession Act* and Rules 44(1) and 59(6) of the *Probate and Administration Rules*. The Application was based on the grounds on its face and further by the supporting affidavit sworn by Sarah Chelangat Tesot on 14th January 2021.

The Applicant's case. (Sarah Chelangat Tesot)

51. It was the Applicant's case that prior to his death, the deceased had subdivided the parcel of land known as KERICHO/KONGOTIK/528 to all his liabilities including themselves. That the beneficiaries of the estate of the deceased have for over 35 years known their respective boundaries to their respective parcels of land and had continued to develop the same.
52. The Applicant stated that the Respondent (Paul Sitienei) had concealed material information from this court and confirmed the Grant without ascertaining the acreage being occupied by the respective



beneficiaries. That this would cause injustice as the property had been substantially developed by most of the beneficiaries.

53. It was the Applicant's case that she was appointed a joint administrator to the estate of the late Magete Tesot through the consent order dated 29th February 2016 but to date no Grant has been issued in their joint names.
54. The Applicant stated that she would suffer irreparable loss and damage if the orders sought were not granted.

The Respondent's case. (Paul Kipkemoi Sitienei)

55. Through his Replying Affidavit dated 15th February 2021, the Respondent stated that the land known as KERICHOKONGOTIK/528 was wholly registered in the names of the late Magete Tesot and that the deceased did not subdivide the land in his lifetime.
56. It was the Respondent's case that the Applicant and her mother intermeddled with KERICHOKONGOTIK/528 by selling it to various purchasers before the Grant was confirmed.
57. The Respondent stated that the Applicant was not a beneficiary of the estate of the deceased and had colluded with his former advocate to record a consent on 22nd January 2015 which made this court issue a Grant in their joint names.
58. There are no written submission on record from the Applicant relating to the Notice of Motion Application dated 14th January 2021.
59. On the other hand, the Respondent filed joint submissions dated 25th July 2022 to the present Application and his Application dated 11th February 2021 which this court has already determined. I have already highlighted his submission earlier on in this Ruling.
60. I have gone through the Notice of Motion Application dated 14th January 2021, the Replying Affidavit dated 15th February 2021 and the Respondent's written submissions dated 25th July 2022. The sole issue for my determination was whether it would be just for the Land Registrar and County Surveyor of Bomet County to visit KERICHOKONGOTIK/528 and issue a status report.
61. It is undisputed that KERICHOKONGOTIK/528 was at the centre of a dispute between the families of the Applicant (Sarah Chelangat Tesot) and the Respondent (Paul Kipkemoi Tesot). The Applicant claimed that the subject land was owned by the deceased, the late Magete Tesot and her late father, Kiprono Tesot. The Respondent on the other hand claimed that the subject land was wholly owned and registered in the name of his father, the late Magete Tesot.
62. Pursuant to a consent entered on 22nd January 2015, this court ordered that a Grant be issued in the joint names of the Applicant and the late Tapsabei Cheptonui Tesot who was the Respondent's (Paul Kipkemoi Sitienei) mother on 29th February 2016. The late Tapsabei Cheptonui Tesot was later substituted as the Petitioner by the Respondent upon her death. By this very fact, the Applicant had locus to file this Application and seek orders.
63. I have however gone through the court file and I have noted that the Grant on record was the first Grant issued on 29th February 2016 in the joint names of the late Tapsabei Cheptonui Tesot and Sarah Chelangat Tesot. There was no Grant which reflected Paul Kipkemoi Sitienei and Sarah Chelangat Tesot as the current co-administrators of the estate of the late Magete Tesot. Since the first Petitioner is deceased and Paul Kipkemoi Tesot was substituted as the Petitioner, the Grant dated 29th February 2016 is hereby revoked and replaced with a new Grant issued in the joint names of the current administrators being Paul Kipkemoi Tesot and Sarah Chelangat Tesot.



64. By virtue of vacating the Grant date 29th February 2016, the late Tapsabei's Summons for Confirmation of Grant dated 22nd September 2016 and Sarah's Summons for Revocation of Grant dated 31st January 2017 have been overtaken by events and the same are struck out.
65. After considering the pleadings on record, it became clear to me that portions of the subject land KERICHO/KNOGOTIK/528 had been sold off to other parties and developments had taken place on the suit property. The Respondent (Paul Kipkemoi Sitienei) who claimed the suit land wholly belonged to his late father confirmed this in his Replying Affidavit dated 15th February 2021. With the judgement dated 6/8/2020 having been set aside and the beneficial ownership of Kericho/Kongotik/528 remains unresolved.
66. In my view, it would be counter-productive and a waste of judicial time if succession proceedings in the instant suit were to continue without ascertaining the current status of the subject land. No party would suffer prejudice once the true status of the subject land is known and made public and it would assist this court in arriving at a just determination.
67. Having considered both Applications being the Notice of Motion Applications dated 11th February 2021 and 14th January 2021, I make the following orders that:-
- I. The Grant issued in the joint names of Tapsabei Cheptonui Tesot (now deceased) and Sarah Chelangat Tesot is revoked and a new Grant is issued in the joint names of Paul Kipkemoi Sitienei and Sarah Chelangat Tesot.
 - II. Paul Kipkemoi Sitienei and Sarah Chelangat Tesot are hereby restrained from intermeddling in KERICHO/KONGOTIK/528 by themselves, employees, agents, relatives, servants or those acting through them from selling, leasing or in any way dealing with the said land pending the determination of the succession cause.
 - III. The Land Registrar – Bomet and the County Surveyor – Bomet to visit the land known as KERICHO/KONGOTIK/528 and file a Report on its status and those occupying the same and their respective acreages and confirm the acreage of the entire parcel of land.
 - IV. The Report shall be filed in court within 45 days of this Ruling.
 - V. The Officer in Charge Bomet police Station provide security for compliance of this orders.
 - VI. The entire survey process will be catered for by the joint administrators of KERICHO/KONGOTIK/528 being Paul Kipkemoi Sitienei and Sarah Chelangat Tesot.
 - VII. Paul Kipkemoi Sitienei and Sarah Chelangat Tesot to bear their own costs on both Applications.
68. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL, 2024.

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Mugumya for the 2nd Petitioner Mr. Kenduiwo holding brief for Mr Koske for the 1st Petitioner and Siele (Court Assistant).

